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Asya Ostroukh

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RUSSIAN SOCIETY AND ITS CIVIL CODES: A LONG WAY TO CIVILIAN CIVIL LAW

Asya Ostroukh*

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I. INTRODUCTION

This article is based on the presentation I gave at Paul M. Hebert Law Center, Louisiana State University, where I was a Fulbright Scholar at the Center of Civil Law Studies in the spring of 2010. Given the natural interest of Louisiana lawyers in

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* Ph.D. Candidate, University of Edinburgh; Candidate of Legal Sciences, formerly Associate Professor, Kuban State University Law School. I would like to thank Professor Olivier Moréteau, Doctor Stephen Bensman and Jennifer Lane for their support, comments and corrections.

comparative law, I was not surprised when my American colleagues asked me numerous questions about Russian law. However, the main question—to which legal family/system/tradition does Russia belong—is not an easy one to answer. The problem is that, even after the fall of the Soviet Union and substantial reforms to Russian law, comparativists (both Russian and Western) are indecisive about placing Russia within the legal tradition of civil law and continue to consider it as a legal tradition *sui generis*. In my opinion, this approach is the result of the power of historical tradition. The expulsion of the Soviet Union from civilian legal tradition was done in 1950-1960s by Pierre Arminjon, Boris Nolde and Martin Wolff in their *Traité de droit comparé*,[1] on one side, and by René David in his *Les grands systèmes de droit contemporains: (droit comparé)*,[2] on the other. I will not go into the details of why the scholars decided to classify Soviet law as a separate legal system, but the main points for distinction were divergent economic and political orientations, dissimilar social values, differences in property, labour, and contract law. Briefly, scholars were looking more for dissimilarities than similarities between Russian and Western law and, definitely, found enough of them to put Russia outside civilian legal tradition. This attitude of looking at how Russian law is different from civilian systems continues to persist today.

In this article, by presenting a survey of the history of civil law codification in Russia, with a special emphasis on property law as the most peculiar part of Russian law, I will try to show that, first, Russia (even in Soviet times) has always belonged to civilian legal tradition. It is obvious that the country was directed by divergent

1. PIERRE ARMINJON ET AL., 1 TRAITÉ DE DROIT COMPARÉ 47 (Pichon & Durand-Auzias, Paris 1951).

2. RENÉ DAVID , LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS: (DROIT COMPARÉ) (Dalloz, Paris 1964). In English translation RENÉ DAVID & JOHN E. C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW (The Free Press, Collier-Macmillan, London 1968).

social and political values and had its own hierarchy of economic preferences. However, the techniques to promote these values and preferences by law were purely civilian. Throughout its history, Russian law has not created a single legal institution that would be incompatible with fundamental principles of the civil law tradition. Second, with the course of time, Russian civil law became more and more civilian and closer to other civil law countries, with the Civil Code of 1994-2006 being the culmination of the process. I hope that my examination of four Russian civil codes will provide persuasive arguments for both statements.

II. THE *CIVIL LAWS* OF 1835: THE BEGINNING OF MODERN CIVIL LAW IN RUSSIA

The formation of the modern Russian legal system can be attributed to an all-encompassing codification that was realized in the Russian Empire in the 1830s. Prior to the codification, the social life of the country was regulated by numerous legal sources that embodied local customary law as well as concepts and rules borrowed from Byzantium and Germanic law. The striking feature of the Russian legal system, which distinguishes it from those of most European countries, is that it has never known a direct reception of Roman law.[3]

The Russian codification of the 1830s fits into the European codification movement of the 18th and early 19th centuries, influenced by the Enlightenment. At that time, either a total codification of the whole scope of law or a codification of its separate branches was undertaken in Bavaria (the Criminal Code of 1751, the Code of Civil Procedure of 1753 and the Civil Code of 1756), Prussia (*Allgemeines Landrecht für die preussischen Staaten* of 1794, hereinafter ALR), Austria (*Allgemeines*

3. MIKHAIL M. SPERANSKY, PRÉCIS DES NOTIONS HISTORIQUES SUR LA FORMATION DU CORPS DES LOIS RUSSES TIRÉ DES ACTES AUTHENTIQUES DÉPOSÉS DANS LES ARCHIVES DE LA 2E SECTION DE LA CHANCELLERIE PARTICULIÈRE DE S. M. L'EMPEREUR (Imprimerie de Mme. veuve Pluchart et fils, Saint-Pétersbourg 1833).

bürgerliches Gesetzbuch für die gesammten deutschen Erbländer der Oesterreichischen Monarchie of 1811, hereinafter ABGB) and France (*Code civil des Français* of 1804).[4] In Russia, the first codification projects were already started at the beginning of the 18th century, but were completed only in 1835, when the *Digest of the Laws of the Russian Empire*[5]—a set of fifteen volumes with 60,000 articles—entered into force.[6] The civil law was codified in the tenth volume of the Digest of Laws, which was entitled *Civil Laws* (*Zakony Grazhdanskie*) and consisted of four books: 1) Family Rights and Obligations; 2) On the Procedure of Acquisition and Preservation of Real Rights in General; 3) On the Procedure of Acquisition and Preservation of Real Rights in Particular; 4) Contractual Obligations.

The terminology of the second and the third book is not consistent: they both regulate real rights and modes of their acquisition. The second book, "On the Procedure of Acquisition and Preservation of Real Rights in General," covers classification of property, various real rights, legal capacity to acquire real rights and general provisions on acquisition of property. The third book, "On the Procedure of Acquisition and Preservation of Real Rights in Particular," regulated the transfer of ownership by donation, succession, sale, and exchange.

The sources used by the drafters of the *Civil Laws*, along with Russian law, were Prussian (ALR 1794), Austrian (ABGB 1810), and French (*Code civil* 1804). Although scholars usually

4. OLIVIA F. ROBINSON ET AL, EUROPEAN LEGAL HISTORY: SOURCES AND INSTITUTIONS, 246-60 (2d ed., Butterworths, London 1994).

5. Or in other translations: *Corpus Juris of the Russian Empire* or the *Collection of Imperial Laws*.

6. For the history of the Digest of the Laws of the Russian Empire, *see* MIKHAIL M. SPERANSKY, *supra* note 3; Tatiana Borisova, *Russian National Legal Tradition: Svod versus Ulozhenie in Nineteenth-century Russia*, 33 REV. CENT. & E. EUR. L. 295-341 (2008); and Tatiana Borisova, *The Digest of Laws of the Russian Empire: The Phenomenon of Autocratic Legality*, 30 L. & HIST. REV. 901-25 (2012).

emphasize the influence of the French Code,[7] the less numerous borrowings from the Prussian Code were also rather important. For example, the famous Russian definition of ownership as a triad of three faculties (to use, to possess and to dispose of property) that has survived Imperial and Soviet Russia, and which serves a fundamental notion of contemporary property law, first appeared in the *Civil Laws*, and was a calque from the Prussian definition. The Russian Code defines ownership in paragraph 1, article 430 of the *Civil Laws* as "the power exclusively and independently of another to possess, to use and to dispose of the property in a manner established by civil laws, in perpetuity and hereditarily."[8] The Prussian ALR stipulates that "full ownership includes the right to possess a thing, to use it and to dispose of it in a similar way (*Zum vollen Eigenthume gehört das Recht, die Sache zu besitzen, zu gebrauchen, und sich derselben zu begeben*)."[9] The key feature that likens the Prussian and the Russian definition is the inclusion of possession as one of the rights inherent to ownership. Other European codes of the time do not include possession in the list of the faculties belonging to the owner.

Overall, the *Civil Laws* were a whimsical blend of modern and medieval legal principles and institutions. On the one hand, the Russian law adopted such progressive principles as an absolute, exclusive and perpetual right of ownership; protection of intellectual property; recognition of divorce, as well as freedom of contract and of testamentary disposition of property. Another merit of the Digest of Laws is that it established a system for Russian law and made it clear and accessible. Boris Nolde justly affirmed that "in no country the law was so substantially transformed as in

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7. Maksim Vinaver, *K voprosu ob istochnikakh X toma Svoda zakonov*, 10 ZHURNAL MINISTERSTVA IUSTITSII 1-68 (1895).

8. Translation by VLADIMIR GSOVSKI in his 1 SOVIET CIVIL LAW: PRIVATE RIGHTS AND THEIR BACKGROUND UNDER THE SOVIET REGIME 556 (Univ. of Michigan Law School, Ann Arbor 1949). I will also use this author's translation of the *Civil Code of the Russian Federation* of 1922 in this article.

9. Section 9, tit. VII ALR, http://www.koeblergerhard.de/Fontes/ALR1fuerdiepreussischenStaaten1794teil1.htm (last visited Mar. 4, 2013).

Russia in 1835: all legal life in all its smallest details, was suddenly regulated by a unified legislation that replaced innumerable statutes, decrees, and judgments which had been governing the country before then."[10] On the other hand, the *Civil Laws* preserved such institutions as: a limitation of certain social groups' legal capacity (e.g., Jews, married women, and natural children); limited commerce of some property (such as entailed estates); a system of *majorat* for some property, preservation of serfdom and, as a result of this, a distinction between populated and unpopulated lands, as well as interpretation of peasants as things accessory to lands;[11] and other obsolete rules and institutions.

In general, the *Civil Laws* were not a real codification in the sense of a substantial legal reform but a mere consolidation of existing law. They were criticized by the leading legal scholars for desuetude, gaps, and contradictions.[12]

Moreover, before the second half of the 19th century not all the population of the Empire could enjoy the provisions of the Digest of Laws. Due to the existence of serfdom, about 35% of the population (who were serfs),[13] were excluded from the application of the official Russian law. The country had to wait until the accession of the emperor Alexander II ("the liberator") who was able to fulfill the difficult task of the emancipation of compatriots from serfdom.[14] However, the peasants were emancipated without

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10. PIERRE ARMINJON ET AL., 3 TRAITÉ DE DROIT COMPARÉ 235 (Pichon & Durand-Auzias, Paris 1951).

11. Similar to the Civil Code of the State of Louisiana of 1825, which considered slaves as immovables by the operation of law (art. 462).

12. KONSTANTIN D. KAVELIN, RUSSKOE GRAZHDANSKOE ULOZHENIE, 1-2 (St. Petersburg 1882); EVGUENY V. VAS'KOVSKY, UCHEBNIK GRAZHDANSKOGO PRAVA. VYP. I. VVEDENIE I OBSHAYA CHAST' 38 (St. Petersburg 1894); PYOTR P. TZITOVICH P.P. KURS RUSSKOGO GRAZHDANSKOGO PRAVA. TOM I. UCHENIE OB ISTOCHNIKAH PRAVA. VYPUSK 1, 22-23 (Odessa 1878).

13. ALEXANDER G. TROINITZKY, KREPOSTNOYE NASELENIE ROSSII PO 10-Y NARODNOI PEREPISI 26-27 (V typografii Karla Wulfa, St. Petersburg 1861).

14. For more details on the reforms, *see* ROSSIISKOE ZAKONODATEL'STVO X - XX VEKOV: V 9-TI TOMAKH. T. 7. DOKUMENTY KREST'YANSKOI REFORMY. (Oleg I. Chistyakov ed.,Yuridicheskaya literature, Moscow 1989) *and*

land. The price for redemption was too high; the majority of peasants could not afford to become landowners. Such a palliative solution of the agrarian question was one of the most important factors that led to the Socialist Revolution of 1917. However, in the years 1861-1864, as a result of liberal reforms, former serfs were granted full legal capacity and became subjects of law, including civil law. Although the legal status of different social groups was still different and it was too early to talk about full legal equality of all the subjects of the Russian monarch (the principle of the equality of all citizens was introduced by the 1917 bourgeois revolution), at least they became free and legally capable (with the exception of the already-mentioned limitations of the legal capacity of certain groups of the population).

The time that followed the Great Reforms could be justly described as the golden age of Russian legal science, including civil law studies. Russian scholars were highly-educated (typically not only in Russia, but in Europe as well), multilingual, and integrated into the European community of legal scholars. Such Russian legal scholars as Leon Petrażycki, Maxim Kovalevsky, Paul Vinogradoff, Georges Gurvitch, Fyodor Martens, Nicholas Timashev, and Pitirim Sorokin have substantially enriched international legal science.

Changes in the social life of the country, as well as the development of legal studies, necessitated legal reforms, including revision of the *Civil Laws*. A new Civil Code (*Grazhdanskoye Ulozhenie*) was drafted by 1905. At that time, the law reform was inseparably connected to the necessity of reception of foreign laws. The Codification Commission relied on the German and the French codifications as models (especially in the law of property, obligations, and succession) and doctrinal sources, both Russian

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ROSSIISKOE ZAKONODATEL'STVO X - XX VEKOV: V 9-TI TOMAKH. T. 8. SUDEBNAYA REFORMA (Oleg I. Chistyakov ed.,Yuridicheskaya literature, Moscow 1991).

and European.[15] The new Civil Code would have introduced new orientations for economic and social development if the Bolshevik revolution had not interrupted the social development of the state.

III. THE CIVIL CODE OF 1923: A CODE FOR TRANSITION FROM CAPITALIST TO SOCIALIST SOCIETY

A. Drafting the Civil Code

The Socialist Revolution of 1917 opened a new period in the history of Russian civil law. Initially the Bolsheviks kept the legal principle introduced by the bourgeois revolution of February 1917: the equality of political and civil rights of all the people, regardless of their sex, class, race or religion.

One of the first decrees of the Soviet state, *On Land* (1917), abrogated the private ownership of land, subsoil, waters, and forests.[16] The title of another decree, *On Abrogation of Successions* (1918), speaks for itself. It was aimed at complete extermination of one of the sources of private ownership. For the same reason donations were abrogated, too.[17]

Revolutionary law (if it could be called law) engendered a new mode of acquisition of ownership: nationalization. This mode of acquisition exists in capitalist countries, too, but the socialist nationalization has two fundamental distinctions. First, it is realized without any indemnification. Second, the new owner is free from all the obligations of the former: from all the charges, all the debts, and all the dismemberments.[18]

In general, the civil law during the first years of Soviet power remained faithful to Lenin's slogan, "We recognize nothing

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15. For more details on the drafting of the Civil Code, *see* VLADIMIR A. SLYSHYENKOV, PROEKT GRAZHDANSKOGO ULOZHENIYA 1905 G. I EGO MESTO V ISTORII RUSSKOGO PRAVA (Moskva 2003).

16. Decret "O zemle", 1 SOBRANIE UZAKONENIY RSFSR 3 (1917).

17. Decret "Ob otmene nasledovaniya", 34 SOBRANIE UZAKONENIY RSFSR 456 (1918).

18. For more details on the stages of nationalization in Soviet Russia, *see* PIERRE ARMINJON ET AL., 3 TRAITÉ DE DROIT COMPARÉ, *supra* note 10, at 246-50.

private, for us in the economy everything is public, but not private."[19] That is why some Soviet jurists proposed to adopt a Code of Economic Laws or a Code of Social Legislation instead of a Civil Code. However, the profound economic crisis of the time showed the necessity of private investments, including foreign capital. The policy of reconstruction of the social economy, known as the New Economic Policy introduced by Lenin in 1921, would never have been successful if it had not been supported by the restoration of the security of juridical acts: that is to say, the restoration of civil law.

That is why and how the first Soviet Civil Code was adopted in December 1922 and entered into force on January 1, 1923.[20] It was the first time in Russian history that the expression "Civil Code" ("*Grazhdansky codex*") had been used.[21] The 1905 project of civil law codification bore a title of "*Ulozheniye*", which is an original Russian term for "code" and had been used in Russia since 1649, the year when the famous *Sobornoye Ulozheniye* was enacted. It was exactly this term that was chosen for the translation of Prussian, Austrian, German and Swiss codes in Imperial Russia, although the term "code" ("*codex*" in Russian) had always been used for the French codification. Thus, the Bolshevik codification established a new tradition to name collections of laws with a Latin word, "*codex*."

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19. Vladimir I. Lenin, *O zadachakh Narkomyusta v usloviyakh novoi ekonomicheskoi politiki: Pis'mo D. I. Kurskomu*, in VLADIMIR I. LENIN, POLNOE SOBRANIE SOCHINENIY 389 (Moscow 1964).

20. For the history of the creation of the 1922 Code, *see* TATYANA E. NOVITZKAYA, GRAZHDANSKY KODEKS RSFSR 1922 GODA. ISTORYA SOZDAINYA. OBSHAYA KHARAKTERISTIKA. TEXT. PRILOZHENIYA (Zertzalo-V, Moscow, 2002). In the Russian legal tradition, codes are dated by the year of their adoption and not by the date of their entrance into force, as in Western European countries. Thus, Russian and some European scholars talk about the 1922 Civil Code. However, I will follow the Western tradition and call it the 1923 Civil Code.

21. However, the very first Soviet Code ("codex") was the *Code of Laws on the Acts of Civil Status, Marital, and Family and Tutorship* law adopted in October 1918. The Civil Code of 1923 was the first *civil* code.

The sources of the 1923 Civil Code are the Draft of the Civil Code ("*Ulozhenie*") of the Russian Empire as revised by 1913, the German, the Swiss and the French civil codes (however, the Germanic codes were more popular than the French).

Although European scholars criticized the Code for its technical imperfections,[22] we should not forget that the Code was hastily drafted in just three months—an amount of time unprecedented for the codifications of the 19th and 20th centuries. Moreover, it was a Civil Code created for an unprecedented political, economic, social, and cultural setting. Finally, in the first years of the new regime, Soviet jurists adhered to the Marxist idea of the state and of the law's inherently temporary character, and their inevitable withering away in the Communist future. The legal profession was perceived as archaic and transient, and law in general, as a means of social regulation, did not enjoy great importance in this period.[23] The Civil Code was initially drafted as an interim Code, but was fated to regulate the life of the Russian people more than forty years. However, given the lack of time and the novelty of the tasks confronting the Soviet codifiers, the first Code of the Soviet State was not all that imperfect, and contained the potential to become a basis for the Civil Code of 1964. The Code was replicated in the Civil Codes of the Ukrainian (1923), Byelorussian (1923), Georgian (1923), Azerbaijan (1923), and Armenian (1924) Republics. It was also applied directly in Uzbek (1924) and Turkmen (1926) Republics, as well as in Lithuania,

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22. Édouard Lambert, *La place des codes russes dans la jurisprudence comparative*, in LES CODES DE LA RUSSIE SOVIÉTIQUE 1-46 (Marcel Giard Libraire-Éditeur, Paris 1925); Heinrich Freund, *L'avenir du droit civil dans l'Union Soviétique*, in 3 INTRODUCTION À L'ÉTUDE DU DROIT COMPARÉ 363, 365 (Recueil Sirey, Paris 1938).

23. On the development of the Soviet legal theory in the first years of Soviet power, *see* SERGEY S. ALEKSEEV, FILOSOFIYA PRAVA 148–182 (Izdatelskaya groupa Infra M. Norma, Moskva 1998), and VLADIK S. NERSESSIANTS FILOSOFIYA PRAVA 163–311 (Izdatelskaya groupa Infra M. Norma, Moskva 1997).

Latvia and Estonia from 1940 until the adoption of the Republics' civil codes in the 1960s.[24]

B. Main Features of the 1923 Civil Code

First, the Soviet legislature completely broke with the pre-revolutionary legal system, prohibiting an interpretation of the Code according to the "laws of overthrown governments and the decisions of pre-revolutionary courts" (article 6 of the Decree of the Russian Central Executive Committee, *On Enactment of the Civil Code of the Russian Soviet Socialist Republic* of October 31st, 1922).[25] Article 2 of the same decree prohibits bringing actions concerning civil law issues that occurred before the 7th of November, 1917.

Second, the Civil Code does not cover family relations and relations between an employer and employees, since the Soviet law established a new legal trend. It proclaimed that henceforth these relations would be regulated by separate codes: the Code of Laws on the Acts of Civil Status, Marital, Family and Tutorship law (1918) and the Labour Code (1918). From that time, the legal regimes of land and forests were regulated by the Land Code (1922) and the Forestry Code (1923). This tradition of distributing the legal material belonging to private law (totally or partially) among various codes has been preserved in Russia to this day.

Third, the Code of 1923 was permeated with the idea of the supremacy of the State in civil law relations. This principle can be perceived from the following examples: 1) The creation of a private legal person requires state authorization, not just registration (art. 15); 2) Also, the Code does not recognize general legal capacity of legal persons; they have only special capacity, meaning that they have to act in conformity with the goals, fixed in

24. VLADIMIR GSOVSKI, 2 SOVIET CIVIL LAW: PRIVATE RIGHTS AND THEIR BACKGROUND UNDER THE SOVIET REGIME 4-5 (Univ. of Michigan Law School, Ann Arbor 1949).
25. *Id.* at 10.

their founding documents; otherwise, the state would liquidate such a legal person (art.18); 3) A natural or a legal person may participate in international trade only with permission from the State (art. 17); 4) Pledged property first covers the debts of a debtor to the State (such as taxes, fees, and salary of the debtor's employees) in preference to the claims of the pledgee (art. 101); 5) The Civil Code recognizes a possibility to rescind a contract for lesion if the aggrieved party is the State, and it was the only case of lesion admitted by the Code. The Soviet judicial protection of the interests of the State went even further than that. For instance, in contractual obligations, the jurisprudence insisted on the specific performance of the contract, if one of the parties was the State. It means that the obligor could not just indemnify the obligee; he had to perform the obligation even if he suffered a loss himself (for example, if his creditor had failed to perform his obligation).

From these rules one general trend can be perceived: a substantial "publicization" of the Soviet private law, a trend which was preserved in the Civil Code of 1964. Thus, the prioritized legal status of the Soviet State in private relations prevents me from agreeing with the statement of a German scholar, Heinrich Freund, that "the Civil Code was a code of economic liberalism and not a code of a Socialist economy."[26] Although in many points the Code of 1923 was similar to a classical liberal civil code, it nonetheless incorporated substantial deviations from the principles of equality of all persons and types of property, of free circulation of property and the freedom of contract—all of which is incompatible with economic liberalism.

However, the Civil Code of 1923 was more liberal than the revolutionary law since it restored successions and donations, which were abrogated by the revolutionary decrees. However, both institutions were rather limited. The Code specified the maximum amount of property that could be inherited or donated. Property

26. Heinrich Freund, *supra* note 22, at 367.

could be inherited by the surviving spouse and descendants to the second degree. A typically-socialist innovation is that the legislature recognized as heirs persons who were dependent on the deceased person. The two subsequent Russian civil codes kept this rule.

C. Property Law

As for property law, the Code of 1923 abrogates the distinction between movables and immovables, justifying this step by the fact that the private ownership on land is abrogated (art. 21). The Code of 1923 recognizes only three real rights: ownership, pledge (this is, probably, the influence of Germanic legal tradition which recognizes pledge as a real right) and a right of construction (which is a kind of superficies as a special mode of ownership). The right of construction was not an invention of the Soviet legislature; it was introduced into Russian law in 1912,[27] and was probably drafted on the basis of the BGB's *Erbbaurecht* (hereditary right of construction).

In spite of the fact that it is a socialist code, it recognizes private ownership even on enterprises. The Code provides the following definition of ownership: "Within the limits laid down by law, the owner has the right to possess, to use and to dispose of ownership" (art. 58). As Vladimir Gsovski justly pointed out, general provisions of the Soviet Code on ownership "might have been included in a civil code of any capitalist country"[28] and that "a non-Soviet jurist would look in vain for a new concept of ownership in the Soviet Civil Code."[29] However, the commerce of housing under the 1923 Code is limited. No one may have more

27. *See* MIKHAIL I. MITILINO, PRAVO ZASTROIKI. OPYT CIVILISTICHESKOGO ISSLEDOVANIYA INSTITUTA (Kiev 1914).

28. VLADIMIR GSOVSKI in 1 SOVIET CIVIL LAW: PRIVATE RIGHTS AND THEIR BACKGROUND UNDER THE SOVIET REGIME 556 (1948).

29. *Id.* at 558.

than one accommodation; a family may alienate only one accommodation every three years.

While keeping private ownership, the legislature, however, pays more attention to the socialist ownership—namely, State property. Property in abeyance is presumed to be State property (art. 68) as well as discovered treasure (the finder receives only recompense equal to one fourth of the treasure's value). According to Boris Nolde, attribution of the ownership of the found treasure is a restoration of the feudal legal tradition.[30]

The Soviet Code follows the Roman law rule that distinguishes between a good and a bad faith possessor. As a general rule, according to the Code of 1923, the owner may revendicate his property from a good faith possessor only if the property was lost or stolen.[31] However, a state enterprise may revendicate its property from a good faith possessor under any circumstance (art. 60). The State is able to make restitution of its property from any possessor. The Supreme Court of the RSFSR, in its ruling of 1925, even outstripped this rule, creating a presumption of State ownership. In case of litigation, the property was presumed to be owned by the State and it was the other party who had to prove the contrary, regardless of who was plaintiff or defendant.[32]

Thus, the Soviet legislature deliberately proclaimed inequality of property and owners and priority of the socialist ownership.

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30. PIERRE ARMINJON ET AL., 3 TRAITÉ DE DROIT COMPARÉ, *supra* note 10, at 315.

31. At the same time, the possession of a non-owner was not protected from infringement, probably due to the fact that the number of real rights in the Soviet Code was very restricted. Similarly, the Soviet civil law does not contain special provisions on possession as factual relationship, probably because the Civil Code did not recognize *usucapion* (acquisitive prescription or adverse possession) as a mode of acquisition of ownership (PIERRE ARMINJON ET AL., 3 TRAITÉ DE DROIT COMPARÉ, *supra* note 10, at 320).

32. VLADIMIR GSOVSKI, *supra* note 24, at 76.

D. Further Developments

The main trend of the development of the Soviet civil law in the years 1930-1950s, which culminated in the Civil Code of 1964, is the reinforcement of State ownership and the weakening of private ownership.

It should be pointed out that there was no special law that would have abrogated private ownership. However, with the advent of Stalin, a forced collectivization of agriculture, industrialization of the country, and reinforcement of the state economy naturally resulted in the weakening of the private initiative and gradual disappearance of private enterprises. As Professor Ioffe puts it, ". . . [P]rivate ownership was eradicated without reference to any legal provision. On the contrary, legal provisions addressed to private activity became dead letter formally, not abolished but actually eliminated from application in practice as a result of the liquidation of private ownership."[33] The Constitution of the USSR of 1936 knows only two forms of ownership: socialist and personal. Private ownership had disappeared in the thirteen years following the enactment of the first Soviet Civil Code.

Moreover, "Stalin's Constitution" demonstrated a trend to centralization of the civil law, depriving Soviet socialist Republics of their rights to adopt civil codes and transferring this right to the all-union legislature (representing all of the republics). Between 1946 and 1952, three drafts of the Civil Code of the USSR were elaborated; however the all-union Civil Code remained a stillborn project.

Between the two codifications—that of 1923 and the Civil Code of 1964—there were numerous doctrinal attempts to split civil law (the set of provisions which regulated proprietary relations and connected to them personal relations) into two

33. OLIMPIAD S. IOFFE, DEVELOPMENT OF CIVIL LAW THINKING IN THE USSR 45 (Giuffrè, Milano 1989).

branches: civil law and economic law. The latter was considered as a branch of law that would regulate the patrimonial rights and obligations of Socialist enterprises in their relations with other Socialist enterprises or with the Soviet State, while the civil law would exclusively regulate private relations of physical persons with other physical persons or of physical persons with Soviet legal entities. Once again, this was far from being a Soviet invention. According to Heinrich Freund, the concept of economic law was borrowed from interwar Germany, where it was called *Wirtschaftsverwaltungsrecht* (economic-administrative law) and at that time consisted of set of provisions applicable to an enterprise when it was subject to the regulatory intervention of the State.[34] However, the attempt to split the civil law into two branches was unsuccessful, which clearly demonstrates that Soviet legal scholars and politicians preferred to develop Russian civil law as a classical united civil law.

IV. THE CIVIL CODE OF 1964: A CODE OF A SOCIALIST SOCIETY

A. General Features

The development of the country after World War II was marked by a substantial economic upswing, and by significant social reforms which required new civil legislation. Although, under Khrushchev's rule, the 1936 Constitution was changed to restore the prerogative to adopt civil codes to the Soviet Republics, it also entitled the Supreme Soviet of the USSR to adopt the *Fundamental Principles of Civil Legislation*, which had to serve as a framework for the Republics' civil codes.[35] These Fundamental Principles were adopted in 1961. They also served as the basis for the new Civil Code of RSFSR of 1964.

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34. Heinrich Freund, *supra* note 22, at 367.
35. OLIMPIAD S. IOFFE, *supra* note 33, at 67.

What differentiated this Code from all the other Russian Civil Codes is that it was not influenced by European civil codes. The major sources of the 1964 Code are the Civil Code of 1923 and Soviet legal doctrine.

This Code follows the tradition of confusion of private and public law. It opens with a preamble that resembles more a political declaration or constitutional provision. The preamble proclaims that the Soviet Union "has achieved a total and definite victory of socialism and has entered into the period of extensive construction of the communist society." Creating such quasi-constitutional provisions, the preamble describes the objectives of this phase of communism, the socialist economy, and its future. According to the preamble, "the purpose of Soviet civil laws is to contribute to solving problems of the construction of communism." It is worth noting that the Civil Code of 1923 was not as impregnated with ideology. Two explanations for this phenomenon are possible. First, the Code of 1964 was adopted between two USSR Constitutions, that of 1936 and of 1977. The Stalin Constitution was already outdated, while "Brezhnev's Constitution" (of 1977) had not yet been drafted. In such a situation, the legislature introduced some constitutional legal provisions into the Civil Code. Second, such provisions show a substantial evolution in the understanding of the social function of the civil law. If in the 1920s, the civil law was perceived as a "narrow horizon of bourgeois law,"[36] which would disappear in a communist society, then in the 1960s, the civil law was already considered as a means that contributed to construction of the communist society.

In comparison to the Civil Code of 1923, the Code of 1964 is better structured, demonstrates better legislative technique, contains books on intellectual property and international private law, and recognizes a more complicated system of obligations. In

36. VLADIMIR GSOVSKI, *supra* note 28, at 576.

general, the Code of 1964 regulates almost the same relations and by the same means as "capitalist" codes.

B. Property Law

The demarcation line between the Soviet Code and civil codes of Western countries lies in property law. The Civil Code of 1964 recognizes only one real right: the right of ownership. It distinguishes only two types of ownership: socialist ownership and personal ownership. Apart from the rights of socialist enterprises over their property, the Code of 1964, unlike the Code of 1922, does not recognize limited real rights.[37] According to E. Sukhanov, "this category was omitted because the State's right to land was effectively exclusive and did not allow for the existence of other real rights, including servitudes."[38]

The first paragraph of article 94, which is devoted to state property, contains an obvious tautology: "The Soviet State is the only owner of all property of the State." However, in my opinion, this phrase was coined deliberately: such a wording suppresses all the attempts to qualify rights of the socialist enterprises on their property as a right of ownership. The second paragraph of the article defines precisely the real right of Socialist enterprises over their property: "The property of the State assigned to state enterprises is under the operational administration of these enterprises. They exercise the right of possession, enjoyment and disposition over this property in the limits fixed by law, as well as

37. In various legal traditions real rights lesser than the right of ownership bear different names. In Roman law they were called *jura in re aliena*. In modern French law and legal systems of French origin they are considered as dismemberments of ownership; in Scotland they are called subordinate real rights. I have chosen the Germanic title "limited real rights" because in property law the Russian legal tradition is closer to Germanic law than to any other western legal tradition.

38. Yevgeny Sukhanov, *The Concept of Ownership in Current Russian Law*, VI JURIDICA INTERNATIONAL. UNIVERISTY OF TARTU LAW REVIEW 104 (2001).

in accordance with objectives of their activities, with the tasks fixed by plans and with the destination of the property."

The legal nature of this operational administration engendered heated discussions among the Soviet civilians. Perhaps the creation of such a real right is the most remarkable contribution of Soviet jurists to legal science. This right was not an invention of the 1964 Civil Code. As a matter of fact, this right already existed from the introduction of the New Economic Policy (1921) and was recognized by Soviet legal doctrine; however, it was not included into the Civil Code. Because of that, the character of proprietary rights of Soviet enterprises was already a subject matter for scholarly debates in the 1920s.

According to the theory suggested by B.S. Martynov, the relations between the State and enterprises are similar to both Roman law *fiducia* and to common law trust. The same scholar also used the medieval theory of divided ownership to explain the distribution of proprietary rights between the State and enterprises, and attributed *dominium directum* to the State and *dominium utile* to enterprises.[39] However, this scholar's theory ignores substantial differences between such legal constructions as *fiducia*, divided ownership, and trust. The fiduciary is not the owner, while trust and divided ownership imply that several persons are owners and the ownership is split between them (although the division of ownership is realized differently in feudally-divided ownership and the common law trust).

Later, in order to avoid any possible references to the theory of divided ownership, Soviet scholars started to insist that the true civil law owner of the property was the State, while the right of enterprises over their property was not a civil law right and could not be classified by using traditional concepts of property. That is how a new real right—the right of operative administration—that

39. OLIMPIAD S. IOFFE, *supra* note 33, at 211-12.

combined administrative and civil law components appeared.[40] However, by the mid-1960s, the doctrine of the Soviet civil law already considered the right of operative administration as a civil law real right, a kind of limited real right. Although an enterprise exercises all the rights of an owner (possession, enjoyment, and disposition), the State reserves the right of juridical accession (or what is called in the French doctrine *l'arrière-droit* or in Québec doctrine *vis attractiva*) of the property and this characteristic is decisive for the determination of a real owner, which is the State.

The Civil Code of 1964 proclaims that personal ownership is derived from socialist ownership and constitutes a means to satisfy the needs of the citizens. Unlike the 1923 Civil Code, the Code of 1964 does not contain provisions on private ownership. It knows only two types of ownership: socialist and personal, the latter being a substitute for private ownership. Only a natural person can own it and the property may not be used for producing income which does not stem from labour (art. 105). The law specifies that the personal property of a citizen may not consist of more than one house with maximum dimension of sixty square meters (art. 106). If, by means of donation or succession, a citizen gets another house, he may, at his own choice, keep one and sell the other within one year. If he does not sell it, the local administration would organize a forced sale. And if there is no buyer, the State acquires ownership of the house in question (art. 107). The ownership of a citizen therefore depends on a fortuity: if there is a buyer, the owner enjoys his right; if there is no buyer, the State deprives the person of his property.

To make things short, by its legal nature the personal ownership of the Soviets is nothing but a private ownership, a limited private ownership, an amputated private ownership. It is limited by its holders: only natural persons are entitled to it. It is confined to certain objects with definite dimensions. Finally, it is

40. OLIMPIAD S. IOFFE, *supra* note 33, at 215-21.

appropriated to a particular purpose: to satisfy material and spiritual needs of the owner (thinking about this, I cannot help seeing a parallel with Québec's patrimony by appropriation/*patrimoine d'affectation*). Nonetheless, in spite if all these restrictions, it is a private property that gives to its owner all the rights of possession, enjoinment, and disposition of property. This right is also protected by all of the means of private ownership known to civilian legal systems (a true revendicatory action/*actio rei vindicatio* and negatory action/*actio negatoria*). Vladimir Gsovski is correct in his statement that, "the Soviet law of property shows also how inescapable private ownership, although in a small dose, is, even in a socialist State."[41]

V. THE CIVIL CODE OF 1994-2006: A CODE FOR A MARKET ECONOMY AND A LIBERAL SOCIETY

A. Drafting the 1994-2006 Civil Code

The predominance of socialist ownership and the degeneration of private ownership engendered negative trends in the Russian economy and society, and by the end of the 1980s, the inefficiency of the socialist economy was indisputable. The Gorbachev government implemented *perestroika*: an unprecedented series of political and economic reforms.

The Laws *On Ownership in the USSR*[42] and *On Ownership in the RSFSR*[43] of 1990 opened a new age in the history of Russian civil law. These laws re-established private ownership (although only the second one openly uses the expression "private ownership") and proclaimed the equality of all forms of ownership and all owners.

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41. VLADIMIR GSOVSKI, *supra* note 24, at 576.
42. Zakon SSSR "O sobstvennosti v SSSR," 11 VEDOMOSTI SOVETA NARODNYKH DEPUTATOV SSSR I VERKHOVNOGO SOVETA SSSR 164 (1990).
43. Zakon RSFSR "O sobstvennosti v RSFSR," 30 VEDOMOSTI SOVETA NARODNYKH DEPUTATOV RSFSR I VERKHOVNOGO SOVETA RSFSR 416 (1990).

Another document that gives a new direction to Russian civil law is the Constitution of the Russian Federation (1993), the first constitution that has a direct application. It proclaims that the right of private ownership is an inalienable right belonging to everyone from the day of birth and protected by the law (art. 35). The third part of article 35 repeats almost verbatim article 545 of the French Civil Code: "No one may be deprived of his property otherwise than by a court decision. Expropriation of property for public utility may be carried out only and in consideration of a just and prior indemnity." This is the first time that such a provision was introduced into Russian legislation. The following constitutional rule sounds as a repercussion of the revolutionary legislation: "The right of succession is guaranteed."

Profound and rapid social reforms that were undertaken in Russia in the early 1990s required the adoption of a new Civil Code as soon as possible. That is why the new Russian Civil Code was adopted in several installments: the first part in 1994, the second in 1995, the third in 2001, and the fourth in 2006. Thus, now the Russian civil law is fully codified, and has even entered a stage of decodification.

The sources of the new Code are the Civil Code of the RSFSR of 1964, the Fundamental Principles of Civil Legislation of the USSR of 1991,[44] classical civil codes (German, Swiss, French, and Italian), two of the newer codes (of Québec and of the Netherlands), the Draft of the Civil Code of the Russian Empire of 1913, and international private law (e.g., Vienna Convention on International Sale of Goods).

B. Main Features

The new Russian Code is founded on liberal values: free enterprise, sanctity of private property, freedom and sanctity of

44. This legislation never entered into force in the USSR itself, but became a source of Russian civil law in 1992.

contract, recognition of five degrees of heirs (compared to only two degrees in the Code of 1964), and equality of the State and other persons in private relations.[45] Briefly, the philosophy of the Civil Code is the 19th century principle of *laissez faire, laissez passer*. The Code does not feature any noticeable socialization of property or contract law that departs from the civil law of Western countries in the 20th century.

One may also notice that the new Civil Code demonstrates very good legislative technique. It contains an impressive theoretical part. Everywhere in the Code there are general provisions. The book on the law of intellectual property reflects the latest results of scientific and technological progress.

One of the hallmarks of the new Code is that it proclaims its own supremacy over all the other civil legislation, which distinguishes it from contemporary European Civil Codes and makes it kindred to the Civil Code of Québec of 1994.[46] Article 3 of the Russian Code stipulates that civil legislation consists of the Civil Code and other federal laws adopted in accordance with it, of presidential decrees, and of governmental regulations. However, presidential decrees and governmental regulations must be in compliance with the Civil Code and other federal laws, and may not contradict them. Thus, article 3 creates a hierarchy of legislative sources of civil law, the Civil Code being the vertex of the pyramid. The aim of the third article is to prevent the executive power (mainly the President) from legislating arbitrarily in the field of civil law, i.e., to establish a separation of powers. The authors of the Civil Code had a good reason for introduction of such a provision.

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45. For the history of the Civil Code and its fundamental principles, *see* Alexandre Scaggion, *La Codification du droit russe* (2002) (Doctoral thesis, Paris I) (on file with Atelier national de reproduction des thèses).

46. The preliminary disposition of Québec Civil Code reads: "The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it."

In the early 1990s, the decrees of President Yeltzin drastically changed Russian civil law. On the one hand, the executive power can change law faster than the legislature, and this was what the country needed at that time for efficient, speedy economic and political reforms. On the other hand, the executive power could sign a decree that would never be passed by the parliament.

Thus, on December 24, 1993, President Yeltzin signed a decree "On Fiduciary Property (the Trust)" that was an instance of direct intrusion of the common law into the Russian legal system.[47] Article 3 of the decree stipulated that "while establishing the trust, the settlor transfers for a certain time property and real rights that belong to him on the right of ownership to the trustee, who is obliged to exercise his right of ownership exclusively in the interest of the beneficiary and in accordance with this decree, with the contract establishing the trust, and with the legislation of the Russian Federation."[48] What is also unusual is that this decree entered into force at the moment of its signing. Although the decree created a general institution of trust, allowing any physical or legal person to become a settlor, a beneficiary or a trustee, the provisions of the decree applied only to state-owned shares of stock-companies created as a result of privatization of state enterprises before the entrance into force of a new Civil Code (art. 21).

That decree outraged the Russian legal community, which thought it to be a specimen of juridical ignorance, disrespectful of national legal tradition, and introducing "absolutely alien Anglo-American approaches."[49] Struggling against common law trust, Russian civilians insisted on the fact that Russia belonged to the continental legal tradition, which does not know trust, and for this

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47. On the history of the law of trusts in Russia, *see* Elspeth Christie Reid, *The Law of Trusts in Russia*, 24 REVIEW OF CENTRAL AND EAST EUROPEAN LAW 43-56 (1998).

48. Decree "On Fiduciary Property (the Trust)," 1 SOBRANIE AKTOV PREZIDENTA I PRAVITEL'STVA ROSSIISKOI FEDERATZII 6 (1994).

49. Yevgeny Sukhanov, *supra* note 38, at 106.

reason the institution was absolutely foreign to Russian legal system. This construction was also criticized as a way to misappropriate State property at the time of privatization.[50] On November 30th, 1994, the same president signed into law the first part of the Civil Code of the Russian Federation. Paragraph four of article 209 of the Code clearly eliminated trust from the Russian legal system and moved the fiduciary administration of property (as the institution is now called) into the law of obligations (i.e., among personal rights). Article 209 paragraph 4 of the Code reads "An owner may transfer his property for fiduciary administration to another person (fiduciary administrator). The transfer of property for fiduciary administration *does not entail the transfer of the right of ownership to the fiduciary administrator* who is obliged to administer the property in the interests of the owner or a third person designated by the owner" (emphasis added). Finally, on December 22nd, 1995, the president signed into law the second book of the Civil Code, which categorizes the fiduciary administration of property as a contractual obligation (chapter 53) and reproduces the provision of article 209 that "the transfer of property in fiduciary administration does not entail the transfer of the right of ownership to the fiduciary administrator" (article 1012 paragraph 1). The story of Russian trust law, thus, explains why the drafters of the Civil Code wanted to securely establish the priority of the Code over other sources of civil legislation and prevent excessive legislative action from the executive power.

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50. Viktor A. Dozortsev, *Doveritel'noe upravlenie imushestvom*, in GRAZHDANSKY CODEX ROSSIISKOI FEDERATZII. CHAST' VTORAYA. TEKST, KOMMENTARII, ALFAVITNO-PREDMETNYI UKAZATEL' 527-49, 531 (Oksana V. Kozyr et al. eds., Mezhdunarodny centr finansovo-ekonomicheskogo razvitiya, Moscow 1996).

C. Property law

During the recent recodification, the most profound and most important changes were made in the field of property law.[51] The new Code has almost 200 (197) articles on property law, compared to just 66 articles on the same subject in the Civil Code of 1964. Besides this quantitative change, the new Code proclaims a new approach to property law. Unlike previous socialist codes, the new Russian Code follows a new system of exposition of provisions on property law. In the past, the legislature organized the articles on property law according to the types of ownership; now the emphasis is made on the acquisition, extinction and protection of ownership.

The gist of the reform of property law in Russia, as well as in other post-socialist countries, was to reject the idea of state ownership as the principal and dominating type of ownership, and to rehabilitate private ownership in its fullness.[52]

Unlike the Code of 1964, the new Code recognizes not only ownership, but limited real rights as well, revitalizing property law in Russia. Apart from the right of ownership, article 216 of the Code recognizes such real rights as: the right of lifetime inheritable possession of a land plot; the right of permanent (in perpetuity) use of a land plot; predial servitudes; the right of economic management, and the right of economic administration (the two last rights originate in the Soviet right of operational administration). Such real rights as pledge and the right of

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51. For more details on property law in the new Civil Code, *see* David Lametti, *Rights of Private Property in the Civil Code of the Russian Federation and in the Civil Code of Québec*, 30 REV. CENT. & E. EUR. L. 29-47 (2005); Oksana M. Kozyr, *The Legal Treatment of Immovables Under the Civil Code of the Russian Federation*, 44 MCGILL L. J. 327-56 (1998-1999); Evgueny A. Sukhanov, *The Right of Ownership in the Contemporary Civil Law of Russia*, 44 MCGILL L. J. 301-26 (1998-1999).

52. Vladimir A. Toumanov, *Évolution du droit de propriété dans les anciens pays socialistes*, in ACTUALITÉS DE LA PROPRIÉTÉ DANS LES PAYS D'EUROPE CENTRALE ET ORIENTALE ET EN CHINE : [ACTES DU] COLLOQUE, 6 DÉCEMBRE 1996, CONSEIL CONSTITUTIONNEL DE PARIS 15 (Société de législation comparée, Paris 1997).

retention are also sometimes recognized by Russian doctrine as limited real rights, although in the Code they are placed in the book on obligations. The striking feature of Russian property law is that, apart from pledge and the right of retention (if they could be recognized as real rights), the objects of all limited real rights are exclusively immovables.[53]

This enumeration is not exhaustive; these are only examples of limited real rights, and the wording of the article presupposes that one may create innominate real rights. Theoretically, Russia does not have a *numerus clausus* of real rights, although most scholars insist that it exists in Russian property law.

Although the new Civil Code recognizes *usucapion* (acquisitive prescription or adverse possession) as a mode of acquisition of both movable and immovable property, it definitely lacks a developed set of provisions concerning possession as a protected factual relationship that could ripen into ownership.[54]

Another part of Russian civil law with a lot of innovation after recodification is intellectual property law. In this field, we have a code with more than 300 articles (even more than on property law), and all possible objects of intellectual activities are protected by the fourth part of the Civil Code.

VI. CONCLUSION

The history of codification of the civil law in Russia demonstrates that all Russian civil codes were based on the civilian legal tradition and quite often borrowed provisions from other European civil codes. It goes without saying that Russian civil law has always had its peculiarities resulting from differences in economy, politics and lifestyle. However, the unique features of

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53. Yevgeny Sukhanov, *supra* note 38, at 104.

54. For the critique of the absence of provisions on possession, *see* Denis Tallon, *Le point de vue d'un expert étranger pour la codification du Code civil en Russie*, in ACTUALITÉS DE LA PROPRIÉTÉ DANS LES PAYS D'EUROPE CENTRALE ET ORIENTALE ET EN CHINE 24 (Société de législation comparée, Paris 1997).

Russian civil law are not deviations from the civilian tradition, and could be compared to local variations in many countries belonging to the civil law or Romano-Germanic tradition. The new Civil Code of 1994-2006 makes a particular and substantial effort to make Russian civil law compatible with the civil law of its European counterparts.

In summary, in the field of civil law, Russian society now has a very good and promising regulator. The lawyers and legal scholars have already intelligently commented upon, interpreted and annotated the Civil Code, and it contains a good regulative potential. However, the implementation of the Code into the everyday life of society is still a problem to be solved. The legislative power has fulfilled its task perfectly. Now it is the turn of the judiciary, the bar, and the notaries public to make the Civil Code a civil law in action.