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Towards a new Civil Code of Georgia

Abstract. The present work provides justification for the necessity of adopting a new Civil Code of Georgia; as recent years have shown, normative material of first three books of the Civil Code of Georgia contain important textual and translational errors, which cannot be overcome by making specific „local“ changes. The only solution is to completely update the text of the Civil Code, which we will try to briefly argue below.

Key words: textual error, owner's mortgage, land charge, rent debt, novation.

Introduction. Almost a quarter of a century has passed since the adoption of the Civil Code of Georgia. In our opinion, this time is quite enough to come to the conclusion, as a result of proper practical observation and thorough scientific analysis, that, unfortunately, the current Civil Code (especially, - its first three books) is already very outdated, of low quality and often contains obvious textual or conceptual errors. It urgently needs to be replaced with a completely new, effective and adequate normative material (at least, - its first 3 books!). It is a fact that the Civil Code of Georgia of 1997 failed to live up to the hopes that existed at the time of its adoption in the Georgian legal community in the second half of the 90s; It is also a fact that the myth of the „values“ of the Civil Code of Georgia, such as its „progressiveness“, „legislative perfection“, „originality“, which we often heard during the first few years after its implementation, was shattered once and for all! As a result of 25 years of observation and application, the Georgian legal community clearly saw that the Civil Code of Georgia is neither modern, nor perfect, nor an original Georgian creation, except for very few exceptions. It is an obvious fact that, due to the shortcomings inherent in the moment of its „birth“, the Civil Code of Georgia failed to carry the „burden“ that the 21st century challenges required, which is why in the existing legal life, its regulation has somehow „fallen into the shadows“ and is no longer relevant in many areas of private legal relations, which it is aimed at regulating; for instance, rules of banking services, except for the regulating norms of bank guarantee, turned out to be practically stillborn, and until now nobody „remembers“ (and nobody needs!) to use them in their life; let us recall, if anyone has used, for example, the following norm contained in Article 871 in the last 20 years:

„If a fixed interest rate for a specified period is agreed upon for a loan, then the borrower can terminate the credit agreement if the interest obligation ends before the specified period for repayment and no new agreement on the interest rate is made. The termination period is

one month“; or the following rule contained in Article 874: „Directors (managers) of banks who, through advertising brochures or otherwise publicly disseminate incorrect data about the bank’s liquidity and creditworthiness, shall also be held liable.“ Examples of this kind can be cited endlessly! Both, scholars of civil law and practicing lawyers have known for a long time that such rules only “exist for themselves” and do not change anything in our existing reality, because they were “replaced” from the beginning (or very soon after their adoption) with new special regulations or judicial practice based on other rules or principles. It has already become a banal habit among the practicing lawyers to look for the current „living“ rules in other special normative or legal acts instead of the Civil Code of Georgia, for the reason that the probability of finding a valid norm regulating the civil-legal relations corresponding to the latter and its practical application is *a priori* minimal.

In addition to the above-mentioned important problems, the normative material of the first three books of the Civil Code of Georgia is characterised by significant textual and translation errors, which is why reading a rule and correctly understanding its content often turns into real „mental torture“ even for the most qualified and trained lawyer! In terms of the number of textual and translation errors and their variety, the Civil Code of Georgia cannot be compared to any civil code of any other country with a progressive civil legislation; if in the civil codes of those countries mechanical textual error is only a very rare and exceptional case, in the Civil Code of Georgia it is a completely normal phenomenon and can be found at every step when reading its text. Presumably, many readers (especially, - young lawyers) at this moment will remember the “incontrovertible fact” of the initial stage of their professional life: an unsuccessful attempt to understand what is written in the law and what the legislator means in its rule, despite the fact that you repeatedly read it clearly loud out! As an example, we can cite the norm of Article 51, part 2 of the Civil Code of Georgia, in which the most serious translational error was made, as a result of which the content of the rule changes substantially; in particular, it is incorrect when the disposition of the norm specifies the preliminary or immediate refusal of the statement by the “other party”. Nothing similar is mentioned in the German version of the Civil Code of Georgia, which, in turn, is a literal analogue of the last sentence of section 1 of §130 of the German Civil Code. In the latter, the following is mentioned: *“It (declaration of intention) does not become effective if a revocation reaches the other previously or simultaneously”*. Thus, the law refers to refusal of a will expressed by an applicant - the sole participant of the one-sided transaction (the legal force of which requires its transfer to another person - mandatory willingness to express a will) and not by any other person. Unfortunately, such gaps cannot be “filled” by the commentary on these articles, which only tries to “mitigate” the impact of such a grave translation error in practice. Also, as a result of many years of observation, we can conclude that judicial practice often “bypasses” such flawed norms in order to exclude their literal interpretation in real life, which is welcomed, although it does not lead to an essential improvement of a sit-

uation: The flawed norm still remains in the law and there is still a risk of its “literal interpretation/ adoption” in the future! Unfortunately, as we mentioned, these kinds of errors are not uncommon; They are found at every step in the text of the Civil Code, and this situation is already “unbearable” for any sane civilian whose daily activity is to apply the Civil Code of Georgia in practice!

Existence of textual and translation errors is only one part of the important errors within the Civil Code of Georgia; the extreme paucity of the normative material itself creates no less problems when using the code. Even if we compare the Civil Code of Georgia with modern civil codes of other developed countries (for example, the civil codes of Germany, Netherlands, Italy, Estonia, Moldova and others), there is a huge difference between the amount of normative material that regulates private legal relations of the same volume. (For comparison, the German Civil Code consists of 2385 paragraphs, the Italian Civil Code - 2969 articles). Such “stinginess” of Georgian legislators is completely incomprehensible, even taking into account the fact that modern legal relations are becoming more and more complicated, which creates a need to organise them as detailed and effective as possible. As an example, we are referring to a work agreement, to which the Civil Code of Georgia devotes only a few articles (Articles 629-656), which regulate all types of contracts arising in the craftsman and business services starting from shoe repair by a shoemaker to the construction of large buildings; it is clear that such a “meagre” regulation is absolutely insufficient and the parties to the agreement have to create a legal document “from scratch” that more or less ensures the effective regulation of complex and multifaceted legal relations between them. In such a case, the result is clear: most of relations between the parties remain outside the regulation of the Civil Code, and in practice this is always associated with serious legal risks (not to mention an absolute legal vulnerability of a weaker party of the transaction, since it has to accept terms of a contract as offered by the other party, and the law is “not even interested” in ensuring parity or balancing mutual interests in such cases!). Unfortunately, for many years, the opinion prevailed in Georgian scientific circles, as if the current Civil Code of Georgia is something “untouchable”, a very “solid” normative act, which should not be updated often, but only after a long time (even after a century!). To “support” this completely incomprehensible and unjustified position, examples of civil codes of France, Austria, Germany, Switzerland, are often cited; these codes were adopted more than 100 years ago and they are still in force today. It is self-evident that such a comparison is incorrect and cannot resist any criticism: the Civil Code of Georgia cannot even come close to these normative acts, neither qualitatively nor in terms of results, it cannot “boast” of such virtues as are characteristic of them, such as, for example, being simple, concise and easy to understand language and the logical structure of the formation of normative material - from the general to the specific (e.g. French and Swiss Civil Codes), homogenous understanding and use of legal concepts and terms throughout the text of the code, delving into the details of legal problems and highly scientific ways of solving them (e.g.

German Civil Code). The Civil Code of Georgia was imperfect from the beginning with many flaws. It is a “product of the 90s”, when authors and editors of the code did not have even basic means for developing or editing a thorough and complete text when developing the normative material (we all know what the situation was in general in the country during that period)! Moreover, analysis of gaps characteristic of normative material of the property law and of the general part of obligation law reveals that the Georgian editors of the civil code project sometimes did not understand the content of particular normative material or entire legal institutions; for example, in Article 288 and the first sentence of Article 299, the Code uses the terms/expressions “mortgage of the owner” and “mortgagor becomes the owner”, which implies that the owner acquires a real right on his/her immovables. The fact is that the German Civil Code recognises 3 types of real rights on the real estate aiming its realisation; these are - mortgage, land charge (Grundschuld) and rent charge (Rentenschuld). A land charge, like a mortgage, is a right on a real estate, but unlike it, it is not dependent on claim and can be established and exist without it. Thus, land charge is not an accessory right, it is abstract. However, it is not excluded that the land charge will be established to secure the claim, but due to its legal nature, it will not be dependant on the claim; in the absence or cancellation of the latter, the claim nevertheless exists. An owner’s mortgage occurs when the claim is not extinguished but is acquired by the owner (it is transferred to him). Because the claim exists, the lien is considered a mortgage. In other cases - e. i. when the claim does not arise or is cancelled, the real right shall be considered as a land charge. Authors of the Civil Code of Georgia copied the rules from the German law, but since they refused to copy the concept of land charge itself from the German law, the Article 288 and the first sentence of Article 299 turned out to be stillborn. Unfortunately, many more examples of similar immature decisions of legislators can be cited in the Civil Code.

Fortunately, despite the strong opposition of the editors of the Civil Code of Georgia and their attempts to “taboo” problematic issues related to the Code, since the beginning of the 2000s, critical articles appeared in the legal literature, where the authors exposed important textual or other errors in the Civil Code text and offered specific suggestions for their correction. It is worth noting that this effort yielded certain results: the myth of the “perfection” of the Civil Code of Georgia was dispelled in the legal community, and the legislators themselves began to work on correcting more or less existing deficiencies. The first such (really revolutionary!) change was made at the end of December 2002, which introduced a number of amendments to the text of the code; for example, the concept of novation was corrected in the following manner: the Georgian legislator removed the word “novation” from Article 428 without changing the disposition of the rule itself (novation is one of the types of termination of an obligation, when the parties agree to replace the existing obligation-legal relationship with another), thereby returning it to its original form as established in the 1st part of §364 of the German Civil Code, since article 428 was literally taken from this paragraph. The rule of

Section 1 of §364 of the German Civil Code has always been understood and interpreted only as it is directly stated in its text: acceptance of other performance instead of the contracted one, not novation!

Amendments made in December 2002 were just the beginning. Subsequently, the text of the Civil Code of Georgia underwent a number of changes. In this respect, the amendments implemented in the Code on the basis of the law of June 30, 2005, by which the rules governing pledge have been completely replaced with new normative material, are worth mentioning. In fact, the entire sub-chapter has been changed and updated, as a result of which we have a completely new regulation of pledge; Also, in 2006, the normative material regulating the touristic service contract (Articles 657-667), and in 2011 - the normative base regulating the legal institution of leasing (Articles 576-580⁸) was completely updated. Despite such individual positive amendments and updates, the situation has not changed essentially as a result of the aforementioned: a significant part of the Civil Code text remains still of low quality, outdated and contains a number of textual and conceptual errors, since all such changes are of a specific nature and concern only a narrow field of civil-legal relations. The situation is aggravated by the fact that some changes were clearly negative and, due to their shortcomings, only hindered the process of perfecting and updating the text of the Civil Code. A clear example of such a flawed change is Article 300 of 2013-2018yy. In particular, with these changes, for the mortgaged real estate to be transferred to the mortgagor's property, it is no longer required to directly consider this possibility in the mortgage agreement, with the exception of the occasion when the parties want to take a notary's enforcement document for the transfer of ownership; the notary issues a paper of execution if there is an agreement between the parties and the notary has explained in writing the legal consequences of issuing the paper of execution. Logically, the question arises: what is the notary's paper of execution issued for - the transfer of ownership or the forced execution of real estate? According to the literal meaning of the text and the place of the norms of parts 1 and 2 of Article 300, a notary's writ of execution must be issued for the transfer of ownership, however, as a result of such an understanding, we may receive an unjustified gross violation of property interests of the owner of an immovable object in accordance with the legislative provisions announced by the legislator in 2013 as a result of a declared policy that the changes implemented in the Civil Code of Georgia should have been aimed primarily at protecting the interests of owners of the objects of mortgage. Therefore, on the basis of an enforcement document issued by the notary, enforcement is carried out in accordance with the procedure provided by the Law of Georgia "On Enforcement Proceedings", which does not provide the rule of direct transfer of the mortgage object to the property of the mortgagor. Thus, amendments made in Article 300 have caused substantial misunderstandings due to their shortcomings. It should be noted here that there is also a technical flaw in parts 1 and 2 of the article: in particular, hypotheses of norms of the mentioned parts indicate, as a prerequisite for implementation of a disposition, the

delay in fulfilment of obligation secured by the mortgage on the part of the “owner of the immovable object”, instead - the violation of the obligation by the debtor; It is self-evident that the debtor is responsible to the creditor for the fulfilment of obligation and not the owner of an object of mortgage, who may not even be a personal debtor of a mortgagor. Amendments made to Article 625 in 2013-2018yy are an equally tragicomic example (especially - its 5th part!) which mainly contains the most complicated formula for calculating an interest rate, which is always a serious “headache” even for a trained lawyer. (I don't think there is at least one lawyer in Georgia who would like to have the following type of wording in the Civil Code: *„When the loan is overdue, until the complete elimination of overdue fees, any financial expenses (including the interest rate of the loan and such expenses that are included in the effective interest rate of the loan) in the calculation, the amount of penalty stipulated/imposed on the borrower due to the violation of any term of the loan agreement and any form of financial sanction should not exceed 1.5 times the amount of the current remaining amount of the loan at each violation of payment terms. For the purposes of this section, the remaining amount of the loan shall not include the increase in the principal amount of the loan in the case of loan postponement, loan refinancing and/or loan restructuring when the loan term is overdue, and the elimination of the loan overdue due to loan restructuring, loan refinancing (if refinancing is carried out) shall not be considered as complete elimination of the loan overdue (by concluding an agreement with the original lender and/or through postponement)”*).

Conclusion. Based on all of the above, we come to the conclusion that the development of a new Civil Code (as mentioned above, at least, - of the first 3 books) is necessary and the sooner this work is done, the better it will be for the country's economic, cultural or other spheres' development; that is why we believe that, first of all, a unified opinion should be created in the legal community regarding the necessity of adopting a new civil code, on the basis of which a legislator will implement the relevant in-depth legislative reform.