PRIVATE AND CIVIL LAW IN THE RUSSIAN FEDERATION

Essays in Honor of F.J.M. Feldbrugge

Edited by

WILLIAM SIMONS

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William Simons

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Preface

The Institute of East European Law and Russian Studies has held three Leiden conferences devoted to the (re)birth of private law in the former USSR after the 1991 break-up of the Soviet Union. (1) "The Revival of Private Law in Central and Eastern Europe" (1993); (2) "The Impact of the Russian Civil Code on Legal Practice and its Meaning for Comparative Legal Studies" (1998); and (3) "The Public/Private Distinction: The East European Debates at the End of a Decade of Reforms" (2003). The proceedings from the 1993 conference have been published in an earlier volume in this series;[1] the present collection rounds out the picture with the materials from the 1998/2003 meetings.

Regrettably, the publication of this volume has been delayed. This is a statement which no author or editor likes to make; which no reader or publisher likes to see. Delay is particularly unwelcome in legal systems. The broad principle, reflecting this, is encapsulated in Jeremy Bentham's words (echoing the *Magna Carta*): "Justice delayed is justice denied." At the end of the 1990s, Zuckerman wrote about this old concern in modern language but the gist remains the same: "Delays can render the judicial protection of rights ineffectual, reduce the value of rights, adversely affect economic activity, and lead to economic distortions."[2]

So, the first question the reader may ask herself reflects this concern. Is legal scholarship delayed always to be equated with legal scholarship denied? It seems to me that where legal scholarship, as in the present case, deals with a subject which remains topical and is presented by authors who are distinguished thinkers in their field, this question should be answered in the negative.

A second, initial question will likely concern the reasons for the delay. They are much the same as those cited a few years ago when a deadline had been missed for revising the US *Freedom of Information Act Guide*: "It was not ready to go", "it [was] a mammoth undertaking", "[w]e were just overly optimistic [...]."[3]

1 George Ginsburgs, Donald Barry and William B. Simons, (eds.), *The Revival of Private Law in Central and Eastern Europe: Essays in Honor of F.J.M. Feldbrugge*, in F.J.M. Feldbrugge, (ed.), *Law in Eastern Europe*, No.46, The Hague, London, Boston 1996, xv + 667 pages.

2 "Justice in Crisis: Comparative Dimensions of Civil Procedure", in A.A.S. Zuckerman, (ed.), *Civil Justice in Crisis*, Oxford 1999, 12.

3 Rebecca Carr, "Delays in Guide Raise Questions About Bush's Information Pledge", Cox News Service, 11 March 2007, reproduced at <http://www.coxwashington.com/news/content/reporters/stories/2007/03/11/BC_FOIA_FAILURE_ADV11_COX.html?cxtype=rss&cxsvc=7&cxcat=0>.

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However, the sixtieth volume of the *Law in Eastern Europe* series, at last, is ready to go. Indeed, it has been no small undertaking to bring together the scholars and practitioners whose works are reproduced herein. Furthermore, my own optimism has also been a factor in this process, prompting me in the past to wrongly conclude that the end of the road was right around the corner. This was only heightened by the "IT mirage": all the wonderful electronic tools which increasingly fill our places of work easily fortify an expectation that publication deadlines will be reached much quicker than in the past—when we were limited to paper and linotype. But as Hans Ulrich Gumbrecht has argued,[4] the time that we appear to save by using a new generation of electronic tools is, by and large, ephemeral; as the next generation of seemingly more efficient tools are offered to (imposed upon) us, they usually turn out to have a learning curve no shorter than the last.

There is, however, more than the size of the editorial effort for a multi-author, multi-jurisdictional volume, the influence of editorial optimism, or the appearance of technical transformation. An additional factor which represents a (if not "the") major cause of this regrettable delay has been the financial crisis afflicting the University of Leiden—and, in particular, the Law Faculty—from the mid-1990s onwards. True, other universities in The Netherlands have also suffered declines in funding for research and education, and other faculties in Leiden have also been struck hard by budget cuts. But the solution designed to meet this crisis—in the particular institutional framework in which the Institute of East European Law and Russian Studies had been anchored in Leiden—had an especially devastating effect on the Institute (and on its scholarly Leiden sisters). At the end of the 1990s when state financing for "non-essential" research and teaching in the Leiden Law faculty was whittled down to near—and, at the beginning of the 2000s, finally reached absolute—zero, the Institute's research and publication activities were faced with liquidation.

Yet the storm—which these developments had wrought upon the Institute—has been weathered and other shores have safely been reached. In doing so, we have kept our link with Leiden; this is reflected, *inter alia*, in the Leiden name on the preliminary pages of the present series (and of our quarterly law journal *Review of Central and East European Law*). For five decades, the Institute has been firmly grounded in Leiden, and I believe that it is only appropriate to continue to honor that tradition even though circumstances have changed fundamentally.

But these changes also have their positive side: for the past four years, the Institute has been afforded welcome financial and academic support

4 "'Latency': How Are the Years Following the End of World War II Presented to Us?", Public Lecture at Smolny College, St. Petersburg, 31 March 2008.

by the faculties of law of the University of Trento and the University of Graz as well as by the European Academy (EURAC) of Bozen/Bolzano.

The authors of this volume have been informed about the delay in its publication and its causes as well as the efforts of this Northern Italian/Southern Austrian consortium to bring our work to its successful conclusion; it is only fitting that the readers of our series also be extended the same courtesy.

* * *

To the scholars and practitioners whose words were heard by those in attendance at our Leiden conferences and whose works can now also be studied by the readers of this volume, once again my heartfelt thanks for your contributions and your patience. Where necessary, the works contained herein have been revised by the authors; others remain in their original conference versions. We have left the decision in this matter to the authors themselves. The difference in timeframe between these two sets of articles should be readily apparent to the reader.

The two broad themes, mentioned above, formed the framework for the last duo of Leiden conferences. However, as the reader will observe, we have taken a middle-of-the-road approach to fitting together the conference contributions within this framework. On the one hand, we could have simply invited the authors to publish their most recent research in the field. In such a case, the interest for the reader would be primarily focused on the author. On the other hand, we could have commissioned specific articles with narrow editorial specifications for each of the conference themes and only published those submissions which conformed to such standards. In this case, the conference theme would be the beacon for the reader. The former approach would have been quicker; the latter, certainly more time intensive.

Our compromise approach should allow both authors and themes to shine. Yet, I am aware that this has produced coverage of the 1998 and 2003 themes which is more diffuse in nature than might have been the case if we had fine-tuned the works of the authors so that each chapter precisely dovetailed with the next. This may be a downside for some readers; the upside is that s/he can benefit from the intellectual filter of each author, from her (or his) individual view of the conference themes.

Naturally, subsequent legislative, judicial and other developments will (tend to) confirm or disprove some of the arguments elaborated on the pages of this volume. Yet, the thinking which is reflected here continues to be of value for those seeking to more fully understand current develop-

ments in Russian law in particular and society in general. *First of all*, this value is in the historical perspective from these contributions; a view of some of the milestones of the late 1990s and early 2000s along the road towards reintegrating private law in the domestic (and regional) legal, economic, and social systems. That alone, it seems to me, recommends this work to the reader. However, these works represent more than consideration of the recent Russian and East European past—as important as that is in such turbulent times as these.

It is a sad note to have to sound by mentioning that two of the contributors to this volume have passed away after the 2003 Leiden conference: Professor Dietrich Loeber and Dr. Ger van den Berg.[5] But I believe that their work—as well as that of all the other contributors to this volume—will continue to help shape the ideas of others and influence developments in the region. This is the *second* "value-factor" in this collection.

There is no better guide to future trends in this field (and surely of others) than to have access to the ideas of those who have been keen observers of—and, often, key participants in—major legal reforms of the recent past. These should be of additional interest to the reader, as in the present case, when the persons generating these ideas are both from Russia and from the "far" abroad.

* * *

In addition to the contributors to this work, I should like to thank my academic colleagues at the Institute of East European Law and Russian Studies—Professor Ferdinand Feldbrugge, Dr. Rilka Dragneva, Dr. Joop de Kort, Dr. Hans Oversloot, Dr. Wim Timmermans and Mr. Ruben Verheul—for their participation in and support for these conferences. In addition, no small amount of time and energy has been expended in taking the contributions of our Russian colleagues and transforming them into precise legal English so as to reflect the care with which they were written in legal Russian. This effort has benefitted from the work of Mr. Curtis Budden for which I am grateful. Professor Feldbrugge has a special place in this conference and, naturally, in the Institute as its second director and Professor of East European Law. I will offer the reader a few thoughts about this special place below; however, I would like to extend another word of gratitude to him here for also providing me with much-needed assistance in translating into English a number of the contributions contained in this volume. Translating poetry is a dif-

5 See F.J.M. Feldbrugge, "In Memoriam Ger P. van den Berg" and "In Memoriam Dietrich André Loeber", 29 *Review of Central and East European Law* 2004 No.3, 429-430 and 431-432 respectively.

ficult task; but it seems to me that the translation of legal writing is a no less difficult one since, after all, the interpretation of law is much more of an art than it is a precise science—the protestations of our colleagues (especially those in the great European Legal Space) who love to call it "legal science" notwithstanding.

The assistance of our Leiden administrative associates of the Institute in the 2003 convocation—Ms. Esther Uiterweerd, Ms. Atie Breugem, and Ms. Sheena Elder—is also hereby acknowledged. In the period since that time, as I have highlighted above, the work of the Institute has benefited substantially from the remarkable interest in comparative law in Northern Italy and Southern Austria: at the Universities of Trento and of Graz as well as the European Academy Bozen/Bolzano (EURAC) and its Institute for Minority Rights—and from the support of Professors Roberto Toniatti and Luca Nogler (Dean and Director of the Trento Law Faculty, respectively) and of Professor Josef Marko (Director of the Institute for Minority Rights in Bozen/Bolzano). I owe a special word of thanks to Ms. Alice Engl and her colleagues at EURAC for their untiring efforts in issuing several volumes in our series and four years of our journal in general and, in particular, for helping me to finally push this volume across the finish line. Likewise, I am indebted to Dr. Francesco Dalba, a Research Fellow of the Institute (Trento), for his invaluable efforts in preparing this work for publication. Finally, a number of organizations and institutions have provided financial support for the Leiden conferences of which the proceedings in this volume are the scholarly fruits: we are grateful to them for their encouragement and assistance. Their names are indicated on a separate page of this volume. In 2008, Koninklijke Brill NV has celebrated its three hundred and twenty-fifth anniversary; our collective congratulations to Brill and appreciation to our publisher, Mr. Peter Buschman, and his colleagues at Martinus Nijhoff for their continued guidance and support.

Introduction

I. Celebrating a Fiftieth Anniversary. The Leiden Institute of East European Law and Russian Studies has been a unique institution for the more than five decades since it was founded in 1953. However, the Institute has never been large in the number of its in-house scholars. On an average, it has always had been a "1+1" affair: one professor and one legal researcher.

Yet, the results of the scholarly enquiry conducted though the Institute have been plentiful—the modest number of its permanent academic members notwithstanding. This is, first of all, because they enjoyed a wonderful position—during the majority of the Institute's history—from which they could devote the majority of their time to research, documentation, and publication. Another reason has been that, over the years, the Institute also enjoyed a very good position: it was able to host a number of guest researchers who have also been frequent contributors to its monograph series *Law in Eastern Europe* and also, later, its quarterly law journal *Review of Central and East European Law*. Periodic Institute conferences have been yet another source of ideas and inspiration reflected on the pages of the Institute's publications.

The 2003 Conference was dedicated to three events, one of which was the fiftieth anniversary of the founding of the Institute. The second event commemorated is highlighted immediately below.

But, at the end of the day, an institute is only a structure; its spirit and its output come from those good people who devote their time and energy to its collective goals and to their own work. From 1973 to 1998, Professor Ferdinand Feldbrugge was the Institute's Director. It was in large part his vision and guidance which made it this special place; but more of his special role below.

II. Commemorating a Unique Part of the Reforms. In the 1990s, new times led to new opportunities in the field—one of which was involvement in post-Soviet legal reform. Fifteen years ago, Professor Feldbrugge—together with Professor Wouter Snijders, the then Vice-President of The Netherlands Supreme Court (and Commissioner for the new Dutch Civil Code) and the writer of these lines—took a trip to Moscow which quickly turned into a substantial collaborative effort in support of the working group drafting the new Russian Civil Code. This also came to involve a number of additional scholars and practitioners from the Dutch legal community; "the Russians and the Dutch" joined together in periodic consultation sessions (in the NL as well as in the RF)

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focusing on domestic private-law problems in their national, regional and international contexts.

Several contributors to this volume have been participants in this unique project. The second event to which the 2003 Conference was dedicated is this fruitful RF/NL collaboration. This also was the platform for the 1998 Conference on the impact of the new Russian Civil Code which is measured in the first part of this volume.

III. Honoring Professor Feldbrugge. The organizers of and participants in these two, most recent Leiden conferences gathered together to honor Ferdinand Feldbrugge, his scholarship as Professor of East European Law and his leadership as Director of the Institute; his seventieth birthday was the third event commemorated by the 2003 Conference.

A biographical sketch of his career has already been published in the first volume of this set.[1] Nevertheless, I believe it appropriate to offer the reader a further perspective on the scholar, advisor, and friend that Professor Feldbrugge is for a wide circle of people; it with a great deal of pride and good fortune that I count myself among them.

During the more than three decades of his scholarly career, Professor Feldbrugge's activities in the primary fields of a university scholar—education, research and publication—have been exemplary. In the *first* area, he has stimulated law students to think about Dutch law (his first chair was as Leiden Professor of Introduction to Dutch Law) and, especially, about Soviet—and, later, Russian—law. He was also the visionary and mover for the creation of a Russian Area Studies (*Ruslandkunde*) program at Leiden University in the late 1980s. Students in this program have also gained much from Feldbrugge's teaching.

The *second* field of a scholar's endeavors—research and its dissemination—in Professor Feldbrugge's case has a wide scope which can be observed in a bibliography of his publications.[2] However, it is not only the variation and quantity of his output which are noteworthy. It is also the way in which he gently and yet clearly conveys his thoughts to the reader.

Yet Professor Feldbrugge's many efforts in these areas have extended beyond his teaching and his own writing. He has been the academic super-

[1] G.P. van den Berg, "Forward", in George Ginsburgs, Donald Barry and William B. Simons, (eds.), *The Revival of Private Law in Central and Eastern Europe: Essays in Honor of F.J.M. Feldbrugge*, in F.J.M. Feldbrugge, (ed.), *Law in Eastern Europe*, No.46, The Hague, London, Boston 1996, xv + 667 pages, xiii *et seq.*

[2] Anne Pries, "Bibliography of the Works of Professor F.J.M. Feldbrugge, Commemorating his 25th Year as Professor of Law at Leiden University", in *The Revival of Private Law, op.cit.* note 1, 573 *et seq.* Professor Feldbrugge has continued to publish since the compilation of this bibliography in the mid-1990s as noted in the main text below.

visor of several doctoral candidates who have successfully defended their dissertations in Leiden; it is again with pride that I am able to count myself among those who have profited from Feldbrugge's invaluable counsel—kind but always to the point—in this last formal leg of a student's journey (at least as measured in academic degrees). And he has advised many others who have also been engaged in putting their thoughts on paper for different purposes—in- as well as outside the classroom.

Furthermore, he has always taken great care to ensure that the publications of others in the field have been made accessible for as wide an audience as possible: he has enriched the Institute's publications by continuing, as well as significantly adding to, the work begun by the first Leiden Professor of East European Law, Zsolt Szirmai (1903-1973). The present series was started by Szirmai (the first volume of which was published five decades ago). After Szirmai's passing, Feldbrugge took over the series editorship and, also, founded a quarterly law journal (begun in 1975). The series and the journal were both unique when they first appeared in print. In the 2000s, *Law in Eastern Europe* and the *Review of Central and East European Law* continue to enjoy a wide circle of respect and interest despite a field that is now much noisier than it was in those early years; in recent years, it has become filled with voices from a multitude of new sources—both hard copy as well as electronic; from the "West" as well as from the "East". This reference to these new resources is not meant to sound a note of lament at any loss of the unique "brand" for the Institute's publications; such competition in the marketplace of ideas is only as it should be.

In addition to the duties which he fulfilled in his capacity as Professor of East European Law, Feldbrugge kept the Institute library in its premier place as he performed the duties of Institute Director. His successful efforts at lobbying—a word not likely to have been used then but which succinctly encapsulates this task—with the Leiden University administration enabled the Institute to preserve its unique documentation as well as research character for such a long time. And, as he broadened the offering of the Institute's publications, he widened the circle of their contributors. He also orchestrated the periodic conferences held in Leiden; and when conditions permitted, he expanded these encounters to include leading

scholars and practitioners from the "East". In the old days, conferences in Leiden had been held among Western European and North American scholars; the podium and audience were bereft of Soviet citizens.[3] But as soon as circumstances changed, Professor Feldbrugge arranged for a number of superb lawyers from the former USSR to participate in the Leiden conference in the 1990s.[4] All of which has added to the attractiveness of the Institute as a leading center for research and for the exchange of ideas.

During the Cold War, there was very little accurate information and few reliable analyses from non-Soviet sources dealing with law and society in the Soviet Union despite the need for as much light as possible in those dark times.[5] For this reason, the achievements of Professor Feldbrugge have been more valuable for legal scholars and practitioners in The Netherlands and abroad than would be the case in a "normal field". And, for much the same reason, the beneficiaries of his work can be found not only in the field of law. They are also in political science and economics since the slogan "law is politics" certainly applied to the USSR, and the link between "law and economics" in the Soviet system was clearly fundamental (although the phrase was never used, as such, to link the two together as is now popular in other jurisdictions, most of all in the US).

While the scene has changed in Russia and the region after 1991, these changes have not taken politics or economics out of law—except perhaps in the hearts of the diehard sectionalists who firmly believe that law is a world unto itself. Thus, it is that the reach of Feldbrugge's work continues to extend beyond the "mere" boundaries of law.

It was also for those interested in other disciplines, not only for those reading law, that Feldbrugge published a major work on *Samizdat and Political Dissent in the Soviet Union* (Leiden 1975). The research for that volume was carried out under a fellowship which he had been awarded by The Netherlands' Institute for Advanced Studies (NIAS). And addressing

3 It could not have been any different in those days. The exception to this rule was to be seen in the case of a few lawyers who had emigrated from the USSR and, later, travelled to the Leiden conferences from their new residences. But while they brought with them a vision of the USSR different than that of (most of) their colleagues in Western Europe or North America, their views were naturally also quite different from those which would have been aired at such conferences by scholars and practitioners permanently residing in the Soviet Union.

4 I am pleased to note that this tradition was continued at the second and third Leiden private-law conferences.

5 This does not speak to the question of the accuracy of information and reliability of analysis dealing with Soviet law from Soviet sources.

a similarly wide audience was also a goal in his writing of numerous entries for, and in editing, an *Encyclopedia of Soviet Law*.[6]

The *significance* of his work for these diverse communities has only increased in the post-Soviet period; now, there is a real chance to work closely with one another in identifying and attempting to solve (un)common problems.

After he became Emeritus Professor in 1998, Feldbrugge has continued his scholarly work, witnessing his *dedication* to the field at a point in a remarkable career at which many would be expecting to leave their work behind them.[7] He had already been honored in 1993 by the Leiden Law Faculty with its E.M. Meijers Medal upon the occasion of his sixtieth birthday and twentieth-fifth year as a Leiden professor of law. In further recognition of his extraordinary achievements and dedication to education, research, and community service, Feldbrugge was made a Knight in the Order of The Netherlands Lion (*Ridder in de Orde van de Nederlandse Leeuw*) at the third Leiden Conference in September 2003.

However, there are *three further facets* of Feldbrugge's scholarly endeavors which should also be highlighted here. Once again, it is not only jurists but, also, political scientists (and politicians) as well as economists (and businesspeople) who form the audience for these additional activities.

(A) In 1974, Feldbrugge was present at the creation—as one of the co-founders—of the International Council for Soviet and East European Studies (later, the International Council for Central and East European Studies [ICCEES]). He was both a member of the ICCEES Executive Council and ICCEES President. In addition to being an important multidisciplinary network for scholars and students from around the world in the diverse fields that make up Central and East European studies, ICCEES has hosted a worldwide conference every five years since the mid-1970s. A number of the contributions to these conferences, dealing with law in Central and Eastern Europe, have been published over the years in the present series.

(B) For two years in the late 1980s, Feldbrugge was Special Advisor on Soviet and East European Affairs to the Secretary-General of the North Atlantic Treaty Organization in Brussels. The importance of well reasoned advice to the NATO Secretary-General during the tumultuous years of

6 The second, revised edition is: *Encyclopedia of Soviet Law,* in F.J.M. Feldbrugge, (ed.), *Law in Eastern Europe*, No.28, Dordrecht, Boston 1985, xix + 964 pages.

7 The most recent of his works is a monograph entitled *Law in Medieval Russia*, in William B. Simons, (ed.), *Law in Eastern Europe*, No.59, Leiden, Boston 2008, xxvii + 334 pages.

Mikhail Gorbachev's *perestroika* cannot be underestimated—especially in light of the hindsight which the post-Soviet era affords us. Feldbrugge has offered his view of this period, again to a wide community, in a work entitled: *The Perestroika Jig-Saw Puzzle: Observations of NATO's Sovietologist-in-Residence 1987-1989* (Leiden 2003).

Furthermore, for many years, Professor Feldbrugge has been a member of The Netherlands Council for Peace and Security (initially, the *Adviesraad Vrede en Veiligheid* and, later, the *Commissie Vrede en Veiligheid van de Adviesraad Internationale Vraagstukken*).

(C) The third major activity has been the Russian-Dutch collaborative effort invlolving the new Russian Civil Code highlighted above. This has had an impact upon scholarship and upon society as significant as his ICCEES and NATO engagements—and, ultimately perhaps, an even greater one (if such things can at all be accurately measured).[8]

Undoubtedly, the new RF Civil Code could have been prepared without any foreign assistance whatsoever; alternatively, such assistance could have provided by one or two major players. Indeed, German and North American thinkers, for example, have also contributed to the elaboration of Russia's new "Economic Constitution".[9] These other initiatives notwithstanding, the Dutch-Russian undertaking has had an impact upon the rebuilding of civil law in post-Soviet Russia which is out of all proportion to the relationship which the territories of The Netherlands and Russian Federation bear to one another in size, for example. Without Feldbrugge's initiative and vision, this unique collaborative effort might never have come into being or, at best, might have been a much less successful project than, in fact, has been the case.

And "as one good thing often leads to another", the bilateral cooperation begun by the Institute with Russia (and also, during the same period, with Kazakhstan, Belorussia and Ukraine) provided the basis for another

8 This project has also resulted in a translation into Russian of several books of the new Dutch Civil Code (F.J.M. Feldbrugge, (ed.), *Grazhdanskii Kodeks Niderlandov*, Leiden 1996 (second edition, Leiden 2000), 372 pps.) and into English of the first book of the RF Civil Code (G.P. van den Berg and W.B. Simons, "The Civil Code of the Russian Federation, First Part", 21 *Review of Central and East European Law* 1995 Nos.3-4, 259-426). One of Feldbrugge's most recent works also deals with the RF/NL collaboration; see F. Feldbrugge, "The Codification Process of Russian Civil Law", J. Arnscheidt, B. van de Rooij and J.M. Otto, (eds.), *Lawmaking and Development: Explorations into the Theory and Practive of International Legislative Projects*, Leiden 2008, 231-244.

9 Professor Alekseev, former chairperson of the USSR Committee of Constitutional Supervision (the forerunner of the RF Constitutional Court), for example, has often referred to the Civil Code as Russia's "economic constitution"; see, *e.g.*, "Misiia Rossiiskoi nauki", *Iurist* December 2000 No.49, 2.

major project in the 1990s/2000s: consideration of the harmonization of private law in the Commonwealth of Independent States (CIS). This has resulted, in turn, in a CIS Model Civil Code (as well as several other pieces of CIS model legislation).[10]

* * *

This sketch—of selected highlights of the accomplishments of Professor Feldbrugge—is accompanied by photographic images reproduced below. They help to round out this overview of his professional service and achievements.

However, it would not be a complete overview if I were to neglect to touch upon his personal side. Yet I shall do so here only in brief since he is a very modest person. The consideration, which Professor Feldbrugge has consistently shown for the needs and thoughts of others, is a part of his professional dedication; but, it is also intertwined with his gentle interpersonal skills. The numerous colleagues who have been visitors to the Feldbrugge home in Zundert—and have partaken of the warm hospitality which his spouse Máire and he always offer to their guests—know this well. So do the many others in the field who have had to pleasure to become acquainted with him in person in other venues.

This volume has been long in coming; he knows that quite well. Yet time has not diminished in any way the measure of his dedication to the field or the significance of his works to its students in the broadest sense of the word. This volume is offered to him by many with the highest professional regard and warm personal greetings which the intervening time between the conferences and the appearance of this volume in print has also failed to diminish. The picture below on page xxx from the 2003 Conference is part of this same expression in another form.

IV. The 2003 Conference Topic. The public-private distinction, as has been mentioned above, was the theme selected for the 2003 Leiden convocation. The prior two Leiden conference topics dealt with the (re) generation of private law and its impact upon legal practice and comparative law scholarship; this third theme obviously rounds out the circle.

[10] At least as far as model "law in books" is concerned (recalling Roscoe Pound's early twentieth century paper which began with this phrase), this has put the CIS—otherwise often viewed skeptically from afar—ahead of the EU in this particular field. See, *e.g.*, William B. Simons, "The Commonwealth of Independent States and Legal Reform: The Harmonisation of Private Law", *Law in Transition* 2000 (Spring), 14 *et seq.* reproduced at <http://www.ebrd.com/pubs/legal/lit001a.pdf>.

(A) It is also to state the obvious to remark that the public sector outweighed the private sector, in all of its aspects, in the Soviet Union and, similarly, in the realms of its Eastern European "little brothers"; in fact, the public-private distinction had—one could quip: according to the plan—virtually been erased during most of the Soviet period. When the public sector had engulfed things private in the Soviet Union and its Soviet Bloc, there was no great need to consider such a distinction.

However, since the beginning of the 1990s, the private sector has become an element of enormous positive interest in post-Soviet Russia and the CIS (and, even earlier, in most of the countries of Central and Eastern Europe). Yet, (certainly in Russia) the swing to "the right" in the early 1990s seemed to be as sharp as the swing in the opposite direction had been in 1917. Then, for example, there had been several mechanisms used to push society across the 1917 bridge to the bright shining future (*most k svetlomu budushchemu*). One was the nationalization of private property. In the 1990s and 2000s, it has been the reverse process—the privatization of state property—which forms one of the major levers of change. The state would take several giant steps in retreat from the all-encompassing public sector; in doing so, it would turn over a great share of its attention to economic and social matters to the private sector; it would step down from most of the commanding heights. All power to privatization!

Yet, once private law began to be revitalized in the post-Soviet era, elementary questions began to arise: would this radical shift accentuate a public-private distinction (as newly rich citizens sought to push the state away from their personal treasures); or, on the other hand, when things were more in balance, would such a theoretical distinction lose its importance in practice? After all, a prime factor in the Soviet "experiment" had been the general continental European concern for social issues (typified, for example, by Pope Leo XIII's *Rerum Novarum*). In the 1990s and 2000s, this concern—enhanced *inter alia* by a century of dealing with the effects of world military conflicts—might lead to a blurring of this distinction rather than to its sharpening.

Ideas from other other sources have also inspired the choice of this topic for the last Leiden conference: (a) B.B. Cherepakhin's 1926 work[11] (devoted to the public/private distinction in an earlier transition period of Russian history); (b) conference proceedings from the 1980s devoted to the public/private distinction in the United States[12] and (c) a white paper of The Netherlands Scientific Council for Government Policy (discussing

[11] "K voprosu o chastnom i publichnom prave", in *Uchenye zapiski Gos. Saratovskogo Universiteta*, Tom II, Vypusk 4, Saratov 1924. I am indebted to Dr. Mikhail V. Gorbunov for bringing this source to my attention.

[12] 130 *University of Pennsylvania Law Review* 1982 No.6.

the divisions between public and private responsibilities at the end of the twentieth century).[13]

(B) The origins of the public/private dichotomy in the fields of political and legal thought have been termed a "double movement" by Harvard legal historian Morton Horwitz. On the one hand, there was the idea of a distinct public realm which began to take shape along with the development of nation-states and theories of sovereignty in the sixteenth and seventeenth centuries. On the other hand, as state leaders (first the crown and, thereafter, people's assemblies) began to (re)assert broad powers for imposing their will upon society, the notion of a private sector began to take shape: the creation of a "space" separate (and protected) from the strong arm of state power.

In the nineteenth century, wealth increased along with empires and (inter)national connections as a result of advancing media and expanding economic intercourse.[14] The lines of battle in the public *versus* private struggles of that era seemed to increase in number and the skirmishes became fiercer in nature. They were economically and politically—as well as socially and legally—charged. This helped to produce, for example, the vision (or was it propaganda?) of the self-regulating market; as Polanyi wrote,[15] this had become the "fount and matrix" of nineteenth century civilization.

At the beginning of the next century, two countries which had been engulfed by these events formed the main stage for crucial developments in the public/private saga; but these marked tracks diverging into the future from what largely had been a common strand of nineteenth-century thought and associated action. In 1905, Russia underwent its first revolution while the US Supreme Court rendered a decision of crucial importance for the private/public distinction in early twentieth century America. In little more than a decade, the Russian path would lead to a system where only the public sector mattered. On the free market range of the US, after the 1905 *Lochner* decision,[16] the public sector was pushed even further into retreat from a position where it had already been marginal to say the least. Indeed, by this time, the effects of social Darwinism—propounded so forcefully by disciples of Herbert Spencer—had already led many Progressives and other like-minded US citizens to argue that the social scales

13 W. Derksen, M. Ekelenkamp, F.J.P.M. Hoefnagel, W. Scheltema, (eds.), *Over publieke en private verantwoordelijkheden*, reproduced at <http://www.wrr.nl/content.jsp?objectid=2658>.

14 See Eric Hobsbawm, *Age of Empire: 1875-1914*, New York 1989.

15 Karl Polanyi, *The Great Transformation*, New York 1944. I am grateful to Dr. Hans Oversloot for bringing this source to my attention.

16 *Lochner v. People of State of New York* 198 US 45 (1905).

required a fairer balance and that this could only by achieved the reasoned state regulation of private economic activity in the public interest.

But at that point in US history, the road taken was a different one: freedom of contract in the US had been constitutionalized by *Lochner*. This further enlarged the private sector and demonized state economic regulation. Thus—despite an increasingly progressive US legal community, whose writings were to be seen in the school of legal realism joining members of the judiciary (such as Brandeis and Cardozo) with scholars (such as Cohen, Corbin, Hohfeld, Llewelyn, and Pound)[17]—it took three more decades before the Supreme Court proclaimed the United States to be a jurisdiction where not only the private sector seemed to matter.[18] And then things seemed to move forward quite quickly:

> "By 1940, it was a sign of legal sophistication to understand the arbitrariness of the division of law into the public and private realms [and no] advanced legal thinker of that period, I am certain, would have predicted that forty years later the public/private dichotomy would still be alive and, if anything, growing in influence [...]."[19]

This is not the place to dwell further on the birth, growth and future of the public/private distinction in Russia or to comment in depth on the differences in the earlier Russian approach (taking to the barricades) and its faint US equivalent (debating in society and arguing in courtrooms). These differences of course have meant that the Russian experience in recent years started at the opposite end of the spectrum from the US

[17] See, *e.g.*, William W. Fisher, III, Morton J. Horwitz, Thomas Reed, *American Legal Realism*, Oxford 1993.

[18] *West Coast Hotel Co. v. Parrish* 300 US 379 (1937) constitutionalized the non-arbitrary state regulation of economic activity. Of course, groundbreaking US legislation—attempting to rectify some of the worst abuses of economic power in the private corporate sector—had been enacted as early as 1890. In fact, passage of the 1890 Sherman Antitrust Act had been brought about, in part, by Senator Sherman rallying his colleagues to his side by using the tool of fear of worse things to come (if his bill were not enacted): under "the socialists, the communists and the nihilists" (*Congressional Record-Senate*, 21 March 1890, "Trusts and Combinations", sec.2460, para.4). (I am grateful to Professor John Quigley for his help in retrieving this source.) Senator Robert LaFollette had called this and similar legislation "the first efforts [...] to reassert the power of popular government and to grapple with these mighty private interests" and "the strongest, most perfect weapon". Robert M. LaFollette, *LaFollette's Autobiography*, Madison, Milwaukee, London 1968, 40 and 309 respectively.

[19] Morton J. Horwitz, "The History of the Public/Private Distinction", *University of Pennsylvania Law Review*, *op.cit.* note 12, 1426. Only a few of the many US cases illustrating this dichotomy are: *Shelly v. Kraemer* 334 US 1 (1948), *Brown v. Board of Education of Topeka* 347 US 483 (1954), and *Kelo et al. v. City of New London et al.* 545 US 469 (2005). Cases from the RF Constitutional Court with which these can be compared are: *Interest Rates* (1999), *Tver Spinning Plant* (2000), and *Credit Organizations* (2001).

example: in Russia, it has been the art of the state in retreat—not taking state power forward. The latter was the battle which Fighting Bob LaFollette and like-minded thinkers waged for decades against the extremes of a minimally-regulated capitalist Wild West. The Russian problem was the over-regulated Soviet East. And thus, the main thrust of political, economic, and legal thinking at the end of the twentieth century—both in the new Russia as well as other parts of the CIS/CEE regions—has also been radically different from that, for example, in the US: it has been engaged in a major (re)definition of a previously minimalist (non-existent) private sector, the (re)emergence of private law and promulgation *inter alia* of market-oriented constitutions and civil codes.[20]

The advanced legal thinker of whom Horwitz wrote would certainly continue to be amazed about the growth of the public/private dichotomy in the US; but she would also, undoubtedly, experience similar amazement about its appearance in Russia. While obviously the United States is not the only country with which to compare Russia (certainly not *vice versa*?),[21] it seems to me that this two-country perspective can be useful.

Horwitz also wrote about a second strand of related thinking. This was not, however, as much about the blurring of the distinction between public and private as it was about the supremacy of one above the other; *e.g.*, about Progressives in the US in the first part of the XX century who had put their faith in the public above the private. But he went on to observe that the revival of natural-rights individualism—after the end of

[20] There have also been major reforms in other parts of the public law arena, such the promulgation of new criminal codes and codes of criminal procedure. But our focus is on private law; thus, I shall limit my excursion into neighbouring territory with this minimalist remark and two citations: William Burnham, "The New Russian Criminal Code: A Window Onto Democratic Russia", 26 *Review of Central and East European Law* 2000 No.4, 365-424; and William Burnham and Jeffrey Kahn, "Russia's Criminal Procedure Code Five Years Out", 33 *Review of Central and East European Law* 2008 No.1, 1-93.

[21] The comparison of countries (at least these days) seems sooner or later to lead to an "abnormal/normal country" debate; this certainly has been the case in the case of RF and the US. Perhaps this is because of holdover thinking from the Cold War, the big country syndrome, or the natural reaction to "the other". So, when comparing Russia to the US, Russia is usually seen as not normal. But, there are those outside Russia who argue that Russia can be characterized as a normal country when viewed among a different group of countries; see Andrei Shleifer and Daniel Treisman, "A Normal Country: Russia after Communism", 19 *The Journal of Economic Perspectives* 2005 No.1, 151-174 and "Andrei Perla: Normal'naia strana", 25 June 2008, reproduced at <http://www.vz.ru/columns/2008/6/25/180178.html>). I am grateful to Dr. Tatiana Borisova for bringing these sources to my attention.

the Second World War—meant "the collapse of a belief in a distinctively public realm standing above private self-interest".[22]

In Russia, so many changes have occurred in the post-1991 period that it is difficult to come to a single, hard conclusion about things there. But the public realm in the 2000s in Russia certainly has not collapsed although the swift Russian shift in the early 1990s from an administrative-command economy to a market-type model did offer zealots of the latter the chance to begin engineering their own version of the *Lochner* era: all power to the capitalists![23]

Of course, the public/private distinction continues to be of (legal) interest in jurisdictions outside the bipolar RF/US world (*e.g.*, the constitutionalization of private law in the EU): how should state action (in its various guises) be delineated from that of private actors; when should a particular (rigorous) standard of conduct for the state also be applied to seemingly private acts?

The public/private distinction brings with it a (much) more complex bundle of factors than can be reflected in such simple ideological bright-lines as nationalization *versus* privatization—although this is how it is often presented in the popular media as well as in some branches of scholarship. As one ponders the issue more carefully, it seems to become a matrix:

Centralization *versus* decentralization (Petrazhitskii as cited by Cherepakhin[24]);

Unity or singleness (Bagehot, Austin) *versus* plurality (Laski).

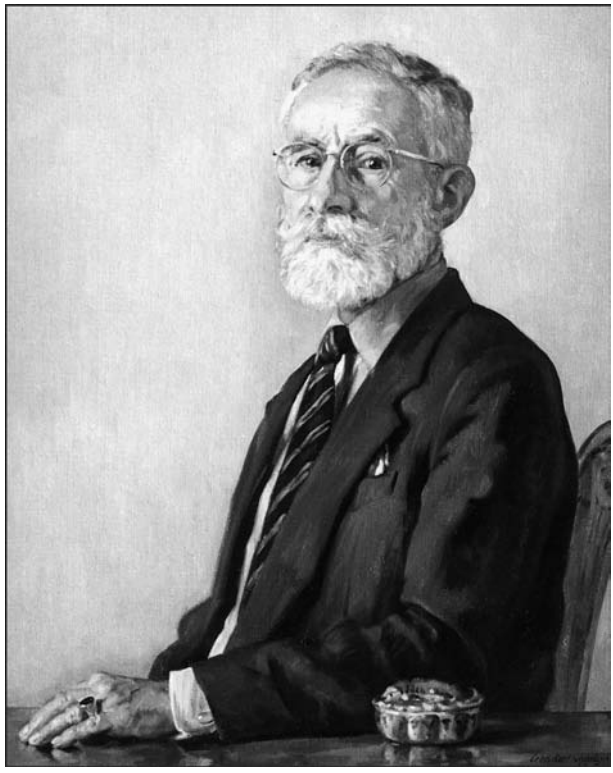
* * *

The chapters in this volume are intended to facilitate the reader's further charting of the progress made in Russia (and the region) in the revitalization of private and civil law—and its impact upon practice and comparative legal studies—and appreciating the role which the distinction between the public and private sectors is seen as playing in the process.

22 Horwitz, *op.cit.* note 19, 1427.

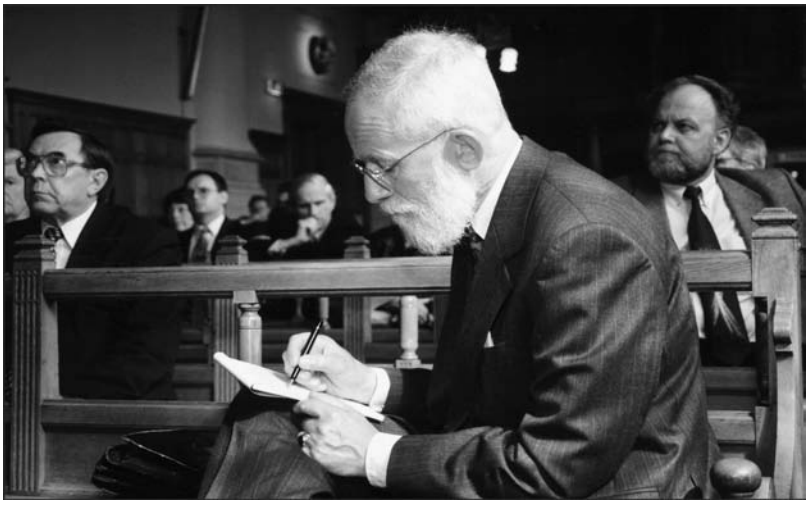
23 Rilka Dragneva and I have looked at a number of RF Constitutional Court cases to determine whether post-Soviet Russia was gearing up its own *Lochner*-style cycle. The cases show a different path. See "Rights, Contracts, and Constitutional Courts: The Experience of Russia", in Ferdinand Feldbrugge and William B. Simons, (eds.), *Human Rights in Russia and Eastern Europe: Essays in Honor of Ger P. van den Berg,* in William B. Simons, (ed.), *Law in Eastern Europe*, No.51, The Hague, London, Boston 2002, 35-63. Also published in Russian as: "Prava, Dogovory i Konstitutsionnye Sudy: Opyt Rossii", 3 *Tsivilisticheskie Zapiski*, Essays in Honor of Sergei Sergeevich Alekseev, Moskva, Ekaterinburg 2004, 406-440.

24 Cherepakhin, *op.cit*. note 11.



Photographic reproduction of a portrait of Professor Ferdinand Feldbrugge
by Leendert van Dijk (1998).

At the behest of Queen Beatrix, Ferdinand Feldbrugge was made a Knight in the Order of The Netherlands Lion (*Ridder in de Orde van de Nederlandse Leeuw*) on 26 September 2003.



Ferdinand Feldbrugge at the 1998 Leiden Conference.
Also visible in the lower photograph are
Chief Justice V.F. Iakovlev (ret.) and Dr. M.V. Gorbunov
(left and right, respectively).

Participants at the 2003 Leiden Conference in the *Hortus Botanicus* of the University of Leiden.

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The Russian Civil Code and its Impact Upon Commercial Transactions

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1. The new Civil Code of the Russian Federation has been in force for some time now. The first part of the Code (453 articles) is divided into three sections (I—General Provisions; II—Property and Other Rights *in Rem*; III—General Part of the Law of Obligations). This part was adopted on 1 January 1995. The second part of the Code contains its fourth section (656 articles) and has been in force since 1 March 1996. The third part of the Code (Section V—Inheritance and Section VI—Private International Law) contains 114 articles and was promulgated on 26 November 2001; work on the fourth part of the Code (Intellectual Property) is still in progress.

Not of all of the constructs of the Code are applied with the same consistency and degree of intensity; a system of civil laws—as has been envisaged by the Code—has not yet been established. Nonetheless, it is possible to say that Russia's Civil Code has lived up to expectations and has become the basic foundation for the legal regulation of the new Russian economic system. In his annual address to the *Duma* and the Federation Council on 17 February 1998, the RF President stated that "the normative basis for the activity of institutions of a civil society" had already been created in the Russian Federation. In this regard, among those laws that comprise this basis, the Civil Code was named second only to the Constitution in its importance.

The new Civil Code is not a "law of reform": the privatization of state property, land reform, the renunciation of planned production and trade, and the transition to a system of free prices are governed by other acts. Russia's Civil Code has a different purpose: it offers a system of stable rules for trade and commerce in the conditions of a market economy.

The Essential Characteristics of the New Russian Civil Code

2. The significance of the Civil Code for commercial transactions is primarily to be seen in the way it has created an institutional environment for the nurturing of business.

William B. Simons, ed.
Private and Civil Law in the Russian Federation 1-9

2.1. Chapter 4 of the Civil Code clearly defines the forms that entrepreneurship can take. The Soviet economy did not require a variety of legal forms of businesses for entrepreneurial activity; its "assortment" included only state enterprises (which, in reality, were institutions [*uchrezhdeniia*]) and quasi-cooperatives, namely, collective farms (*kolkhozy*). The shift to a market economy, based primarily on private property, necessitated the (re) birth of another type of legal person, that is, of corporations. The types of corporations listed in the Civil Code, (Ch.4, secs.1, 2, RF Civil Code and unless otherwise noted, all other references herein will be to the RF Civil Code)—joint-stock companies (*aktsionernye obshchestva*), companies with limited liability (*obshchestva s ogranichennoi otvestvennost'iu*), full partnerships (*polnye tovarishchestva*), and limited partnerships (*kommandita*) are well known in the legal systems of most countries of continental Europe. They were also known in pre-Revolutionary Russian legislation as well as in the Russian Soviet Federative Socialist Republic's (RSFSR) first Civil Code of 1922. Production cooperatives, permitted under the new Code (Ch.4, sec.3), also belong to the category of commercial organizations of a corporate type.

The Civil Code grants certain specific rights and obligations to the participants and founders of various types of legal persons. The Code also sets forth the specific rules of a legal person's internal organization, and, more importantly, its liability *vis-à-vis* third parties (creditors). Therefore, although the Code allows entrepreneurs to choose from among different types of legal persons, it also prohibits the establishment of entrepreneurial organizations in any other form. Prior to the entry into force of new Code, it was possible to create all sorts of "legal sphinxes and centaurs" in the commercial sector—*i.e.*, business forms unknown to the legislator—and this had been fertile soil for the growth of all sorts of fraud and speculation.

As of the late 1990s, there were approximately two million business organizations in Russia in the types set forth in the Civil Code. In addition to these, another 3.5 million citizens were engaged in entrepreneurial activities who have chosen not to form legal persons and who, rather, run their businesses as "individual entrepreneurs" (Arts.23-25). The Code stipulates that individual entrepreneurs must, nevertheless, register and extends to them many of the rules regulating the activities of legal persons.

2.2. On the basis of the 1993 RF Constitution, the Russian Civil Code establishes a system of property rights (functioning as the prerequisites for, and result of, commercial transactions), characteristic for a society with a developed market economy.

As opposed to the period when virtually all means of production were in the hands of the state and collective farms, the new RF Civil Code accords equal recognition to the property of citizens, legal persons, and of the state as well as of municipalities. As a general rule, there is no limit to the amount and value of private property that may be owned by citizens or legal persons) (Art.213, para.2). The rights of all owners are equally protected (Art.212, para.4).

As a result of privatization, the bulk of state property has passed into private ownership. At the same time, the Civil Code provides for the statutory designation of "the types of property that may only be owned by the state or by municipal government" (Art.212, para.4). At present, it consists primarily of subsoil resources (although the use thereof can be transferred, *e.g.*, leased), nature preserves, and national parks. Thus far, there is no general law on property that has been taken out of trade and commerce or on Russia's national heritage.

Gradually, as the privatization of state and municipal property continues, the norms of the Civil Code that deal with property rights involve a growing number of assets, including land (there are several million owners of small plots in Russia) and housing (40% of municipal housing has already become private property).

The very restrictive way in which the Civil Code addresses the problem of the forced termination of the property rights is extremely important. The circumstances in which such termination is justified (debt collection, appropriation for public needs, etc.) are precisely defined in the Civil Code (Art.235). As a general rule, the appropriation of one's property—as well as its nationalization—can be effected only by a way of a court judgment, provided that the value of the property and other damages are indemnified.

2.3. The new Civil Code offers participants in commercial (*khoziaistvennye*) transactions a wide range (the largest, perhaps, if compared with the codes of other countries) of institutions for use in entrepreneurial activities. In a market economy, the freedom of enterprise encourages participants in commercial transactions to create more and more new types of business relations. But if owing to the lack of business traditions they are not regulated, the necessity arises to regulate such relations by law.

In the Civil Code, the expansion of the civil-law "toolkit" has primarily affected the matter of contracts. Twenty-six chapters are devoted to this subject in Section IV of the Code (as compared with eighteen chapters in the 1964 RSFSR Civil Code). Together with the types of contract—well known in the previous Code, such as purchase and sale,

lease (*arenda*), independent contracting (*podriad*), transportation, agency (*poruchenie*), commission, etc.—the new Code includes detailed regulations on contracts for rent and lifetime support (Ch.33); the paid provision of services (Ch.39); factoring (Ch.43); agency (*agentirovanie*) (Ch.52); entrusted administration of property (Ch.53); and franchising (Ch.54). Also, some new variants of contracts have appeared on the horizon within the framework of contracts that have been considered traditional in Russian law; these new forms are: the sale of an enterprise (Arts.559-566); the lease of an enterprise (Arts.656-664); financial leasing (Arts.665-670); warehouse storage (Arts.907-918), etc.

As compared with the older Codes, the new RF Civil Code has been enriched primarily by the inclusion in the latter of contracts related to entrepreneurial activity. Yet nearly all these contracts, (with the exception of franchising), can involve one who is not an entrepreneur, *i.e.*, a party who is an ordinary citizen or a non-profit organization. This was one of the reasons (but not the primary one) why Russia—following an old tradition—refrained from creating a distinct commercial (*khoziaistvennyi* or "economic") code.

3. The main differences that can be seen in the effective implementation of the Code are in the interstices between public and private law.

3.1. The Civil Code ensures the "transparency" (*prozrachnost'*) of the institutional environment by requiring the official registration of legal persons (Art.51), as well as of the rights in, and transactions related to, immovable property (Art.131). Both registrations must be performed by justice departments on the basis of federal laws, *i.e.*, in a uniform fashion throughout the country. However, it was not until the early 2000s that the law "On the Registration of Legal Persons" was adopted. Consequently, each of the Federation's eighty-nine regions performed registration according to its own rules. In respect of this problem, the President pointed out to Parliament that "it is necessary to radically strengthen state supervision [*kontrol'*] of the legality of creating and of the functioning of entrepreneurial structures". The Law "On State Registration of the Rights to Immovable Property and Transactions Related Thereto" was promulgated on 17 June 1997 and is currently being implemented. However, the establishment of a uniform system of government registration of immovable property was not an undertaking that could be completed overnight.

3.2. The norms of the Civil Code concerning the compensation for damages (*inter alia* Art.15), penalties (Arts.330-333), pledge (Arts.334-358), and

interest (Art.395), as well as many others enable the creditor to be held harmless for damages occasioned by a breach of contract or tort. However, court judgments rendered on the basis of these provisions often remained unexecuted due to a lack of sufficient financial or human resources to support the enforcement thereof. The federal laws on bailiffs and enforcement proceedings of 21 July 1997 have contributed to major improvements in this area.

4. Although the norms of the Civil Code have been designed primarily to regulate commercial transactions within Russia, they have also been drafted to conform to existing international norms, such as the 1980 UN Convention on Contracts for the International Sale of Goods (the Vienna Convention) (*inter alia* Arts.455, 465, 470, and 524) and the 1988 Ottawa Conventions on International Financial Leasing (Ch.34, sec.6) and on International Factoring (Ch.43). International commercial custom—such the uniform rules of the International Chamber of Commerce (ICC) for Collections (1978), Demand Guaranties (1992), and Documentary Credits (1993)—has likewise served as the model for a whole range of provisions of the new Civil Code.

Furthermore, the application of the Civil Code to international commercial transactions is governed by detailed norms of private international law. Such norms were contained in the 1991 Principles (*Osnovy*) of Civil Legislation of the USSR and the Union Republics, and a portion of this document (Arts.156-170) continued to remain in force throughout the Russian Federation until the adoption of third part of the new Civil Code in 2001.

It should not be forgotten that the Civil Code accords national treatment to foreign citizens, stateless persons, and foreign legal persons (Art.2). Exceptions thereto may only be established by a federal law.

The Basic Features of the Process of the Judicial Implementation of the Civil Code

5. Since the entry into force of the Civil Code, the courts have settled hundreds of thousands of cases on the basis thereof. At the same time—as with all new legislation—numerous questions have arise concerning the correct interpretation of a number of rules found in the Code. In addition, some of its norms have been deemed to be insufficiently precise and several gaps have been discovered. Nevertheless, neither the RF Supreme Court nor the RF Higher *Arbitrazh* Court has considered it necessary to exercise its right of legal initiative and to propose amendments to the Code. At the same time, the interpretation of the Code by courts represented an

enormous contribution to the to the process of its implementation: in this way, the dry skeleton of the norms puts on flesh, which is the real life of the law.

One of the specific characteristics of the Russian judicial system is the right—shared by the two highest judicial instances (Arts.126 and 127, RF Constitution)—to "provide Guiding Explanations [*raz"iasneniia*] on issues of court practice". The explanations issued by these courts—which are normally based on the generalization and analysis of the practice of lower courts as well as on decisions of the highest instances—constitute acts of judicial interpretation of the law and are mandatory for courts of all levels. By clarifying ambiguous or unclear issues that arise in the process of the application of the Civil Code, these "explanations" add to the stability of the Code. By the late 1990s, the RF Supreme Court and the RF Higher *Arbitrazh* Court had jointly issued such clarifications on issues related to the introduction of Part One of the Civil Code (28 February 1995), the application thereof (1 July 1996, No.6/8), and on the Law "On Joint-Stock Companies" (2 April 1997, No.4/8).

6. Russia's economy has evolved in a distinctly uneven fashion. At present, the main economic role is played by financial capital and transactions related to the movement thereof. Consequently, the various institutions of the Civil Code are applied with varying frequency. The disputes most often encountered concern the legal status and liability of commercial organizations (Ch.4); financial obligations and banking transactions (Ch.42-46); and securing the performance of obligations *via* pledge or suretyship, etc. (Ch.23). The ongoing privatization of state property also results in numerous disputes related to the right of ownership and leasing. The practice of applying the norms of the Civil Code to issues concerning the delivery of goods, construction contracts, and the transportation of goods is significantly more limited.

The transition from a rigid planned economy to a market economy (characterized by the principle of the freedom of contract) has created (especially in connection with a number of other reforms, *e.g.*, administrative, military, and housing.) fertile soil for various abuses in the sphere of contractual relations. This has increased the importance of the courts in evaluating the terms and conditions of contracts in accordance with the provisions of the Civil Code on invalid transactions (Ch.9, sec.2), on the reduction of penalties (Art.333), and even on the abuse of legal rights (Art.10).

7. The RF Civil Code accords courts a greater role of independence than previously was the case. In many instances, the application of norms depends on the extent to which it agrees with the "essence" (*sushchetvo*) of the actual, concrete relationships (*inter alia* Art.467, para.2; Art.479, para.2; Art.480, para.3; Art.481, para.1). An expansion of courts' discretionary powers also appears in the usage of some of the Code's norms of concepts and criteria that can only be interpreted by a court taking into account all the circumstances of a concrete case ("a serious violation" [*sushchestvennoe narushenie*], "reasonable period" [*e.g.*, *razymnyi srok*], "essential expenses" [*nobkhodimye raskhody*]) Nevertheless, the boundaries of the freedom of discretionary judgment granted to the courts in Russia are substantially narrower than those found in the civil law of most Western states.

Russia's Civil Code: Providing Security for Commercial Transactions

8. The variety of options that the market economy offers to economic actors as well as to their agents can only ensured in a stable and predictable legal environment. In Russia nowadays, such a stable legal environment is created mainly by the Civil Code.

8.1. The 1993 Russian Constitution (Art.71(o)) refers civil legislation to the exclusive jurisdiction of the Russian Federation. Therefore, the Civil Code as well as all other civil laws may only be federal laws, *i.e.*, uniform for the whole country. The Subjects of the Federation do not always take account hereof, and time and again add new civil-law norms and even separate acts to their regional legislation. Undoubtedly, however, such additions will be overturned by the RF Constitutional Court as being in violation of the Constitution (Art.125(2) (b)).

Things become more complicated where legislation on land, water resources, forestry, housing, labor, and family is concerned. The RF Constitution refers these branches of legislation to the joint jurisdiction of the Federation and its Subjects (Art.72(2) (k)). It appears that the Civil Code provides a general solution to this problem where it states: "the norms of civil law contained in other laws must conform with the present Code" (Art.3, para.2). From this general principle spring more concrete rules concerning the relationship of civil legislation with legislation on land and other natural resources (Art.129, para.3; Art.209, para.3) as well as with housing legislation (Art.672, para.3).

8.2. In order to stabilize the legal environment for commercial transactions, the Civil Code assigns the principal role for the regulation thereof

to a law (*zakon*) rather than to inferior acts. The present Code is more than twice as long as the previous 1964 Code. Many types of relations that used to be regulated by the Government or even by individual Ministries (deliveries of goods, capital construction, credits and accounting, insurance, etc.) are now regulated by the Code in such a detailed fashion that further specification or concretization of the Code by way of normative acts such as presidential edicts, government decrees, etc. has become superfluous. The parties may conclude their agreements expressly on the basis of the Code. In those cases where the Code acknowledges the need for additional legal regulation, it nearly always refers to statutory law rather than to lower-level normative acts (*podzakonnye akty*).

8.3. In order to minimize "spontaneous law-making"—*i.e.*, laws adopted for incidental reasons or uncoordinated with the Code, etc.—the Code has for the first time in the history of Russian law predetermined the system of civil legislation. The Code expressly refers to over thirty federal laws that must be adopted in furtherance of the Code. The majority of these laws have already been adopted: for instance, the laws "On Public Associations" (19 May 1995); "On Joint-Stock Companies" (26 December 1995); "On Production Cooperatives" (8 May 1996); "On Homeowners' Partnerships" (15 June 1996); the Air Code (19 February 1997); "On State Registration of the Rights to Immovable Property and Transactions Related Thereto" (17 June 1997); "On Consumers' Cooperatives" (11 July 1997); "On Bankruptcy" (10 December 1997); the Railway Transportation Charter (19 December 1997); and "On Companies with Limited Liability" (8 February 1998). A number of other laws—the promulgation of which is foreseen by the RF Civil Code—have been debated in parliament (*e.g.*, the laws "On the Registration of Legal Persons"; "On Mortgages"; and the Maritime Shipping Code).

8.4. The predictability and stability of civil laws—adopted in addition to Russia's Civil Code—are conditioned by the requirement that they must be adopted "in compliance" with the Code (Art.3, para.2). This requirement (which is not unfamiliar to Russian legislation) springs from the specific nature of the Code as a system-generating law. The Russian President has repeatedly vetoed federal laws that contradicted the Code.

8.5. According to the general rule, amendments to the provisions of the Civil Code or any other civil law which is mandatory for the participants in commercial transactions, *i.e.*, imperative (*imperativnye*) norms, do not affect the terms and conditions of agreements that have been concluded

previously; such terms and conditions continue to be valid even if they contradict the new norms (Art.422, para.2). The exclusion of this rule—which is quite important from the point of view of the stability of commercial transactions—could only be realized by making the effect of the new norms retroactive; however, this almost never happens.

8.6. In the first four years after the entry of the Code into force, it was amended a mere four times (Arts.64, 185, and 855). The first two amendments were of little importance, and one (an amendment to Art.855) was declared to be in violation of the RF Constitution by the Constitutional Court on 23 December 1997. In this way, despite the vastness of the scale of its application, the Civil Code during its formative years was one of Russia's most stable laws. In the subsequent years, less than a score of amendments have been made to the Code; given the importance of the Code for—and the degree to which it is applied in the activities of—legal and natural persons, it continues to be remains in our view a bedrock of Russia's civil society.

At the same time, it has become obvious that further improvement of the Civil Code and other civil legislation must not be stopped. A method of "repair by blocks" should help make this improvement more effective: on the basis of a careful and comparative analysis of large groups ("blocks") of inter-related norms (of the Civil Code and of other laws), the coordinated amendments of the Civil Code and that other legislation should be drafted. The highest RF courts that have the right of legal initiative and have experience in the comprehensive application of the Civil Code should be in charge of this effort.

The Civil Codes of the Russian Federation and The Netherlands: Similarities and Contrasts

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Introduction

It was the idea of Professor Feldbrugge to bring together those who had been involved in preparing the new civil codes of Russia and The Netherlands and to open the way for them to an exchange of views. This makes a comparison of the mainlines of these codes—meant to bring out clearly their most characteristic features—an appropriate theme for an essay in his honor. It will also give me an opportunity to go somewhat deeper into certain practical problems that may ask for attention in the near future. The most obvious examples of this are Chapters 9 and 10 on secured transactions, the fiduciary transfer of property, and the working of mandatory law.

However, one observation must be made beforehand. The Russian Code and the Dutch one belong to the same family, but are not closely related. The work on the new Russian Code started too late for any influence on the Dutch Code. As far as the Russian Code of 1964 is concerned, some rare but interesting references have been made to it in the reports exchanged between the Minister of Justice and the parliament as a part of the Dutch parliamentary procedure for adopting a law.[1] Similarly, the influence of the Dutch Code on the new Russian one, if any, has been slight. As will be seen below, the parallels are all more or less coincidental. This should be kept in mind because, from time to time, Dutch and foreign sources venture exaggerated opinions on the extent of the influence of Dutch law on the codification process in CIS countries, including the Russian Federation.

Nevertheless, the initiative of Professor Feldbrugge was fruitful in the sense that it led to a better understanding, on both sides, of civil-law problems and possible solutions in a developing market economy with obvious transition problems. What in Dutch eyes seemed to be self-evident fundamentals—taken for granted by practice—became often new and

[1] *Parlementaire Geschiedenis Boek 6*, 746-747, connecting the part of the US Restatement of the Law of Torts, concerning liability for "abnormally dangerous activities", with Art. 454 of the Civil Code of the RSFSR of 1964, creating a comparable liability. This current, in both important industrialized countries, was seen as an argument in support of the Dutch system of risk liabilities, based on the concept of sources of increased danger.

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interesting again and sometimes required a not insubstantial degree of rethinking when forced to see them through Russian eyes. This increased consciousness, resulting from many discussions, may have helped the Russian experts to a deeper insight into the issues they had to solve.

Background

The main purpose of both codes is the general aim of every civil code: to bring certainty and predictability to the field of civil law and to create a reliable legal framework for participants in commercial activities. Their historical background has common features, when one views it from a distance and is prepared to go back to Roman law and to the pandect system followed in both codes.[2] But their recent historical background differs considerably.

The new Russian Code is a result of the recent rapid and radical changes in Russian society and economy, forcing the Russian legislator to break away from many fundamental concepts of the past. At short notice, civil law had to be reformulated entirely on the basis of clearly expressed, new fundamental principles. On the other hand, it was necessary to build in safeguards in view of the many uncertainties that can be expected in a society in transition, as well as to meet, where possible, the need for continuity if only to reduce implementation problems. It turned out, indeed, to be possible to use—to a large extent—the existing terminology and technical devices. Elaborating those traditional devices in view of the new situation, the drafting commission sometimes even sought inspiration in old legislation from Tsarist times in which those devices had their roots. Still, implementation problems have certainly not yet been overcome.

The work on the Dutch Code started in 1947 in quite a different setting. The Netherlands traditionally has had a market economy, but after the war, the Dutch economy had to be rebuilt. There was no doubt about the underlying freedoms of civil law, such as the freedom of enterprise; freedom of contract; the freedom to accumulate property; or the free circulation of goods, services, and capital. While these freedoms had their limitations, at the time many of them were thought to be of a temporary nature. Against this background, the aim of the new Dutch Code was, in fact, a modest one. The old Civil Code of 1838 no longer contained civil law as it existed in practice, overgrown as it was by case law and legal doctrine. This was all the more the case of the commercial code of the same year. What was thought to be needed was a *re*codification of existing civil

[2] Both codes were influenced by the German *BGB*, but to a different extent. In fact, The Netherlands *returned* to the pandect system prevailing in Dutch-Roman law until the first codification of 1809.

law, restoring the lost balance between legislation and judge-made law. In addition, the occasion could be used to adapt the code to new practical needs and to take into account, where possible, more recent legislation in comparable countries in particular and international developments in general. Of course, this required changes—and, on occasion, important changes—with respect to existing law. The unexpectedly long time taken by this process enabled the drafters to introduce many renovations that mirrored changes in Dutch society and in the economy in the years between 1947 and 1992. But during this work, the tension between the urge for innovation and the need for continuity became a major issue, which led to a curious phenomenon. The courts, in their interpretation of the existing code, began to seek inspiration in the already-published drafts for the new code and its explanatory reports. The resulting case law was, in turn, a source of inspiration for the drafters of the code, working on it in a subsequent part of the parliamentary procedure. This interaction was accompanied and facilitated by a continuous flow of academic criticism in the form of theses, comments in law journals, conferences, and so on. This criticism often made necessary repeated consultations of representatives of the different legal professions and groups of interested parties (judges, lawyers, notaries, insurers, bankers). All this had the dual effect of slowing down the whole legislative process and of enlarging and intensifying the contribution of all segments of the Dutch legal practice and academic scholarship to the new code.[3]

As a result, practice, as well as the law faculties (including their students), were also already more or less familiar with the new code, when the bulk it entered into force in January 1992. In this way, problems of transition and implementation were reduced to a minimum, a luxury that the need for rapid and radical change in Russia did not permit.

Structure

A striking parallel between both codes is their structure, which can be defined as a special variety of the pandect system. Both codes are built up in layers, proceeding from the general rules to the gradually more and more special ones. Both codes, moreover, have in common that the general rules are not directly applicable in family law. In Russia, this subject is regulated outside the Civil Code, which contains only patrimonial law. In The

[3] Compare the contributions by Mr. Neleman and Arthur Hartkamp, "Interplay Between Judges, Legislators and Academics, The Case of the New Civil Code of The Netherlands", in B.S. Markesinis, (ed.), *Law Making, Law Finding and Law Shaping: Diverse Influences*, *The Clifford Chance Lectures*, Vol. 2, Oxford 1997, 91-112.

Netherlands, family law is the subject of the first book of the code, while the general rules concerning patrimonial law are in the third book.

But there are differences. First, the law of inheritance might be mentioned here. In the Russian Code, it will find a place in the third part of the code, at this moment in the process of final adoption. That means that it will come after the law of property (sec.II), the general part of the law of obligations (sec.III), and the specific types of obligations (sec.IV). The new Dutch law of inheritance will be placed in Book 4.[4] This book will find a place immediately after the general rules on patrimonial law of Book 3 and will precede the law of property of movable and immovable things in Book 5, both of which entered into force in 1992 together with Book 6 (general part of the law of obligations) and parts of Book 7 (specific contracts).

Another difference: the rules on legal persons are placed in Book 2 of the Dutch Code, while the Russian Code concentrates the main rules on legal persons in one chapter of the first part of the code: Chapter 4, placed in Section I (general provisions), Subsection 2 (persons). The more specific rules are left to a series of special statutes.

But apart from these kinds of variations, the subsequent layers of both codes correspond roughly to one another: the law of property, being followed by the general rules of the law of obligations, the law of contract in general and specific contracts. Again a variation: the law of tort and unjust enrichment is placed in the Dutch Code immediately before the law of contract; in the Russian Code, they come after the specific contracts.

This kind of structure has consequences for the application of the code. It makes one aware of the coherence of the system because it forces us to see special rules always in relation to the more general ones that precede it. In the Russian situation, this seems clearly an advantage because this stresses the importance of the new fundamental principles and the consequences drawn therefrom in the subsequent parts of the code. In The Netherlands before 1992, the system had been criticized because it was thought that the resulting high degree of abstraction of the rules of the general part was hostile to the needs of practice, especially in the field of transactions in general in contrast to the contract law of the old code. But after 1992, this criticism has not been repeated, which might lead to the conclusion that practice, after all, can work with those provisions. This might have been expected because before 1992 the formulas contained therein were already accepted by the courts, which had to deduct them from more specific rules as an underlying concept.

4 See the contribution to this volume by Ms. N. van der Horst. For the time being, Book 4 contains a somewhat modified version of the law of inheritance of 1838.

A last remark: the third part of the Russian Code contains provisions on private international law while the final part of the Code has rules governing intellectual property. In The Netherlands—though legislation on those subjects is in the course of preparation—the intention of inserting them in the Civil Code has recently been contested yet again. As far as intellectual property is concerned, this seems to be based on underestimation by specialists of the importance of general rules of civil law in this field. It is true that the general part of the code has not much to contribute to private international law. But its place in the code can be justified by its function to indicate the limits of the applicability of the code in international cases and by the wish to prevent practitioners in applying the code from ignoring this international dimension.[5]

Scope

A perhaps still more characteristic common feature of both codes is that they cover the whole field of civil law, including categories specified as commercial (or economic) law. In the view of both countries, distinctions of this nature have become obsolete. Civil law—especially contract law—regulates the circulation of goods, services, and capital through all segments of society (work contracts concerning the building of huge industrial plants or the repairing of a simple watch, wholesale contracts, and retail trade, agency, banking, transport, or insurance; in short, all contracts that can be used for very different commercial and individual purposes). This requires a framework covering all civil-law relations, although—as is the case with the Russian Code—elaboration of special subjects might be left to separate statutes.

But here again, attention must be paid to a contrast. The Russian Code not only includes all civil-law provisions but in addition a set of provisions that, to Dutch eyes, would be considered as administrative law. Protection against unjustified state interference is—in a developing market economy, even if it is still in a transitional stage—a point of utmost importance. This explains why the Russian Code not only had to express clearly the fundamental freedoms I have mentioned above, but also had to furnish efficient remedies against possible violations. The system of Article 1(2 and 3), Article 11(2), Articles 13, 16, and 306 and 1069-1071—related to Article 46 of the Russian Constitution—is intended to provide such protection. For instance, Article 13 makes it possible, upon certain conditions, to petition a civil (or *arbitrazh*) court for the invalidation of state acts that violate

5 See, for a more detailed discussion, A.L. Makovskii, "A New Stage in the Development of Private International Law in Russia", 22 *Review of Central and East European Law* 1996 No. 6, 595-601.

the civil rights and interests of a citizen or a legal person, eventually even normative acts. This pragmatic solution was, no doubt, facilitated by the historic context: in the Soviet concept of predominant state property, there was no reason to draw a sharp line between civil law and administrative law.[6] Although some of the provisions have their origin in Soviet legislation, the system as such seems new.[7] I understand that actually lawsuits of this nature are not rare. Special attention should be paid here to the criterion of proportionality as a test for reviewing state interference. This test is an essential element of the fundamental rights protected by the European Convention on Human Rights and Fundamental Freedoms of 1950 and the CIS Convention on Human Rights of 1995. It is expressed now as well in Article 1(2) (second sentence), of the Russian Code in terms that correspond to similar phrases in those conventions.

The situation in The Netherlands at this moment is different. Article 107 of the Dutch Constitution of 1983—prescribing regulation of civil law, criminal law, and the law of civil and criminal procedure in general codifications—adds that general rules of administrative law should be introduced as well. The most important parts of those general rules are now in force.[8] The protection of citizens against state interference has been put in the hands of administrative-law courts, in first instance the administrative sections of the *raion* tribunals. The kernel of the system is the right to petition a court for the annulment of decisions of administrative authorities on grounds such as a violation of law, as well as violation of "general principles of proper administration", a kind of general standard for the conduct of those authorities. Such demands can be combined with a claim for damages. Recently, even an independent claim for damages was admitted in some cases.

6 The line drawn by Art.2, para.3, of the Russian Code is certainly not a bright one. What if a citizen has paid more than was due under a tax law and bases his demand on Arts.1102-1108? Another example: the unfamiliar rule (in Western eyes) on forfeiture to the revenue of the Russian Federation, adopted in Art.169 (invalidity on the grounds of violation of legal order and morality) and in Art.179, para.2 (invalidation on the grounds of fraud, violence, threat, etc.), both traditionally linked to invalidation on the grounds of violation of the interest of the state, as was possible under the Codes of 1922 and 1964, but abandoned in the Code of 1994. This kind of a rule might significantly endanger the position of the creditors of the guilty party, among whom are the innocent victims of the transaction. The Codes of 1922 and 1964 were—for all intents and purposes—blind to interests of creditors. The Code of 1994 has introduced many improvements in this field, but sometimes remnants of the old approach can still be seen.

7 See the contribution elsewhere in this volume by Donald D. Barry.

8 Some CIS countries (*e.g.*, Georgia) have showed an interest in introducing a similar codification of administrative law and have started to consult Dutch experts in this field.

Still, the Dutch approach is much closer to the Russian one than may seem at first sight. In The Netherlands, administrative law has for a long time remained underdeveloped. For that reason, the Dutch civil-law courts—long before the new legislation—have attempted to fill this gap by adopting a line of protection against administrative authorities and their decisions, based on civil law (mainly on rules pertaining to tort). Arbitrary decisions of such authorities were considered to be a tort, giving rise to a claim for damages. In certain cases, even nonperformance of a public-law obligation was construed as a tort, leading to a judgment enabling citizens to enforce this performance. This has led now to a system that, roughly speaking, makes it possible to bring tort claims against public authorities before civil-law courts in all instances:

(a) where there is no competent administrative court; or
(b) where a competent administrative court has invalidated the decision of the public authority involved, provided that this invalidation shows that it has committed a tort.

But civil-law courts cannot judge an act of a public authority illicit if appeal to an administrative court is possible and if this court has not yet decided in favor of the citizen. On the other hand, civil-law courts, as well as administrative courts, will devote much attention to the proportionality of state measures with respect to their intended purpose.

Style, General Standards, and Interpretation

Obviously, the codes differ considerably in style; this could have practical consequences for the style of interpretation. The Russian Code is elaborated in much greater detail than its predecessor of 1964, but to Western eyes it is still relatively succinct. The first two parts in force now have 1,109 provisions. The idea is that the code has a special status as the main source of civil-law legislation; it is not the only source. Details are left in many places with so many words to separate statutes linked to it: on different kinds of legal persons, state registration, mortgage, and so on. This system has the advantage of not encumbering the code with too many special rules of minor importance, which might blur the mainlines, a reproach sometimes made as regards the Dutch Code. Moreover, it has enabled the drafters to proceed quickly, leaving the accompanying statutes to a later moment. But it does create the danger of involuntary contradictions.[9]

[9] Important here is Art.3, para.2 (second sentence): "Norms of civil legislation in other laws must conform to this code." This was intended to prevent contradictions, but

The Dutch Code goes into far more detail—in the general part, as well as in the later books. It has until now far in excess of 3,000 provisions, and this number will increase even further when additional parts, such as Book 4, enter into force. It bears the vestiges of the sometimes far-reaching academic discussions and the not always well-balanced contributions of worried practitioners and interest groups during the long time of its creation.

On first sight, it may seem that this love for detail could lead to a rather legalistic style of interpretation, trying for the sake of certainty to stick as much as possible to the wording and the system of the new code. Before introduction of the code, Dutch legal professionals were fearful, in fact, of such a development. This fear turned out to be unfounded, as might have been expected from the court practice under the legislation prior to 1992, including the then new Books 1 and 2, and from the many provisions in the new legislation maintaining (or extending) the vague norms and general standards that lead, in fact, to judge-made law. Characteristic here are the references to reasonableness and equity in the Articles 6:2 and 6:248, the former for obligations in general and the latter for contracts.

The first paragraphs of those provisions state that parties must act between (or among) themselves according to these standards, which means that these paragraphs might lead a court to accept additional rights and duties not provided for by contract or statute law. Reasonableness and equity here have a supplementary function. The second paragraphs state that a rule—even a rule of law—binding upon the parties does not apply to the extent that, under the circumstances, this would be unacceptable according to criteria of reasonableness and equity. These standards have here a derogatory function.[10] This might seem a rather radical rule,

might have been overly optimistic. First, the sanction on violations of this rule by laws of the same level as the code seems doubtful. The President of the Russian Federation might veto a law on the grounds of such violation, as he has done several times. But when he fails to do so, the courts will probably have no other choice than to attempt to find an interpretation of the special law that is—as much as possible—in conformity with the code. Working on the code, it must have been difficult to foresee all the problems that could possibly be met during the future work on the more precise rules in the special statutes. As Professor Sukhanov has observed in *Sudebnik* 1996, 297, it is difficult to adhere to the principle of Art.3, para.2 (second sentence), in practice. This, again, might be an incentive for a flexible interpretation of the special statute, as well as of the provisions of the code that this statute pretends to elaborate. Elaborating a main rule means, in practice, accepting new distinctions and exceptions. There is no harm in this, as long as the main rule is not seriously affected. In this view, Art.3, para.2 (second sentence), where applied to legislation of the same level as the code, is reduced to a rule of interpretation.

10 Arthur S. Hartkamp, "Judicial Discretion under the New Civil Code of The Netherlands", *The American Journal of Comparative Law* 1992, 551-571.

endangering the certainty and predictability that the code promised to bring. But it must be remembered that, under the old code, virtually the same standards were derived from the traditional notion of good faith in the performance of contracts and had been applied in practice for a considerable time. For that reason, Articles 6:2 and 6:248 refer, in fact, to a large reservoir of existing case law developed in the decades before 1992 and continued thereafter in the same spirit. Many norms and guidelines have their basis in this case law. The new code has codified some of those norms and has reformulated those standards according to what was, in fact, already court practice. All this, combined with the need to come to reasonable results on the basis of the obsolete Code of 1838, has led the courts to a rather free attitude in interpreting even recent legislation, paying more attention to the concept behind it and to practical consequences than to the actual wording.

In Russia, the situation seems more or less the opposite of this. In the field of interpretation, Russia has inherited from the times of the former Soviet Union a rather legalistic tradition. Literal meaning and systematic arguments used to prevail, which is, of course, in the interest of certainty. But under the new code, it is simply not possible to continue this attitude in its old strict form. A new code not only needs to be interpreted but also implemented. It necessarily has gaps and will be full of provisions that might turn out to be ambiguous when confronted with unexpected cases, as inevitably will be invented by entrepreneurs and their legal advisers trying to find their way in the new economic circumstances. As Professor Makovskii and the late Dr. Khokhlov have already observed in their introduction to an English translation of the new code,[11] the code gives the courts much more freedom than they previously had. That means that, in fact, the creating of certainty in Russia, as well as in The Netherlands, to a large extent, is in the hands of the courts with the difference that Russian courts still have to create an amount of case law comparable to what existed in The Netherlands in 1992 and served as the basis upon which Dutch courts were able to continue to build their practice. On the other hand, Russia has the important instrument of guidelines for interpretation, rendered by decree of the plenums of the Supreme Court and the Higher *Arbitrazh* Court of the Russian Federation, an instrument that has already given evidence of its usefulness with respect to the Civil Code.

[11] This has been published in a volume which also contains a translation of the Russian code: see *The Civil Code of the Russian Federation, Parts 1 and 2*, (Peter B. Maggs and A.N. Zhiltsov, trans.) Moscow 1997. Another translation of the code is at "Civil Code of the Russian Federation: First Part", (Ger P. van den Berg, William B. Simons, trans.), 21 *Review of Central and East European Law* 1995 Nos. 3-4, 259-426.

The most obvious instrument in the Russian Code for filling gaps is Article 6, which stresses analogy. The first paragraph refers to analogy of legislation (*analogia legis*), which comes to a form of systematic interpretation. The second paragraph refers to general principles of civil legislation (*analogia iuris*) and the requirements of good faith, reasonableness, and equity. As far as the general principles of civil legislation are concerned, it should be remembered that the Russian Code pays much more attention to fundamental rules, expressing clearly the spirit in which the code should be applied, than does the Dutch Code. In this respect, the Russian Article 6 is perhaps more important than the Dutch Articles 6:2 and 6:248. On the other hand, the impact of Article 6 is less in this sense in that it has only a supplementary function. The Russian Code does not give to good faith, reasonableness, and equity the derogatory function characteristic of Dutch civil law. The Russian courts can apply here only the more restrictive standard of abuse of right (Art.10, para. 1, RF Civil Code).

This reluctance to give the courts all at once the same power to influence civil law by means of general standards—as exist in countries such as The Netherlands—seems wise. As it is, the position of the Russian judiciary in its confrontation with major changes in nearly all fields of law is already difficult enough. For the time being, the code does not ask for bold legal scholars intent on innovation but, rather, for reasonable practitioners who are prepared to consult carefully the Civil Code, including the general principles of the first chapters, and who—in case they encounter a gap—will stay as much as possible within the lines suggested by the code itself. Article 6, as it stands, suits practitioners of this kind. A cautious judge who has to find a solution for a new problem will go forward by trying to find comparable cases in the field of *analogia legis*, as well as in the field of *analogia iuris,* and the requirements of good faith, reasonableness, and equity. This quest for analogy, together with Articles 5 and 421(5), might lead one, where necessary, to seek inspiration in international rules like the Vienna Convention on International Sales (CISG)—which has already inspired several provisions of the code (formation of contracts)—and the UNIDROIT Principles of International Commercial Contracts.[12]

An example can be given here to illustrate this point. Some writers on the Russian Code have criticized it because of its unclear rules on

[12] Compare A.S. Komarov, "Remarks on the Application of the UNIDROIT Principles for International Commercial Contracts in International Commercial Arbitration", in: *The Unidroit Principles for International Commercial Contracts:: A New Lex Mercatoria?*, ICC dossier of the Institute of International Business Law and Practice, 1995, 157-166, and A.S. Hartkamp, "The Use of the Unidroit Principles for International Commercial Contracts by National and Supranational Courts", *idem*, 253-262.

the consequences of termination of a contract.[13] Article 453(3) seems to preclude any return of that which was performed prior to the moment of the termination, a solution that differs from Article 167 concerning the consequences of invalidity and seems hardly justified in cases where the other party did not perform his own obligation that was the counterpart of the obligation of the first party. But problems of this kind can be solved by arguing that Article 453 leaves a gap for the special situation of unjust enrichment. This gap can be filled by bringing this situation under the provisions on unjust enrichment of Articles 1103(1), 1105, and 1106, by seeking support in provisions like Articles 468(3), 475(2), 480(2), and 523 on purchase and sale—eventually applying them per analogy—and in seeking inspiration in Articles 81-84 CISG and Articles 7.3.5 and 7.3.6 of the UNIDROIT Principles. The result, thus obtained, is perfectly in accordance with Articles 6:271-275 of the Dutch Code. I understand that the plenums of the RF Supreme Court and Higher *Arbitrazh* Court have already reached the same solution.[14]

Legal Persons and Law of Property

It would certainly be interesting to go into a detailed comparison between the rules on both sides on legal persons and on the law of property and rights *in rem*. But it is not possible to delve into these subjects without exceeding the limits of this simple essay. So it must suffice to make some general observations.

The Dutch Code contains a closed system of legal persons, including public-law legal persons. Article 2:1, para.1, enumerates the state, provinces, municipalities, and some other expressly mentioned specimens. According to Article 2:1, para.2, entities that have a public task only have legal personality when this is given by statute or on the basis of a statute. Russia—as The Netherlands—has a closed system of civil-law legal persons. As far as public-law entities are concerned, the Civil Code thus does not answer the question of their legal personality. It gives only rules

[13] See, for instance, V.A. Rakhmilovitch, "The New Civil Code of the Russian Federation", 22 *Review of Central and Eastern European Law* 1996 No.2, 135-152, esp. 151-152.

[14] Decree of 1 July 1996 "Some Questions Connected with the Application of Part 1 of the Civil Code of the Russian Federation", ruling in Point 59 that the nullity of a contract aiming at privatization, prescribed by Art. 30 of the Law "On Privatization" of 1991, in case the price is not paid, is not covered by Chapter 9, para.2, of the Civil Code on invalidity of transactions, but by Chapter 29 on amendment and termination of contracts. Nevertheless, the parties are entitled to require the return of what has been performed by them under the contract until the moment of its rescission. See, also, M.I. Braginskii and V.V. Vitrianskii, *Dogovornoe pravo, Obshchie polozheniia*, Moscow 1997, 652-653. Case law seems to confirm this. I thank Dr. Ger van den Berg for his kindness in providing me with this information.

(Arts.124-127) on the participation of the Russian Federation, Subjects of the Russian Federation, and municipal formations in relations governed by civil legislation. The result of both systems seems similar, but in Russia it might be difficult to decide whether or not a particular public authority is a legal person.

As far as property law is concerned, the sad fate of Chapter 17—not yet in force because of its being linked to the politically difficult issue of land legislation—keeps me from going into the interesting features of the Russian law on immovables, where typical Russian institutes prevail. I will, therefore, restrict my remarks here to the combined Articles 261, 263, and 271 resulting in a system that gives the owner of a building certain rights on the land beneath it if this land is owned by someone else, instead of making the owner of the land also owner of the building, unless this ownership is given to another person on the basis of a right *in rem*, as is the classical Roman-law rule prevailing in The Netherlands. Another point on which I cannot be entirely silent is that of the old distinction between state property, property of bodies of local self-government, and private property, though nominally maintained, is almost stripped of its practical consequences. According to Article 212, para.3, the rights of all owners are equally protected. Under Article 213, para.1, any property may be owned by citizens and legal persons; Paragraph 2 provides that the quantity and value of property in the ownership of citizens and legal persons are not limited; exceptions to these rules must be based on law. This means that the gap between the Russian and the Dutch concept of ownership has diminished considerably. Equally, in The Netherlands the fundamental rules on protection of ownership, and the freedom to acquire it, are not without exceptions. The bottom of the territorial sea can only be state property (Art.5:25). Goods used for public service cannot be seized by creditors who want to take recourse upon them (Arts.436 and 703, Code of Civil Procedure), which amounts to a kind of immunity.

I must let the rights *in rem* rest but will draw attention to the Russian concept of the right of pledge. In contrast to the Dutch view, the Russian Code does not include it in the list of *rights in rem* (Art.216) but, rather, regulates it in the law of obligations as one of the means of securing performance of an obligation (Arts.334-358), the other ones being penalty, right of retention, suretyship, bank guarantee, and earnest. For this reason, I will make my remarks on pledge later on.

Contract Law: General Conditions

Civil legislation should offer to participants in commercial activities a level playing field. On the one hand, this requires mandatory law. It must

see to it that all parties can take part in these activities on an equal footing. This means that limits must be set on the freedom of those parties. Both codes are rather brief on this subject, leaving the rules on preventing monopolistic conduct and unfair competition to case law or special statutes. On the other hand, civil legislation must give the instruments necessary for self-regulation, allowing the parties to organize their mutual relations as they think best. The most obvious instrument for this is, of course, contract law.

A major issue here is the standardization of contracts by using general conditions. General conditions are a very important instrument for regulation of commercial relations. In the same way that a large enterprise has to standardize its products for the sake of the transparency of the production process, it has to standardize the conditions upon which those products are sold for the sake of the transparency of its commercial activities. The same thing goes, for instance, for banking. In The Netherlands, banking law is almost entirely a matter of the general conditions of the banks and their adhering organizations, such as the central clearing institute.

The Russian rule on this subject is to be found in Article 428 (contract of adhesion; see, also, Art.400, para.2). Paragraph 3 of this provision favors the use and validity of general conditions between enterprises that knew (or should have known) the terms and conditions concerned, while Section 2 gives clear protection against abuses in other cases. Moreover, the Russian Code admits agreements in favor of a third party (Art.308, last sentence) in contrast to the common law. This enhances considerably the scope of what can be achieved by general conditions. Those few Russian provisions are simple but sufficient for contracts between entrepreneurs.

Characteristically, the Dutch rules on general conditions (Arts.6:231-247) are much more detailed and complicated. They have in view general conditions in contracts between professionals, as well as in consumer contracts, and they include contracts where one of the parties is the state or another public-law entity. The emphasis is on the protection of consumers in accordance with the guideline of the European Communities on this subject. The general rule is that stipulations that are deemed to be "unreasonably onerous" may be annulled. Following the example of other European countries, this principle has been worked out for contracts between consumers and professionals by introducing two lists of stipulations: the *first* one (blacklist) pertaining to stipulations that are considered to be unreasonably onerous in any event; the *second* one (gray list) pertaining to stipulations that are presumed to be unreasonably onerous, the user of those stipulations being allowed to prove that they are not. The annulment can be effected upon request of the consumer, but

equally upon request of a consumer organization or an organization of entrepreneurs that might fear the use of unreasonable general conditions as an instrument for unfair competition.

Another difference between both codes is that the Dutch Code has a special rule for the "battle of forms" in Article 6:225, para.3, stating that where offer and acceptance refer to different general conditions, the second reference is without effect unless it explicitly rejects the applicability of the general conditions indicated in the first reference. In the Russian Code, this problem is left to the general rules on offer and acceptance of Articles 443 and 438, para.3. This will probably give a different result. The reference to general conditions in a letter purporting to accept an offer will, according to Article 443, be considered as a rejection of the original offer and—at the same time—as a new offer if those general conditions are in conflict with the general conditions mentioned in the original offer. When the party that made the original offer does not react and starts performing unaware of the reference to the general conditions of the acceptant, he will be deemed to have accepted these general conditions even if this acceptant did not explicitly reject the applicability of the general conditions in the original offer. However, both systems seem to accept the application of distinctive sets of general conditions as far as they concur.

Interpretation and Form

This brings me to another major issue: interpretation of contracts. This interpretation is, of course, something different from the interpretation of the code itself, as dealt with before. But it has much in common with it.

Here, the Dutch Code does not have any special rule. Case law is based mainly on the general provisions pertaining to the conclusion of juridical acts. These provisions apply to contracts as well as to other transactions (Arts.3:33 and 35). Article 3:33 stresses the importance of the will (the intention to produce juridical effect) and the declaration manifesting this intent. Article 3:35 stresses the reliance principle: it is not the real intention of a party that is decisive but the interpretation of its statement by the other party, provided that this party has interpreted this statement in conformity with the sense it could reasonably attribute to it in the circumstances of the case. It might even be that the first party, in reality, intended no declaration at all but that the other party could reasonably interpret its conduct as a declaration. The rule of Article 3:35 applies in that case as well. Case law has deduced from those rules that—for the conclusion of a contract—it is what both parties in the given circumstances were reasonably allowed to conclude from each other's statements (and

eventual other conduct) that is decisive; it has stressed that the literal meaning of a written contract is only one element that must be taken into account in the light of this general standard. This means that—just as in the field of interpretation of legislation—the courts have a wide latitude to interpret contracts even where they are in writing or have the form of a notarial deed.

Again, the situation in Russia is different. The Russian Code has an express provision concerning the interpretation of contracts: Article 431. Article 431, para.1, stresses the importance of the literal meaning of the wording and of systematic interpretation of the contract as a whole. In Paragraph 2, this general approach is somewhat mitigated by introducing—as a subsidiary standard—the common will of the parties, taking into account the aim of the contract. A second sentence takes over Article 8(3), of the Vienna Convention on International Sales, referring to all relevant circumstances, corresponding as well to Article 4.3 of the UNIDROIT Principles. But this sentence applies only in the context of the subsidiary standard.

The emphasis on literal and systematic interpretation is clearly in the interest of certainty. This can be seen in relation to another characteristic feature of the Russian Code: its emphasis on form and writing. Literal interpretation of contracts and the requirement of writing belong to each other as hand and glove. According to Article 161 of the Russian Code, writing is required for all transactions between legal persons, between a legal person and a citizen and between (or among) citizens, in the last case provided that the value of the transaction exceeds ten times the minimum wage, the sanction being that proof by witnesses is not admitted. According to Article 162, para.3, "foreign commercial transactions" are not valid if not in writing. In many cases, notarization and state registration are required as a matter of form not only for the transfer of property but, equally, for the contract that contains the obligation to transfer the property. Even lease contracts, long-term or not, are subject to state registration if immovables are involved.

This stressing of form is in sharp contrast to Dutch practice as mirrored in the Dutch Code. Dutch law tends to informality as a result of a development that started a long time ago and probably has not yet ended. The new code knows but few exceptions to the main rule that oral agreements are binding. However, it must be admitted that the Russian love of form certainly has diminished in comparison to the past. From the introduction of Professor Makovskii to an English translation of the code,[15] we might even understand that the notaries were worried by this

[15] *Op.cit.* note 11, 52.

because they feared a fall of their income. Foreign investors sometimes complain about the high fees for notarization (1.5% of the value of the contract). But we should be aware of the fact that those formalities serve clarity and may contribute to the prevention of fraud. The danger that state registration might degenerate in state interference is reduced by the express remedy of Article 131, para.5, against unjustified refusal of registration. The elaboration of this is left to a special statute.

With respect to this last matter, the Dutch Code has a similar solution. Article 3:30 provides a remedy against unjustified refusal of registration in the field of immovables. The whole subject of registration is elaborated in a separate statute on land registration and the registration of ships and airplanes.

Secured Transactions

An important task of a civil code is to offer to practice instruments for the financing of entrepreneurial activities. The classical way of financing is, of course, to borrow the money and to do this against an interest rate as low as possible by using the assets of the enterprise as collateral. The most obvious instrument here is the right of pledge. In the Russian terminology, which I will follow hereafter, mortgage is seen as a special form of this right. Another instrument is buying the goods needed by the enterprise on credit, the supplier giving immediately possession of the goods but reserving their property by means of a retention of title. The contract of hire-purchase is a variety thereof. Other important instruments are the financial lease, factoring, and securitization.

The Russian and the Dutch rights of pledge, at first sight, seem to have much in common. Both codes allow a right of pledge on goods that remain in the possession of the debtor and both require registration only for such rights on immovables. Legal systems recognizing rights of pledge on movables requiring neither possession by the creditor nor registration are rare. But, *first*, this parallel is purely coincidental. The Russian Code has followed its predecessor of 1964 and the Law "On Pledge" of 29 May 1992, both knowing a right of pledge on movables without possession or registration. The Dutch system is, in fact, the successor of the former Dutch fiduciary transfer of property of which I will speak hereafter. *Second*, on further reflection, differences between both systems prevail.

The Russian right of pledge is, in particular, a much weaker right than its Dutch counterpart. To illustrate this, I will make some remarks on the most obvious kinds of collateral.

As far as immovables are concerned, the code (Art.334, para.2) refers to a special statute that has indeed been adopted: the Federal Law "On

Mortgage (Pledge on Immovables)", which entered into force on 22 July 1998.[16] But this law, though stipulating that the right of mortgage shall only enter into force from the moment of its state registration (Art.10, para.2), does not solve the main problem of such a right: a workable registration system that makes it possible to protect creditors who obtained a right of mortgage from an apparent owner on the basis of their good faith. Registration, which is indispensable for any reliable right on immovables, is at this moment still a point of much concern in Russia. A satisfying registration is linked to land registration problems that, for political reasons, are difficult to solve. We here meet again the gap in the code concerning land in general: the postponed introduction of Chapter 17. Nevertheless, a law on state registration of the rights to real estate and real-estate transactions was adopted on 17 June 1997.[17] But it will take years to set up a countrywide real-estate system, and it still remains to be seen if this system will really be effective in the sense that every interested party is allowed to consult the register and is able to learn from it—without delay—who the owner is of the immovable offered to him for sale or as collateral, and what rights are already established thereupon. This makes it understandable that no protection on the basis of good faith is offered to acquirers of immovables who relied on the registration. The pledgor is obliged to warn the pledgeholder about all rights of third persons to the subject of the mortgage known to him at the moment of registration, but the sanction for non-performance of this duty is only that the pledgeholder may demand early performance of the secured obligation or may change the conditions of the mortgage contract (see Arts.12, 42, and 44, para.1 (second sentence), of the Law "On Mortgage"). Again, this is not effective protection for a creditor who has already furnished the money, relying on its right of mortgage. All this is important indeed because it leads to a lack of transparency that is a strong obstacle to any development of a reliable right of pledge on real estate.

The code also speaks of a right of pledge on an enterprise (Art.334, para.2; Art.340, para.2), which is considered to be an immovable (Art.132). But, in contrast to the selling or leasing of an enterprise (Arts.559-566 and Arts.656-664), Articles 69-73 of the Law "On Mortgage" do not contain detailed rules that might enable practitioners to cope with the problems that this complicated collateral must be expected to entail. Moreover, registration problems here are no less serious than in the field of real estate.

16 For an English translation, see *Sudebnik* 1998, 673-734; for a German one, see *WiRO* 1999, 59-66 and 90-99.

17 For a comment on this law, see F.W. Digmauer, C. Hüper, and I. Rumjanzev, *WiRO* 1998, 21-29.

As I have mentioned, movables can be pledged in the Russian system as in the Dutch one without any registration.[18] Especially in a society as disorganized as Russia is for the time being, such a right cannot be considered to be a particularly reliable means for a creditor to get back its money. The volatile character of movables that have remained in the uncontrolled hands of the debtor and the uncertainty of their value when it comes to realizing this value by public auction is not entirely compensated by the fact that the real function of such a right of pledge is often only to give a creditor a grip on the enterprise of the debtor. A brewery might finance a pub to be able to sell the beer it produces; receiving interest on the money lent to the pubkeeper will be only of secondary importance. Moreover, a right of pledge enables a creditor to keep away other creditors who might otherwise try to take recourse upon the goods for their own claims. For such reasons, a bank generally will rely less on the value of its assets and more on its expectations concerning the capacity of the enterprise in making profit. In this way, it could be said that for a bank the natural collateral is not the machinery or the raw materials or finished products of the enterprise but, rather, the money coming in by selling these products, which brings me to the possibility of a right of pledge on (future) claims—in Western practice, a quite common phenomenon.

The pledging of rights is possible under the Russian Code, even the pledging of future rights (Art.336 in connection with Art.340, para.6).[19] But the Russian right of pledge on claims misses one vital rule: there is no provision enabling the creditor to collect the money due from a debtor of its debtor. See, also, a decree of the Presidium of the Higher *Arbitrazh* Court of 2 July 1996, ruling that monetary assets cannot be the subject of a right of pledge because legislation does not regulate the possibility of realization of this subject, realization by public auction being impossible here.[20] Article 334, sec.1 (last sentence), seems to give a pledgee the right to collect insurance proceeds, but this is not construed as a pledge on the claim against the insurer. Only Article 855, para.2, seems to make possible a realization of a right of pledge without auction, but the position of the pledgeholder is reduced here by placing him among the creditors of the fifth rank.

18 The Dutch Art.3:237 states that a right of pledge on movables can be established "by an authentic or a registered deed under private writing". But this has nothing to do with registration of the right itself. What is required here is a deed with a fixed date. For this purpose, the deed is offered to an official, who certifies by means of a mark on the deed itself the day on which it was offered.

19 In contrast to the Dutch Code (Art.3:239, para.1).

20 See, for an English translation, *Sudebnik* 1996, 1069.

But the perhaps most fundamental weakness of the Russian right of pledge is the system of priorities. Articles 25 (para.3) and 64 of the Russian Civil Code and Article 106 of the new Russian Law "On Bankruptcy" of 8 January 1998—all prescribing the order in which creditors are to be paid—give a set of important claims priority over claims secured by pledge.[21] This priority is notably given to:

(a) Claims concerning liability for causing harm to life and death; and
(b) Claims concerning the settlement of accounts for payment of severance allowances and payment for labor to persons under an employment agreement and payment of royalties under authors' contracts.

The possibility of claims of this kind, and the eventual amount of those claims at the moment of levying execution, is a very insecure element and will considerably reduce the value of any goods as collateral.

Things are further complicated by Article 109 of the Law "On Bankruptcy". This provision contains the following three rules. The amount of a claim secured by pledge of the debtor's property shall be determined considering "the portion of the debtor's indebtedness that is secured by pledge". Pledgeholders have the position of the creditors of the lowest (fifth) rank for the portion of the debt not secured under a pledge of the debtor's property. Claims secured by pledge of the debtor's property shall be subject to satisfaction "out of all property of the debtor, including property that is not subject to said pledge". It is not totally clear what these rules mean in practice.[22] The text of Article 109 in connection with Articles 106 and 114 appears to leave no room for a separate dividing of the proceeds of individual goods subject to a right of pledge: the pledgeholder is satisfied

[21] See, also, Arts.49 and 78 of the Law "On Enforcement Proceedings" of 21 July 1997. The rank of a claim secured by pledge is given a special form there. According to Art.49, para.1, execution upon pledged property can only be on behalf of a creditor other than the pledgee with observance of the right of pledge. In addition, Art.49, para.2, provides that the pledgee, reserving for itself the pledged property, shall be bound to satisfy the demands of creditors with a higher priority out of the value of the pledged property but to an amount not exceeding this value. These rules explain why pledgees are ignored in Art.78, para.2, listing creditors with a priority position. This approach corresponds to Arts.419-424 of the Code of Civil Procedure of 1964, drafted in a period in which the right of pledge was much less important than it is now.

[22] According to V.V. Vitrianskii ("Insolvenzrecht in der GUS: Wege zur Vervollkommnung und Annäherung", in *Wege zu neuem Recht*: *Materialien internationaler Konferenzen in Sankt Petersburg und Bremen*, Berlin 1998, 213), the rules were intended to reduce the influence of the pledgeholders during insolvency proceedings. Especially the position of pledgeholders in the US and Canada was seen as something that, in Russia, would be unworkable.

not out of the proceeds of the collateral but, rather, "out of all property of the debtor" just as other creditors with a priority right. Probably the system is that each pledgeholder in case of bankruptcy has priority over creditors with a lower rank for an amount corresponding to the *estimated* value of these goods, estimation of the debtor's property being prescribed by Article 102 of the Law "On Bankruptcy". If this estimated value is lower than his full claim, the pledgeholder may participate for the difference in the dividing of the assets of the bankrupt estate as a creditor of the fifth rank. But this interpretation, if right, entails a problem. Estimation of the value of goods is a very uncertain matter and can lead to persistent disputes with an unpredictable outcome. Moreover, manipulation in this field (such as systematically underestimating the value of pledged goods) is relatively easy. When the goods, after their valuation, are sold—a process upon which the pledgeholder in this system has no influence—differences between the estimated value and the price obtained will in reality remain concealed if the pledged goods are sold together with others as one parcel, as probably will be the normal procedure. In this way, it is possible to favor even creditors with a lower rank than pledgeholders have.

Of course, strong social arguments can be advanced for the priority of the two categories of claims going before pledge, as long as a good social-insurance system is lacking in the Russian Federation. But until then, Russian practice will have to manage without the reliable financing instrument that the right of pledge was meant to be in the Dutch Code. This raises a fundamental problem that I can explain best by referring to a characteristic Dutch experience, illustrating the sometimes unexpected effect that rules of mandatory law might have in practice.

Mandatory Law and Its Limits

Dutch experience in the period before 1992 teaches us that practical objections to the rules on pledge form a strong incentive for creditors to try to replace this right by contracts giving them full title to the goods.

The Dutch Code of 1838 excluded the possibility of a right of pledge on movables in the possession of the debtor. Moreover, according to this code, a right of pledge on claims did not include the power to collect the money due out of these claims. A special power of attorney was possible, but this did not help when it was most needed: such a power ends in the case of bankruptcy of the debtor. This resulted in a growing tension between those strict mandatory rules and the needs of practice that were felt more and more acutely, as the interests of both debtors and creditors were involved, the former being frustrated in their need to obtain credit for a reasonable interest rate, the latter being unable to protect themselves against insolvency of their debtors and, consequently,

missing opportunities of safe investment. In this situation at the end of the 1920s, the Dutch courts without any base in legislation accepted the construction of a fiduciary transfer of property to the creditor in line with the *Sicherheitsübertragung* German style and, in fact, intended to circumvent the limitations of the right of pledge in the code. The result was a kind of informal right of pledge, giving the creditor fundamentally *more* rights than he could derive from the rules on pledge in the code even if the mandatory restrictions mentioned above would be abandoned. From the 1930s on, these fiduciary transactions became more and more important. It became in this way quite normal that all the important assets of an enterprise were, in fact, property of the financing bank. A drawback of this kind of right was the uncertainty of its exact limitations because the courts tended later on to apply by analogy at least some of the rules on pledge on fiduciary ownership. Even after 1992, this remained a rich source of lawsuits for the Supreme Court because cases originating from before this year kept coming in.

Under the new code, the situation has changed but less than it might seem at first sight. What the new code has tried to do is to replace fiduciary transfer by an extended right of pledge giving the creditor a position of approximately the same strength. Nevertheless, until the last moment, the opposition of practitioners against the new rules had been strong. Though the code contains in Article 3:84, para.3, a clear provision excluding fiduciary transfer old-style, the pressure from legal and commercial practice to restore as much as possible the old situation has continued. Pleas to repeal Article 3:84, para.3, are not rare, though this alone would not have the desired effect: the gist of this rule already results from the closed system of Dutch rights *in rem*.

The discussion on this subject has not yet ended, connected as it is with the desire to introduce into Dutch law the possibility of creating institutions inspired by the trust of the common law. The Supreme Court, however, has accepted as valid the construction of sale and leaseback: the debtor sells and transfers goods that are already his property to the lease company; in the same contract, he leases the goods back from this company, which enables him to continue the use of these goods. Economically, the price obtained functions as a loan that has to be paid back in installments in the form of rent. At the end of the lease, the debtor may be entitled to become owner again for a symbolic consideration. It is possible that the goods were just furnished to the debtor by a supplier who is paid by the lease company, as was the situation in the case judged by the Supreme Court. But the court has added that this kind of transaction is valid irrespective of the period that the debtor was already

owner of the goods and of his intentions concerning the use of the money he received by selling the goods to the lease company. This—to many eyes—approximates a fiduciary transfer. Some legal scholars have already ventured the opinion that this judgment opens the gate for many other fiduciary transactions as well.

I wonder what the situation would be in such cases under the Russian Code. Russian bank practice tends, as I am told, to make more and more use of this kind of transaction in any case, preferring it to pledge contracts. The bad turn that the Russian economy took in the 1998 crash will probably enforce this tendency. This is understandable. The Russian Code regulates the contract of purchase and sale, as well as the contract of lease, including financial lease (Arts.665-670), which is a secured transaction giving to the creditor the ownership of the goods. Moreover, the new Law "On Leasing", which entered into force on 28 October 1998, makes clear that leasing is seen as a very important instrument for financing. It is difficult to see, at first sight, on what grounds a contract of sale and leaseback could be judged invalid. Moreover, Article 329 of the code does not contain a closed system of means for securing obligations. In Russian law, a right of pledge is not a right *in rem*, which makes it impossible to rely here on the closed system of rights *in rem* of Article 216. This is different in Dutch law where pledge and mortgage are considered to be rights *in rem* and where this closed system is a major argument against fiduciary rights that do not fit into it.

On the other hand, this kind of contract can be seen as a disguised loan, the goods being used in fact as collateral. For that reason, other creditors, invoking Article 170 of the Russian Code, might claim that the whole thing is just a sham transaction to circumvent the mandatory rules on pledge and not a real transfer. The intent of the parties is not to give the transferee the rights of an owner but only to give him the right to take recourse on the goods in case the debtor fails to pay. In the strict system of the new Russian Code, such a transfer—serving exactly the purpose of a right of pledge without possession—seems at least questionable. Even if this is not thought to be decisive in case of a clear sale-and-leaseback construction as in the case judged by the Dutch Supreme Court, it probably is a real obstacle for a fiduciary transfer German-style in general. Essentially, *fiducia* is an instrument of unwritten law in the hands of the courts to break through written rules of law that are esteemed too strict for practice. In a new code, radical instruments like this should be superfluous. Hostility to constructions of this nature might also be deduced from Article 209(4), excluding trust ownership.

However, it seems uncertain what turn Russian law will take in the long run. What we see here is, in fact, an example of the limits that even a legislator cannot exceed. In the end, it is judicial practice that decides where the tension on restrictive rules of mandatory law becomes too strong to contain the rising power of economic reality.[23]

The Role of Suppletive Law

The general part of the law of obligations is, in both codes, mainly a matter of suppletive law. This is in accordance with the nature of this subject matter. Parties may be aware of at least the mainlines of specific contracts such as purchase and sale, lease, and insurance. But it is unrealistic to suppose that they have in mind the general rules of contract law applicable in case of complications in the performance of their contract and know exactly what behavior is required from them by the still more general rules on obligations. The Dutch Code, for instance, has rather detailed rules on different categories of nonperformance and the rights and obligations of each of the parties in those categories. In the Dutch view, those rules are not so much indications for those parties on how to behave as they are standards for the courts to judge their behavior after the event. That means that those provisions must be seen in the general light of the requirements of reasonableness and equity that might easily lead a court to corrections based on the circumstances of the case, as it is entitled to do by referring to Articles 6:2, para.2, and 6:248.

The Russian approach seems to be slightly different. The emphasis is on another function of suppletive law, which can be explained by the difference of background of both codes. Drafting a reliable contract requires sufficient skill in compiling detailed sets of terms and conditions and a thorough knowledge of the problems that should be solved therein. In a society in transition as the Russian one is at this moment, this kind of skill and expertise is obviously lacking in many places. For that reason, the Russian Code offers substitute solutions or guidelines for practice in the form of suppletive law, not only in the general part of the law of obligations but perhaps even more so in the part on specific contracts. Moreover, Article 427 opens the possibility to assist practice by publishing model terms and conditions for contracts that might be used by parties referring to them in their agreement, and that eventually might be applied as business usage even in cases where the agreement does not refer to them.

[23] A possible development of Russian fiduciary transactions that might be used to circumvent the limitations of the right of pledge is touched upon in other contributions in this volume as well; see, *e.g.*, P.B. Maggs.

In The Netherlands, this function, though not entirely absent, is much less obvious. I have already referred to the importance of general conditions in Dutch practice. It can be left to legal practitioners to draw up sophisticated agreements needed by entrepreneurs and to develop new varieties of contracts in the field of insurance, leasing, factoring, securitization, and so on. Moreover, the rules on protection against unreasonable and onerous general conditions make mandatory law concerning specific contracts, to a large extent, superfluous. In this light, it is understandable that the Russian Code has suppletive and mandatory rules on many well-known contracts on which the Dutch Code is silent:[24] power supply (Arts.539-548), sale of an enterprise (Arts. 559-566), lease of an enterprise (Arts.656-664), financial leasing (Arts.671-688), credit (Arts.819-823), factoring (Arts.824-833), bank deposit, bank account, and some other bank transactions (Arts.834-885), and franchising (Arts.1027-1040). Some of these new rules have been inspired by international conventions (financial lease, factoring). Other contracts evidently have been inserted because they were usual under the planned economy of the past and were expected to stay in use at least for some time after this, such as delivery of goods for public needs (Arts.525-534).

Dutch experience with legislation on specific contracts in the period 1930-1960 teaches us that even recent suppletive law may soon lose its interest because parties prefer to regulate their economic relations by using their model contracts and general conditions.[25] A similar development seems possible in Russia. This fading away of parts of a civil code in the course of time must be seen as a sign of a healthy civil-law system and might be expected from the activities of the reasonable practitioners who were introduced in my reflections under section heading "Style, General Standards, and Interpretation" above and who are necessary to give the code its true meaning.

[24] At this moment, the Dutch Code only contains chapters on purchase and sale, provision of services, mandate, commercial agency, contract of medical treatment, traveling contract, deposit, employment agreement, suretyship, and contract of settlement, all in Book 7. Moreover, a series of specific contracts in the field of transport law is placed in Book 8. Drafts on hire-purchase of immovables, insurance, gift, leasing, and work contract are in different stages of parliamentary procedure. Some other subjects, like partnership, are in course of preparation.

[25] Large parts of the suppletive law inserted in the commercial code by the Law of 14 June 1930, concerning transport by seagoing ships, were rarely applied in practice because the customary forms of bills of lading and charter parties practically always contained more or less diverging clauses. The same phenomenon was seen after the entry into force on 1 November 1952 of the legislation on transport by ship of inland navigation. Here, general conditions were prepared in advance precisely to prevent the new legislation from ever having any practical effect.

Summary

Summing up my findings, I might add that new civil codes are a bit like seventeenth century landscape paintings. They seem to show a harmonious whole and a coherent conception. But when you look closer and make a real study of them, you will see that they are composed in fact out of many heterogeneous elements, brought together by the painter in his workshop from sketches and other paintings made on very dissimilar occasions. Flowers blooming in different seasons might be seen next to each other. A bull might have the head of a bull that is one year old and the body of one that is at least five years old; its legs might be taken from a sketch of a cow. In this respect, the resemblance of both codes is striking, although the elements are dissimilar even where they seem to concur.

Civil Law According to Russian Legislation: Developments and Trends

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Present-day social relationships are regulated according to various branches of law. Such branches unite mutually connected sets of norms. Together, such norms guarantee a single legal regime for a specific branch of law, intended for a specific range of relationships assigned to it. The unity of the regime of a branch of law ultimately reflects the basic considerations expressing the subject of the branch.

The regulation of law according to branches, based on a single subject, allows us to solve many problems arising in the codification of legal norms and their application, and in the process of adopting new norms and the construction of entire institutions. The importance of regulating law according to branches (including especially such a complex branch as civil law) may be illustrated by the example of analogy, one of the basic instruments for filling gaps in legal regulation. This concerns both types of analogy: statutory analogy (*analogia legis*), as well as analogy of law (*analogia iuris*).

According to Article 6 of the 1994 Civil Code of the Russian Federation, statutory analogy is employed when—in relationships not directly regulated by civil legislation—legislation regulating similar relationships is applied, while at the same time an agreement between the parties and a custom of trade are absent. Statutory analogy, however, is only applicable to relationships that can be regarded as belonging to civil law (as defined by Art.2, paras.1 and 2)and which display the characteristics of the subject of civil law.

The unity of a branch of law is especially clear in the case of analogy of law. In this connection an innovation contained in the present Civil Code is of singular importance. Previously, the rule concerning analogy of law was not to be found in the Civil Code, but in the Code of Civil Procedure (in this case in Art.10, 1964 Code of Civil Procedure). It directed the court to base its judgment "on the general principles and sense of Soviet legislation", when a rule regulating similar relationships could not be found. This could mean that basic principles of the entire domestic legal system could be applicable to relationships not regulated by concrete civil law norms, irrespective of the fact to which branch of law the relationship in

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question belonged.[1] In this question, the present Civil Code occupies a different position. Article 6 clearly provides:

> "In case of impossibility of use of analogy of statute, the rights and obligations of parties shall be determined proceeding from the general principles and sense of *civil legislation* [...]." (italics added, M.B.)[2]

The definition of an object of civil law may be formulated, in principle, on the basis of the norms adopted on its account. Such norms can be found especially in the general part of the Civil Code, which constitutes the basic feature of the pandectist system. However, even in countries which have adopted civil codes embracing the pandectist system, such a possibility is by no means always utilized.[3] In this respect the doctrinal approaches to the definition of the branch of law concerned, based on an analysis of its most important norms, acquire great significance. This is illustrated by pre-Revolutionary civil law literature.

As is well known, there was no general civil law codification in Russia at that time. The draft civil code (*Grazhdanskoe Ulozhenie*)—work on which had started already around the end of the nineteenth century—was never adopted, notwithstanding its undoubted merits. For this reason already, the legislation of that time failed to provide one with a direct answer to the question concerning the object of civil law—although there was a clear need for such an answer, even outside the framework of substantive law. Article 1 of the 1864 Russian Statute on Civil Procedure (*Ustav Grazhdanskogo Sudoproizvodstva*), in force at that time, provided that "any dispute concerning civil law is subject to adjudication by a court". On the basis of this provision, for instance, the Senate ruled that a teacher's claim against a local government for payment of his wages and the claim of an official against the city administration (his former place of work) for restitution of payments made by him to the pension fund, on account of his

1 To some extent, the 1964 Code had inherited the rule in question from the first Code of Civil Procedure of 1923. The latter Code did not contain a reference to statutory analogy and referred to analogy of law only obliquely in the following words: "If there is no legislation or regulation, the court, in reaching its decision, will be guided by the general principles of Soviet legislation and the general policies of the Government of the Workers and Peasants" (Art.4). Leaving aside the obvious precedence of politics over law, the latter rule—in a similar fashion to the rule contained in the 1964 Code—had no relevance, in filling gaps in the law, to the branch of law to which the relationship in question belonged.

2 Similar norms may be found in the new civil codes of Kazakhstan (Art.5), Uzbekistan (Art.5), and Kyrgyzstan (Art.5). Only the Civil Code of Georgia (Art.5) contains a reference to the "general principles of law".

3 All three civil codes of Russia (of 1922, 1964 and 1994) have adopted the pandectist system, with a separate general part. The civil codes of the countries of the CIS, adopted during the last decade, as well as the Model Civil Code of the CIS, all have a separate general part.

dismissal, were not to be dealt with by a court but through administrative proceedings. The Senate referred in these cases to the special position of the claimants, to the fact that a local government was a representative of public power (in the first case), and to the fact that the pension law was an act of public law (in the second case).[4] Such a practice was widespread.[5]

Ulpian's division of law into private and public served as the general principle in the civil law doctrine of pre-Revolutionary Russia, which took the specific branch of law as its starting-point. At the same time, there were significant differences in the views of various authors concerning the borderlines between these branches and, accordingly, between the objects of each of them.

First of all, one group only considered material (financial) relationships as the object of civil law. This meant that immaterial relationships remained outside the framework of civil law. This idea was expressed in particular in the works of K.D. Kavelin, including the study published in 1864 under the unambiguous title *Chto est' grazhdanskoe pravo i gde ego predely?* (What Is Civil Law and Where Are its Borders?). One of its basic propositions was that in civil law "all indicated legal relationships have as their object material, financial values in the form of physical things, rights and services".

It is obvious that—in a logical development of this point of view—immaterial relationships, especially family relationships, imbued with personal elements, would find themselves outside civil law.[6] Similar views were developed, in particular by Professor Meier, who came to the conclusion that "the doctrine of civil law is to be determined by the doctrine concerning the law of things [*imushchestvennoe pravo*]". Of special interest in this connection are his views on the nature of family law. Meier considered that "the institutions of family relations are alien to the sphere of civil law".[7] Accordingly, he proposed to divide these relationships among canon law (which dealt mainly with the conditions of concluding and

4 Both decisions were critically discussed by G.F. Shershenevich in his *Uchebnik rossiiskogo grazhdanskogo prava*, 10th ed., Moscow 1912, 2-3.

5 For an extensive list of such decisions, see A.M. Guliaev, *Russkoe grazhdanskoe pravo*, St. Petersburg 1913, 2.

6 A special position was occupied by K.I. Malyshev. Acknowledging that material relationships constituted the only object of civil law, he nevertheless gave a very broad content to this concept. In the same vein he proposed that "this concept covers any interest, capable of being expressed objectively and of being an object of private law, and it therefore also embraces in its wide sense personal civil relationships and therefore the entire field of possible private legal relationships"; K.I. Malyshev, *Kurs obshchego grazhdanskogo prava Rossii*, St. Petersburg 1878, 2.

7 D.I. Meier, *Russkoe grazhdanskoe pravo*, St. Petersburg 1897, 2.

dissolving marriages) and public ["state"] law. The latter was supposed to regulate questions regarding guardianship and curatorship, as well as relations between parents and children. Observing that "the legal aspect of the relations between parents and children is expressed mainly in parental power", Meier considered that "it would be appropriate to refer it [parental power] to *state law* [*gosudarstvennoe pravo*]" (italics added, M.B.).[8]

The most widespread point of view remained nevertheless the position of those who considered it impossible to limit the object of civil law to mere material relationships. This implied that it was considered inevitable to include personal relationships in the object of civil law, along with material (property, *imushchestvennye*) relationships.[9] In this way any doubts concerning the possibility of civil law also embracing family relationships were removed. Moreover, one did not feel prevented from regarding personal relationships of all different kinds as civil relationships.

The views of Professor Pokrovskii may serve as an example.[10] He proposed to start from the general tendency in the history of mankind towards an increasing complexity of human existence. He pointed out that as the human personality developed, his interests became more complex, and this in turn led to the need to have the scope of civil law embrace also the right to one's name, to the protection of one's private life, and to the protection of the individual's existence against invasion by other persons. Pokrovskii regarded the maximum protection of human interests as the purpose of civil law and, following Professor Shershenevich, he therefore specifically included the so-called exclusive rights among the other immaterial rights covered by civil law: rights which have as their object the intellectual ownership arising especially in connection with "the creation of a work of literature, the painting of an artist, or a scientific of technical discovery". On a wider plane, this was all connected with the affirmative answer to a question to which Roman law replied negatively: the possibility of the existence in civil law of immaterial (non-financial) obligations. Pokrovskii of course approved of the first step taken in this direction by Article 28 of the Swiss Civil Code, which specifically protected personal rights. A similar idea had been inserted from the very beginning in the draft Civil Code of Russia. Already its very first article, as observed above, was supposed to provide that "everybody is considered to be free to have and to acquire civil law rights, personal as well as material, from the day he is

8 *Ibidem*.

9 *E.g.*, K.N. Annenkov, *Sistema russkogo grazhdanskogo prava*, St. Petersburg 1899, 31 ff.; G.F. Shershenevich, *Uchebnik rossiiskogo grazhdanskogo prava*, 10th ed., Moscow 1912, 7 ff.

10 What we have in mind is certain statements to be found in his work *Osnovnye problemy grazhdanskogo prava*, Petrograd 1917, 104.

born". The draft included at the same time family law as an inherent part of the code, and provided specifically for copyright and patent law.

Once the separate existence of public and private law had been recognized, it became necessary to distinguish between the two. In this respect, different views were put forward. Two of them in particular were discussed by Shershenevich. He observed that some based the distinction on "substantive" elements, while others opted for something quite different, "procedural" elements. The former took the difference in interests as the starting-point, juxtaposing private and public interests, while for the latter the criterion was not what was being defended, but how such defense was effected: in public law the initiative to defend the protected interests should belong to the state and should be exercised independently from, and possibly even against, the interests of the party affected. In private law the initiative would unquestionably belong to the party affected.

Shershenevich himself supported the former position. In the end he therefore reached the conclusion that:

> "civil law consists of the totality of legal norms which determine private relationships between individual members of society. The scope of civil law is therefore determined by two factors: (1) private persons, as subjects of relationships, and (2) private interest, as the contents of the relationships."[11]

The first Russian Civil Code (1922) was adopted under, and operated in, conditions in which Ulpian's idea of the existence of two different branches of law—public and private—had been rejected at the highest level and in the most resolute way. According to Lenin's well-known statement: "We do not recognize anything as *private*, for us anything in the field of economics belongs to *public law*, and not to private law."

[11] *Ibidem*, 5.

The views of Malyshev were close to those of Shershenevich. Malyshev considered the difference between the two branches to be in their objects: for public law "this is the organization and administration of the state, the relationships between the state and its subjects, as well as foreign relations [...] while civil law is concerned with personal/property competences" (K.I. Malyshev, *Kurs obshchego grazhdanskogo prava Rossii*, St. Petersburg 1878, 1-8). The same goes for the views of Vas'kovskii, who held that civil or private law in an objective sense was to be defined as "the totality of norms which determine the mutual relationships of people in their private lives, and in a subjective sense—the measure of power and liberty granted to individual persons in this sphere" (E.A. Vas'kovskii, *Uchebnik grazhdanskogo prava*, part 1, St. Petersburg, 1894, 2).

One of the few opponents of a division of law into public and private, based on the interest criterion, was Gambarov. He argued that: "not only public [*publichnye*], but also private interest are public [*obshchie*]. The difference between the two branches is only in the degree to which the public interest is expressed." The distinguishing criterion was therefore quantitative, rather than qualitative (Iu.S. Gambarov, *Kurs grazhdanskogo prava, chast' obshchaia*, St. Petersburg 1912, 40-47).

The Civil Code itself did not express itself explicitly on the matter of the object of civil law. The Code in fact reiterated the first article of the (prerevolutionary) Statute on Civil Procedure (quoted above); its Article 2 provided: "Disputes concerning civil law are resolved by the courts." To this was only added that "relationships concerning land, relationships arising from the hire of labor and family relationships will be regulated by a separate code of law" (Art.3.). The latter norm gave rise to several diverging interpretations. In the dominant view in legal literature it was regarded as a direct indication of the recognition of land law, labor law and family law as independent branches of law, similar to civil law; only much later, in respect of family law, did doubts arise which led some authors to the firm conviction that family law was actually a part of civil law.[12]

The unconditional rejection of a distinction between public and private law resulted in the necessity of using not only the object, but also the method of regulation as a means to individualize civil law and other branches of law. The combination of these two independent criteria served as the starting-point for separating, on the one hand, civil law, land law, and family law, and, on the other, constitutional, administrative, financial, criminal and procedural (criminal as well as civil) law,

The second Russian Civil Code (1964) was preceded by another statute: the 1961 Principles (*Osnovy*) of Civil Legislation of the USSR and the Union Republics. According to the Constitution of the USSR, the Civil Code had to conform completely to these Principles. Nevertheless, in the question considered here—concerning the object of civil law—a significant difference arose between the Principles and the Civil Code. The Principles (Arts.1 and 2) defined the contents and the limits of civil law as such, while the Code combined the provisions concerned in a state-

[12] *E.g.*, S.N. Bratus', *Sovetskoe grazhdanskoe pravo* Part 1, Moscow 1938, 8-9; Iu.K. Tolstoi, "O teoreticheskikh osnovakh kodifikatsii grazhdanskogo zakonodatel'stva", *Pravovedenie* 1957 No.1, 46; S.I. Landkof, *Osnovi tsyvil'nogo prava*, Kiev 1948, 5 ff.

The authors (D.M. Genkin, I.B. Novitskii and N.V. Rabinovich) of the voluminous *Istoriia sovetskogo grazhdanskogo prava (1917-1947)*, Moscow 1947, included the history of family law, without any attempt to regard it as something separate, together with the history of the law of property, contractual obligations and inheritance law (390 ff.).

The views of Professor Ioffe showed some evolution over the years. Initially he considered family law as a part of civil law, but only in the sense of an educational discipline (*cf.* O.S. Ioffe, *Sovetskoe grazhdanskoe pravo*, Leningrad 1957, 15). Later on, he argued in favor of the necessity of including family law as a special subdivision in civil law (*cf.* especially O.S. Ioffe, *Sovetskoe grazhdanskoe pravo*, Moscow 1967, 38).

There were, however, many opponents of the idea, in other words—advocates of the independence of family law, among them especially V.A. Riasentsev, (ed.) (*Sovetskoe semeinoe pravo*, Moscow 1982, 11 ff.), G.K. Matveev (*Semeinoe pravo*, Moscow 1985, 34), and V.A. Tarkhov (*Sovetskoe grazhdanskoe pravo*, Saratov 1991, 15 ff.).

ment of the contents and action radius of the Code itself, neglecting the fact that for all its importance the Code is and will always remain a part, albeit the basic part, of civil legislation (civil law).

With regard to the object of civil law, the Principles distinguished between four different elements (this applied also, with some reservations, to the Civil Code). First of all, three kinds of regulations were recognized as being regulated by civil legislation (the Civil Code): property relationships, non-property personal relationships connected with them, and also other non-property personal relationships. With regard to the latter, a reservation was made: such relationships were regulated by civil law only where specifically provided by law (Art.1, para.2, Principles; Art.1, RF Civil Code). Moreover, in the Principles and the Civil Code an explicit statement appeared for the first time that the rules of civil law (the Civil Code) did not apply to property relationships based on the administrative subordination of one party to another, or to fiscal and budgetary relationships (Art.2, para.3, RF Civil Code).

Finally, both statutes repeated the statement already contained in the RF Civil Code of 1922 to the effect that family, labor and land relationships were regulated by resp. family, labor and land legislation (Art.2, para.8, RF Civil Code). This legal regime was extended in 1987 to mining, water and forestry relationships, which were to be regulated by special legislation for the three subjects concerned.

The norms mentioned were of no particular influence on the accepted system of branches of law. After the adoption of the Principles in 1961 and the subsequent adoption of the Civil Code in 1964, the most generally accepted view among the authors was that family, labor and land law (and, after 1987, also environmental law) existed as separate branches of law, parallel to civil law, and alongside state, financial and administrative law, considered as part of public law in those days. The impossibility of applying the norms of civil law was explicitly restricted to property relationships based on the administrative subordination of one party to another, as well as fiscal and budgetary relationships. This allowed the conclusion, through an *a contrario* argument, that the supplementary application of the norms of civil law to, especially, property relationships that were to be regarded as belonging to family, labour or land law would be permissible even without a special statutory indication.

Numerous discussions arose concerning the object of civil law in connection with amendments to the Civil Code. One such discussion concerned the inclusion of personal non-property relationships among the objects of civil law. In this case, Professor Ioffe argued, civil law would be limited to the defense of personal non-property rights, inasmuch as the

corresponding relationships could not be an object of regulation by civil law. The explanation was that such relationships were either regulated by other branches of law (*e.g.*, the manner of acquiring and changing a name would be regulated by norms of administrative law), or (as, for instance, in matters of honor and dignity) by their very nature admitted only legal protection but lacked the possibility of legal regulation.[13]

Further steps in the codification of civil law were connected with the drafting of the Principles of Civil Legislation of 1991 (it is to be noted that the Principles remained in force until they were superseded by the new 1994 RF Civil Code). The Principles of 1991 took over the formula from the 1961 Principles and the 1964 RSFSR Civil Code that:

> "The civil legislation does not apply to property relationships based on the administrative or other public law subordination of one party to another, including fiscal and other budgetary relationships [...]."

At the same time, Article 1, para.3 provided:

> "Civil law applies to family and labor relationships and to relationships concerning the utilization of natural resources and the protection of the environment, possessing the characteristics indicated in point 1 of this provision, where these relationships are not regulated by respectively family or labor legislation, or the legislation concerning the utilization of natural resources and the protection of the environment."

Accordingly, the subsidiary application of civil law norms became universal with only this difference that in some cases subsidiary application required a direct statutory indication, while in other cases it was sufficient for the subsidiary application of the norms of the Civil Code if there were gaps in the legislation.

[13] See, in particular, O.S. Ioffe, *Sovetskoe grazhdanskoe pravo*, Leningrad 1967, 12 and, by the same author, "Okhrana chesti i dostoinstva grazhdan", *Sovetskoe gosudarstvo i pravo* 1962 No.7, 62. The views of Tarkhov were virtually the same. Arguing that the regulation of non-property relationship, not connected with property relationships, would be a matter for constitutional (state) law, he also pointed out that the Civil Code merely protects personal non-property rights (V.A. Tarkhov, *Poniatie grazhdanskogo prava*, Saratov 1987, 70 ff.). The same views were expounded by him in the textbook *Sovetskoe grazhdanskoe pravo*, Saratov, 1991, 8. Agarkov also used the concept of "defense" with reference to certain non-property rights which "although strictly speaking personal rights, were protected as rights to certain [immaterial] goods [*blaga*] against anything and anyone (so-called absolute rights)" (M.M. Agarkov, "Predmet i sistema sovetskogo grazhdanskogo prava", *Sovestkoe gosudarstvo i pravo* 1940 No.8-9, 66).

Another position , also widely developed in the legal literature, was advocated by Fleishits and Makovskii ("Teoreticheskie voprosy kodifikatsii sovetskogeo grazhdanskogo zakonodatel'stva", *Sovetskoe gosudarstvo i pravo* 1963 No.1, 87), by Chigir (*Grazhdanskoe pravo BSSR*, Minsk 1975, 8) and others. These authors held that civil law not only protected but, also, regulated personal non-property relationships.

Another important innovation of the 1991 Principles was the statement—made for the first time—that property relationships regulated by civil law were characterized as based on equality (Art.1, para.1). Also, there was a change in the presumption concerning personal non-property relationships not connected with property relationships: according to the 1961 Principles and, in their wake, the 1964 Civil Code, civil law only extended to such relationships in cases where this was provided by law (Art.1, Principles; Art.1, RF Civil Code); according to the new Principles, such relationships were also to be regulated by civil law in so far as the law did not provide otherwise or it was not required by the nature of the personal non-property relationship concerned.

Property relationships based on administrative power and subordination remained outside the scope of civil law; fiscal and budgetary legal relationships were mentioned only as examples of such relationships.

Finally, the following was of great importance: civil law could be extended to certain relationships based on administrative power and subordination. This was proclaimed for the first time in the Principles (and the Civil Code), although the legislator had practiced this extension before. Article 407 of the 1922 Civil Code did, in fact, refer to an obligation to compensate damages for harm caused by administrative authorities—at least if this had been provided specifically by law. Such legislation was, for instance, the decree of the Central Executive Committee and the Council of People's Commissars of the RSFSR of 28 March 1927, which constituted a comprehensive law on requisition and confiscation,[14] or the decree of the same bodies of 16 January 1928 "On Liability for Losses caused by Intervention of State Organs in the Activities of Co-Operative Organizations".[15] But already in Article 446 of the 1964 Civil Code, at least with regard to harm caused to citizens by administrative officials, such liability—within the framework of civil law—was presumed and consequently arose always, except in cases especially provided by law.

The 1994 Russian Civil Code was drafted and adopted in a period in which ideological limitations were definitively laid aside, including those concerning the division of law into public and private spheres. It is no coincidence that, precisely in this period, there was a clear renaissance of the concept of private law. A significant role in this process was played by Professor Alekseev. Apart from other things, he was closely involved in the setting up of the Research Center for Private Law, which headed the preparatory work on the new Civil Code of the Russian Federation.

14 *Sobranie uzakonenii RSFSR* 1927 No.38 item 248.

15 *Sobranie uzakonenii RSFSR* 1928 No.11 item 101.

Under these conditions, of course, the need arose to solve numerous questions of civil law. One of the most prominent among these was the matter of the object of civil law.

The present Code regulates the question of the operation of civil law in greater detail. Some of the norms in this respect concern the definition of the specific features of relationships to be regulated by civil law, others the method itself of regulating civil relationships.

Property relationships and non-property relationships connected with them are indicated as the object of civil law, as was done in most of the previous acts of codification in the field of civil law. Such non-property relationships are characterized by the fact that, although property is not their object, the person entitled to the object enjoys certain rights of a proprietary character. The author of a work, for instance, is entitled to a fee.

The present Civil Code for the first time mentions specifically relationships in which entrepreneurs take part, frequently making special provision for such relationships. It is of fundamental importance that the Code recognizes relationships in which entrepreneurs take part as being an object of regulation by civil law. This underlines the legislative rejection of the concept of an "economic" (*khoziaistvennoe*) (or "trade" [*torgovoe*] or "entrepreneurial" [*predprinimatel'skoe*]) law, distinct from civil law.

Of primary significance among the norms defining the scope of relationships subject to regulation by civil law is Article 2, para. 1 of the RF Civil Code. On the one hand, this provision identifies the basic object of civil law regulation: property relationships and non-property relationships connected with them. On the other hand, with a view toward the possibility of regulating such relationships by branches of law belonging to public law, the Code mentions three characteristics of relationships subject to regulation by civil law: equality of the parties, autonomy of will, and proprietary independence (*imushchestvennaia samostoiatel'nost'*).

In our view, the relationships regulated by civil law, in particular property relationships, are indeed based on the principles of equality, autonomy of will, and proprietary independence; but, nevertheless, only one of these three characteristics is to be regarded as essential—equality of the parties. As to independence, any kind of relationship can only exist on the basis of the independence of the parties, and in the case of property relationships—proprietary independence. In this regard, proprietary independence is no less essential in a property relationship based on administrative power and subordination, as for instance in tax law, as in a civil law property relationship. As to the second characteristic—autonomy

of will, this is secondary in any event, being a corollary of equality of the parties.

Numerous discussions on the question of the relationship between public and private law also lead to the conclusion that the many other criteria put forward at different times for distinguishing between private (civil) and public law also fail for one reason or another. This concerns in particular such criteria as "the subjects of the legal relationships" (it would be sufficient to point out that, for instance, by virtue of Arts.124 ff., RF Civil Code, the Russian Federation, the Subjects of the Russian Federation and municipal entities may participate in civil law relationships along with natural and legal persons) or "the method of protection". With regard to the latter, one could refer to the fact that general courts and *arbitrazh* courts have jurisdiction in various public law disputes, among them in particular cases concerning determination of the invalidity of non-normative acts (and in special instances also of normative acts) of a state organ or an organ of local self-government (Art.13, RF Civil Code) or concerning compensation for losses caused by state organs or organs of local self-government to citizens or legal persons (Art.16, RF Civil Code). All this confirms once again that there is actually only a single distinguishing feature—the character of the connection between the participants of the legal relationship, based on power and subordination in a public law relationship, and on equality in a private law relationship.

One of the novelties of the Civil Code is the norm devoted to inalienable human rights and freedoms and to other immaterial goods. According to Article 2, para.2, they are protected by civil legislation, unless their nature requires another approach. This formula is in line with para.1 of the same article, inasmuch as the property relationships and the non-property relationships connected with them could also be characterized as being regulated by civil law, unless their nature requires another approach. It would, therefore, be a good idea to include a similar formula in future in Article 2, para.1.[16]

Another matter is the separate identification of immaterial goods (*neimushchestvennye blaga*) as such, to be protected by civil law, although their regulation is considered as being outside the scope of civil law. In this controversial question the opinion of one group of authors has prevailed. The solution adopted raises some doubts however. In our view, the

[16] In this context, in our view, the wording of Art.2 of the Uzbek Civil Code is to be recommended, which states that: "personal non-property relationships and personal relationships not connected with property relationships are regulated by civil legislation, unless otherwise provided by legislation or it *follows from the nature of these relationships*." (italics added, M.B.)

position of the opponents of this opinion appears to be better founded, in particular as expressed by Professor Bratus', who argued that:

> "the special treatment of these relationships as an object of regulation [...] is undesirable, because the relationship concerning the protection of honor, copyright, or the name is closely intertwined with property relationships."[17]

The obligation to pay damages for harm caused to a business reputation, and even more convincingly, financial compensation of moral damage as a means to protect the most diverse immaterial goods, may be regarded as a manifestation of this connection.

As a result, one can come to the conclusion, which follows from the basic provisions of the Civil Code in our view, that civil law regulates property—as well as non-property—relationships. A dichotomy exists therefore, and this means that such a characterization of the relationships regulated by civil law cannot serve the individualization of its object, because relationships can only be either property relationships or non-property relationships. It would therefore be better to consider the structural organization of these relationships (as explained above: "equality" or "power and subordination") as the qualifying element of the branch of law concerned. Consequently, there is no sense any longer in separating the object and the method of civil law in defining civil law, because—in the present version of the object of civil law—everything is reduced to a single method.

The innovations of the Code also involve the appearance of new norms and the exclusion of old ones which did not agree with the idea of civil law as the universal heir of private law. In this respect it is significant that the Civil Code for the first time excluded the reference to family, labor and land relationships, which, as noted above, had given rise to the view that these relationships were to be considered as the object of branches of law not belonging to civil law (although the contents of the relevant provisions were in fact quite different; *cf.* Art.3, 1922 Civil Code; Art.2, 1964 Civil Code; and Art.3, 1991 Principles of Civil Legislation).

Before the adoption of the 1994 Civil Code, the argument in favor of the independence of these branches of law rested ultimately on the standards developed in connection with each of them. Once the Code had been adopted, these standards became invalid, if only because they were ideological, rather than technically-legal. In the end much was determined by juxtaposing the law of "the socialist system" to the law of "the capitalist system".

The impossibility of including family law within civil law, for instance, was traditionally explained, all through the post-revolutionary era, by

[17] S.N. Bratus', *Predmet i sistema sovetskogo grazhdanskogo prava*, Moscow 1963, 78.

pointing to the differences with "capitalist society", where property relationships were the foundation of the family and marriage was essentially an ordinary transaction. In Soviet family law, on the contrary, in relationships resulting from marriage, family connections, adoption, or the assumption of responsibility for the care of children, the personal aspect was decisive and the property aspect of only secondary importance.

In land law, decisive significance was given to the fact that the state as such was considered, and actually was, the only and exclusive owner of land. Land lost any financial value; the balance sheets of enterprises indicated only the size of the land in hectares, not its value—it did not have any. Land had in fact been withdrawn from circulation. The transfer of land plots for use by citizens and legal persons was effected exclusively on the basis of unilateral acts of administrative agencies. In the discussion concerning the independence of land law as a separate branch of law, the proponents of this idea stood against those who considered land law part of another branch of law, not civil law but, rather, administrative law based on the principles of public power and subordination.

The independence of labor law was at times defended by reference to the single organizational will, the necessity of authority, and the strict discipline of the labor process, constituting the basis of labor law. At the same time, the property aspect of the relationships concerned was connected with what was called "the socialist principle of distribution according to labor".

Nowadays, such arguments in favor of the necessity of the independence of the relationships and norms concerned, supplemented occasionally by similar considerations, have lost their meaning.[18] Various developments in present-day economics and law confirm the tendency towards the merger of land law, family law and labor law with civil law, and the emergence of a single body of private (civil) law. The transformation of family law, land law and labor law into institutions of civil law in no way excludes the importance of their special regulation, including at least the need for two separate codes of law (family and labor).[19] An analogous situation occurs in transportation, where the existence of separate transportation regulations and codes does not raise doubts about the civil law nature of the basic legal institution in this field, the contract of carriage. In such cases the special rules take precedence over, and supplement the general norms of civil law.

18 This has been demonstrated successfully, in our view, by Egorov, referring to all three types of relationships; *cf.* N.D. Egorov, *Grazhdanskoe pravo, chast' 1*, St. Petersburg 1996, 13 ff.

19 Among the new civil codes of the CIS, the Civil Code of Georgia includes family law.

Uniting the branches of law mentioned above with civil law appears to have at least two consequences. *First of all*, any remaining doubts evaporate concerning the supplementary applicability of civil law norms to family, labor or land relationships. *Secondly*, the absorption of these branches of law, formerly considered as independent, by the single system of civil law will have an effect on the special regulation of these branches.

Family law may serve as our first example. It is of considerable importance that the new civil and family codes now contain a number of provisions clearly directed towards making the relationships concerned more similar. The new Civil Code, for instance, regulates in detail questions concerning guardianship and curatorship and registration of civil status acts. It includes norms concerning the joint ownership of spouses, regarded as a special form of ownership. At the same time the institute of the marriage contract made its first appearance in the Family Code (Ch.8). This Code now contains special norms which provide for the applicability of the norms of civil law to those relationships between family members which have not been regulated by family law (Art.4). Of special interest is Article 5 of the Family Code which allows the application of civil legislation to family relationships, not only on the basis of statutory analogy, but also on the basis of the analogy of law. This provision of the Family Code explicitly allows the application, in relevant cases, of the "general concepts and principles", not only of family law, but equally also of civil law. And, as pointed out above, the application of the norms of a particular branch of law on the basis of the analogy of law presupposes (as expressly provided by Art.6, RF Civil Code) that the relationship concerned belongs to that particular branch.[20]

Labor law may serve as a second example. The Law of the Russian Federation of 17 March 1997, devoted to the amendment of certain provisions of the Labor Code,[21] extended the effect of certain rules—which until then had been restricted to civil law—to labor relationships. The Law strengthened the negative effect for the employer of one of the most serious violations of labor law (dismissal without legal foundation or in violation of the established procedure, or unlawful transfer to other work) by making him liable to compensate the employee not only for material, but also for immaterial (moral) harm. Simultaneously, other amendments were made in order to extend provisions embodying the freedom of contract to labor relationships. At the same time, certain exceptions to this principle—typical for civil law—have been made which are directed towards protecting the employee who is generally deemed to be the weaker party in the contract.

[20] *Sobranie zakonodatel'stva Rossiiskoi Federatsii* 1995 No.1 item 16.

[21] *Sobranie zakonodatel'stva Rossiiskoi Federatsii* 1997 No.12 item 1382.

It should be stressed that the inclusion of labor law into civil law presupposes the unconditional retention and development of employees' guarantees, provided by domestic and international acts. At the same time, purely civil law means of protection may be extended to labor relationships in this way. In Russia, for instance, long delays in payments of wages are not exceptional. It would therefore be appropriate to consider the possibility of claiming from the employer not only the sum of unpaid wages, but also the utilization of the various means of securing obligations, as provided by the arsenal of civil law, including, in particular, the extraction of a fixed penalty and of interest, as provided for violations of financial obligations by Article 395 of the Civil Code.

One of the most frequently used arguments against the inclusion of labor law in civil law amounts to the following: the risk of accidental non-performance of the result of an employment agreement which used to lie with the entrepreneur, would be transferred to the employee. In the system of the new Civil Code, however, this argument is fallacious. A new type of contract of hire, the hire of services (*locatio-conductio operarum*), has been added now to the two types which were known in previous legislation: the hire of things (*locatio-conductio rei*, Russ. *arenda*) and the hire of a work (*locatio-conductio operis*, Russ. *podriad*). Chapter 39 of the Civil Code is devoted to this type of contract, the hire (provision) of services for payment (*vozmezdnoe okazanie uslug*). An employment agreement should be regarded as a variant of this kind of contract, which resolves the issue of the risk of accidental failure to achieve the desired result.

Unlike the new Land Code, the new 2002 Labor Code fails to contain any references to civil law legislation.[22] However, there are a number of articles in this new version of the Code which govern an employment agreement as well as the consequences of causing both material as well as moral damages; these are quite similar to specific articles in the Civil Code which deal with contracts and damages. The goal here of is to provide for the fullest possible protection of both the interests of the employee and employer.

Finally, there is land law. Doubts concerning the inclusion of land law in civil law should be dispelled because the Civil Code now includes a Chapter 17, "The right of ownership of land and other rights in things in land", which reflects the needs arising from the ever increasing involvement of land in civil law transactions. The 2001 Land Code[23] contains several provisions which call for the application (subsidiary) of "civil legislation".[24]

22 *Sobranie zakonodatel'stva Rossiiskoi Federatsii* 2002 No.28 item 2791.

23 *Sobranie zakonodatel'stva Rossiiskoi Federatsii* 2001 No.44 item 4147.

24 Arts.3, 17, 22 (twice), 25, 26, 27, 44, 52, 53, and 62.

In addition, an express reference has been included in Chapter 38 on the application, in appropriate cases (here, reference is to "the procedure for organizing and conducting bids [competitions and auctions by the sale of land plots or for such land plots for the right to conclude such land plots"], of the "Civil Code and Land Code"). It is worth remarking here that the legislator deemed it necessary to continue, in part, the policy of converging these two codes. Thus in 2007, a law was promulgated "On Amending Articles of the Land Code".[25] The original version of this article ("losses, inflicted upon a citizen or a legal person as a result of the promulgation of an act by an executive agency of state power, which is not in accordance with the law and violates the rights to land and interests of a citizen or legal person which are protected by law, is subject to indemnification by the executive agency of state power which has promulgated such act") has been amended with the words: "in accordance with civil law legislation."

All this, in connection with other innovations of the Civil Code and other acts adopted parallel thereto, create the necessary conditions to unite the traditional branches of law—with the aid of the new Civil Code—into the basic regulator of civil law (private law) relationships, belonging to a single branch of law.

25 *Sobranie zakonodatel'stva Rossiiskoi Federatsii* 2007 No.10 item 1142.

Branches of Law under the Russian Civil Code (with Special Attention to Labor Law)

Ger P. van den Berg (†)

Branches of Law

The most common definition of a branch of law in Russia is that it is the totality of rules regulating a certain kind of social relationship. Each branch unites the legal rules regulating one particular type of social relationship. According to their content, these social relationships may be financial, ecological, land or labor, etc.[1] This definition—going back to discussions in the USSR in the 1930s—puts the main accent on these relationships that are reflected, consolidated, and protected by the law. Some branches distinguish themselves from the others because the method of regulation stands out as central. Other fields of law may be called "complex branches" and use parts of other branches.[2]

In many present-day continental (civil law) legal systems, the idea is that a strict distinction between public and private law does not exist—or, in any event, is rather marginal. The state must have certain special powers *e.g.*, in the field of defense or for the maintenance of public order; but, in principle, the state is an actor within society and does not stand above society. The most important aspect of the distinction is that in the field of public law, the requirement of the *Vorrang des Gesetzes* is fairly strict: the state does not have any power *vis-à-vis* private persons (save for certain, exceptional situations) unless its powers are based on a law, describing the conditions under which this power may be used. As far as the citizen is concerned, a principal difference between his/her legal possibilities—such as going to court—in public or private law no longer exists (although even in such documents as the European Convention on Human Rights, a certain distinction can be seen between judicial protection in public and private law matters [Art.6, ECHR] and, also, between the legal protection accorded natural persons and legal persons).

The Russian Constitutional Court has drawn a very strict distinction between public law and private law in its *Fiscal Police* ruling (17 December 1996).[3] It was called upon to review the constitutionality of the existing

1 A.B. Vengerov, *Teoriia gosudarstva i prava. Teoriia prava*, Vol.1, Moscow 1996, 163; A.I. Bobylev, "Sovremennoe tolkovanie sistemy prava i sistemy zakonodatel'stva", *Gosudarstva i prava* 1998 No.2, 24-25.

2 E.A. Kirimova, "Sistema sovremennogo rossiiskogo prava: Poniatie i problemy razvitiia", *Pravovedenie* 1997 No.4, 166-167.

3 *Rossiiskaia gazeta* 26 December 1996; *Sobranie zakonodatel'stva Rossiiskoi Federatsii*

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procedure for the summary collection (*v besspornom poriadke*) by the tax service and the tax police of taxes from private, commercial legal persons. Tax law is a part of public law; generally, the state is free to establish rules for the collection of taxes. Thus, it may provide that the tax authorities may collect the taxes from the bank account of the taxpayer—even where the taxpayer objects thereto.[4] However, this is as far as commercial legal persons are concerned because they have separated or distinct (*obosoblennye*) assets, destined only for their commercial activities. They may not dispose freely of their property, because they forfeit a part of the money to the state in the form of taxes. In this respect, these persons enjoy a certain legal protection only if this is provided for in the law, but this does not affect their right to judicial protection: they always can approach a court for review of the legality of acts of the tax authorities (Art.46, RF Constitution). As far as natural persons—who are individual entrepreneurs—are concerned, they do not have separated assets for their commercial activities; rather, they have only one mass of property which they also use for their personal business. If the tax authorities have direct access to their bank accounts, this would amount to administrative interference in the rights of an individual and, therefore, would extend beyond the framework of the fiscal (public-law) relations and intrude into civil-law ones in which power and subordination relations (state to individual) do not exist. Therefore, the fiscal authorities may not enjoy direct access to the bank accounts of these natural persons.

Thus, in analyzing the relationships at issue, the court concluded that where only public-law relations play a role, the state is basically free in its regulation of the question. But if individual rights also play a role, the state must balance the various public-law and civil interests, and this may (has to) result in a different form of judicial protection. Therefore, the rule that—as

1997 No.1 item 197; *Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii* 1996 No.5, 22; *Konstitutsionnyi Sud Rossiiskoi Federatsii: Postanovleniia. Opredeleniia. 1992-1996,* Moscow 1997, 477.

4 This procedure of the summary collection of funds from a bank account was widely applied by creditors in the past. The list of documents for which this is possible was established by RSFSR decree of 11 March 1976, *Sobranie Postanovlenii Pravitel'stva RSFSR* 1976 No.7 item 56 (as amended 1986 No.2 item 10, No.9 item 72; 1992 No.6 item 27). It was still widely used by the fiscal service in the 1990s (in 1995: 278,000 times); for them, in many cases, a court judgment is not necessary. The question was discussed by the Plenum of the Higher *Arbitrazh* Court in October 1993 as far as fines for ecological violations were concerned. The Plenum still deemed it possible in those cases, I. Karpenko, "Arbitrazh oblachaetsia v mantii," *Izvestiia* 23 October 1993; *Finansovye izvestiia* 1996 No.38, 9 April. Prior to the adoption of the 1992 *Arbitrazh* Procedure Code that regulates the court proceedings in commercial disputes before the *arbitrazh* courts, the courts could apply the law on ownership in case of an unlawful act of a tax inspector. See V.V. Vitrianskii, E.A. Sukhanov, *Zashchita prava sobstvennosti*, Moscow 1993, 40.

far as natural persons are concerned—taxes are collected through a court and in case of legal persons not, is not a form of legal inequality, prohibited by Article 19 of the RF Constitution.[5]

This new view on law is, in many respects, the result of the new doctrine on human rights, and in turn it results in a different treatment of natural persons and legal persons in doctrinal writings based on the Constitution and in the field of public law. Natural persons also have natural rights in their public-law relations with the state; legal persons do not.

In principle, civil-law rules do not apply to tax relations unless tax law provides otherwise. This means *e.g.*, that the rule of Article 395 of the 1994 RF Civil Code—on the legal duty to pay the legally established interests for the enjoyment of money of another person, unlawfully in the possession of the state—does not apply.[6]

The branches of law, conceived as parts of the legal system of Russia, play an important role not only in the systematization of the law for practical purposes and in teaching law but, also, in the operation of law as such in legislative and judicial practice.

The idea is explained in such a way that all legislation must belong to a certain branch. When a bill had been adopted to protect Lake Baikal, as a grounds to veto the law, the RF President cited a definition in the legislation characterizing the lake as an independent branch of legislation which, in the President's view was impossible since it belongs to the system of legislation on environmental protection. Therefore, such a law may not also regulate other questions, such as rules on payments for the use of the name Baikal, because such legislation would belong to tax law.[7]

Past Links between Civil Law and Labor Law

Before 1977, a citizen's honor and dignity was not protected at the level of the USSR Constitution—such protection was only provided at the levels of the 1926 and 1960 Criminal Codes, and since 1961, Soviet civil legisla-

5 *Rossiiskaia gazeta* 26 December 1996; *Sobranie zakonodatel'stva Rossiiskoi Federatsii* 1997 No.1 item 197; *Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii* 1996 No.5, 22; *Konstitutsionnyi Sud Rossiiskoi Federatsii: Postanovleniia. Opredeleniia. 1992-1996*, Moscow 1997, 477. See, also, a letter of the court's chairperson of 11 July 1997 on the application of this ruling (<http//ist.ru>, March 1998). He stressed that summary collection is restricted only to those cases where fiscal relations exist; where other elements play a role, it may not be applied. Thus, it does not extend to property other than money because, in that case, civil law also plays a role.

6 See the Guiding Explanation on the Civil Code's First Part of 1 July 1996, *Biulleten' Verkhovnogo Suda Rossiiskoi Federatsii* 1996 No.9, 1 ff.

7 *Rossiiskaia gazeta* 9 August 1997.

tion (Art.7, 1961 Principles [*Osnovy*] of Civil Legislation; 1964 RSFSR Civil Code). Labor law failed to contain a rule on defamation and insult.

Therefore, defamation within labor relations was not protected by law—except by the means offered by criminal law, *i.e.*, when the state would institute a criminal case. As a result, defamatory entries relating to the grounds for an employee's dismissal in his/her labor book (which every employee must keep and show to future employers before his/her next assignment) could not, as such, be contested in court by an individual at his/her own initiative. Ordinary employees, however, could contest the dismissal itself. But, the not insubstantial group of people who belonged to the *nomenklatura* (people in higher, or politically sensitive, positions) could not contest their dismissal in court (since 1927, and until in 1990[8]); consequently, labor law did not afford them protection. Defamatory remarks in a reference from an employer (usually issued by the employer, the enterprise's Communist Party, and trade union committee) also could not be contested in court.

When the 1977 USSR Constitution was adopted, the honor and dignity of an individual came to be protected by a reference norm in this Constitution (Art.57), turning the civil law's protection into a general one, independent of the social relationship. From that time onwards, employees were protected against attacks on the part of their employer against their 'labor honor' and the regulations of the Civil Code could be used in labor law relations through this provision in the Constitution.[9] This was of great practical importance because the labor books (*trudovye knizhki*) and references from employers were often necessary in everyday life. Thus, even in those years, the Constitution could mitigate the doctrine of the branches of law if provision had been made for protection by a law of a certain right (or value); thus, such a law had a kind of umbrella character, but only in some instances.

Under the impact of *perestroika*, the re-codification of civil law had already begun in the USSR *via* the promulgation of the Principles of Civil Legislation in 1991, replacing the 1961 Principles of Civil Legislation.[10] A

8 See the Guiding Explanation of 7 February 1927 establishing the *nomenklatura* system, *Sudebnaia praktika RSFSR* 1927 No.3, 1, and the *nomenklatura* system opinion of the USSR Committee for Constitutional Supervision of 21 June 1990, *Vedomosti S"ezda narodnykh deputatov SSSR i Verkhovnogo Soveta SSSR* 1990 No.27 item 524.

9 See, for example, *K. v. G. and O.* dealing with a *kharakteristika* (1979), *Biulleten' Verkhovnogo Suda SSSR* 1979 No.6, 19; *P. v. (director of) music school* also dealing with a *kharakteristika* (1979), *Kommentarii sudebnoi praktiki za 1981 god,* Moscow 1982, 23-25.

10 *Vedomosti S"ezda narodnykh deputatov SSSR i Verkhovnogo Soveta SSSR* 1991 No.26 item 733. See for a translation of the Principles: *Basic Documents of the Soviet Legal System*, 3rd ed., New York 1992.

draft of these Principles still contained the rule that their provisions would only be applied in other branches of law (*e.g.*, in labor law) if that branch would refer to them, because of the doctrine holding that a branch law must regulate the whole spectrum of relations (compartmentalization). The final redaction of the Principles contained the opposite rule for all property relations. Civil legislation applies to family and labor relations—and relations relating to the use of natural resources and environmental protection—in the instances when such relations have *not* been regulated by branch legislation (Art.1). Thus, civil law became the *lex generalis* and branch law a *lex specialis*. This is—at least in theory—not the same as the 'subsidiary' application of the civil legislation, as Professor Braginskii has argued; but it is a rule testifying to the general character of civil legislation, because civil law ceases to be one of the branches of law.[11] Under this rule, court practice became such that—if in a labor relation moral damages were claimed—the question was decided by application of the provisions of the Principles of Civil Legislation, because the 1971 Labor Code did (and still does) not have general rules on moral damages. Therefore, the fact that the Labor Code failed to mention the legal institution, was no longer deemed decisive for resolving a labor dispute: moral damages could be awarded to persons dismissed after the Principles entered into force. This happened in the 1993 case of a supervisor (D.) of a St. Petersburg tramway park.[12] D. had been dismissed in 1992 and he had demanded reinstatement in his job and compensation for damages (his lost wages during the period of his enforced idleness and for moral damages). The city court had refused to award him moral damages; however, the Civil Chamber of the RF Supreme Court honored the claim. The Court's Guiding Explanation on compensation for moral damage, issued when the new Civil Code had become law, held that compensation for moral damages may also be awarded in employment relationships.[13]

[11] M.I. Braginskii's paper for the 1998 Leiden conference "Predmet grazhdanskogo prava po Rossiiskomu zakonodatelst'vu (Tendentsii razvitiia)", 10.

[12] *D. v. St. Petersburg Tramway Park*, (15 September 1993), reported by V.M. Zhuikov, "Vozmeshchenie moral'nogo vreda", *Biulleten' Verkhovnogo Suda Rossiiskoi Federatsii* 1994 No.11, 12.

[13] 20 December 1994 in *Biulleten' Verkhovnogo Suda Rossiiskoi Federatsii* 1995. See, also, the cases of *B. v. kombinat* on moral damage after dismissal, *Biulleten' Verkhovnogo Suda Rossiiskoi Federatsii* 1995; *Sudebnaia praktika po grazhdanskim delam 1993-1996*, Moscow 1997, 140; and of *Zolotarev c.s. v. Gran* on moral damage after dismissal (30 March 1995), *Sudebnaia praktika po grazhdanskim delam 1993-1996,* Moscow 1997, 142. The claim for moral damages in labor relations was refused in the case of the *Guard of State Ermitazh* reported in *Iuridicheskaia praktika* 1995 No.3, 44-45, but this was not based on "branch arguments".

The first drafts of the new RF Civil Code had maintained the general role for civil law,[14] but the final redaction of the first part seems, at first sight, to have returned to the solutions of 1961/1964. The Code itself does not say anything on the question. However Braginskii, who is one of the draftspersons of the Code, stated in 1995 that the Code does not contain rules relating to family and labor relations, and therefore "there are grounds to assume that the Civil Code takes the same position as was expressed in the 1964 Code".[15] Thus, civil law may not be applied in labor relations unless labor law itself would refer to civil law for a specific institution.

As appears from his paper, at the Leiden 1998 anniversary conference, that Braginskii has changed his position. He lists the ideological arguments used in the past to defend the special nature of family and labor law. He points out that amendments to the Labor Code illustrate developments in civil legislation have resulted in changes in labor law; in 1997, the institution of moral damages was included in the law on dismissal.[16] At the same time, it can be argued that such a development shows that it is still necessary to include such rules in the Labor Code, because otherwise they would not be applied.

The 1995 Family Code provides that civil legislation is applied to property and personal non-property relations among members of a family if the relation is not regulated by family legislation and if the application of family law does not conflict with the essence of family relations (Art.4). Moreover, civil law can be used by way of analogy. This means that, in principle, the civil and family "branches" form one unity.[17]

In a number of instances, the Civil Code stresses the importance of the legal aspects of a certain regulation; the 'social relationships' involved are no longer decisive. This results from the fact that the Civil Code no longer contains branch law but, rather, regulates in principle all property relations in the horizontal sphere. The Code also regulates ownership relations relating to natural resources (in their natural state) and the ownership and rental of housing. Property relations between spouses (Art.256) and within an individual peasant farm (Arts.257-259) are included therein as special types of joint property, leaving the elaborated regulation to branch legislation. The Code regulates in principle all contracts. Thus, the contract for the rental

14 See, also, the Civil Code of Kazakstan of 27 December 1994 (Art.1).

15 M.I. Braginskii in *Kommentarii chasti pervoi Grazhdanskogo Kodeksa Rossiiskoi Federatsii*, published by *Khoziaistvo i pravo*, Moscow 1995, 30-31.

16 Braginskii, *op.cit.* note 11, 17. See the law of 17 March 1997, *Sobranie zakonodatel'stva Rossiiskoi Federatsii* 1997 No.12 item 1382.

17 M.I. Braginskii, "Grazhdanskii Kodeks. Chast' Pervaia. Tri goda spustia", *Khoziaistvo i pravo* 1998 No.1, 7.

(lease) of dwelling houses is also regulated in the Civil Code (Ch.35) as is the contract of the social rental of dwelling premises (Art.672). It refers for its elaborated regulation to housing legislation (the Housing Code).

However, the same technique has not been used for employment agreements. The Civil Code's special part, dealing with individual types of contracts, fails to contain this type of contract. The Code does regulate a number of contracts related to the rendering of services (lifetime support with maintenance, the work contract or independent contracting, services to consumers, etc.). The general rules on contracts do not seems to be applicable to employment agreements because of the definition of a contract as "an agreement of two or several persons on establishing, changing, or terminating civil law rights [*grazhdanskie prava*] and obligations" (Art.420). A difference with the definition of contracts in Dutch law (the Dutch Civil Code does not contain a true definition of contracts but, rather, refers to obligations) is particularly evident in the use of the term 'civil law rights and obligations'; a similar definition has been used for transactions (Art.153). Apparently, such concepts as contract or transaction only may be used in civil law.

In the years between 1987 and 1992, there was an attempt to introduce the concept of employment agreements (*trudovye kontrakty*) as an alternative civil law form of labor relationships.[18] In practice, this idea had a large impact on the development of social relations; official labor law plays only a minimal role in the private sector. People employed under such contracts do not go to court because of the high costs involved or out of fear losing their job.[19] However, when cases dealing with such contracts come before the courts, they apply the same rules as those governing employment agreements.[20]

18 Without using the concept of employment agreements itself, they were made possible in the first regulations on joint ventures with foreign firms dating from 1987. When the Labor Code was amended in 1992, the term "contract" was included therein. Therefore, the term "employment agreements" became synonymous with employment agreements.

19 Report of the RF Commissioner for Human Rights of 1993, *Rossiiskaia gazeta* 25 August 1994; V.V. Glazyrin, "Effektivnost' realizatsii zakonodatel'stva o trude v negosudarstvennykh organizatsii", *Effektivnost' zakona (metodologiia i konkretnye issledovaniia)*, Moscow 1997, 87.

20 See *Sharapova v. insurance firm in Tatarstan* (1997). After being turned into a joint stock company, the firm had concluded a temporary, one-year employment agreement on 8 July 1992 with all of its employees, including Sharapova, who was an insurance inspector. The employer unilaterally extended the contract by another two years. On 28 August 1995, plaintiff had been sent with vacation with a consecutive dismissal because, of the end of the two-year term, Sharapova had requested reinstatement. In 1987, she had been assigned on a permanent basis but had been forced to sign

Changing Court Practice

In 1996, court practice in labor disputes began to change. In cases of delays in the payment of wages, a system of indexation has been applied based on the indexation of the minimum wage, adapted to reflect inflation from time to time (Art.81 *prim*, Labor Code).[21] In such cases, the RF Supreme Court does not apply the rules of the Civil Code (Art.395), which are based on the interest rates of the Central Bank and are deemed to be compensation to the employee for the use of his/her property by the employer. The court argued that wages are paid under an employment agreement; therefore, only the Labor Code applies, and gaps in the Code may not be filled by civil law.[22] The same Article 395 is not applied in tax cases when taxpayers lodge judicial appeal against acts of tax agencies for the same motive: branch law does not provide for the application of the provision in tax relations. While this rule for tax law may be derived from a direct statement in the Civil Code (its Art.2), such a direct prohibition to apply civil law rules in labor relations does not exist. That it might be argued that tort law may be applied in such cases on the basis of Article 53 of the RF Constitution and Articles 1064 and 1069 of the RF Civil Code, is not of importance for this discussion.[23]

It has been argued that land law ceases to be a separate branch of law because the Constitution has introduced private ownership in land. Ownership rights in land (and transactions in land) seem to be regulated as parts of civil law and not of land law (the Civil Code's Ch.XVII), but Chapter XVII will only enter into force together with a new Land Code. It has been argued that the decision of the lawmaker[24] to make this part

the temporary contract in 1992 under threat of dismissal. The court of Tatarstan did not honor the claim; the Civil Chamber struck down the judgments. Under Art.17 of the RF Labor Code (as amended in September 1992) and the Plenum's Guiding Explanation of 22 December 1992 (as amended), employment agreements may be concluded only in instances provided in the law. Moreover, defendant did not really challenge the claim. Under Art.29 of the Labor Code, a change of owner does not terminate the employment agreements, *Biulleten' Verkhovnogo Suda Rossiiskoi Federatsii* 1998 No.4, 4.

21 Introduced by law of 25 September 1992, *Vedomosti S"ezda narodnykh deputatov Rossiiskoi Federatsii i Verkhovnogo Soveta Rossiiskoi Federatsii* 1992 No.41 item 2254.

22 See indexation in labor law (1996), reproduced in *Biulleten' Verkhovnogo Suda Rossiiskoi Federatsii* 1997 No.2, 23-24.

23 A. Filippov, "Gosudarstvo dolzhno platit' za sobstvennye oshibki", *Finansovye izvestiia* 1997 No.38, 27 May.

24 The rule was introduced by the *Duma* in the text of the law; the law had been signed by El'tsin without taking into account the discussions in the Council of the Federation. This Council had debated the law after the period of 14 days, mentioned in Art.105(4) of the RF Constitution. It had rejected the code because it wanted to exclude the Chapter on ownership of land from the Code.

of the Civil Code—dependent of land law—contravenes the Constitution, and the President of Tatarstan approached the RF Constitutional Court contesting the constitutionality of this approach.[25] Justice Gadzhiev has speculated about the consequences of a ruling of the court in this question. The drafters of the Civil Code have recognized the priority of land law in the Civil Code itself (its Art.2). Thus, a decision will result in a "war of priorities": a civil law or a land-law priority. The 1997 Forestry Code and the 1995 Water Code contain a number of references to civil legislation allowing the application of civil law in a number of "social relations" regulated by these codes. Apparently, this will also be the case with the Land Code. However, does this mean that civil law rules may only applied to these social relations because of the reference to them in these branch codes?

What is a branch of law? The main question is the division of law into private and public law. Land law is comprised of public-law and private-law norms. It has been estimated that one-third of the rules of the Civil Code have a public-law nature. In land law, more rules have a public-law nature because land law must reflect the interests of the peoples living on the concerned territory (Art.9, RF Constitution). The priority of the provisions of civil law, means—in the opinion of Gadzhiev—the priority of the private-law rules of the Civil Code and not its public-law rules.[26] Thus, whether or not a plot of land may be the object of a civil-law transaction is a public-law question. If this is allowed, the transaction is concluded—at least as far as the property aspects are concerned—under the rules of civil law, with certain restrictions to be established in land law. It has to be kept in mind that in the Soviet past, land law had been separated from civil law because of the prohibition against the commercial purchase and sale of land.

The question is still more complex in family law. In the past, it was said that marital relations in a socialist society were not based upon property, as is the case under bourgeois law, but upon mutual love. Therefore, a separate family code must exist, and civil law does not apply to family relations unless the family code would provide otherwise. In 1991, family law would was to become a part of civil law: under the Principles of Civil Legislation, civil law was applicable to family relations unless the question was regulated in family law as a *lex specialis*. The 1994 Civil Code has reversed this position (once again). The 1995 Family Code regulates personal and property relations within the family (family relations), and if a relation between members of the family is not regulated in family law, the rules of civil law are applied unless this would contravene the essence (*sushchestvo*) of family relations (Art.4, RF Family Code). However, here, it is necessary

25 *Zhurnal rossiiskogo prava* 1997 No.1, 157.

26 G.A. Gadzhiev in *Zhurnal rossiiskogo prava* 1997 No.1, 157-158.

to know whether or not a particular relation is a familial one; taking the definition of "a family" in family law may do this, *i.e.*, a group of persons connected to one another by rights and obligations arising out of a marriage, kinship, adoption, or another way of taking children for upbringing. This means that family law does not regulate all "social relations" because a family—in a sociological sense (and maybe under the ECHR or the RF Constitution)—is not restricted to this rather traditional definition of a family but, rather, also includes *de facto* marriage relations as well as those between persons of the same sex.[27]

It can be argued that the concept of branch of law has received a different meaning: social relations no longer determine the system of law and legislation and their branches; it is the legal nature of the issue involved which is decisive. Sometimes, *e.g.*, for property relations arising out of a marriage, the Civil Code only contains one provision and refers for detailed regulations to the branch legislation: the 1995 Family Code. The Civil Code contains a number of provisions, traditionally included in the Housing Code. This means that in relations between civil law and family or housing law, civil law contains the general rule which prevails—at least as far as property relations are concerned.[28] The solution of family law is a rather fortuitous one: the application of the general rules of civil law must be done carefully, and may not conflict with the essence of family relations. At the same time, when the Civil Code uses the term "members of the family" (especially in housing relations, included in this code), a strict branch approach would result in applying the family law concept of the family in civil law.

The main exemption from this new approach seems to be labor law. The second part of the Civil Code—containing the law of specific obligations and contracts—does not contain any regulation for the employment agreement. Therefore, this contract is not deemed to be a genuine contract in the sense of the Civil Code; apparently, because it defines the status of the employee in the employing organization after s/he has joined it. The basis of the labor law is not a genuine contract, but an employment agreement, creating the basis for a relation based on status.[29] This does not mean that the Civil Code does not contain any provision in the field of labor law.

27 M.V. Antopol'skaia, *Semeinoe pravo*, Moscow 1997, 8-9.

28 V. Ershov, "Otnosheniia, reguliruemye grazhdanskim pravom", *Rossiiskaia iustitsiia* 1996 No.1, 13-14. Ershov does not make the addition as far as property relations (or civil rights) are concerned. Thus, the rules of civil law do not govern the contract on which the marriage itself is based. The meaning of what kind of premises may be deemed to be a dwelling house are still largely determined by housing law.

29 In Russian law, the term "employment agreement" (*trudovoi kontrakt*) is also used but only for some special types of employment relationships, especially those with directors of firms. This contract is, however, also governed by the rules of labor law, but those rules mainly establish special rules for this labor contract, *e.g.*, the rule that such contracts may not be concluded for a period exceeding five years.

Thus, it provides that an individual entrepreneur may conclude employment agreements (Art.25).[30] Moreover, the Civil Code sees the employment agreement as a variant of the employment agreement (see Arts.25, 27, 64, 139, 855, and 1068, RF Civil Code).

Nevertheless, in its Guiding Explanation on compensation of moral damage of 20 December 1994, the Plenum of the RF Supreme Court ruled that moral damage still may be claimed in labor relations under Article 151 of the Civil Code. According to a survey of court practice published by the Civil Chamber of the Supreme Court in October 1995, the rules for moral damages—included in the Civil Code (Art.151)—must also be applied to labor relations as long as labor law does not contain any provision for this. In a case on reinstatement into employment, decided in 1995, the lowest court had adjusted the claims for back wages and for moral damages, but the cassation court had refused to award the second claim. The Civil Chamber of the Supreme Court agreed with the court of first instance.[31] It also may be argued that the question of demanding moral damages is regulated as a legal institute in the Civil Code: demanding moral damages in general is completely regulated as an institute of civil law and, therefore, the Labor Code may not rule on this question or only in the sense of a *lex specialis*.[32] When the Labor Code was amended in March 1997, the right of dismissed employees to demand moral damages in cases of irregular dismissals or transfers to other work was confirmed (Art.213, RF Labor Code).

Another disputed question is whether or not the regulations protecting trade secrets[33] in the Civil Code are compatible with the Labor Code: the RF Civil Code provides:

> "A person, who has received information constituting a service or commercial secret by unlawful methods, is bound to reimburse the harm caused. The same duty is imposed

30 The decision to expressly mention this power finds its declaration in the past when no small amount of confusion existed about the concepts of "individual labor activity" and "individual entrepreneur" (without creating a legal person). Individual labor activity was permitted in principle in 1986, but without using labor of other persons (the communist prohibition of exploitation of foreign labor [non-labor income]). When private enterprises were allowed in 1990, individual entrepreneurship also became possible, *i.e.*, without creating a legal person.

31 See, also, A.I. Stavtseva, "Podvedomstvennost' trudovykh sporov", *Kommentarii sudebnoi praktiki* II, Moscow 1995, 22 ff.

32 The latter point is probably not correct when the Civil Code does not provide "unless a law provides otherwise, moral damages [...]".

33 Art.139, RF Civil Code: "Information constitutes a service or commercial secret when the information has a real or potential commercial value by virtue of it being unknown to third persons, free access to it on a lawful ground does not exist, and the holder of the information takes measures to protect its confidentiality."

> upon employees, who, contrary to the employment agreement [...] have divulged a service or commercial secret [...]."[34]

Under the Labor Code, as amended in 1992, the employer may seek the reimbursement only of the amount of the factually incurred losses, established on the basis of accounts of the bookkeeper, while the Civil Code provides for the full reimbursement of the losses including lost profits. The Civil Code does not allow these restrictions. If the Civil Code applies in cases of violations of the immaterial goods of the employee (the issue of moral damages), should then the Civil Code not apply when similar rights of the employer are violated? It could be argued that the issue of these restrictions is regulated exhaustively by the special norms of labor law and, therefore, they still apply in the case of trade secrets.[35]

Apart from the problem of labor relations, the Civil Code has become in many respects the *lex generalis* as far as property relations are concerned. This new place of civil law, however, does not seem to affect the relations between an individual and the state. If the relation itself is one of power and subordination, the relationship is not a civil-law relationship:

> "Civil legislation does not apply to property relations based on administrative or other relations of subordination to power of one party to another, including tax and other financial-administrative relations, unless otherwise provided for by legislation." (Art.2(3) RF Civil Code)

However, it could be argued that if in a vertical relationship private law interests (*e.g.*, someone's property) are affected, the interested party—whose ownership rights are at stake—can nevertheless approach a court of law arguing that his/her property interests are affected. This approach has also been followed by the RF Constitutional Court. In its *Fiscal Police* ruling, where it draws a principal distinction between public and private law, it rules that the fact that the collection of taxes affects the property relations of the legal persons concerned, means that they can seek protection from the courts.

Public Law or Labor Law

As far as labor relations are concerned, it seems clear that they are of greater importance than the question of "power and subordination". When the President dismissed the governor of Lipetsk Province, Gennadii Kuptsov, the latter went to court to contest the dismissal. When the case reached the Presidium of the RF Supreme Court, the Procuracy argued that:

34 Whether or not the operation of this rule may be extended to the period after the relationship is terminated is not known.

35 See for the different options for the relation between civil law and branch law V. Ershov, "Otnosheniia, reguliruemye grazhdanskim pravom", *Rossiiskaia iustitsiia* 1996 No.1, 13-15.

> "relations between a head of a province with the RF President are not labor relations, but carry the character of public-law relations. Therefore, his dispute on reinstatement into his previous position may not be considered by the general court on the basis of a law-suit, but only in the context of the review of the constitutionality of the act of the RF President."

The Presidium did not agree with this argument in its judgment of 5 July 1995 in the case of *Lipetsk Governor Kuptsov v. President* (July 1995).

Kuptsov (Provincial Governor from October 1991 to 23 December 1992) had been dismissed by President El'tsin after pressure from the provincial Soviet without any motives having been given. Kuptsov petitioned the court for the statutory compensation after an illegal dismissal. The lower courts did not accept the claim because another procedure existed for appealing complaints of a governor in case of dismissal. In its decision of 18 May 1994, the Civil Chamber held that USSR legislation was not applicable (see the December 1991 decree to ratify the Covenant on the creation of the CIS) and applied Article 63 [now 46] of the previous Constitution and remanded the case. The Moscow City Court, at first, tried to reconcile the parties and obliged El'tsin to talk with Kuptsov. Filatov received him and offered him a position in Moscow, but Kuptsov refused. On 21 September 1994, the court awarded the relief which the claimant had sought, declaring the Edict unlawful and requiring the Administration of the President (a legal person) to pay more than 9 million (old) rubles. The Civil Chamber of the RF Supreme Court agreed with this judgment (9 November 1994), but ruled that Kuptsov had lost his position as of 11 April 1993, when he failed to be (re-) elected as Governor of Lipetsk; his dismissal was fixed as of 21 September 1994. By edict of 7 February 1995 ("On Kuptsov G.V."), El'tsin abrogated his edict and declared that Kuptsov had been dismissed on that day. In the procedure before the Presidium, the Procuracy argued that the relations between a governor and the President have a public-law nature and, therefore, may not be the object of judicial review; but, a court may review the legality (constitutionality) of an edict on dismissing a governor. The Presidium did not agree: Article 63 [previous, now Art.46] of the RF Constitution guarantees judicial protection; the law of 27 April 1993 on judicial review excludes from judicial review only acts/decisions relegated to the exclusive competence of the Constitutional Court, however, the contested act is not a normative one. Moreover, only a limited number of persons may approach the Constitutional Court, and citizens do not belong to this category. Because Kuptsov argued that his labor rights had been violated, he may demand abrogation of the act; such cases are claims. Articles 125(2) and 125(4) of the RF Constitution do not apply.[36]

[36] *Biulleten' Verkhovnogo Suda Rossiiskoi Federatsii* 1996 No.2, 5-6; *Sudebnaia praktika po grazhdanskim delam 1993-1996,* Moscow 1997, 110; V.M. Zhuikov, "Primenenie sudami

Thus, the Constitution guarantees to all the judicial protection of his/her rights and freedoms. When a person believes that his/her labor rights have been violated by an edict, s/he may address the court to have the edict abrogated. This reasoning has also been applied in other labor law cases.

Social Relations or Rights

The shift from "social relations" to the rights of the individual reflects partly old disputes among jurists as to what makes a court competent to consider a claim: that which is claimed (*petitio*) or the grounds for the claim (*fundamentum petendi*)? Already in the stolen-key case (decided on 10 August 1988), the Civil Chamber of the RSFSR Supreme Court had ruled that the court was competent to consider a defamation case including when the plaintiff had been called a thief during a meeting of a committee of the Communist Party: the dispute is not a dispute about party life but, rather, the plaintiff is seeking protection for his honor and dignity.[37] The idea—

Konstitutsii Rossiiskoi Federatsii", *Kommentarii rossiiskogo zakonodatel'stva* I, Moscow 1995, 22-23; *Argumenty i fakty* 1995 No.1-2, 16; L.B. Alekseeva, V.M. Zhuikov, I.I. Lukashuk, *Mezhdunarodnye normy o pravakh cheloveka i primenenie ikh sudami Rossiiskoi Federatsii*, Moscow 1996, 71-73. Kuptsov had been appointed after having supported El'tsin in August 1991. The Soviet had begun demanding his dismissal in June, but El'tsin seemed satisfied with his policy. In September, a visit of El'tsin to the province was postponed after the Soviet again had demanded the dismissal of Kuptsov. In the circumstances of those days, when Khasbulatov was strengthening the Soviet system, El'tsin dismissed Kuptsov on 23 December 1992. When Kuptsov asked for abrogation of the edict, Orekhov (then the acting head of the *GPU*) advised El'tsin to abrogate it; when this did not happen, Kuptsov went to court. The *raion* court refused to take the case. On 6 March 1993, the Constitutional Court did not deem it necessary to consider the matter because Kuptsov was able to petition for the restoration of his civil rights in an ordinary court, V. Mirolevich, "Polety v sudakh i naiavu", *Izvestiia* 13 February 1997.

After eight months of complaints, Justice Viktor Zhuikov lodged a protest against the decision of the Moscow City Court and the Civil Chamber of the RF Supreme Court awarded this protest. After the Supreme Court had declared the results of the elections of his successor (Narolin) legitimate (*Summary of World Broadcasts SU*/2223 B/2, 9 February 1995), El'tsin wrote his new edict. Kuptsov asked El'tsin for a public apology. Nine months later, he received a letter of the deputy head of the Presidential department of letters, repeating the text of the edict. Kuptsov again went to court seeking protection of his honor and good name. The *raion* court accepted the lawsuit on 15 December 1995 and had scheduled a hearing for 12 May 1996, but the defendant had failed to appear. During a hearing at the end of 1996, it appeared that the former head of the presidential Administration (Egorov) had signed the power of attorney of the defendant's lawyer (Reznik). See for the first public statements of Kuptsov on his case V. Mirolevich, "Polety v sudakh i naiavu", *Izvestiia* 13 February 1997.

37 Plaintiff had been called a thief during a meeting of a committee of the CPSU. When he went to court under Art.7 of the 1964 Civil Code, the lower courts argued that they could not consider the case because it was a party affair. The Civil Chamber put an end to the party privilege in cases of defamation: what is claimed (*petitum*), and not the legal relationship (*fundamentum petendi*) decides whether or not a court is competent, *Biulleten' Verkhovnogo Suda RSFSR* 1990 No.2, 4.

as far as citizens were concerned—was expressed in general for the first time in a USSR law of 13 November 1989 which confirmed new Principles on Judicial Organization. They contained a general rule on access to the courts: USSR citizens have a right to judicial protection against unlawful actions of organs of state administration and officials, against any type of infringement on honor and dignity, life and health, personal freedom and property, and other rights and freedoms, provided by the Constitution and laws. Only a law may establish another method for protection of rights and lawful interests of citizens. This USSR provision—still valid at the time of this conference—is rarely invoked however.[38]

The issue can be clearly demonstrated by looking at issues of criminal law, where the *legal relationship* within which a person seeks protection of his/her rights is still deemed more important than the *claim* that his/her lawful rights have been violated as such. In present-day law, a fairly strict distinction is made between the powers of the police in combating crime, the operative investigational activities of the police and other agencies with police powers on the one hand, and the rules governing criminal proceedings on the other. The legal reasoning is that operative measures are not performed within the framework of a criminal-procedural (or criminal-law) relationship between the state (the police) and the particular person under observation but, rather, that only criminal prosecution activities are. The criminal process is a one between the state and a suspect. Between the state and a person who has committed a crime, a criminal-law relationship exists, originating at the moment that the persons has committed a crime, *i.e.*, at the moment that the state becomes entitled to prosecute this person.[39] Of greater importance is the assumption of the existence of a criminal-procedural relationship, which is relevant for the specific powers of state organs during the prosecution and for the legal protection offered to the affected individual. During the prosecution, several participants (the

[38] *Vedomosti S"ezda narodnykh deputatov SSSR i Verkhovnogo Soveta SSSR* 1989 No.23 item 441; V.M. Zhuikov, *Prava cheloveka i vlast' zakona*, Moscow 1995, 12-13.

[39] *Kurs sovetskogo ugolovnogo protsessa. Chast' obshchaia* I, Moscow 1968, 9-15; V.P. Bozh'ev, *Ugolovno-protsessual'nye pravootnosheniia*, Moscow 1975; M.S. Strogovich, L.B. Alekseeva, A.M. Larin, *Sovetskii ugolovno-protsessual'nyi zakon i problemy ego effektivnosti*, Moscow 1979, 88-98; P.A. Lupinskaia, (ed.), *Ugolovnyi protsess*, Moscow 1995, 32-34. Because of its character as legal relationship, the vertical relationship is combined with a system of rights, duties, and guarantees for the persons participating therein. However, this does not result in such duties for the state to ensure that the accused has a fair trial; rather, only that it is explained that the state organs not only have rights but, also, duties, *e.g.*, the duty to take care that the accused may use his/her rights (see *e.g.*, Art.58, Criminal Procedure Code). A 1995 textbook on criminal procedure restricts itself to a list of the duties, mentioned in this Code. At the same time, the court is also seen as a party in this relationship, which is rather odd.

accused, a prosecutor) play their roles, each having a certain procedural status; therefore, both enjoy specific rights.[40] This means that such general principles as fair trial or due process only apply to criminal prosecution activities, but in that stage they are hardly relevant because the accused is protected by the elaborated procedural provisions governing this stage of the prosecution.

This logic has a number of implications because the principle of fair trial may not be used as a general test for the legal evaluation of the entire pre-trial stage. Thus, the question of how a suspicion has arisen (the problem of "the poisoned tree doctrine") does not influence the legal position of the person on trial (see, also, Art.50.II). The 1995 Law "On Operative Investigational Activity" is only of importance for the supervision of police activities as a state agency, by *e.g.*, the Procuracy or a judge acting as part of the administration.[41] This entails—as Sheifer has argued—that data which has been collected by the police, as such, cannot be used as evidence in a trial unless its authenticity can be verified. Is it really true, not because the police say that it is, but because it can be proven that it is true? Sound recordings or photographs, as such, do not have any significance as evidence in a trial nor do transcripts of telephone conversations because such data has not been collected in any procedural form but, rather, only as an operative measure. It is not the task of the prosecutor to perform such measure. S/he is not even allowed to do so because then s/he would become a participant in the police activities and that would be a reason to challenge him/her (Art.23, RF Criminal Procedure Code).[42] For the same reasons, the position of a person detained by the police is somewhat unclear as long as s/he is in the hands of the police. During this phase, the person is not protected by a specific law except by the rules included in police law.

In a judgment in the case of senior operative police investigator *L. v. the Procuracy* (7 August 1996), the Presidium of the RF Supreme Court wrestled with the problem of criminal-law relationships. Police investigator (detective) L. had been prosecuted by the prosecutor's department of the Ministry of Security (the name of the successor of the *KGB* in 1992 and

40 Such theories have been rejected in France, L.V. Golovko, *Doznanie i predvaritel'noe sledstvie v ugolovnom protsesse Frantsii*, Moscow 1995, 76-77. The criminal process is considered only as a system of acts of state organs although the legal position of the accused has been gradually strengthened, especially his/her right to have a defense counsel.

41 See the former Procurator General Stepankov in an interview, *Summary of World Broadcasts SU*/1372 B/1, 5 May 1992.

42 S.S. Sheifer, "Dokazatel'stvennye aspekty zakona ob operativno-rozysknoi deiatel'nosti", *Gosudarstvo i pravo* 1994 No.1, 99; E. Dolia, "Proslushivanie telefonnykh i inykh peregovorov—sledstvennoe li eto deistvie?", *Sovetskaia iustitsiia* 1992 No.19-20, 12.

1993) Samara Province for having divulged a state secret, but the prosecution was terminated by a transport procurator to whom the case had been transferred. The procurator deemed L.'s acts only to be a breach of service rules. L. went to court to contest this qualification of his conduct by the Procuracy, but the lower courts declared themselves not to be competent: decisions of a procurator may only be appealed under the RF Criminal Procedure Code, *i.e.*, to a higher procurator. Referring to the non-restrictable right to judicial protection (Arts.46 and 56, RF Constitution), the Presidium ruled that each citizen is entitled "to address a court in connection with a violation of his [*sic*] rights in the sphere of the application of the norms of criminal procedure law".[43]

In such a case however, the question has to be considered by applying rules of substantive and procedural criminal law; therefore, such complaints cannot be considered under the rules for court procedures as established by civil procedure law. On the basis of Articles 15 and 18 of the Constitution, courts must consider such cases "taking into account the procedure of judicial review of other acts of the organs of inquiry, prosecutors, and procurators, established by criminal procedural legislation". This affords protection to a citizen even if s/he does not have a right to such protection. Moreover, the procedure to which the Presidium refers lacks some important guarantees: the procedure is the same as that used for reviewing the legality of a detention (thus, not in an open court), and the judgment could not be appealed until changes were made in December 1996 to Article 331 of the RF Criminal Procedure Code.[44]

Therefore, the basic approach still is a branch approach. The branches, as such, do not decide the question of access to court because—for natural persons (and, in partly, also for legal persons)—this issue has become a constitutional one; but the rules to be applied in deciding a case have to be taken from branch legislation although they may be reviewed as to their constitutionality.

For a Russian court, general rules on torts included in the Civil Code cannot be applied *e.g.*, in the event a person would be held in prison unlawfully. A person, who has been prosecuted, but is acquitted, may sue the state seeking damages; but this issue is regulated by a special law, providing only for compensation of a certain amount of the damage, but, in particular not for moral damages. In such cases, this law must be applied rather than the general rules on tort.

These restrictions do not apply, however, when the damage is caused under police law or to a legal person. When a police officer shot a person

43 *Biulleten' Verkhovnogo Suda Rossiiskoi Federatsii* 1996 No.11, 12-13.

44 *Sobranie zakonodatel'stva Rossiiskoi Federatsii* 1996 No.52 item 5881.

without any reason, the officer himself was sentenced to eight years imprisonment; the victim's parents claimed 12 million (old) rubles as compensation of the moral damages from the police (the price of a car was taken as a measure). The court awarded this amount (see *Police victim v. police* (30 August 1994)). The law does not provide for any compensation of the damage, inflicted through a detention, followed by acquittal; under Article 53 of the RF Constitution, compensation is required only in the case of unlawful acts. However, such compensation is possible under the rules of the Civil Code and is afforded in any case of an acquittal (see Art.47, RF Constitution). Sergei Porokhnenko sued the police because he had been detained illegally by the police. The Frolovo *Raion* Court (Volgograd *Oblast'*) awarded a claim for damages in the case of *Porokhnenko v. Police* (14 February 1995)—including moral damages—because the police had acted wrongfully. Porokhnenko had been detained when he was driving his car without having fastened his seatbelts. He was taken to the police office and released only the next day.[45] The *Arbitrazh* Court of Moscow City has examined a claim of the *ERG* firm again a division of the Moscow City Police because its car had been stolen and the police had not been diligent ("illegal inactivity") in recovering it. A criminal case had only been instituted after seventeen days, and the case had been closed already after one and a half-months (see *The firm ERG v. Police* (18 December 1995)).[46]

Conflicts of Rules

The existence of branches of law may also result in conflicts among different branches. The 1991 Law "On the Environment" provides that acts violating environmental legislation and causing damage to the environment (and the health of the population) are crimes. The RF Criminal Code also provides for liability if there is a threat of such harm and, occasionally, also for the very violation of a rule.[47] If the rule of environmental legislation is necessary—because otherwise the Criminal Code could not label violations of that law as crimes,—the norms of the Criminal Code have to be interpreted on the basis of the Law "On the Environment". If the norms contained in the Criminal Code have an independent meaning, the reference to the Criminal Code in the environmental law has no legal meaning but, rather, has only an informative nature.

45 V. Kornev, "Grazhdanin Porokhnenko vyigral sud u militsii", *Izvestiia* 15 February 1995.

46 V. Iakov, "Kto vozmestit ubytki, esli ugnali avto?", *Izvestiia* 19 December 1995.

47 V.M. Syrykh, "Voistinu li normy zakonov istiny?", *Gosudarstvo i pravo* 1996 No.7, 33.

The Constitutional Court's *Order of Payment and Fiscal Debts* ruling (23 December 1997)[48]—rendered at the request of the Presidium of the Supreme Court—arises out of a judgment of the Supreme Court of 10 December 1996 in the case of *Zharov v. Ministry of Finance*.[49] Plaintiff had asked the Supreme

48 *Rossiiskaia gazeta* 6 January 1998; *Sobranie zakonodatel'stva Rossiiskoi Federatsii* 1997 No.52 item 5930. The ruling was based on the idea that a firm's earnings belong to the state from the moment that the firm can dispose on them; therefore, it is not allowed giving a priority to wages. The ruling has been explained differently: *Russian Regional Reports* writes that the court ordered enterprises to pay taxes before paying salaries. On 23 January 1998, the State *Duma* asked the Court to suspend its decision because enterprises were refusing to pay wages under the pretext that they have to pay taxes first. On 5 February 1998, the Court ruled that it did not have the power to do so. According to Aleksandr Chichkanov, head of a trade union association in Nizhnii Novgorod, the ruling caused the region's salary arrears to increase by 108 million rubles ($18 million). Governor Skliarov, with the backing of the speaker of the regional legislature, defied the court when he issued his decree mandating local companies to use 50% of their earnings toward salary and benefits payments. The court's ruling takes precedence over regional laws, and local banks had often ignored the governor's decree, afraid to be seen as taking his side in the standoff. Banks in Nizhnii Novgorod were forced with a tough choice: comply with the governor's decree and defy federal legislation and possibly risk their banking licenses or acquiesce to the ruling to pay back taxes before paying back wages. Because the banks were uncertain whether to obey the court or the governor, the governor's decree was never implemented, which caused him to reinforce it by publishing his instructions. Unlike his original decree, the instruction was discussed with local financial institutions and tax authorities, increasing its chances for effectiveness. Even letters from the tax police relieving banks of the obligation to transfer funds from companies' accounts to the government to pay back taxes failed to help. The law mandated that banks transfer companies' tax penalties [should be tax payments, regular taxes due to the state] to the government within 24 hours of receiving the funds. Meanwhile, trade unions planned to stage protests against the court's ruling. Workers of the Unified Energy Systems of Russia, for example, began collecting signatures against making back tax payments before making back salary payments, *IEWS Russian Regional Reports* 12, 26 February, 5 March 1998. The Savings Bank explained the court's ruling in such a way that it pays first taxes, then back wages and thenreafter premiums to social funds, *Rossiiskaia gazeta/Biznes v Rossii* 7 February 1998. The Constitutional Court itself, however, has stated that the ruling does not make a choice: both have to be paid simultaneously, *Rossiiskaia gazeta/Biznes v Rossii* 7 February 1998. The letter of Beagle is published in *Rossiiskaia gazeta* 25 February 1998.

49 See for the text *Economic i zhizn'* 1997 No.3, 24, with a short comment. A letter of the Supreme Court of 26 December 1996, pending the decision of the Presidium of the court, suspended the judgment after a protest by way of judicial supervision. Justice Andreev called the abrogated circular a clear example of an interpretation of the law in departmental interests, Iu. Andreev, "Ispolnenie sudebnykh reshenii", *Rossiiskaia iustitsiia* 1996 No.12, 36. The problem of Art.855 of the RF Civil Code (wages prevail over taxes) would have been solved in the Tax Code, giving again priority to taxes over wages. This conflict between civil law and tax law had to be resolved in favor of tax law because Art.3.2 provides for this. L. Ternova, "Storony nalogovogo pravootnosheniia v svete Nalogovogo Kodeksa Rossiiskoi Federatsii", *Khoziaistvo i pravo* 1997 No.12, 58-59.

Court to declare unconstitutional a circular letter of several federal authorities dealing with the order of payment of debts. He argued it was based on the premise an that tax law has its own rules for collecting funds from bank accounts of clients and—if the amount of money is insufficient to pay all debts—taxes and premiums to social security funds have to be paid on the first place, while the Civil Code (its Art.855, as amended in 1996 giving priority to wages following a court judgment and in 1997 giving priority to all wage payments) gives fourth priority to 'payments to the budget'. The Presidium had doubts as to the constitutionality of the provision of the Civil Code because paying taxes is a constitutional duty. Nevertheless, the regulation of tax law can damage the interests of employees, and paying wages is a constitutional duty as well. The RF Constitutional Court described the history of Article 855 against the background of the payment crisis in Russia. It argued that taxes are the most important source of budget income, necessary to ensure the rights and freedoms of the citizens and the social nature of the state, and that the money is necessary to pay the employees in the budgetary sphere. The established priority of wage payments results in a disparity of equally protected rights and freedoms of other citizens, and this contravened Article 55(2) of the RF Constitution. A real problem only exists when the funds on the account do not permit full payment of all debts. The collision is one between the norms of civil law and of tax law. A solution for the problem which arises may be given only in a concrete case; as long as such a conflict is not resolved, one cannot argue that tax law gives a priority to tax payments over wage payments. A priority of wages over tax payments would be unconstitutional.

This solution is the same as the one for a conflict of constitutional rights. In its Kozyrev decision of 27 September 1995, the Constitutional Court held that the question of whether an application of the provisions on defamation—based on the right to privacy—would restrict the freedom of speech can only be decided in a concrete case by an ordinary court. These courts have to secure the required balance in the use of these constitutional rights.[50]

[50] *Rossiiskaia gazeta* 22 November 1995 (extracts, with a comment by Justice T. Morshchakova in the same issue); *Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii* 1995 No.6, 2; *Konstitutsionnyi sud Rossiiskoi Federatsii: Postanovleniia. Opredeleniia. 1992-1996*, Moscow 1997, 495. The newspaper's version of the decision is not entirely correct. See for a comment Iu. Feofanov, "Mozhno li vora nazvat' vorom, ili Pochemu Konstitutsionnyi sud otkazalsia rassmatrivat' zhalobu ministra Kozyreva", *Izvestiia* 16 November 1995. Several years have passed since Kozyrev described Zhirinovskii's views as "fascist" on NTV in January 1994, but the ensuing slander case remained long unresolved. The case had been postponed for the third time on 20 December 1995 after Zhirinovskii and the presiding judge both failed to appear for the court hearings. Kozyrev told journalists that he came to court "to defend my right to call fascists what they are" and referred to Zhirinovskii as a *Führer*, *OMRI* 21 December 1995.

This seems to mean that the lawmaker may not solve such problems resulting from a conflict of branches or of constitutional rights and, also, that a general rule to solve such conflicts cannot exist. The question of whether a certain priority among human rights exists (or may be given in a constitution or a law) is debated. The opposite rule that indicating such a priority *in abstracto* in law would be unconstitutional because of the nature of human rights seems unacceptable.

The question of a conflict among certain branches of law is a somewhat artificial question because such branches are a creation of the lawmaker him/herself (and of doctrine). The notion of branches of law is useful for arranging legislative materials and for teaching purposes and, also, it may be used when drafting laws. However, the notion becomes dangerous when it might frustrate the lawmaker (or a court) in balancing the interests involved in drafting a rule (or in deciding a case).

A bill adopted by the *Duma* (in a first reading in May 1998) attempted to solve the problems raised by the Constitutional Court. It introduced a rule—in the 1992 Law "On the Foundations of the Tax System"—that the issue is regulated in the Civil Code: "Said payment orders are executed in accordance with the Civil Code of the RF." This gave a general priority to wages, but the Constitutional Court had already said that this would be unconstitutional. This rule of the Constitutional Court cannot be overruled by the ordinary lawmaker by including a simple reference in one branch to another branch. The lawmaker should have tried to set forth more specific rules in cases of a real conflict between the duty to pay taxes (the general interest) and the duty to pay wages, by balancing these duties, the "social state" principle and the interests of the banks concerned. By failing to do so, it neglected its task as the supreme lawmaker of the land under the RF Constitution.

Codes and Codifying Acts

Under existing doctrine, the hierarchy of legal norms is affected by the idea of codification of law. In its *Lankina* ruling (23 June 1992), the Constitutional Court argued that Article 109 of the previous Constitution imposed a duty upon the Supreme Soviet "to ensure the unity of legislative regulation". This duty requires the harmonization of the substantive and procedural branches of law. From this, the Court derived the rule that procedural legislation—governing the settlement of labor disputes and included in the Labor Code—could not be different from those in the Civil Procedure Code unless the latter Code would allow for this.[51] A similar rule could be

[51] *Vedomosti S"ezda narodnykh deputatov Rossiiskoi Federatsii i Verkhovnogo Soveta Rossiiskoi Federatsii* 1992 No.30 item 1809; *Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii*

derived from the idea of codification itself—intended to create a stable set of rules which must not be adapted to the issues of the day.[52]

Lankina and several other persons, dismissed between 1982 and 1989, had petitioned the court to review the constitutionality of certain restrictions upon their right to judicial protection. Dismissed employees may ask for reinstatement to their prior employment in a court; but, in the subsequent labor dispute, judicial supervision protest proceedings are allowed only during a period of one year. Such a statute of limitations does not exist in other instances.[53] However, it could have been argued that the lawmaker had adopted the rule in order to also protect the legal interests of the employee who has replaced a dismissed employee. The Constitutional Court failed to devote a single word to this aspect of the provision in the Labor Code; this balancing of interests resulted in a rule in this Code, different from that in the Civil Procedure Code.

The idea itself that codes have a special place in the legal system was included in the presidential draft of April 1993 of the Constitution:

> "In the RF, codes, fundamentals of legislation, and other codifying laws are adopted, which have the force of general and fundamental principles for the laws and other legal acts." (Art.65)

This provision disappeared in later versions of the text. The Constitution does not provide that the law, in specific fields of legislation, should consist of Codes or other codifying acts and that such acts would enjoy a special place within the legal system. It is argued that a broader interpretation of the concept of federal constitutional laws could solve these problems, when all codes would be adopted by such acts.[54] However, the Constitutional Court has held that federal constitutional laws may be adopted only in those questions, in which the Constitution requires the adoption of such a law (see its interpretation of Art.136,RF Constitution, of 31 October 1995).[55]

1993 No.2-3; *Statutes & Decisions* 1994 No.3*; Konstitutsionnyi Sud Rossiiskoi Federatsii: Postanovleniia. Opredeleniia. 1992-1996,* Moscow 1997, 219.

52 See Iu. Kalmykov, *Sovetskoe gosudarstvo i pravo* 1988 No.7, 41; G. Ajani, "The Soviet Experience with Codification: Theoretical and Comparative Perspectives", in Kathryn Hendley, (ed.), *The Soviet Sobranie of Laws. Problems of Codification and Non-Publication,* Berkeley, CA 1991, 185.

53 *Vedomosti S"ezda narodnykh deputatov Rossiiskoi Federatsii i Verkhovnogo Soveta Rossiiskoi Federatsii* 1992 No.30 item 1809; *Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii* 1993 No.2-3; *Statutes & Decisions* 1994 No.3; *Konstitutsionnyi Sud Rossiiskoi Federatsii: Postanovleniia. Opredeleniia. 1992-1996,* Moscow 1997, 219.

54 *Kommentarii k Konstitutsii Rossiiskoi Federatsii, op.cit.* (1996), 456.

55 *Rossiiskaia gazeta* 9 November 1995; *Sobranie zakonodatel'stva Rossiiskoi Federatsii* 1995 No.45 item 4408; *Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii* 1995 No.6*; Konstitutsionnyi Sud Rossiiskoi Federatsii: Postanovleniia. Opredeleniia. 1992-1996,* Moscow 1997, 29.

The 1994 RF Civil Code regulates this question as follows:

"**Article 3. Civil Legislation and other Acts Containing Norms of Civil Law**

1. In accordance with the Constitution of the RF, civil legislation belongs to the jurisdiction of the RF.

2. The civil legislation consists of this Code and other federal laws adopted in accordance with it (hereinafter laws), regulating relations [in the field of civil law]. Norms of civil legislation contained in other laws must conform to this Code."

As far as a federal law would contain other rules than the Civil Code, the Civil Code sets aside the usual rules of *lex specialis derogat legi generali* and *lex posterior derogat legi priori*. This is an instance of *Selbstbindung* of the lawmaker, which is directed especially to the lawmaker, but another question is whether or not courts must abide by these rules of interpretation of the term "law".[56] The provision of the Civil Code sanctions the President's power to 'supplement' the Code, because it repeats the constitutional rule that the President is allowed to issue edicts "not contrary to" the Code and other laws. At the same time, laws must conform to the Code. This seems to restrict the legislature more than it does the President. The President has frequently used this idea as a basis for the exercise of his veto powers.

This supreme value of codified rules has been praised by some authors,[57] but others have stressed that this means that the lawmaker is obliged—when issuing a special law—to amend the Civil Code rule with the reservation: "unless a law does not provide otherwise." The lawyers Kozlov and Falileev reject the thesis on the prevalence of the Civil Code over other acts of the same level (*odnourovnennye akty*) because the Civil Code is an ordinary law. That the code has sometimes been called the 'economic constitution' of the country or 'a super code'[58] is, in my view, not a very convincing argument.[59] In any case, as far as the relation between the general norms of civil law and

56 In his separate (dissenting) opinion to the *Capital Moscow* ruling (19 May 1992), Justice Ebzeev called such issues a question of legislative technique, *Vedomosti S"ezda narodnykh deputatov Rossiiskoi Federatsii i Verkhovnogo Soveta Rossiiskoi Federatsii* 1992 No.23 item 1247; *Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii* 1993 No.1; *Statutes & Decisions* 1994 No.3; *Konstitutsionnyi Sud Rossiiskoi Federatsii: Postanovleniia. Opredeleniia. 1992-1996*, Moscow 1997, 537.

57 M.I. Braginskii in *Grazhdanskii kodeks Rossii. Chast' vtoraia. Dogovory i drugie obiazatel'stva*, Moscow 1995, 225; V.A. Rakhmilovich, "O dostizhenii i proschetakh novogo Grazhdanskogo kodeksa Rossiiskoi Federatsii", *Gosudarstvo i pravo* 1996 No.4, 119-121.

58 This term has been used by Professor Aleksander Makovskii, *Vestnik Arbitrazhnogo Suda Rossiiskoi Federatsii* 1995 No.4, 90, 97.

59 V.B. Kozlov, P.A. Falileev, "Sootnoshenie obshchikh i spetsial'nykh pravovykh norm na primere grazhdanskogo i morskogo prava (kritika sovremennogo zakonodatel'stva)", *Gosudarstvo i pravo* 1997 No.11, 83.

special rules of commercial law are concerned, many countries provide for the opposite rule. In case of conflict, the rules of commercial law should be applied and the rules of civil law only are applied when those of commercial law cannot be.

The Criminal Code provides that only such acts as are enumerated in the special part of that Code are deemed to be a crime (Art.7).[60] The same provision is not included in the Administrative Violations Code, under which minor transgressions are punishable. In its *Gurdzhiiants* ruling (27 March 1996), the Constitutional Court held that the 1993 Law "On State Secrets" as such complies with the Constitution; however, its Article 21—requiring a special procedure for any admittance of citizens to state secrets—was too broadly formulated because certain exemptions must exist. It cannot extend to deputies of the federal parliament or judges, because this "contravenes their constitutional status, the particularities of how the position is occupied (election or a special appointment procedure) and of the functions performed by them". As far as lawyers, who are active as defense counsel, are concerned, they are participants in criminal proceedings; the procedure—as established by Article 1 of the RF Criminal Procedure Code—is:

> "uniformly obligatory for all criminal cases and for all courts, organs of the Procuracy, preliminary prosecution and inquiry and is established by this Code, and not by any other federal law. Therefore, the procedure for the participation of a lawyer in criminal proceedings, connected with information constituting a state secret, also is established by the cited Code."

The Code does not contain any rule in this question; therefore all lawyers, as members of colleges of advocates (*Antipov* ruling) are entitled to act as defense counsel.[61]

A rule similar to the one in the Civil Code is also used in fiscal legislation.[62] This may result in the odd situation that a rule in a law provides

60 A draft law prepared within the President's Administration and the *Duma* to combat organized crime contravenes this principle; see V. Kudriavtsev, "Zakon protiv zakona", *Moskovskie novosti* 16-26 March 1995.

61 *Rossiiskaia gazeta* 4 April 1996; *Sobranie zakonodatel'stva Rossiiskoi Federatsii* 1996 No.15 item 1768*; Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii* 1996 No.2, 34*; Konstitutsionnyi Sud Rossiiskoi Federatsii: Postanovleniia. Opredeleniia. 1992-1996,* Moscow 1997, 410.

62 Law "On the Foundations of the Budgetary Process" of 10 October 1991 (as amended by law of 2 February 1992), *Vedomosti S"ezda narodnykh deputatov RSFSR i Verkhovnogo Soveta RSFSR* 1991 No.46 1543, *Vedomosti S"ezda narodnykh deputatov Rossiiskoi Federatsii i Verkhovnogo Soveta Rossiiskoi Federatsii* 1992 No.18 item 966 (Art.23). See, also, the Law "On the Budget for 1992", *Ved.RF* 1992 No.9 item 392 (only for tax benefits) and less strictly Art.1 of the Law of 27 December 1991 "On the Foundations of the Tax System of the RF", *Vedomosti S"ezda narodnykh deputatov Rossiiskoi Federatsii i Verkhovnogo Soveta Rossiiskoi Federatsii* 1992 No.11 item 527.

e.g., that foreign investment companies have to pay only one-half of the usual taxes under the special rules applicable them but that—under the fiscal legislation itself—they are liable for the entire amount.[63] A provision in the law on education allows for the deduction of amounts donated by sponsors to schools, but fiscal legislation fails to make such a provisions and, in turn, the fiscal agencies fail to apply the Law "On Education".[64] In the same way, a provision in the law of 30 January 1996 on the international business center "*Ingushetiia*" which provides a total waiver for foreign companies registered there "of the payment of all taxes of the RF" would not be enforceable in court unless this rule also would have been included in a tax law. The President has frequently argued that he applies his right of veto to a law by applying the rule that all regulations in the field of taxation must be included in a tax law and not *e.g.*, in a special law regulating tax benefits for the special economic zone in Kaliningrad Province; however, sometimes this is overlooked, *e.g.*, as far as the Law "On the Budget for 1996" was concerned.

In fact, most federal laws—which regulate a certain activity (social relation)—contain such a rule, even a law of 11 August 1995 dealing with philanthropic activity.[65] In the field of education, this is clearly expressed in the (revised) Law "On Education" (13 January 1996):

> "legislation in the field of education includes the RF Constitution, the present law, other laws and normative legal acts of the RF adopted in accordance therewith, as well as laws and other normative legal acts of the Subjects of the RF in the field of education." (Art.3)

Because the special nature of a Code is cited as the argument to give it a prevailing force, problems may arise when two codes regulate the same question. The 1995 Water Code provides that property relations—arising in relation to the use and protection of water objects—are regulated by civil legislation unless the Water Code provides otherwise. The 1968 USSR Maritime Code (still in force at the time of the 1998 Leiden Conference) provides for the same rule (Art.18).[66] A similar rule may be found in other, special legislation, *e.g.*, the Law "On Production Sharing Agreements" (6

63 A circular registered by the Ministry of Justice on 1 July 1993, *Rossiiskie vesti* 1993 No.144. See for such a problem in connection with the free economic zone of Nakhodka, *Finansovye izvestiia* 1993 No.58, 10-16 December (S. Mitin) and that of Kaliningrad, *Finansovye izvestiia* 1996 No.6, 31 January.

64 *Rossiiskaia gazeta* 4 January 1996 (V. Molodtsova).

65 Law of 11 August 1995, *Sobranie zakonodatel'stva Rossiiskoi Federatsii* 1995 No.33 item 3340.

66 This may cause problems because maritime law provides for the possibility of restricted liability and other rules not permissible under the Civil Code; see V.B. Kozlov, P.A. Falileev, "Sootnoshenie obshchikh i spetsial'nykh pravovykh norm na primere grazhdanskogo i morskogo prava (kritika sovremennogo zakonodatel'stva)", *Gosudarstvo i pravo* 1997 No.11, 87 ff.

December 1995). The rule in the Water Code could be defended by arguing that the relation between the two codes in case of collision of norms has to be regulated, but this argument cannot be used to discuss the relation between a code on the one hand and an ordinary law on the other. Whether the latter rule applies is not totally clear because of the *Lankina* ruling (cited *supra*).

A draft Maritime Shipping Code (submitted to parliament to replace the 1968 Code) attempts to govern this branch by regulating the use of maritime vessels as an entirely separate branch providing rules for any relation connected with the use of ships. This is impossible—so writes the President—because it may not regulate a number of public-law questions (taxes, customs etc.), and this solution fails to take into account the powers of the Federation Subjects. Moreover, the draft bill uses many concepts of civil law. Therefore, the President proposes to provide that civil law relations (property relations based on equality and autonomy) be regulated by the proposed Code in accordance with the Civil Code. However, this will be supplemented with the provision: "The rules of civil legislation are applied to relations, not regulated or not completely regulated by the present Code."[67] This would mean, in fact, that the Civil Code is not the central code but, rather, the general law in the field of civil legislation.

Sometimes, the relations between one law and other laws are based on a different approach. The (now obsolete) Federal Law "On Fundamental Guarantees of Electoral Rights" (6 December 1994) even provides:

> "The electoral rights of citizens of the RF and their guarantees, established by this Federal Law, as well as by other federal laws, laws and other normative legal acts of the legislative (representative) organs of state power of the Subjects of the Russian Federation, may not be amended otherwise than by the adoption of a federal law."

This provision directly affects the lawmaking rights of the Subjects but leaves the federal lawmaker free in adopting other rules. At the same time, the 1994 law regulates all sorts of basic questions in the field of electoral law; in case of doubts as to the application of a certain rule in a special electoral law, the participants in the electoral process (and the electoral commissions and courts) must be guided by the 1994 Law.[68] In *Solov'ev Vadim v. TsIK* on the safekeeping of election results, the Supreme Court considered the 1994 Law as "the basic Federal Law for all types of elections". Therefore, a provision in the law on presidential elections—providing for elections

67 Letter on the draft Code, *Rossiiskaia gazeta* 18 March 1998. Another question raised is that the draft reproduces many rules of international treaties in the field of maritime law, not yet ratified by Russia. Many rules would be impossible under the Civil Code and would become possible only after Russia has acceded to these conventions.

68 A.E. Postnikov, "Sistema rossiiskogo izbiratel'nogo zakonodatel'stva", *Zhurnal rossiiskogo prava* 1997 No.1, 34.

results to be stored for a period of six months—is not in compliance with that basic law, which prescribes a period of one year and, therefore, it is not subject to application.[69] (The 1997 law on basic guarantees contains the same rule.)

The question of *Selbstbindung* of the lawmaker does not pose many problems, but this is different when these rules also have to be applied by courts—including the Constitutional Court—without any basis in the Constitution but, rather, only in a federal law itself. In its *Lankina* ruling, the Constitutional Court still could cite some provisions from a constitutional provision on the unity of legislation to this effect. The 1993 Constitution does not provide for "unity of legislative regulation" or contain a rule according codes a special place within the legal system, nor does it provide for a special procedure for adopting such laws. In Article 15 of the RF Constitution, the concept "legal system" is used, but only to provide that treaties belong thereto; it hardly can be argued that the occasional use of this term in that provision mandates a "unity of legislation". Under the Law "On the Constitutional Court", however, the Court also has to render a decision with regard to the constitutionality of a law "proceeding from its place in the system of legal acts" (Art.74). This could be (and is) used by the Court as empowering it to enforce the idea of "unity of legislation". Russian scholars largely agree with the application of these rules by the court.[70]

Apparently, the ordinary courts also see such rules—under which the lawmaker binds itself to its own laws—as quasi-constitutional rules and rule on the constitutionality and legality of laws on this basis: they are binding for the Court too.

In a letter of 21 July 1997—explaining his veto of a bill on the legal position of military serviceman—the President argued that the provision in the bill (providing that legal and social guarantees set forth in the law may only be reduced by way of an amendment to that law) contravened Article 76(1) of the RF Constitution; this provides that all laws operate directly, thus denying the possibility of codifying acts.[71] Herewith, he neglected the rulings of the Constitutional Court, legalizing the concept of codifying acts.

In most issues, cited *supra*, the result of the application of notions such as branch law, codifying acts, or foundations of the legislation was a progression in the law along an increasingly democratic direction. This, however,

69 *Sudebnaia praktika po grazhdanskim delam 1993-1996*, Moscow 1997, 40, *Biulleten' Verkhovnogo Suda Rossiiskoi Federatsii* 1998 No.2, 14-15. See for this case J. Middleton, "Legal Regulations on the Russian Presidential Elections", *Sudebnik* 1996 No.3, 707-709.

70 Braginskii, *op.cit.* note 17, 13.

71 Letter of El'tsin of 21 July 1997, *Rossiiskaia gazeta* 7 August 1997.

need not always be the case. Thus, the 1991 Law "On Mass Media" provides a journalist with witness immunity. S/he does not need to reveal his/her sources if these have requested confidentiality. The editorial board has to inform the court about such sources in a criminal trial, when it has them at its disposal, but the court cannot oblige the journalist to do so (Art.41). Under the Criminal Procedure Code, a journalist is obliged to give all the information at her/his disposal. Applying the reasoning of the *Lankina* or *Gurdzhiiants* rulings would result in a holding that the rule of the media law cannot be applied.[72] In my opinion, it would be unacceptable to declare the rule in the media law void, because of reasoning derived from the system of law (the reasoning in the *Lankina* ruling).

The difference from the situation in the *Gurdzhiiants* ruling is clear: there, a conflict between two laws was resolved that could be applied both in the case and that would result in a different judgment. The Law "On State Secrets" sets forth only very general rules and fails to expressly deal with the position of deputies, judges, and lawyers. Therefore, a court has to refine the rules of this law. The media law is different because it regulates the position of a journalist in a criminal trial in all details of importance. Thus, this is really a special law; this law must be applied—even when the rule *per se* is not made possible by the Code of Criminal Procedure.

Foundations of Branch Legislation

In its *Kaliningrad Deputies* ruling (30 November 1995), the Constitutional Court used a more material concept of the foundations of branch legislation when it held that the rules on the inviolability of deputies—included in regional regulations—intrude into federal competence. It asserts that Federation Subjects may legislate in the field of joint competence if a federal law is lacking; but, a regional law must resolve the question:

> "in accordance with Chapter One RF Constitution, laying down the foundations of the constitutional order, other provisions of the RF Constitution, and the system of federal legal acts, based thereon, in which these provisions have been reproduced and elaborated."

By the manner in which the question was regulated, the regional provisions on the inviolability of deputies from administrative liability affect "the principles, fundamental provisions and institutes of administrative law and administrative liability, *i.e.*, in their substance they relate to the foundations of administrative law, established by the federal legislation in force".[73]

[72] See for this issue *Delo No.1. P. Grachev protiv V. Poegli st.131 UK RSFSR*, Moscow 1996, 11-12.

[73] *Rossiiskaia gazeta* 27 December 1995; *Sobranie zakonodatel'stva Rossiiskoi Federatsii* 1995

Thus, the fundamental regulations of a certain branch of law follow from Chapter One of the Constitution, other provisions of the Constitution and from the system of federal legal acts, based thereupon, which reproduces these provisions and provides them with more concrete content.

Some Conclusions

The issues of branch legislation are partly a remnant of the past because, in essence, the idea of branches of law with their own specific rules was based on the idea that the law must be different for each type of social relationships. This resulted in the compartmentalization of law and denies that there is unity within the legal system—except the unity brought by the Constitution, at least when this document can directly be applied.

The new Russian codification of civil law seems to be based on a branch approach, and several provisions in the Civil Code can be cited for this proposition. However, at the same time, this Code appears to be intended as a set of general rules and regulation for all private-law relations in general. The relationship between the 1994 Civil Code and the 1995 Family Code is that between a general law and a special one in which the general law is used when the special law fails to provide for a particular solution. This is done in a modern way by including the *proviso* that the application of these general rules may not distort the essence of family law. In many respects, the same approach has been followed with regard to other new codes.

This distinctly pragmatic solution also seems—to me—to be the best one for labor law. If a question has been expressly regulated in labor law, the special rules prevail over the general rules of the Civil Code (or Civil Procedure Code, see the *Lankina* ruling). If the general rules of the Civil Code have to be used—because the issue has not been regulated in the Labor Code—this must done by taking into account the special nature of labor law; this is designed to protect employees in their labor relationships with employers (or by applying the "social state" principle of Art.7, RF Constitution). Rules of labor law—which conflict with those of the more general codes—should not be declared void for this reason alone and, certainly, not when they are construed because of a special balancing of the interests involved in labor relations.

The issue of a conflict among constitutional rights (or constitutional duties) is rather different from a conflict among branches. A branch approach would result in solution whereby a certain doctrine prevails and more pragmatic solutions seem impossible.

No.50 item 4969; *Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii* 1995 No.6; *Konstitutsionnyi Sud Rossiiskoi Federatsii: Postanovleniia. Opredeleniia. 1992-1996*, Moscow 1997, 629.

A conflict among constitutional rights may be resolved in a concrete case by balancing these rights. As far as rights may serve as trump cards in court, this seems the correct approach where the Constitution (or the lawmaker) does not give priority to a certain right. In principle, all constitutional rights (or duties) have the same force; but this does not mean that it would not be possible to provide for certain rules in case of a conflict of rights, taking into account the lawful interests which are involved. This may be done by the lawmaker; but when the lawmaker has not done this, a court has to do it in each concrete case. Such a conflict of rights does not deprive the lawmaker of her/his influence of balancing these rights, by providing that in certain situations specific interests of one of the parties (or of other groups of persons) affected by the decision in that situation may prevail. In this sense, the rule of the Constitutional Court that only ordinary courts can resolve conflicts among branches of law (or between rights or duties) in a concrete case is too general.

Comments on the 1994 Russian Civil Code and its Meaning for Comparative Legal Studies

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The 1994 Russian Civil Code has a meaning for comparative legal studies, as correctly stated in the title of our conference. At the same time, it has a meaning for the harmonization and unification of civil law. It is this aspect to which I shall devote my brief comments.

Harmonization and unification of laws is on the agenda both in the Commonwealth of Independent States (CIS) and in the European Union (EU).

Commonwealth of Independent States

The Russian Civil Code was drafted on the basis of a Model Civil Code prepared by a working group of the Commonwealth of Independent States and adopted by the Inter-Parliamentary Assembly (IPA) of the CIS in 1994.[1] The Model Code has also influenced the drafting of civil codes of other CIS member. As stated in the *Information Bulletin* of the IPA,[2] the Model Code was elaborated in conformity with basic guidelines approved in 1992, and is conceived as a "recommendatory legislative act".[3] Efforts to achieve a more coordinated piece of legislation have failed because CIS members—as Zbigniew Brzezinski has observed—"insist on subordinating CIS laws to their own constitutions" and to their "sovereignty".[4]

However, a visible result of endeavors toward the unification of law within the CIS was an agreement on uniform rules of conflict of laws. The agreement was concluded in 1993 in Minsk and entered into force

1 V.F. Iakovlev, in *Grazhdanskii kodeks Rossiiskoi Federatsii: Chast' vtoraia*, Moscow 1996, xxxv; A.L. Makovskii, *Review of Central and East European Law* 1995 No.4-5, 239; F.J.M. Feldbrugge, *Review of Central and East European Law* 1995 No.3-4, 239; *idem*, *Review of Central and East European Law* 1996 No.6, 601; P. Maggs, *Rule of Law Consortium Newsletter*, Spring 1983 No.11, 3.

2 The Inter-Parliamentary Assembly of the Member Nations of the Commonwealth of Independent States. *Information Bulletin* 1992-1996 Nos.1-10.

3 Note 2 in *Information Bulletin* 1992 No.1, 43; *Information Bulletin* 1994 No.4, 52; *Information Bulletin* 1996 No.10, 57.

4 Z. Brzezinski, P. Sullivan, (eds.), *Russia and the Commonwealth of Independent States. Documents, Data, and Analysis*, Armonk, NY 1997, 505.

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in 1994. The agreement means, in effect, the adoption of a uniform code of private international law in the contracting states.[5]

European Union

The European Parliament considers the harmonization of the law of member states in the area of private law to be one effective way of meeting the European Community's legal requirements. This was recognized in a resolution adopted in 1989 requesting that a "start be made on [...] drawing up a common European Code of Private Law".[6] The European Parliament emphasized the importance of unifying contract law. Pioneering steps in this direction have been undertaken by Ole Lando (Copenhagen) on whose initiative a Commission of European Contract Law (Lando-Commission) has been at work since 1982.[7] The countries of Central and Eastern Europe associated with the European Union are under an obligation to adapt their legislation to the requirements of the EU. The requirements for integration into the internal market of the EU were defined in a 1995 White Paper.[8]

Past Experience Compared

The significance of attempts to harmonize and unify laws becomes visible in perspective. Almost forgotten are two unsuccessful attempts:

— A uniform code of obligations and contracts, drafted by Italy and France in 1928,[9] that never entered into force.
— A uniform code of family law, adopted separately, but with identical texts by Czechoslovakia and Poland in 1950, remained an experiment that did not work. The codes were replaced by new legislation in 1963 and 1964, respectively.[10]

5 F. Majoros, *Osteuropa-Recht* 1998 No.1, 1, 10, 20.

6 Resolution of 26 May 1989, *Official Journal of the European Communities* 1989 C, 158/400.

7 O. Lando, "Legal Harmonization of the European Contract Law in a Social and Cultural Perspective", in *Proceedings of International Symposium on Law, Economics and Business in the Melting Pot, 1996*, Vedbaek 1997, 248-274. For further references, see *Europarecht* 1991, 379-381; 62 *RabelsZ* 1998, 124-127.

8 European Union. *White Paper*, Brussels 1995.

9 Commission francaise d'etudes de l'Union legislative entre les Nations allies et amies. Commissione reale per la riforma dei codici. Projet de code des obligations et des contrats. Texte definitif approuve a Paris en Octobre 1927, Paris 1929, XIX, 573.

10 S. Rozmaryn, in *Unidroit. L'Unification du droit. Annuaire 1963*, Rome 1964, 156-157.

Successful, on the other hand, were other examples of the unification of law:

— The three Baltic countries, Estonia, Latvia, and Lithuania, established a Joint Legal Office in 1934 with a view toward harmonizing their legislation. They concluded Conventions on a Uniform Law on Bills of Exchange in 1938 and on a Uniform Law on Checks in the same year. Other conventions were in preparation when the Soviet Union incorporated the Baltic states in 1940.[11]
— The Council of Mutual Economic Assistance (CMEA) adopted General Conditions for the Delivery of Goods in 1968 (supplemented in 1975). This act created a unified legal regime for the purchase and sale of goods among the member states. [12]
— The Soviet Union used Principles (*Osnovy*) of federal legislation as a means for achieving conformity of republican codes.

Under Stalin's rule, an attempt was made to implement uniformity directly by enacting codes on the federal level, bypassing republican legislatures. Thus, a Criminal Code of the USSR was drafted in the 1940s. Also prepared were all-union codes of criminal procedure and of civil procedure.

I suppose that these drafts are not to be found in any library outside of the former Soviet Union, and even on former Soviet territory they are not readily available. I have brought with me some of these texts of Soviet legislative history. This is a special occasion to honor a special person. Therefore, it seems appropriate to conclude my comments by presenting a few draft all-union codes of the Stalin period as a gift to Professor Feldbrugge for the Institute of East European Law and Russian Studies in Leiden.

[11] For documentation on the harmonization of the law of the Baltic states in the inter-war period (1918-1940) with an introduction, see D.A. Loeber, in *Humanities and Social Sciences*, Riga 1998 No.2(19)/3(20), 197-223.

[12] P.S. Smirnov, *Review of Central and East European Law* 1985 No.3, 201-213; D.A. Loeber, *Osteuropa-Recht* 1960 No.1, 39.

The Constitutionality of Civil Law Norms

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1. Concepts such as the right of private ownership, freedom of economic activity, unfair competition, monopolization, the free flow of goods, services and financial funds, entrepreneurship, ownership, intellectual property, the right to privacy of one's personal and family life, protection of honor and reputation were first used in the 1993 Constitution of the Russian Federation (RF).

All of these concepts are genetically connected to civil law. A number of constitutional norms and principles reproduce the norms of civil law and *vice versa*: the norms of the RF Civil Code (hereinafter "the Code") often reproduce constitutional provisions. The constitutional guarantee of the right to private property, found in Article 35(3), of the RF Constitution, is regulated in greater detail by the norms of Articles 279-283 of the Code. The norms of Article 1(2), para.2, of the Code are close in their legal content to the norm contained in Article 55(3) of the RF Constitution.

Of course, while these norms are similar in nature, to some extent homogeneous, they are not identical. A constitutional norm always takes priority in the hierarchy of legal norms. Constitutional norms, as opposed to norms from specific branches of law, are always distinguished by a greater degree of legal weight, *i.e.*, a greater density of legal content (which allows for a variety of legal interpretations, taking into account a change of circumstances or the subjective understanding of the law). Constitutional norms predetermine the content of branch norms of a similar nature, often correcting such norms in the process of applying the law.

The constitutional principle of freedom of economic activity established in the fundamental constitutional principles (Art.8, RF Constitution) forms the basis of a series of norms in Chapter 2 of the Constitution guaranteeing rights essential to a society in which a market economy functions. These include such fundamental rights as:

(1) The right to choose a type of activity or occupation—the freedom to be an entrepreneur, or give or receive loans (Art.37, RF Constitution);
(2) The right to freedom of movement, to choose one's place of domicile—freedom of the labor market (Art.27);
(3) The right of association for joint economic activity—freedom of choice of organizational or legal form of business, and of formation thereof on the basis of various business structures (Art.34(1));

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(4) The right to own property, to possess, use and dispose of such property both as a single person as well as together with others, the freedom to possess, use and dispose of land and other natural resources—the freedom to own real estate (Arts.34 and 35) and freedom of the land market (Art.36(2));
(5) Freedom of contract—the freedom to conclude civil law and other transactions (Art.35(2));
(6) The right to protection against unlawful competition (Art.34(2)); the freedom to engage in any entrepreneurial activity and other economic activity not prohibited by law in accordance with the principle that "all which is not prohibited by law is permitted" (Art.34(1)).

The constitutional principle of freedom of movement of goods, services, and financial funds (Art.8(1)) is also extremely important as it ensures a stable regime of economic circulation. The new Russian Civil Code and other new civil legislation are gradually developing and complementing this constitutional principle, guaranteeing stable economic circulation on the legal branch level. In essence, norms on charter capital, the performance of obligations, and liability for violation of one's obligations serve precisely this aim.

The fundamental economic rights, proclaimed in Chapter 2 of the Constitution, are both of a public law and private law nature. From our point of view, these should not be considered simply as norms of either a state (public) or a civil (private) law nature.

In their public law aspect, constitutional norms regarding fundamental economic rights ensure the protection of private property and freedom of entrepreneurship as economic and social institutes that form the material basis for a certain degree of organization of state power. The private law content of such norms ensures the protection of the rights of specific owners and entrepreneurs.

The complex nature of fundamental economic rights—their dual, public and private law aspects—determine the particular nature of their action. Demonstrating their public law content, norms providing for fundamental economic rights act in the field of relations between the state and individuals. When such norms display their private law content, they actively combine with civil law norms to act in the field of private relations.

This way, the system of private law norms is more extensive than the system of civil law legal norms. In addition to civil law norms, the system of private law norms includes the following:

(1) Constitutional norms governing fundamental economic and private rights (taken in their private law aspect);
(2) Norms governing private law found in land, water, forestry and mining legislation and legislation on the mass media;
(3) Private law norms found in laws and other normative acts of Subjects of the Russian Federation adopted under both the joint jurisdiction of the Federation and its Subjects, as well as the jurisdiction of Subjects of the Russian Federation.

The possibility that civil law norms exist in laws of Subjects of the Russian Federation does not contradict the provision of Article 71(o) of the Constitution, according to which civil legislation falls under the jurisdiction of the Russian Federation. One cannot but agree with Professor Tolstoi, who—in expressing support for the idea we propose concerning distinguishing the concepts of "civil legislation" and "civil law"—confirms that "we cannot turn a blind eye to the fact that we cannot do without the appearance of civil law norms on the level of Subjects of the Federation".[1]

The fact that precisely civil legislation and not civil law falls under the jurisdiction of the Russian Federation means that laws of the Subjects of the Russian Federation—adopted in the field of joint jurisdiction and also jurisdiction by Subjects of the Russian Federation—may contain norms which, according to their branch attributes, are considered civil law norms. Naturally, however, they may not contradict the norms of federal civil legislation.

The study of the relationship between constitutional and civil law norms in the mechanism of the legal regulation of public relations represents a topical issue in need of interdisciplinary research at the intersection of constitutional and civil law.

2. The mechanism of interaction between these norms proposes the development of constitutional provisions through civil legislation, *i.e.*, the clarification of the number of subjects of constitutional rights, their authority and capacity to regulate proprietary and non-proprietary rights.

The interaction of constitutional and civil law norms should be of a mutual, dual nature, meaning that both lawmakers in the process of writing laws—as well as law enforcers in the process of applying constitutional provisions—need to take the provisions of civil legislation into consideration. Constitutional concepts such as "ownership", "property", "entrepreneurship", "intellectual property" and others can be properly interpreted only by taking civil law norms into account. However, it is also

[1] Iu.K. Tolstoi, *O chasti vtoroi Grazhdanskogo Kodeksa Rossiiskoi Federatsii*, St. Petersburg 1996, 16.

necessary—when applying civil law norms—to take their constitutional interpretation into account.

Article 15 of the RF Constitution establishes that constitutional norms are direct action (*priamoe deistvie*) norms, while Article 18 confirms that the rights and freedoms of persons and citizens operate *proprio vigore*. They define the purpose, content, and application of laws, the activities of the legislators and the executive as well as of local self-governing bodies, and they are also enforced by the courts.

In the process of applying the law, law enforcers must always endow branch norms with their constitutional meaning. Consequently, constitutional norms, along with branch norms, together have a regulatory effect on concrete social relations. A similar "layering" of constitutional norms and civil law norms also takes place in the regulation of proprietary relations. In and of itself, the opportunity to similarly "layer" various legal norms, and their ability to encompass the same social relations, attests to a certain degree of their similarity.

We do not share the opinion of Professor Chechot who holds that—prior to taking part in the mechanism of legal regulation—constitutional rights must first "dissolve" into their corresponding private rights counterparts insofar as this throws doubt on the ability of such norms to be exercised in their pure form; this contradicts their subjective character, in connection with which they are transferred to the category of elements of civil and labor legal capacity.[2]

The formulation of Article 18 of the Russian Constitution—which states that "rights and freedoms of man and citizens operare *proprio vigore*"—in our opinion also presupposes that, in practice, in certain situations not only branch norms but, also, the constitutional norms which predetermine them should be applied. In this way, direct regulatory influence on proprietary and related non-proprietary relations is achieved through constitutional provisions on the rights and freedoms of man and the citizen, in particular: norms dealing with fundamental economic and private rights.[3]

Constitutional rights that directly establish the foundations of Russia's economic system are deemed to be economic rights.These include: the right to freely utilize one's abilities and property in entrepreneurial activities and other activities permitted by law (Art.34(1), RF Constitu-

[2] D.M. Chechot, *Sub"ektivnoe pravo. Formy ego zashchity*, Leningrad 1968, 16-17

[3] It is no accident that Art.79 of the Law "On the Constitutional Court of the Russian Federation" stipulates that if a ruling of the Constitutional Court—declaring a normative act (or portion thereof) unconstitutional—creates a gap in the legal regulation, then the relevant norms of the Constitution of the Russian Federation must be directly applied.

tion), the right to private property and other property rights (Art.35), and the right of citizens of the Russian Federation and their associations to privately own land (Art.36). From the meaning of Articles 22(1), 35(2), and 37, we can extract a constitutional right to freedom of contract.

Figuratively speaking, a considerable number of civil rights, *i.e.*, branch rights stipulated by civil legislation, are created "under the wing" of such constitutional rights. Fundamental economic rights guarantee a certain degree of freedom in the economic field. They have a proprietary character and are distinguished from other fundamental private rights that ensure personal immunity—the right of privacy of one's personal and family life, protection of one's honor and reputation (Art.23(1), RF Constitution), freedom of movement and the right to choose one's place of domicile (Art.27(1)). Fundamental private rights do not predetermine the basis of economic and social foundations, and as a result may not be considered fundamental economic rights. Personal non-proprietary civil rights may be found (Arts.150, 152, RF Civil Code) "in the shadow" of such constitutional rights, *i.e.*, under their corrective influence.

The 1993 Russian Constitution also contains a number of fundamental rights which—while not entirely economic in nature—do have economic and constitutional significance and, accordingly, affect civil rights.

This concerns fundamental rights such as the constitutional right to intellectual property (Art.44(1), RF Constitution), the constitutional right to freedom of thought and word (Art.29(1), RF Constitution) which in the economic field is refracted into the constitutional right to industrial property and the right of commercial freedom of the press. Under the influence of these fundamental rights are found exclusive rights (Art.138, RF Civil Code) and the right to advertisement (Federal Law of 18 July 1995, "On Advertising").

The right of each individual to compensation from the state for torts caused by the unlawful acts (or inaction) of state bodies or their officials (Art.53, RF Constitution) has a certain degree of economic and constitutional importance. This right is matched by the civil right to compensation of losses caused by state and local self-governing bodies (Art.16, RF Civil Code).

The mechanism of "layering" constitutional norms on civil law norms may be described using the example of a case reviewed by the RF Constitutional Court of 9 June 1992 dealing with the constitutionality of a government decree concerning the acquisition of automobiles by citizens who used special-purpose checks and deposits. In 1988, Sberbank and the Trade Ministry of the USSR confirmed regulations in accordance with which Sberbank accepted special-purpose deposits from workers involved

in the construction and operation of the Baikal-Amur Railroad for the acquisition of automobiles; this was to be done by way of transferring a portion of their salary to such special deposit accounts. According to the terms and conditions of such deposits, the necessary funds would accrue within a period of three to five years in accordance with an employee's application; once a sum sufficient to purchase an automobile had been accrued, a branch of Sberbank would be obliged to issue to depositors a special voucher granting the depositor the right to purchase a certain make of automobile at a certain price according to the depositor's registered place of domicile.

In 1991, the Government of the RSFSR issued a resolution postponing until 1992 the receipt of 533,000 automobiles using Baikal-Amur Railroad checks. This postponement in effect represented the state's unilateral amendment of the terms of performance of its obligations, *i.e.*, a moratorium. During the period in which the postponement was in effect, the President issued an edict liberalizing prices which abolished state-regulated prices for many goods, including automobiles. As a result, citizens whohad been granted the right to purchase automobiles with deposits during the second half of 1991 and who—as a result of the moratorium—were not able to exercise said right, incurred substantial damages caused by the state due to the sharp increase in automobile prices. Relations between employees of the Baikal-Amur Railroad and the state were not considered to be ordinary contractual relations. Under conditions of general privatization, both the Baikal-Amur Railroad (as an employer) and Sberbank (as a banking institution) represented the state in contractual relations—as a result, contractual relations in this case were burdened by the element of public law. Professor Rudden has correctly noted that the bank loan (deposit) contract in question was not a standard civil law agreement regulated by the Civil Code, insofar as it was a "special purpose" agreement—not open to all citizens on an equal basis, but only to certain workers selected on the basis of the administration's estimation of their importance for the general public interest. The savings accounts of the victims were re-evaluated, *i.e.*, the currency exchange rate was raised in relation to other deposits by the public authorities.[4]

Due precisely to the fact that relations between citizens and the state were complicated by an element of public law, the Constitutional Court found that it was appropriate to refer to Article 67 of the 1978 Russian Constitution (see Art.53, 1993 RF Constitution) which stipulated the right of private entities to compensation from the state for damages. Similar

4 See V.V. Boitsova and L.V. Boitsova, "Interpretatsiia printsipa otvetstvennosti gosudarstva za ushcherb, prichinennyi grazhdanam, v pratike Konstitutsionnogo Suda", *Gosudarstvo i pravo* 1996 No.4, 57-58.

to Article 53 of the Constitution, the provisions of Article 16 of the Code may apply only in the absence of contractual relations. However, the Constitutional Court found that the state's tort liability is stipulated not only by norms of civil law but of constitutional law as well; moreover, as a right stipulated by constitutional law, it possesses an independent legal content and may arise independently.

We concur with V.V. and L.V. Boitsova that in the constitutional sense, violation of the principles of constitutional government serves as grounds for imposing liability upon the state, and that the provisions of the Constitution cannot be examined in isolation since they contain an internal unity and hierarchy of values. An understanding of the Constitution as a whole assumes that its provisions should be interpreted in such a manner as to avoid violating other constitutional norms and principles.[5]

Grounds for civil law liability of the state are determined by the norms of the Code (Art.16 and Ch.25, RF Civil Code).

The mechanism of "layering" constitutional norms onto branch norms has also been considered by the RF Constitutional Court in a 1993 case dealing with the constitutionality of restrictions upon the period for compensation resulting from involuntary absence from the workplace owing to the unlawful termination of employment. In the opinion of the Court:

> "the right to full compensation of torts inflicted upon individuals by the unlawful acts of state bodies and officials is included among the rights of the person and of citizens. A clarification of its content upon reproduction in the norms of branch legislation is possible only by taking into account the specifics of the regulated public relations. However, at the same time, restrictions should not be established on full compensation of torts for citizens whose rights and freedoms have been violated by the unlawful acts of state bodies and officials."[6]

In disclosing the content of the principles of constitutional government, upon the violation of which the state may be held liable in the constitutional sense, the Constitutional Court ruled that:

> "the custom of law enforcement practice in question contradicts above all general law principles of justice, legal equality, the state's guarantee of the rights and freedoms of the person and of citizens, and of compensation by the state of all torts caused to individuals by the unlawful acts of state bodies and officials stipulated by the Constitution of the Russian Federation. These principles enjoy the highest degree of normative generalization, predetermine the content of constitutional rights of man, have a universal character and in this regard have a regulatory effect on all areas of public relations. The mandatory nature of such principles consists of both their priority before other legal institutions as well as the extent of their action on all subjects of the law."[7]

5 *Ibidem*, 54.

6 *Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii* 1993 No.2-3, 60.

7 *Ibidem*.

Consequently, the problem of evaluating the constitutionality of norms of civil law (as well as other branch norms) presupposes the elucidation of the content of norms of the RF Constitution that predetermine the content of civil law norms, and the determination of the degree in which they adhere to the Constitution. A situation where civil law norms allow various interpretations is also possible. The Constitutional Court has the right to interpret a branch norm in such a manner that it acquires meaning in accordance with the Constitution, and as a result the norm is declared to be constitutional.

Minister of Foreign Affairs Kozyrev appealed to the Constitutional Court with a petition in which he requested the Court declare that Article 7 of the RSFSR Civil Code (currently Art.152, RF Civil Code) contradicts Article 29, paras.1 and 3, of the Constitution (guaranteeing each person freedom of thought and word and providing that no one may be forced to express their opinions and convictions, or prevented from expressing them). The grounds for Kozyrev's appeal arose out of court proceedings commenced in the Presnenskii *Raion* Court of Moscow in the case of Zhirinovsky *versus* NTV and Kozyrev (dealing with the protection of honor on the basis of Art.7, para.1, RSFSR Civil Code). In its ruling, the Constitutional Court refused to accept the case for review; however, it also stated that the right to judicial protection of honor—and the requirement to those who distribute defamatory information to prove its correspondence to reality—did not violate the freedom of thought and word as guaranteed by the RF Constitution. The Constitutional Court imparted a constitutional meaning to civil law norms concerning the protection of honor, indicating that during the examination of cases dealing with protection of honor in courts of general jurisdiction, a determination needs to be made not only the accuracy but also the character of the disseminated information. On the basis of this, the court must decide whether such information has caused harm to values protected by the Constitution, whether such information remains within the bounds of a political discussion, whether inaccurate factual information may be distinguished from political evaluations, and whether such information may be refuted in court.[8]

This case, which arose in the Presnenskii court, clearly attests to the expansion of potential constitutional control by courts of general jurisdiction. Fundamental economic and private rights and freedoms act not only in relations between the state and individuals but, also, in the field of private relations. Courts of general jurisdiction must apply not only branch norms but, also, constitutional norms and, furthermore resolve

8 *Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii* 1995 No.6, 3-4.

conflicts arising between two major laws: constitutional laws governing the protection of honor and reputation (Art.23(1), RF Constitution) and the constitutional right to freedom of thought and word (Art.29, RF Constitution). Having imparted constitutional meaning to Article 7 of the RSFSR Civil Code, the Constitutional Court nevertheless refused to accept Kozyrev's complaint, ruling that although a significant and topical issue had been presented to the Court in the appeal—specifically, how the requirements of protection of honor and reputation should be guaranteed so as not to contradict the interests of freedom of discussion of political problems in each specific case—the resolution of such issues falls under the competence of courts of general jurisdiction.

4. As shown by the practice of the Constitutional Court, the unconstitutionality of a civil law norm may be established in instances where its content is not clearly defined. In a case reviewing the constitutionality of Article 54, paras.1 and 2, of the RSFSR Housing Code, heard by the Constitutional Court on 25 April 1995, the Court expressed the opinion that:

> "the provisions of part one, Article 54 of the Housing Code of the RSFSR on the right of an employer to house other citizens in his residential premises 'in accordance with established procedure' has a blanket character. The uncertainty of its legal content does not allow an answer to the question: by which body and according to which act should said procedure be established, and this leads to an arbitrary understanding of what this means in essence."

The legal position taken by the Constitutional Court in this case in essence is contained in the following phrase:

> "the possibility the arbitrary application of the law is considered a violation of the equality of all persons before the law and the court, declared by the Constitution of the Russian Federation (Art.19(1))."

5. Articles 19 and 27(1) of the Constitution use the concepts "domicile" and "residence". Simultaneously, Article 20 of the Code establishes that domicile is recognized as the *place* where a citizen permanently or predominantly resides. What should we take as the meaning of "place" in the constitutional sense of this concept? A minimum of two distinct interpretations can be proposed. First, the place where a citizen permanently or predominantly resides may be understood as her/his chosen locality, meaning a point on the map. A second possible interpretation is not simply a "point on the map" but, rather a specific residence with an address. If one uses the second interpretation of the concept of "place", then registration—on a notification basis—of citizens according to their domicile and place of residence as it exists in Russia should be completed

only if actual housing is present. In the absence of housing (even for fully valid reasons), registration acquires an aspect of permission rather than notification. Consequently, from the constitutional right of freedom of movement and residence, it follows that only the first interpretation of "place" is constitutional. And in considering the Avanov case dealing with the constitutionality of provisions from Article 8, parts one and three, of the Federal Law "On the Procedure of Exit from the Russian Federation and Entry into the Russian Federation", and also the constitutionality of points 10, 12, 21 of the Regulations of the Registration of Citizens (confirmed by the RF Government), the Constitutional Court based its conclusions on an interpretation of "domicile" and "residence" that corresponds to the Constitution.

The concepts "domicile" and "residence" exist in the legislation of many countries. Domicile is usually understood as the lawful, legally registered location of an individual which forms a strong legal connection determining his legal status and within which s/he exercises rights and obligations (electoral rights, obligation to pay taxes, mandatory military service obligations, etc.). Residence usually refers to the fact of temporary residence in a certain place.

In the judicial practice of the United States, domicile is understood as the legally registered housing of an individual. In one court ruling, domicile was defined as the place where an individual has fixed and permanent housing to which s/he intends to return even if s/he temporarily resides in another place.[9]

Residence, in American judicial practice, is interpreted in a variety of ways: as the place where an individual actually lives at a given time, as his/her place of sojourn, as shelter (*Perez v. Health and Social Services*, reviewed by the Supreme Court of New Mexico).[10] Residence is more than simply one's physical presence yet less than domicile. Residence is defined by the fact of residence in a certain place while domicile means residence in such place with the intention of acquiring legal registration and permanent housing.

As opposed to domicile, residence signifies living in a certain place temporarily. Moreover, residence may be established for those without a permanent place of residence (for example, migrant Roma).

Insofar as residence represents temporary domicile, the question arises: may legal norms restrict the period of temporary residence to a certain period, for example, six months? Precisely such a period of registration of place of residence is established in point 10 of the Regulations

9 See *Black's Law Dictionary*, 484-485.

10 1977 NMCA 140, 573 P2nd 689, 91 NM 334.

on the Registration of Citizens of the Russian Federation. The Constitutional Court declared that the establishment of such a timeframe for residence violates the constitutional right to freedom of movement and choice of residence. Choice of domicile (or residence)—as explained by the Constitutional Court in its judgment of 4 April 1996 in the case of the constitutionality of normative acts of Moscow, the Moscow *Oblast'*, Stavropolsk Region, Voronezh *Oblast'*, and the city of Voronezh governing the registration of citizens—represents the result of an act of free determination by individuals. Citizens independently decide how long their residence will continue. If a citizen lives in a place which s/he considers domicile for an adequately significant amount of time, then s/he may require that the state certify this fact by means of registering this change, indicating that henceforth said place will serve as her (his) domicile. Domicile is a place of permanent (or primary) residence.

6. Through the prism of constitutional and civil law, one necessarily comes to the concept of "property". Article 35(3) contains the most important constitutional guarantee, which guarantees the sanctity of property: "No one may be deprived of his property other than by a judgment of a court." At present, we have noticed a tendency to expand the definition of "property" in connection with which the framework of this guarantee has expanded as well. Thus, property can also be deemed to be the object of fiduciary (trust) management, including enterprises and other property complexes, separate objects of real estate, securities, exclusive rights and other property (Art.1013, para.1, RF Civil Code). Under fiduciary management of property, the object of an agreement may comprise things to be either created or acquired in the future, following the conclusion of the agreement. Consequently, the constitutional guarantee of Article 34(3) of the RF Constitution extends not only to property in the possession of an owner at a certain moment but, also, to property that s/he may receive in the future.

We concur with the conclusion of Professor Braginskii that:

> "when Article 35 of the Constitution of the Russian Federation states: 'The right to private property is protected by law' and 'no one may be deprived of his property other than by a decision of the court', this means that when necessary, the object of protection is not only things, but also rights arising out of the law of obligations, including the right of an entity 'owning private property' to monetary funds in bank accounts."[11]

A reference to the judgment of the RF Constitutional Court in the case of the constitutionality of Article 11(1), paras.2 and 3, of the RF Law "On Federal Bodies of the Tax Police" is highly instructive: the provisions of

[11] M.I. Braginskii, V.V. Vitrianskii, *Dogovornoe pravo*, Moscow 1997, 233.

this law—granting federal bodies of the tax police the right to automatically impose claims on fines from legal persons—as well as on all sums of undisclosed or artificially lowered revenues—were declared to be contrary to the RF Constitution, in particular to Article 35. At the same time, no distinction was made between claims made upon things, belonging to taxpayers, and upon rights, including funds in a bank. In the judgment of the Constitutional Court, both were deemed to be co-equal as private property in the sense given in Article 35 of the Constitution.

Article 35(3) of the Constitution contains two extremely significant guarantees. The *first* may conditionally be called judicial ("no one may be deprived of his property other than by a judgment of a court"). The *second* has an aspect of value ("forced taking of property for the needs of the state may be effected only on condition of adequate, advance compensation").

In its judgment of 20 May 1997, in a case involving the constitutionality of a series of provisions contained in Articles 242 and 280 of the RF Customs Code, the Court drew a distinction among state entities and bodies and horizontal relations arising between private citizens. The constitutional guarantee in question extends to both of these fields of public relations.

However, if in the field of private law this guarantee proposes only preliminary judicial review over a deprivation of property, then in the field of public relations subsequent judicial review is possible as well.

In the field of civil law relations, the aforementioned guarantee signifies that one subject of civil law may not deprive another subject of property in the absence of a valid court judgment. Concerning the field of public law, in analyzing relations arising among customs bodies and entities in violation of customs legislation resulting in the confiscation (*i.e.*, sanctions for violation of customs regulations) of certain property, the Constitutional Court has held that subsequent judicial review is sufficient. In the opinion of the Constitutional Court, the issuance by customs bodies of orders to confiscate property—with the guarantee of subsequent judicial review over the legality of confiscation—does not contradict the requirements of Article 35 of the RF Constitution. However, from said holding of the Constitutional Court, it does not follow that in all other instances involving the field of public law only subsequent judicial review is sufficient. The property of commercial organizations with foreign investment created on the territory of Russia may not be requisitioned or confiscated by way of administrative procedure.[12]

[12] Art.7, RF Law "On Foreign Investments in the RSFSR" (with amendments of 19 June 1995).

The *Arbitrazh* Courts and the New Russian Civil Code

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1. The profound transformations that have characterized Russia's transition to a market economy have clearly created a need for a new, independent and highly professional judicial system as the legal underpinnings of economic reform. Under these conditions, the only sufficiently effective system is one of specialized courts qualified to resolve commercial disputes among participants in trade and commerce, whether in entrepreneurial or other spheres, regardless of whether the litigants represent private or state property or the state itself.

The speed with which economic reforms were undertaken, and new property relations formed, necessitated the quickest possible resolution of this issue by the intelligent use of the experience of the agencies of government *arbitrazh* which were in place in the USSR prior to 1991.

The new specialized courts were given the name "*arbitrazh*," in a fashion similar to their immediate predecessors of the *Gosarbitrazh*, although in essence they represented a rebirth of the commercial courts that existed in Russia prior to October 1917.

The new *arbitrazh* system's primary goal has been to assert the rule of law governing commercial relations and to enforce basic legal principles: independent judges, equality of all before the law and the court, adversarial proceedings and equal rights of the parties, transparency and directness (*neposredstvennost'*) of all judicial proceedings and decisions. To do this, the system first of all needed modern and systematic civil legislation reflecting and securing the new economic system and commercial relations.

Thus, the passage of the first and second third parts of the new Civil Code of the Russian Federation—as the primary regulator of this system and of these relations—has had a most beneficial effect on the further activity of the *arbitrazh* courts.

This has been enhanced by adoption of the third part of the Code—dealing with issues of inheritance rights and private international law—and the fourth (and final) part: "Rights to the results of intellectual activity and the means of the individualization thereof."

In this way, the work to codify post-Soviet civil legislation has been completed in the Russian Federation. The rules of the Civil Code are universal. They regulate relations among citizens as well as among en-

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trepreneurs and consumers. The Code's promulgation has significantly improved the development of civil law, and has filled in numerous gaps left in the previous 1964 Civil Code, gaps which had prevented the regulation of new commercial relations, contracts, and obligations.

By respecting historical continuity, employing provisions of pre-revolutionary Russian civil law, of the 1922 Civil Code, and of modern-day experience in Western countries in regulating commercial relations, and also by observing the norms of international agreements, the new Civil Code—as adequately as possible—meets the needs of a transformed Russian economy.

It includes provisions for the legal regulation of contracts (and variation thereof) that were not previously covered by Russian civil legislation. These include the purchase and sale of businesses (enterprises), the lease of businesses, financial leasing, factoring, franchising (*i.e.*, the transfer of rights to utilize industrial property such as a company name, trademark, etc.), property under trust, agents' contracts, and others.

Aside from these new provisions, other contracts have been separated from broad legal constructs and are now treated independently for the first time in the new Code. These include contracts on transportation, contracts on performing research, research and development and technological work, and contracts for bank accounts, bank deposits, and credit agreements.

Even traditional institutions have undergone significant further development. These include purchase and sale agreements, gift, lease, construction, transportation, commission, agency, loans, storage, etc.

Obviously, the sphere of regulated activity has been expanded most of all in the business sector (*i.e.*, entrepreneurial activity). In noting the universality of the Civil Code, it is appropriate to remark here that both the first and second parts of the Code specifically distinguish business activity, and that somewhat different rules govern "business to business" arrangements as opposed to those which apply to relations among consumers. In dealing with entrepreneurs, the Code allows significantly more freedom of discretion in the conclusion and determination of terms and conditions for contracts among entrepreneurs, while also establishing stricter rules of liability, regardless of fault.

2. In introducing—with the aid of the Civil Code—civil law methods for regulating the economy, the state has thereby widened the sphere for free and dynamic activity by domestic subjects who have become full-fledged participants in commercial relations. This has significantly reduced the state's role in determining the terms and conditions of contracts and other binding relations of businesses and organizations. At the same time, the

states' regulatory role *via* new (amended) legislation—and the role of the judiciary in implementing this legislation—must grow.

The Civil Code, despite its considerable volume, cannot regulate all commercial relations in their entirety. A number of its provisions are filled in and made concrete by the promulgation of special laws and by-laws (*ustavy*) regulating the activity of rail, sea, air, and river transport, as well as corporations (joint-stock companies), financial-industrial groups, limited liability companies, laws on government registration of rights in and transactions involving immoveable property, bankruptcy, and other regulatory acts.

Especially important has been the development of appropriate (*pravil'noe*) and all-encompassing legislation regulating relations between the state and the private sector (state and private property), the order and conditions for the transfer of land, immoveable property, monetary funds and other property from state to private property and ownership, while establishing the optimal relationship between public-law and private-law regulatory methods.

In order to expedite the drafting and promulgation of the most important legal acts, the federal government has set up a Council for the Preparation of Prioritized Normative Legal Acts in the Economic Sphere (*Sovet po podgotovkve prioritetnykh normativnykh pravovykh aktov v ekonomicheskoi sfere*). This advisory body—which includes representatives from all branches of government as well as scholars and community leaders—is entrusted with developing recommendations for subjects of the legislative process and has as its goal the coordination of the work of drafting and adopting of legislation that will help to best achieve the strategic goals of economic reform.

In order to bring civil legislation into line with the needs of the economy, as well as to provide for its further improvement, the Russian President has also set up a Council on Codifying and Reforming Civil Legislation (*Sovet po kodifikatsii i sovershenstvovaniiu grazhdanskogo zakonodatel'stva*). This council is a consultative body which is also called upon to facilitate cooperation among various levels of government agencies, social groups, and scientific-research organizations on issues relating to the preparation of proposals on government policy in the sphere of civil legislation. The Council has also been entrusted with providing reviews of federal legislation in this field as well as analysis of practice in implementing the Civil Code.

The Higher *Arbitrazh* Court of the Russian Federation also plays a crucial role in this process. The Court has been active in the preparation of the Civil Code from the very beginning and—with its experience in

applying civil law in the judicial process—has also been instrumental in developing other necessary legislative acts.

3. Since the passage of the Parts One and Two of the Civil Code, *arbitrazh* courts have been focusing on the interpreting of the new civil-law norms and on ensuring the proper (*pravil'noe*) and well-founded application thereof in resolving specific economic (commercial) disputes. In particular, at a time when the legal foundation of the Russian economy is still under development, the *arbitrazh* courts play a major role in laying down that foundation and elaborating its major elements.

The provisions of the Civil Code allow *arbitrazh* courts to play an active role in selecting and forming the necessary legal concepts and positions for resolving commercial disputes. Article 6 of the Code stipulates that in cases where the commercial relations of two litigants are not regulated by legislation or by the agreement of the two parties, and where there are neither standard business procedures nor corresponding legal norms which could be applied as extensions of the law, the court may proceed by analogy of law (*analogiia zakona*), *i.e.*, from the general principles and intent of civil legislation (*analogiia prava*) and from the demands of good faith, reasonableness, and fairness (*dobrosovestnost'*, *razumnost'*, *spravedlivost'*).

In addition, a number of the Code's provisions leave to the court's discretion (*usmotrenie*) the definition of such concepts as significant violation" (*sushchestvennoe narushenie*),"significant shortcomings" (*sushchestvennye nedostatki*), "reasonable time-frame" (*razumnyi srok*) "necessary expenditures" (*neobkhodimye raskhody*) etc. These concepts can only be defined by the resolving of, and then generalizing from, specific cases *via* an analysis of the court's decisions over time. This is the task of the *arbitrazh* courts, and above all of the Higher *Arbitrazh* Court, which issues Rulings (*postanovleniia*) and Guiding Explanations (*raz"iasneniia*) on the basis of generalized court practice and the examination of specific cases, as provided for by Article 127 of the 1993 Constitution of the Russian Federation.

In the four years during which the new Civil Code has been in place, the Higher *Arbitrazh* Court has performed a gargantuan task in interpreting legal norms and standardizing judicial practice in the sphere of business activity. This work has been codified in the adoption of a number of the rulings (*postanovleniia*) by the Plenum of the Higher *Arbitrazh* Court, as well as in judgments of the Court in specific cases. As far as the most important issues connected with the activities of the *arbitrazh* courts and of courts of general jurisdiction (*obshchei iurisdiktsii*) are concerned, this work has been done jointly with the Supreme Court of the Russian Federation. Therefore, numerous joint rulings (*postanovleniia*) have been

adopted by the Plenum of the RF Supreme Court and the Plenum of the Higher *Arbitrazh* Court.

For example, soon after the Part One of the Civil Code had been adopted, Ruling No.2/1 (28 February 1995) set forth interpretations of issues dealing with the Code's relation to the norms of previously adopted legal acts, questions which had not been fully addressed in the federal law governing the entry into force of Part One of the Code.

This same ruling resolved a very interesting issue which arose in judicial practice in connection with the application of Article 205 of the Civil Code. According to this article, where a statute of limitations (*srok iskovoi davnosti*) has expired, it may only be waived in special cases when the court finds that the claimant was unable to file its claim due to extraordinary personal circumstances (such as serious illness, a helpless state, illiteracy, etc.). This article had not envisaged the possibility of waiving the limitation period for a legal person representing another organization in trade and commerce.

In practice, a question arose as to whether or not the waiver in Article 205 governed to a business relationship in which one of the parties was a citizen/entrepreneur. The Plenums of the Supreme Court and the Higher *Arbitrazh* Court answered that it did not, taking the position that the expiration of a statute of limitations involving a citizen/entrepreneur engaging in her (his) business duties could not be waived since it was also not possible to waive the limitation period for a legal person—regardless of the reasons for the expiration thereof.

In Ruling No.6/8 (1 July 1996)—consisting of 60 sections—the Plenums of the Supreme Court and the Higher *Arbitrazh* Court formulated approximately one hundred clarifications dealing with the application of the Code's provisions in judicial practice. In part, it was expressly held out that norms of civil law contained in acts of Subjects of the Russian Federation—promulgated prior to the adoption of the 1993 RF Constitution—may be applied by courts only insofar as they do not contradict the Constitution or the new Civil Code.

The norms of the RF Civil Code establishing the bases and procedure for declaring transactions to be invalid differ significantly from those of the previous Code. A great deal of attention has been devoted to this questions in the course of judicial practice: first of all, because courts are often called upon to decide whether specific transactions are voidable (*osporimye*) or void (*nichtozhnye*); secondly, because the rules set forth in Article 168 must be concretized in order to determine whether a given transaction is invalid (*nedeistvitel'no*), that is, void *ab initio*.

The issue of whether a transaction was voidable or void arose in the matter of so-called *ultra vires* transactions (*vneustavnye sdelki*) concluded by legal persons. According to the 1964 RSFSR Civil Code, and in light of the principle of the special legal capacity of legal persons, all such transactions were deemed to be void. The new Civil Code solves this problem in a different manner.

In their joint ruling of 1 July 1996, the supreme judicial organs have held that if the special legal capacity of legal persons is established by law (for unitary state companies, banks, insurance and other organizations), they cannot conclude transactions which contradict their purposes (*tseli*) or the subject of their activity (*predmet ikh deiatel'nosti*) as these are defined in a normative fashion (*v normativnom poriadke*). In such a case, these transactions are void on the basis of Article 168 of the Civil Code. However, if the legal capacity (*pravosposobnost'*) of a commercial organization is not defined in a normative fashion but, rather, by its charter (*ustav*) documents, and the given transaction contradicts its goals, then this transaction falls under the purview of Article 173 of the Civil Code; as such, it is voidable and may be declared invalid only if the conditions indicated in Article 173 are present.

Judicial practice uses an analogous method of resolving the issue of the validity of transactions concluded in the name of a legal person by an organ, the powers of which are limited. If the organ has exceeded its powers, as defined by normative act, then judicial practice considers this transaction as void. But if in making the transaction the organ has exceeded its powers set only by charter documents, then such a transaction is voidable and can be declared void only: (a) if a suit is brought by those persons enumerated in Article 174; and (b) where the conditions stipulated in that article are present.

This same ruling defines as invalid (*nedeistvitel'no*) any transactions concluded after the Civil Code entered into force and related to the acquisition of shares in joint-stock companies (or a portion of the charter capital of other economic societies [associations]) by state agencies or agencies of local government that have not been authorized to do so by a law (*zakon*).

In accordance with Article 340, para.3, of the Civil Code, buildings or structures can only be mortgaged if a mortgage is also taken out on the plot of land on which the building or structure is located. If the mortgagor is the owner or lessee of the land plot and—according to the mortgage agreement—mortgages only the building or structure without the corresponding land plot, then according to the 1 July 1996 Ruling of the Plenums of the higher courts, this agreement is void.

Several instances from judicial practice have been most useful as they relate to the application of legislation on the procedure for concluding agreements. Paragraph 20 of the July 1996 Ruling holds that if an agreement signed by the head of a branch (*filial*) of a legal person does not contain an indication that it was concluded in the name of the legal person and under his (her) power of attorney (*doverennost'*), but nevertheless the branch's head does in fact have a power of attorney and the relevant authorization, then the agreement will be deemed to have been concluded in the name of the legal person. The 1996 Ruling (para.58) also provides an important practical interpretation: in addition to an answer attesting to the full and unconditional acceptance of the terms and conditions of an offer—unless otherwise provided by agreement or a law—acts in fulfillment of a contract performed by a person who has received an offer, bound with a time limit for the acceptance thereof, will be deemed to be acceptance of such offer.

Mortgage contracts have been widely applied in practice where ownership of the object of the mortgage will pass to the mortgagee if the mortgagor breaches a basic obligation of the mortgage agreement. Such agreements are characterized as void in the joint ruling mentioned above, except in those cases where the contract can be considered a release of rights (*otstupnoe*) or a novation (*novatsiia*) of the underlying obligation. The basis for declaring such contracts invalid is that they contradict Articles 344 and 349 of the Civil Code. Article 349 stipulates that if a mortgagor fails to fulfill the obligations guaranteed by the security, the mortgagee merely becomes the first in line among the mortgagor's other creditors to receive his (her) satisfaction from the proceeds of the mortgaged property. Since the norms of these articles are imperative, the parties to a contract cannot establish different rights for the mortgagee.

Under para.47 of the Plenums' ruling, any term or condition which affirms the right of the mortgagee to levy execution against the mortgaged immoveable property without filing a claim in court will also be deemed to be void unless such an agreement is expressly set forth in the security agreement (*dogovor o zaloge*). Such a condition would contradict Article 349 of the Civil Code, which allows such conditions to be imposed only in a notarized contract between the mortgager and the mortgagee concluded after a breach of the original commitment.

According to the new Civil Code, commercial organizations (excluding state and municipal enterprises) are the owners of all the property transferred to them in the form of investments (contributions) by their founders, partners, or members. Therefore, a Plenum Ruling (25 February 1998) has held that once property has been contributed to the charter

(cumulative) capital and there has been official state registration of the relevant legal person, the founders of these legal persons lose their right of ownership to this property.

Of great importance is the courts' interpretation of the principles of civil law as set forth in Article 1 of the Civil Code, especially of one of the most important of these—the principle of freedom of contract. Judicial practice in this sphere was initially riddled with contradictions. In some cases, courts had based their decisions on the full and absolute freedom of contract, being guided by any contract concluded by two parties, regardless of its content. In other cases, the courts held that freedom of contracts cannot be unlimited and that courts are obliged to evaluate the content of contracts from the point of view of their conformity with fundamental principles of civil legislation. In such cases, the courts took into account certain general principles as well as specific rules pertaining to individual institutions.

Eventually, the courts have come to apply an approach whereby disputed contracts are evaluated in accordance with the rules laid down in Article 10 of the Code. If in the court's opinion a contract contains terms and conditions the realization of which could significantly harm the interests of one of the sides—*i.e.*, if a right was abused by one of the parties—then the *arbitrazh* courts have refused to protect the right so abused.

The norms contained in Chapter 25 of the Civil Code, "Liability for Breach of Obligations", have in particular been thoroughly elaborated in judicial practice. The courts have accumulated a wealth of experience in applying Article 333 of the Code on "Reducing Contractual Sanctions". At first, the courts differed in their understanding and use of this article. Some courts believed that the implementation of Article 333 was a right—but not a duty—of the court, and that the court could determine the amount of the contractual sanction only in cases where the defendant had filed a motion requesting it to do so. These courts believed, furthermore, that a higher appellate court had no right to reduce the sanction if the lower court had not availed itself of this right. Other courts, on the other hand—basing their findings on the view that given objective proof of the obvious disparity between the proposed sanction and the actual effects of the breach—believed that they were required to reduce the amount of the sanction by applying Article 333. Eventually, the second approach has come to dominate judicial practice, and this has been reflected in a review (*obzor*) of the application of Article 33 approved by the Presidium of the RF Higher *Arbitrazh* Court (14 July 1997).

Numerous difficulties arose in interpreting Article 395 of the Civil Code dealing with the imposition of interest on loaned monies after a failure to fulfill monetary obligations. The greatest problem has been in defining the interest rate as provided for in Article 395. According to some, this interest was merely a normal payment for the use of borrowed funds. Others believed that imposing interest on the basis of Article 395 was a type of civil-law liability for breach of a legal duty. The rules for applying Article 395 depend on one's answer to this question.

If interest is a form of liability for breach of an obligation, then imposing interest on this basis could only be mandated if all the terms and conditions for apportioning liability are present. In such a case, it would be impossible to apply both Article 395 and the sanction provided for either by law or by the contract—first of all because this would mean subjecting one of the parties to liability twice for the same infraction, and also because the compensatory sanction would in effect become punitive. On the other hand, if the interest provided for in Article 395 is considered a regular payment for the use of borrowed monies, then it can be imposed regardless of whether or not the conditions for liability are present.

Despite some hesitation, judicial practice has eventually moved toward applying Article 395 as a form of (and, therefore, according to the rules for imposing) liability. In this, the courts have been directed not only (and not so much) by the fact that Article 395 is entitled, "Liability for Breach of Monetary Obligations", and is found in Chapter 25, "Liability for Breach of Obligations" but, rather, by the fact that interest can be imposed according to Article 395 only after a finding of wrongdoing (*pravonarushenie*), in the form of the improper use of borrowed funds in the wake of failure to fulfill one's monetary obligations. Another factor that has been taken into account was that, compared to the total damages, the interest imposed by Article 395 had an essentially compensatory function, making it identical in this sense with a compensatory penalty, which indicates that these are legal equivalents, and which is what the Plenums of the Supreme Court and the Higher *Arbitrazh* Court have indicated in their Ruling of 8 October 1998.

The work of interpreting the norms of the Civil Code continues. It includes legislative acts promulgated during the development of the Code. In this way, the legal basis for the economy widens, and the sphere of commercial relations falling outside the framework of legal regulation narrows.

4. In accordance with Article 46 of the Russian Constitution, the Civil Code has significantly expanded the jurisdiction of the courts. The Code

proclaims judicial protection to be the universal and highest form of defense of the rights of natural or legal persons that have allegedly been violated or otherwise challenged. Article 12 of the Code provides eleven vehicles for defending civil-law rights; all of them, with the exception of the right to self-defense, are exercised by the filing of a claim in court. The courts have also been mandated to protect the rights of natural and legal persons against illegal acts by state agencies. According to Article 11, any administrative act can be challenged in a court of law. According to Article 16, damages incurred by a natural or legal person as a result of illegal act (inaction) on the part of state agencies, agencies of local self-government, or the representatives of these agencies must be indemnified by the state or municipality.

According to the division of jurisdiction between general courts and *arbitrazh* courts, the latter are have been delegated jurisdiction over claims filed by organizations or citizen-entrepreneurs seeking a declaration of invalidity (in whole or in part) of non-normative acts of state agencies, agencies of local self-government, or other agencies. An act can be declared invalid if it is found violate existing existing legal norms or of the rights of legal persons or citizen-entrepreneurs who have filed suit in court.

The *arbitrazh* courts' role in resolving disputes among the state and its subjects is expanding. One indication is to be observed in the increasing number of cases of this category brought before *arbitrazh* courts. While the total number of cases before *arbitrazh* courts had increased by 35% in 1999 when compared to the same period in 1998, the number of disputes involving administrative relations rose by more than 90%.

It should also be noted that a significant portion of the suits filed against administrative acts are upheld by the courts. Participants in trade and commerce rountinely avail themselves of this means of protection against violations of their rights by the tax and customs services, and, more recently, by agents of the federal treasury as well.

5. The process of enacting the Civil Code has been accompanied by a gradual reform of the judicial system and the systematic improvement of procedural legislation regulating the activity of the *arbitrazh* courts.

In 1995, the Federal Constitutional Law "On Arbitrazh Courts in the Russian Federation" and the *Arbitrazh* Procedural Code (APC) were passed, replacing the prior legislation dating from 1992. And in 1996, the Federal Constitutional Law "On the Judicial System in the Russian Federation" established the structure of judicial authority in Russia, codified the procedure for creating and abolishing courts, and consolidated the general principles on forming and on the functioning of the judicial

system. And—in the fall of 2002—the 1995 APC gave way, in turn, to a more recent version of this Code.

These laws have made significant changes in the structure, competence, and norms of *arbitrazh* courts and court proceedings, completing the process of turning the *arbitrazh* courts into a fully empowered branch of the judiciary, capable of implementing the new Civil Code and providing legal security for economic reform.

With the adoption of new *arbitrazh* procedural legislation, the procedural basis for the activity of the *arbitrazh* courts has been changed by strengthening the legal guarantees and and, thereby, enhancing the interests of those engaged in entrepreneurial activity, as well as toward greater economy and efficiency in the work of the courts. In particular, the *Arbitrazh* Procedural Code provides for the individual examination of the overwhelming majority of all disputes in the courts of first instance and has abolished (for the basic category of cases) the previous requirement of proof of exchange of demand and refusal (or of demand and failure to respond) as a mandatory condition for access to the courts.

The APC has widened the jurisdiction of the *arbitrazh* courts by placing under their purview cases involving foreign organizations, organizations with foreign investors, international organizations, and foreign nationals engaged in business activity. The courts' activity in this sphere is of particular importance for Russian jurisprudence; we view their reliability as a necessary condition for Russia's integration into the world economy.

In the hopes of improving the quality and authority of the judiciary, fourteen *arbitrazh* courts have taken part in an experiment in which people with rich and significant experience in various and extremely complex spheres of business and other economic activity (banks, treasury bills, transportation, shipping, etc.) had been invited to participate in the *arbitrazh* process as lay judges.

The search for newer, more effective and efficient court procedures continues. The goal is to develop the most appropriate possible norms of jurisprudence for various types of disputes while allowing for a differentiated approach to disputes of varying character and importance.

Experts of the RF Higher *Arbitrazh* Court have been involved in elaborating the new APC to further improve the procedural mechanisms for resolving commercial disputes. The draft which they prepared—and which served as the basis for promulgation of the 2002 APC—takes into account not only the needs of a modern information society in creating adequate "judicial technologies" but, also, *arbitrazh* court precedent and recommendations from the Council of Europe.

The endpoint of judicial power is the implementation of judicial decisions. Until late in the 1990s, this was the weakest area in the work

of the judiciary: prior legislation and agencies of judicial enforcement had not been designed or trained to deal with free market realities. Since November 1997, however, two federal laws—drafted with the active participation of the Higher *Arbitrazh* Court—have been in force: the Laws "On Enforcement Proceedings" and "On Bailiffs." The enforcement of judicial decisions in Russia is up to the bailiffs, who are part of the Ministry of Justice.

Federal Decree No.6 (1 June 1998) promulgated the Statute "On the Federal Debt Center", under the auspices of the federal government, the main task of which is to create organized economic, informational, and other conditions for the effective functioning of a system of mandatory claims against property of debtor organizations.

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All the measures, which have been discussed above, are designed to to raise the effectiveness of the *arbitrazh* courts in implementing the provisions of the new Civil Code in the conditions of a modern Russian economy.

The Supreme Court of the Russian Federation and the New Russian Civil Code

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The adoption of the new Civil Code of the Russian Federation (hereinafter "the Code") has been of great importance for the codification of legislation and for bringing such legislation into accordance with the 1993 RF Constitution, and also for court practice and the effective protection of the rights, freedoms, and lawfully protected interests of persons concerned by the courts.

Before turning to court practice regarding the application of the new Code, it should be noted that in recent years the role of the courts in general—and, in particular, the role of courts of general jurisdiction (*sudy obshchei iurisdiktsii*), the system of which is headed by the RF Supreme Court—has increased significantly in the Russian Federation.

The Russian Constitution provides for the principle of division of powers, the implementation of which has turned the courts from state bodies which, in recent times, had rather restricted authority and played a minor role, into independent bodies of judicial power.

Article 46 of the Constitution guarantees each individual the judicial protection of his (or her) rights and freedoms and establishes that the rulings and acts (or inaction) of state bodies, bodies of local self-government, public associations and officials may be contested through the courts.

The right to judicial protection is not subject to any restrictions whatsoever and extends not only to citizens of the Russian Federation and Russian legal persons, but also to foreign citizens and foreign legal persons whose rights have allegedly been violated on the territory of the Russian Federation.

The adoption of the RF Constitution in 1993 and, thereafter, of the new Code as well as of other legislation, along with expanding the jurisdiction of general jurisdiction courts, has also provided a new means of judicial protection aimed at ensuring the full restoration of rights which have been violated, as well as—more importantly—measures directed at preventing the possible violation of the rights of both specific subjects and indeterminate groups of entities (persons).

The main activity of general jurisdiction courts—involving the protection of rights, freedoms, and lawfully protected interests—comprises the resolution of individual civil cases. The overwhelming majority of civil

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cases (approximately 99.9%) heard in general jurisdiction courts are dealt with by district (*raion*) courts (the lowest ranking courts in the system of general jurisdiction courts, operating in each *raion* of the Russian Federation); this ensures easy access to the judicial system, since such courts are closest to the general population.

A portion of civil cases—insignificant in number yet extremely significant in terms of their ramifications—is dealt with by higher courts of first instance, including the Supreme Court. In addition to reviewing specific cases, the Supreme Court is specifically charged (under Art.126 of the Constitution) with the authority to issue Guiding Explanations (*raz"iasneniia*) and clarifications on issues of court practice, including issues arising in connection with the application of the new Civil Code. (The RF Higher *Arbitrazh* Court [*Vysshii Arbitrazhnyi Sud*, *VAS*] is endowed with the same authority.)

Insofar as the new Code is applied by both general jurisdiction courts and *arbitrazh* courts, the Supreme Court and *VAS* together issue joint explanations relative to the application of the new Code, which are designed to ensure uniform court practice.

With the increased role of general jurisdiction courts and the expansion of their authorities, the number of civil cases dealt with in the Russian Federation has considerably grown, almost doubling in number in recent years.

In the field of the protection of civil-law rights, such cases involve for example:

- protection of property rights;
- protection of honor, business reputation, and other immaterial things;
- various transactions;
- compensation of material and immaterial damages;
- protection of copyright;
- inheritance; and
- the activities of new subjects of civil-law relations (commercial partnerships and societies, various cooperatives).

A fundamentally new category of cases concerning the protection of civil-law rights, involving cases concerning disputes between citizens and the state, has come under the authority of courts of general jurisdiction. The Code stipulates the obligation of the state (the Russian Federation and its Subjects) to indemnify losses suffered by citizens or legal persons as a result of the unlawful acts (or inaction) of state bodies or officials of such bodies, including losses suffered as a result of the publication of acts by

state bodies which contradict a law or other legal acts (Art.16), and also determines the participation of the Russian Federation and its Subjects in relations regulated by civil legislation (Ch.5).

Prior to the adoption of the new Code, courts had experienced considerable difficulty in ruling on new categories of civil-law cases insofar as many legislative acts—including the prior 1964 Civil Code—had become outdated and failed to take into account new trends *inter alia* in the definition of the status of individuals and the development of commercial relations; the legislation had also come to contain numerous contradictions and loopholes which were difficult to resolve.

The adoption of the new Code has played an extremely important role in the codification of legislation and has alleviated countless problems concerning its application; it has also occupied a not insignificant place in the development of civil procedural legislation. Its fundamental provisions—which are important in terms of civil procedure—were taken into account in the legislation amending the Code of Civil Procedure, which was adopted upon the legislative initiative of the RF Supreme Court (and which entered into force on 9 January 1996).

At the same time, a considerable number of important, complex issues have arisen after the adoption of the new Code and other laws adopted on the basis thereof.

Many of these issues, which require uniform resolution both at the level of courts of general jurisdiction and *arbitrazh* courts, have been clarified by issuing joint resolutions by the Plenum of the Supreme Court together with the Plenum of the Higher *Arbitrazh* Court of the Russian Federation.

The following joint resolutions were among those which have been adopted by the Plenum of the Supreme Court together with the *VAS* Plenum:

— "On Several Issues Related to the Entry into force of Part One of the Civil Code of the Russian Federation", 28 February 1995, No.2/1;
— "On Several Issues Related to the Application of Part One of the Civil Code of the Russian Federation", 1 July 1996, No.6/8;
— "On Several Issues Involving the Application of the Federal Law 'On Joint-Stock Companies'" 2 April 1997, No.4/8; and
— "On Several Issues Involving the Application of the Federal Law 'On Bills of Exchange and Promissory Notes'", 5 February 1998, No.3/1.

These resolutions have dealt with issues concerning, *e.g.*, the demarcation of authority in civil-law cases between courts of general jurisdiction and *arbitrazh* courts, provisions on legal persons and natural persons, on the right of ownership and other rights *in rem*, on obligations, and the statute of limitations.

The Supreme Court independently has clarified issues arising only in courts of general jurisdiction. Examples of this can be seen in the resolutions "On Several Issues Involving the Application of Legislation on Compensation of Moral Torts (Punitive Damages)" (1994, as amended) and "On Several Issues Arising upon the Judicial Review of Cases Involving the Protection of Honor and Dignity of Citizens, and also the Business Reputation of Citizens and Legal Persons" (1993, as amended).

One of civil law's most important problems, which without exaggeration is of national importance, is related to the particular nature of the state structure of Russia, which is a federative state.

The Russian Federation includes eighty-nine Subjects (republics, *kraia*, *oblasti*, federal level cities, autonomous *okrugi*, and autonomous *oblasti)* which—in accordance with the Constitution—promulgate their own legislation in specific areas. Herein lies the complexity of the legal system of the Russian Federation, which consists of federal legislation, international legal acts and the legislation of Subjects of the Russian Federation.

In accordance with Article 71 of the Constitution, civil legislation has been delegated to the exclusive competence of the Russian Federation, from which it follows that Subjects of the Federation are not entitled to adopt legislation regulating civil-law relations. However, it is sometimes very difficult to distinguish civil relations from other legal relations; this can cause serious problems and threaten to violate civil-law rights insofar as the regulation of many legal relations that are "borderline" civil-law relations come under the joint competence of the Russian Federation and its Subjects, with regard to which the latter are entitled to adopt their own legislation (for example, land, housing, labor, family, and administrative law come under the joint competence of the Russian Federation and its Subjects).

The Supreme Court has taken the position that civil legislation belongs to the exclusive competence of the Russian Federation, that the Code is subject to direct application throughout the entire territory thereof, that the adoption of laws and other normative acts by Subjects of the Russian Federation is prohibited, and that such legislation may not be enforced by the courts.

In this regard, it should be noted that in the Russian Federation many of the most important civil-law relations are expressly regulated by the Constitution.

For example, the Constitution stipulates the following:

— in the Russian Federation, a single economic space, the free movement of goods and financial funds, support of competition and freedom of economic activity are all guaranteed Art.8(1));
— the Russian Federation recognizes and protects, in equal measure, private, state, municipal and other forms of property (Art.8(2));
— each individual is entitled to freely utilize his (or her) abilities and property for entrepreneurial or other commercial activity permitted by law (Art.34(1));
— the right of private property is protected by law, each individual is entitled to own property, to possess, utilize, and dispose of said property both individually and jointly with other entities (Art.35);
— citizens are entitled to privately own land (Art.36(1));
— customs borders, duties, fees and any other obstacles to the free movement of goods, services and financial funds may not be established in the Russian Federation (Art.74(1)).

The Supreme Court bases its rulings on the above constitutional provisions, reproduced and developed in the Code in the review of specific cases, in the implementation of judicial supervision (*nadzor*) of the activities of courts of general jurisdiction, and also in the issuance of clarifications of questions in judicial practice.

As mentioned above, courts of general jurisdiction deal with a plethora of varied cases related to the application of the Code which cannot be analyzed in the framework of a single article. Therefore, it would be more fitting to focus on those categories of cases that—from my perspective—are the most significant and fundamentally new to court practice.

One such category includes cases which contest normative acts involving our theme, *i.e.*, acts containing civil-law norms or other normative acts related to citizens and legal persons exercising their civil-law rights.

As a means of protecting civil-law rights, Articles 12 and 13 of the Code provide for the authority of courts to declare invalid the normative acts of state bodies and bodies of local self-government which contradict a law or other legal acts. Article 13 states that normative acts may be declared invalid by the court "in instances stipulated by law".

However, the RF Constitution (Art.46) provides more extensive rights than does the Code, including, for example, the right to contest not only

the acts of state bodies but, also, their decisions, which may include normative acts adopted by them. For this reason, the Supreme Court follows the principle that interested parties are entitled to contest any normative acts in the relevant court of general jurisdiction, regardless of a special indication of such a right in the law, with the exception of normative acts for which the Constitutional Court has exclusive authority of review in cases of contesting their constitutionality.

In the event that discrepancies are found between federal laws (or normative edicts of the President of the Russian Federation) and the RF Constitution, upon the review of cases involving the protection of subjective rights by courts of general jurisdiction, another means of protecting civil-law rights must be applied in accordance with Article 12 of the Code and said law or edict may not be enforced.

Courts of general jurisdiction review a large number of cases contesting normative acts. For example, in 1997 these courts reviewed over three thousand cases in which over fifteen hundred normative acts were declared invalid.

It should be noted that *arbitrazh* courts do not review cases contesting normative acts insofar as these courts are considered specialized; such cases do not come under their competency by law (they review cases contesting non-normative acts of state bodies and bodies of local self-government).

For this reason, cases contesting normative acts are filed with courts of general jurisdiction by citizens, including citizens engaged in entrepreneurial activity without forming a legal entity (with individual entrepreneur status), citizens' associations, legal persons, and also the prosecutor's office.

The importance of these cases, reviewed by the courts of general jurisdiction, should not be underestimated. Court rulings declaring invalid normative acts in the field of civil-law rights that contradict a federal law concern a large group of entities (both legal persons and natural persons); they encourage not only the protection of the rights of the specific complainants filing suit but, also, the rights of other entities or persons; they furthermore can prevent other violations which might have occured as a result of the implementation of such acts.

Cases contesting the normative acts of bodies of local self-government are reviewed by *raion* courts of first instance, while the normative acts of Subjects of the Russian Federation are reviewed by the corresponding supreme courts of republics, as well as *krai*, *oblast'*, federal level city (Moscow and St. Petersburg), autonomous *okrug* and autonomous *oblast'* courts. The normative acts of the government of the Russian Federation and federal

ministries and departments are reviewed by the Supreme Court; it also reviews cases ruled upon by lower courts of first instance, in the form of cassation and judicial supervision.

Two examples of this are as follows.

The Legislative Assemble of Altai *Krai* adopted a law which introduced licensing procedures for activities related to the collection, preparation, acceptance, and re-processing of scrap and waste non-ferrous metals material on the territory of the *Krai*. An individual entrepreneur contested this law in court, arguing that it violated his right to engage in entrepreneurial activity. The Presidium of the RF Supreme Court, which reviewed this case by way of judicial supervision, satisfied the claim and declared the law invalid. The Presidium based its decision on the fact that establishing lists of types of activities requiring a license comes under the competence of civil legislation and may be regulated only by federal laws; the legislative authorities of Subjects of the Russian Federation do not have this right.

A resolution issued by the head of administration of the Krasnodar' *Krai* established that the export from the *Krai* of several types of agricultural products (grain, sunflower seeds, etc.) was allowed only with a permit from the *Krai* government on the basis of barter agreements. According to a claim filed by *OOO "Kubanagroprodukt"*, the judicial collegium for civil cases of the RF Supreme Court, having reviewed the case by way of cassation, declared the resolution invalid. It ruled that the *Krai* administration was not entitled to regulate civil-law relations, and that its resolution contradicted Article 8 of the RF Constitution as well as Article 1 of the Code, according to which goods, services and financial funds may freely be moved within the territory of the Russian Federation. Restrictions on the free movement of goods, services and financial funds are introduced by a federal law where necessary to ensure safety, to protect the lives and health of the population, or to protect valuable environmental or cultural objects.

Another interesting and important category of cases related to the application of civil-law norms includes cases contesting in courts of general jurisdiction the rulings of the International Commercial Court of Arbitration (*MKAS*) attached to the RF Chamber of Commerce and Industry.

In accordance with Article 34 of the 1993 Law of the Russian Federation "On International Commercial Arbitration", grounds for contesting arbitration awards in courts of general jurisdiction include violations of procedural rules for conducting commercial arbitration proceedings and also arbitration awards which violate public policy (*publichnyi poriadok*, *ordre public*) of the Russian Federation.

However, considerable difficulties arise upon determining whether or not an international arbitration award violates public policy.

According to one award of *MKAS*, an African company was awarded 1.8 million dollars from Joint Stock Company Vneshintorg as payment for goods delivered by the African party under an agreement concluded in 1991, under which settlements were to have been made in clearing dollars.

A Moscow city court refused to overturn this ruling, with which the judicial collegium for civil cases of the Supreme Court concurred.

In accordance with a protest lodged by the RF Deputy General Prosecutor, stating that the *MKAS* had violated public order of the Russian Federation insofar as it had changed the terms of an agreement in terms of payment for goods, the case was reviewed by the Presidium of the RF Supreme Court by way of judicial supervision. The Presidium concurred with the *MKAS* that settlements could not be made in clearing dollars; the Supreme Court, therefore, held that performance under foreign trade agreements in freely convertible hard currency did not violate RF public order.

The Role and Significance of International Arbitration in the Formation of a Modern Legal System in Russia

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As a means of alternative dispute resolution involving foreign trade activities, international commercial arbitration has always played a more notable role in Russia compared to the situation characteristic of a majority of other states, in particular of western states with highly developed judicial systems. In this field of commercial relations, arbitration in the USSR was practically the sole alternative for resolving international commercial disputes, not only because it was the usual practice of Soviet foreign trade organizations to include in contracts clauses providing for the resolution of disputes by means of arbitration. Courts of general jurisdiction in the USSR also lacked experience in the application of private law in fields of commercial relations since jurisdiction in this field belonged to special bodies: *i.e.*, state *arbitrazh* courts which combined judicial and administrative functions while remaining an important element of the centralized system for managing the national economy. Naturally, these bodies were also unfamiliar with the practice of applying private law.

Arbitration institutes active under the Soviet Union's Chamber of Commerce and Industry in Moscow—the Foreign Trade Arbitration Commission (presently the International Commercial Court of Arbitration [ICCA or *MKAS*]) and the Maritime Arbitration Commission—were virtually the only jurisdictional bodies where norms of Soviet law containing provisions that could be deemed to have a private law nature were applied to relations facilitating trade and commerce. In general, these included norms regulating relations involving private citizens. As to content, they were formulated according to the civilist tradition and to a lesser degree reflected the socialist nature of economic relations. These were the norms that were applied in the regulation of foreign trade transactions where—in tdispute resolution proceedings—private international law called for the application of Soviet civil law.

In this way, during these years, the practice of international commercial arbitration created a situation where domestic civil law had the opportunity to develop in a direction which, although it was not the main

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direction of that period, was nonetheless necessary to preserve its historical essence, and which corresponded to its initial meaning and content.

This conclusion may be applied to many institutes of contract law since the domestic economic life of Russia was regulated by a series of legal norms built on the foundations of a planned economy and denying the principle of freedom of contract, which obviously is a part of the foundations of private law's method of regulating commercial relations. In particular, civil law norms on liability for the non-performance of contractual obligations were subject to considerable deformation in actual practice. For example, the practice of compensating losses suffered due to a violation of commercial obligations was almost completely replaced by provision for liquidated damages (statutory penalty); compensation for lost profits was hardly ever considered in the resolution of disputes.

In domestic doctrine, the role of judicial and *arbitrazh* practice in the lawmaking process has been repeatedly emphasized, in particular in terms of the regulation of relations in the field of private international law. Relations arising from foreign trade transactions, being of a private law nature, could of course not be established and regulated according to unilateral directives. Therefore, it is not surprising that an analysis of international commercial arbitration regarding the application of domestic norms to such relations played a significant role in the elaboration of the corresponding provisions of the 1994 RF Civil Code, which sought to restore a private law character to domestic civil law.

Support for this proposition can be seen in the norm on the interpretation of agreements. Legislation previously in force (prior to the adoption of the 1991 Principles (*Osnovy*) of Civil Legislation of the USSR and the Republics) lacked normative provisions on the principles of interpreting agreements. Due to detailed regulation of the normative acts to be applied in the resolution of domestic economic disputes, which provided parties with few opportunities to exercise their will in concluding agreements, the practice of resolving such disputes lacked the preconditions and incentives to develop general rules for interpreting agreements.

The nature of court proceedings during the resolution of economic disputes—which in many ways reflected an inquisitorial approach—also failed to stimulate parties in a dispute to use varied methods of interpreting an agreement. On the other hand, the practice of international arbitration—which encompasses disputes arising from transactions where parties are free to directly exercise their will and where the process of examination of disputes creates considerable opportunities for competition—has accumulated sufficient experience in the use of various means of interpreting agreements in examining foreign trade disputes, where

quite often the need to interpret an agreement arises in order to discover the real content of the agreement.

The experience of international arbitration involving the application of norms of a private law nature allows one to conclude that—in a number of instances of the application by international arbitration tribunals and state *arbitrazh* courts of the same provisions of civil legislation in a different way—the position which dominated in international arbitration appeared to be closer to an interpretation of the content of such norms based on private law.

In accordance with currently effective Russian legislation (see Art.28, Law "On International Commercial Arbitration" of 7 July 1993), in the resolution of disputes, international commercial arbitration tribunals should be guided by the following in applying law. (1) Arbitration tribunals should resolve disputes in accordance with those legal norms which the parties have designated as applicable law in relation to the essence of the dispute. (2) Any designation of the law or a system of laws of any state should be interpreted as a direct reference to the substantive law of that state, and not merely to its conflicts norms. (3) In the absence of any reference made by the parties, the arbitration tribunal should apply the law determined in accordance with conflicts norms which it deems to be applicable. (4) In all instances, the arbitration tribunal should render its decision in accordance with the terms of the agreement and by taking into consideration commercial practice applicable to the relevant transaction.

The success of the unification of international trade law on the international level has narrowed considerably the sphere in which domestic law is applied in the regulation of the rights and obligations of participants in international trade and commercial relations. However, even in those types of agreements in which unification is quite advanced, the application of domestic legal norms continues to remain an issue. In particular, the 1980 UN Convention on Contracts for the International Sale of Goods (the Vienna Convention) may serve as an example. Since the Vienna Convention does not deal with all the issues which may arise between the parties under international purchase and sale agreements, it stipulates (Art.7(2)) that questions within its scope but not expressly addressed in the convention, will be subject to resolution in accordance with the general principles on which it is based; and in the absence of such principles, according to the law applicable under the norms of private international law.

In practice, it is no a simple task to determine the general principles of the Vienna Convention that are not expressly formulated therein, yet the absence of which serves as a prerequisite for the application of relevant

domestic law to international purchase and sale agreements. It should be noted that priority is given to the application of the general principles of the Vienna Convention only in relation to issues relating to its subject of regulation. This may serve as grounds for the direct application by parties of a particular domestic law to an international purchase and sale agreement only where issues arise which are strictly beyond the regulation of purchase and sale agreements and relate, instead, to general provisions on agreements, for example. Yet even where a provision is deemed to be a general principle of the Vienna Convention and may be applied in a particular case, its content will always remain less clearly defined than the relevant regulation present in a domestic legal system.

Judging from published accounts of such incidents, the application of the general principles of the Vienna Convention is quite rare, while the subsidiary application of domestic law in instances where the Convention does not expressly regulate matters occurs quite often. In particular, the application of the Vienna Convention by the International Commercial Court of Arbitration under the aegis of the Chamber of Trade and Industry of the Russian Federation attests to this as well.

The RF Civil Code in the Practice of the International Commercial Court of Arbitration

The provisions of the new Civil Code of the Russian Federation began to be applied by the ICCA immediately after they entered into force. In large part, this concerned the application of Article 395, which stipulates liability for failure to perform monetary obligations on a timely basis. However, before analyzing this practice, the application of a new regulation to a situation which traditionally occupied a special position in foreign trade transactions merits our attention, *viz.*, the consequences of abolishing the rules under Russian law requiring two signatures for foreign trade obligations.

The ICCA declared that if a dispute is heard after the new Civil Code entered into force (1 January 1995), the rule requiring a foreign trade transaction to be declared invalid due to a violation of procedure regarding signature would not be further applied—regardless of the time at which the transaction was concluded. This approach was based on a reference to Article 9 of the Law of 30 November 1994, "On the Entry into Force of Part One of the Civil Code of the Russian Federation". In accordance with this article, the norms of the Civil Code concerning grounds for, and the consequences of, the invalidity of transactions (Arts.162, 165-180) are applicable to transactions, the invalidity of which is considered after 1 January 1995, regardless of the time at which the relevant transaction

was concluded. Insofar as these articles do not contain provisions on the invalidity of foreign trade transactions involving a failure to observe the procedure for their signature by two signatories, the International Commercial Court of Arbitration concluded that a defendant's claim to declare invalid a document certifying the relationship between parties (that had only been signed by one party) should not be subject to satisfaction.

As indicated above, the requirement of payment of interest in connection with a failure to timely perform monetary obligations was reviewed by the ICCA during the resolution of a considerable number of disputes. In several instances, this issue was resolved by applying Article 395 of the Civil Code, either as a result of parties to an agreement having chosen Russian civil law as the applicable law, or on the basis of the application of private international law norms. In particular, the aforementioned article was applied in instances where relations were covered by the Vienna Convention. Since the Vienna Convention does not address the amounts of and procedure for designating annual interest under overdue monetary obligations, Article 395 of the Civil Code was applied.

Often, claims for payment of annual interest were made in instances of the failure to pay for—or late payment of—delivered as well as nonperformance of work, and a seller's failure to return an advance paid for goods which were not delivered.

In certain instances, the application of said article requires qualifying obligations that have been violated as monetary obligations. For example, upon the resolution of one dispute, the ICCA reviewed the issue of the consequences of a failure to deliver in the period established by a contract. The court declared that failure to perform said obligation, in fact, transformed it into a monetary obligation since the defendant was obliged to pay the plaintiff the cost of the goods which were not delivered in monetary form, keeping in mind that the defendant had received goods to the amount of said sum from the plaintiff.

The ICCA also interpreted as monetary obligation the duty of a seller who had received a pre-payment for goods but had failed to perform her obligations in fact within the term stipulated by the contract, to refund, at the request of the buyer, the paid pre-payment in place of actual performance of the obligation. It must be noted that during the examination of disputes by arbitration, the issue of a debtor paying interest upon its overdue performance of monetary obligations was only considered in instances where the plaintiff made such a request. There is no doubt that such a fundamental position on the part of the ICCA in this issue is fully legitimate in terms of both the meaning of norms on interest in

the context of a private law approach, as well as of the principles of legal proceedings in international commercial arbitration.

Another important aspect emphasizing the economic content of the aforementioned norm in a market economy is the ICCA's approach to the application of Article 395 of the Civil Code, under which the issue of whether a plaintiff actually used the monetary funds comprising his debt, and whether he received revenue from such, was not taken into consideration when he was obliged to pay interest on the outstanding sum.

In connection with the fact that, as a general rule, claims filed with the ICCA are expressed in foreign currency, certain problems arose concerning the rates at which interest should be charged on the basis of Article 395 of the RF Civil Code. Such a situation resulted from the fact that the wording of the article allowed various interpretations, depending on whether monetary obligations were expressed in Russian or foreign currency. In accordance with legislation in force, the latter is fully acceptable (Art.317, RF Civil Code).

In particular, this concerns provisions stipulating that interest rates payable upon the failure to timely perform monetary obligations must be determined using the banking discount rate effective for the location of the creditor. Difficulty in applying this norm was connected with the fact that neither the Civil Code, nor any other legislative act clearly defines the term "banking discount rate".

The opinion exists that in this case, where obligations expressed in Russian currency are at issue, the discount rate of the RF Central Bank should be applied. It has been established that:

> "at the present time, interest in the amount of the discount rate of the Central Bank for credit resources provided by commercial banks are to be paid in relations between organizations and citizens of the Russian Federation."

It should be noted that this provision does not expressly mention international trade, being limited to relations among Russian legal subjects.

Insofar as the above approach to interpreting Article 395 of the RF Civil Code, in terms of monetary obligations expressed in foreign currency, leads to a dead end because the RF Central Bank does not establish refinancing rates for foreign currency credit, it has also been acknowledged that in instances involving foreign currency the discount rate would equal the effective market interest rate established for the use of borrowed funds, *i.e.*, the rate for credit extended by commercial banks.

It seems that this approach more closely corresponds to a consistent interpretation of the general content and intent of the aforementioned provisions of Article 395, as norms designated to both act under conditions of an existing banking services market and to directly compensate

losses incurred by creditors upon a failure to make timely payment of monetary amounts since in the event of non-payment of receivable sums creditors are forced to use funds borrowed from commercial banks at the effective interest rates of the latter. This approach will also help solve the problem of determining the interest rate which may arise when creditors involved in overdue monetary obligations expressed in rubles are located abroad. It should be noted that the existing two-pronged interpretation of the banking discount rate leads to a situation where, in cases of monetary obligations expressed in Russian currency, a creditor must make a greater effort in order to receive full compensation for losses incurred by failure to timely perform monetary obligations, due to the need to prove that losses comprise the difference between the refinancing rate and the interest rate of commercial banks, as opposed to the same situation where obligations are expressed in foreign currency, since the commercial bank interest rate is directly taken as the basis for determining the amount of compensation. In this case, there is no need for a creditor to prove that the commercial rate is higher than the refinancing rate.

When the issue of determining the rate of interest due upon a failure to timely perform monetary obligations was put before the ICCA, the currency interest rates of commercial banks at the location of the Russian creditor were used. Considering the inadequate level of development of the Russian credit market, these rates differed substantially in various regions of Russia. In each specific case, the ICCA evaluated the evidence submitted by creditors in support of the interest rate they had indicated as effective for their location. As a rule, in the resolution of disputes where a creditor is located in Russia, in terms of evaluating evidence of the banking discount rate in foreign currency, statements from leading banks in the location of the creditor confirming their rates for short-term foreign currency credit, on the basis of which the average amount of the banking discount rate is determined, were taken into consideration as was information from the creditor's own bank. In cases where foreign organizations acted as creditors, the bank interest rates effective at the location of the foreign creditor were taken into account. At the same time, these were generally banks servicing such creditors.

In the event that a creditor failed to submit any evidence of the banking discount rate, ICCA practice shows that such claims remained unexamined or were denied satisfaction in this part of the claim. Instead, it seems that from the point of view of the regulation of relations between contractual parties in the conditions of market relations, a better approach to resolving the issue of interest payments where a creditor has failed to submit evidence of the interest rate, would be the position expressed in

the ruling of the International Commercial Court of Arbitration in one such case. In this matter, the ICCA, referring to legislative norms on payment of interest upon a failure to timely perform monetary obligations—in particular, Article 395 of the RF Civil Code—found it fair, based on its practice of reviewing cases related to settlements made in freely convertible currency, to confirm the plaintiff's right to receive the statutory average banking discount rate at 10% annual interest.

Major Directions in the Reform of Private International Law in Russia from the Vantage Point of International Commercial Arbitration

An important element in the analysis of international commercial arbitration in Russia is the fact that, according to long-standing tradition, the international court of arbitration most often applies conflicts norms effective at the location in which a dispute is being heard, *i.e.*, under present conditions—Russian conflicts of law norms. And although Russian legislation, currently in force, and the 1961 European (Geneva) Convention on International Commercial Arbitration—in which the Russian Federation is a participant—stipulate that, where parties fail to designate applicable substantive law, the arbitration tribunal is to apply the law in accordance with the conflicts norms it deems appropriate, one rarely sees a significant divergence from the established practice of applying conflicts norms in this case.

A significant stage in the development of Russian private international law was marked by the new provisions of Chapter VII of the 1991 Principles of Civil Legislation. And while the new Russian regulations in both form and content have begun to meet to a greater degree the needs of foreign trade practices and correspond to the level of development achieved in this area of both domestic and international law thus far, the need for its further improvement remains a quite topical.

The section on private international law in the RF Civil Code has now been completed. This work was carried out taking into account presently effective international and domestic legal acts concerning issues of conflicts of law regulation, reflecting the current level of development of private international law. In this connection, we would like to devote the reader's attention to the following: the Third Part of the RF Civil Code does not provide for separate conflicts rules for obligations under foreign trade and other transactions as was the case with the 1991 Principles. Yet, in a number of instances, they contain more detailed regulations. For example, in terms of establishing general rules concerning an agreement

between parties *vis-à-vis* the choice of applicable law, the Civil Code now provides that such agreement shall either be expressly stated or shall arise from the terms of the agreement and the aggregate of relevant circumstances involved in the specific matter. This provision means that lack of an express designation of applicable law shall not automatically lead the court to apply the relevant conflicts norms; rather, the court is now obliged to analyze all of the terms of the agreement and the totality of the circumstances of the transaction.

In this regard, we should mention a problem that also arises in the absence of an express designation of applicable law by parties to a transaction and that has become increasingly important in the last few years in the practice of international commercial arbitration: the application of contemporary *lex mercatoria*.

It should be noted that in Russia, legal doctrine has thus far not devoted much attention to this problem, reviewing it instead from a critical position and skeptically evaluating the developmental perspective of *lex mercatoria* as the aggregate of transnational legal norms regulating international trade. It appears that actual international commercial arbitration practice, including that of the Russian Federation—in view of its versatility and the specific nature of international arbitration proceedings—is not as categorical in this issue; this is underscored by the established tradition of applying international commercial custom in dispute resolution proceedings. In addition, the new norms of Russian private international law should take this trend into account.

The innovations in modern-day Russian civil legislation also include a rule establishing restrictions—through the corresponding imperative norms—upon the autonomy of parties in designating applicable law. It is stipulated that if the aggregate of circumstances in a matter effective at the moment at which applicable law is chosen leads to the conclusion that the agreement is, in fact, only connected with one country, then the parties' choice of the law of another country will not affect the operation of the imperative norms of the first country.

This norm should prevent the creation of "artificial" conflicts connections and create an obstacle to parties abusing their autonomy in designating applicable law.

The position of Russian law on the issue of establishing conflicts connections to various types of contractual relations has undergone fundamental change. The approach of establishing the priority of the rule providing that—in the absence of an agreement on applicable law between parties—the law of the country with which the agreement is more closely connected is applied may be regarded as fully justified and corresponding

to the trend in the development of private international law. The law of the place of residence or primary place of business of the party whose performance has a decisive significance upon the content of the contract will be deemed to be the law of the country with which the agreement is most closely connected.

In accordance with this new approach, specific conflicts connections enumerated with regard to certain types of contracts should be seen as implementing the principle of close connection. These should be applied unless otherwise stipulated by either the law, the terms of the agreement, or the circumstances of a particular case. Considering the varied nature of contemporary commercial practices, this approach will certainly further the flexibility needed when resolving the issue of the law to be applied to the contract and will simultaneously ensure that transparency in the conflicts regulation of disputes remains on a sufficiently high level.

Specific conflicts connections involve a wide scala of agreements in practice, including the majority of agreements regulated by the RF Civil Code. The law which is applied to an agreement on the basis of said conflicts norms will encompass—in particular—such issues as the interpretation of agreements, the rights and obligations of parties, performance of agreements, the consequences of non-performance or improper performance, termination, and the consequences of the invalidity of an agreement.

It should be emphasized that the creation of a new private international law in Russia relies not only upon present-day achievements of legal technique, as found in international acts or the laws of foreign countries, but also takes full account of the traditions of domestic law and legal practice, and the actual level and potential development of socio-economic conditions in Russia.

New Legislation on Insolvency (Bankruptcy)

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The 1990s witnessed major reforms of Russian legislation on insolvency (bankruptcy): at the end of the 1990s, this was to be seen in a Federal Law "On Insolvency (Bankruptcy)", adopted by the State *Duma* on 10 December 1997, and by the Federation Council on 24 December 1997 (which entered into force on the territory of the Russian Federation as of 1 March 1998).

The new federal legislation differed significantly from the earlier RF Law (of 1 March 1993) "On the Insolvency (Bankruptcy) of Enterprises" and includes a whole range of innovative provisions for Russian legislation.

First of all, one should note the cardinal change in the approach to defining the insolvency (bankruptcy) criteria for legal persons.

The concept and indicia of bankruptcy that were employed by the earlier law failed to satisfy contemporary notions of property transactions or the claims which were lodged against parties to such transactions. According to the above-mentioned law, the term insolvency (bankruptcy) meant the inability of a debtor to settle the claims of a creditor in payment for goods (works, services), including the inability to make mandatory payments into the budget and extra-budgetary funds, as a result of a situation whereby *a debtor's obligations exceeded his assets* or in connection with *the unsatisfactory structure of a debtor's balance sheet* (Art.1, 1993 Law).

Not only did a debtor have to fail to pay his debts for a long period (in excess of three months), that he was in principle *incapable of paying*, but to be declared bankrupt a court also had to verify the nature and value of his property and to evaluate his balance sheet from the point of view of the degree of liquidity of his assets. And only when the debts owing to creditors exceeded the balance-sheet value of all his assets could such a debtor be declared bankrupt. Under such an approach, parties to property transactions could include entities (organizations and entrepreneurs) that were *incapable* of paying for the goods, works, and services that they received and, on the strength of this, they could force into insolvency those with whom they had entered into contracts. This resulted in a domino effect, which, of course, caused a payments crisis that dominated the Russian economy.

On the other hand, conditions were created whereby managers of commercial enterprises—who more or less obeyed the law and were not

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afraid of bankruptcy—could avoid paying their debts for a long time and use the funds designated for this purpose as their own floating capital as long as the total amount owed to their creditors did not exceed the value of the assets of their enterprise.

It is clear that the earlier legal concept and indicators of bankruptcy protected unscrupulous debtors and, in doing so, subverted the principles of property transactions.

In drafting the 1997 Federal Law, the legislator did not have a great choice: all of the existing approaches used in various legislative systems to define the insolvency of a debtor could be summarized by two options, depending on which one of basic principles is used to determine the basis for recognizing a debtor as bankrupt: either the principle of *neplatezhesposobnost'* (resulting from a cash-flow analysis) or the principle of *neoplatnost'* (resulting from the relationship between assets and liabilities on the debtor's balance sheet). As noted, the earlier law used the principle of *neoplatnost'* as its criterion for insolvency, which hindered the consideration of cases to the detriment of creditors, and—most importantly—deprived *arbitrazh* courts and creditors of the possibility of applying insolvency procedures (including external management for the purpose of promoting the solvency of the debtor) to insolvent debtors if the value of their assets formally exceeded the total amount of debt owed to creditors.

It should be underlined that several legislative systems use the criterion of *neoplatnost'*, which requires an analysis of the debtor's balance sheet (according to German legislation, for example, in addition to *neplatezhesposobnost'* as a criterion for insolvency, the principle of overindebtedness (*sverkhzadolzhennost'*) is also recognized, *i.e.*, when a debtor has an insufficient amount of property to cover all of his obligations). As a rule, however, this criterion is applied in addition to the criterion of *neplatezhesposobnost'* and serves mainly as the basis for the choice of procedure to be applied to the insolvent debtor: liquidation or rehabilitation.

The 1997 Russian legislation on insolvency (bankruptcy) followed the same path: a legal entity or an entrepreneur may be declared bankrupt in the case of its *neplatezhesposobnost'*, but possession of property (assets) exceeding the total amount of debt owed to creditors is evidence of a realistic possibility of restoring its solvency and, consequently, could serve as the basis for applying to the debtor the procedure of external management. With regard to the insolvency of individuals who are not entrepreneurs, the principle of *neoplatnost'* will be applied, *i.e.*, when the debt owed to creditors exceeds the value of the individual's property (assets).

Thus, insolvency (bankruptcy) in the 1997 Federal Law means the inability of a debtor to settle the claims of his creditors with regard to

financial obligations and/or to fulfill his obligation to make mandatory payments.

If the role of debtor is played by an organization (a legal entity), then it is considered incapable of settling the claims of its creditors with regard to financial obligations (or of making mandatory payments) if the relevant obligations are not met within three months from the date of their expected performance. In order to recognize an individual debtor as bankrupt, it is also necessary that the total value of his obligations exceed the value of his property (assets). Thus, the foundation of the concept of bankruptcy is the presumption that a participant in property transactions (a legal entity) that does not pay for the goods, works, or services received from contractors—and that also does not pay taxes and make other obligatory payments in the course of a substantial period of time (more than three months)—is incapable of meeting the obligations owing to his creditors. In order to avoid bankruptcy, a debtor must either meet his obligations or provide a court with evidence that the claims of his creditors (or tax or other authorized state organs) are unjustified.

It is clear that, when defining the criteria for insolvency (bankruptcy), only a debtor's financial obligations are taken into account, as well as his obligations to make payments to the budget and extra-budgetary funds. Actually, when drafting the 1997 Federal Law "On Insolvency (Bankruptcy)"—and especially during its passage through parliament—the authors of numerous amendments thought that the draft "insulted" other creditors with respect to non-financial obligations; they suggested providing any creditor with the right to petition an *arbitrazh* court to begin insolvency (bankruptcy) proceedings for any civil-law obligation. It is a blessing that the legislator had enough wisdom to reject such amendments.

Let us imagine, for a moment, the results of a broad approach to the group of creditors entitled to initiate bankruptcy proceedings, *e.g.*, a buyer who receives an insufficient number of goods from a seller under a purchase and sale agreement; a customer who receives a faulty item from a contractor; or a consignee who suffers a shortage in her delivery, etc. As it was suggested, they would all have a right—in such situations—to petition an *arbitrazh* court to initiate bankruptcy proceedings against the debtor, with all of the resulting consequences. In such a situation, it seems to me that very little time would be needed to eliminate the remnants of all initiative from commercial relations.

On the other hand, a creditor may take the initiative to convert any civil-law obligation that is, in essence, not met or improperly met by a debtor into a financial liability. In addition, even if a court were to impose bankruptcy measures upon a debtor (including receivership, which

can continue for a significant period of time) based on the petition of a creditor with respect to a financial obligation, this in no way means that creditors—with respect to other types of obligations—lose hope of receiving from the debtor the goods, works, or services owed to them.

In accordance with the 1997 Federal Law "On Insolvency (Bankruptcy)", however, when determining arrears with respect to obligations and mandatory payments to the budget and extra-budgetary funds, obligations to make payments for fines or penalties (or other types of financial sanctions) should not be taken into account. The total amount of indebtedness that serves as the basis for finding evidence of bankruptcy includes only debts for goods, works, and services (as well as tax arrears and other mandatory payments).

The amount of the monetary claims of creditors—as well as of tax and other authorized state organs—is deemed to be proven incontrovertibly if they are confirmed by a court judgment or by documents evidencing the recognition thereof by the debtor. With respect to other claims, the debtor is afforded a chance to dispute them. In such case, their validity will be verified by an *arbitrazh* court.

Claims that are not disputed by the debtor are also considered to have been proven. To ascertain the amount of each claim, its value is taken at the moment a petition to declare a debtor bankrupt is filed with an *arbitrazh* court.

As was the case with the prior law, the right to petition an *arbitrazh* court for a debtor to be declared bankrupt is granted to the debtor, his creditors, and state prosecutors (the *prokuratura*), as well as to authorized tax and other state organs. An innovation is the rule establishing cases where the director of an organization (or an individual entrepreneur) is *required* to petition an *arbitrazh* court to be declared bankrupt: namely, when settling the claims of one or more creditors leads to a situation whereby it is impossible to meet financial obligations in relation to other creditors; when a debtor's administrative bodies or the owner of its property (a unitary enterprise) decides to petition an *arbitrazh* court to be declared bankrupt; as well as several other situations. For the non-fulfillment of this obligation, the director of the organization will have secondary liability for the debtor's obligations to other creditors (Arts.8 and 9).

In the absence of any evidence of bankruptcy, an *arbitrazh* court should refuse to grant the corresponding bankruptcy petition. However, if such evidence is found, *i.e.*, the debtor's inability at the present time to meet his financial obligations or to pay taxes and make other payments to extra-budgetary funds, this in no way means that the bankrupt debtor will be subject to mandatory liquidation. In addition to receivership, applied

when a legal entity is liquidated, other procedures may also be applied: *supervision; external management; amicable settlement.* With respect to an individual debtor, receivership can be applied or an amicable settlement may be reached. An *arbitrazh* court always has the last word in determining which particular procedure to apply to a debtor.

Entirely new for Russian legislation is the procedure of *supervision* (*nabliudenie*), which, as a rule, is introduced from the moment at which an *arbitrazh* court accepts a petition regarding a debtor's bankruptcy. The main purpose of this procedure is to ensure the safety of the debtor's assets until the rendering of the decision of the *arbitrazh* court on the merits of the case. Fulfilling this task is the responsibility of a *temporary director* appointed by the *arbitrazh* court. In this case, the director of the enterprise is not relieved of the duty to fulfill his own obligations; however, an entire range of transactions that could lead to the disposal (waste) of immovable and moveable property (depending on the value of the transaction) may be concluded exclusively with the agreement of the temporary director.

Another task of the temporary director during the period of supervision is to examine the debtor's financial situation and to determine whether or not it is possible to reestablish his solvency (upon the existence of signs of bankruptcy, naturally). It is the temporary director who has to call a creditors' meeting before the *arbitrazh* court can render a judgment on the merits of the bankruptcy proceedings, which—on the basis of the information provided by the temporary director on the results of an analysis of the debtor's financial situation—renders one of the following decisions: the introduction of external management and an appeal to an *arbitrazh* court with the corresponding petition; or an appeal to an *arbitrazh* court with a petition to declare the debtor bankrupt and to enter into receivership. Thus, upon making a decision on the bankruptcy of a debtor, an *arbitrazh* court may rely on the will of the creditors, which—in the case of introducing external management—predetermines the decision of the *arbitrazh* court.

The procedure of *external management* (*vneshnee upravlenie*) is not new to Russian legislation; however, it is necessary to note that it is now regulated more carefully and in greater detail.

Gaps in the prior legislation not infrequently discredited the very idea of reestablishing the solvency of a debtor during external management. The principal means of creating conditions for the reestablishment of a debtor's solvency is a *moratorium* on settling claims of creditors. Previously, this was limited by a rule that stated that: "for the period of conducting external management of the property of a debtor, a moratorium shall be

introduced on settling the claims of creditors against the debtor" (Art.12(3)), but it did not link the introduction of a moratorium with a cessation of the application of penalties or fines to a debtor with respect to monetary obligations or financial sanctions for mandatory payments. As a result, the chances for a debtor to regain solvency were virtually zero since—for the entire period of external management, and consequently during the functioning of the moratorium—the burden of fines and penalties (as well as financial sanctions), grew like a snowball and hung above him like a blade. In such circumstances, a moratorium on old debts lost any practical meaning.

In accordance with the 1997 law, a moratorium on settling the claims of creditors will mean not only halting the enforcement of judicial decisions and other documents ordering the recovery from the debtor of debts arising out liabilities the term for the performance of which had ensued prior to the introduction of external management. During this period, there will also be no additional fines or penalties related to these liabilities (or financial sanctions for mandatory payments or interest for the use of borrowed funds). With the aim of providing compensation for losses incurred by creditors and the state (for mandatory payments) on all "frozen" accounts, interest is accrued at the refinancing rate of the RF Central Bank.

External management is the responsibility of the *external manager*, whose candidacy is recommended to an *arbitrazh* court by the creditors' meeting. The temporary manager who was earlier designated by the *arbitrazh* court for the period of supervision may also act in this capacity. The director of the organization relinquishes responsibility for fulfillment of all of his duties. The authority of all of the administrative bodies of the legal entity is transferred to the external manager, including the authority to dispose of the debtor's property. However, major transactions—transactions involving real estate and transactions involving other property the value of which exceeds 20% of the balance-sheet value of the debtor's assets—may only be concluded by the external manager with the agreement of the creditors' meeting (committee) unless otherwise stipulated by the plan for external management.

The external manager has the right to refuse to honor the debtor's long-term contracts or contracts that expect to attain positive results only in the long term, as well as contracts that would entail losses for the debtor should they be performed. It is true that creditors who are party to such contracts will have the right to demand compensation for damages from the debtor in the case of real losses, but the moratorium will apply to such claims.

Measures aimed at reestablishing the debtor's solvency will be conducted by the external manager, as before, on the basis of a plan of external management approved by the creditors' meeting. The 1997 Federal Law "On Insolvency (Bankruptcy)" provides detailed regulations for the implementation of measures for reestablishing the solvency of a debtor such as the sale of an enterprise, the sale of property (assets), conceding the debtor's right of claim, or having a third party perform the debtor's obligations.

The adoption of a decision by an *arbitrazh* court to declare a debtor bankrupt entails the start of receivership. As with external management, this is not a new procedure. In accordance with the 1997 law, starting receivership means that the period for performing all of the debtor's financial obligations will be deemed to have begun; the imposition of fines or penalties, financial sanctions, and interest for all types of the debtor's obligations will cease; any claim against the debtor—including those made by the tax authorities—can only be submitted within the framework of receivership. In order to conduct receivership, an *arbitrazh* court appoints a *receiver* from among a number of candidates who are recommended by the creditors' meeting. The receiver has the duty to gather the debtor's property (assets) in order to form the bankruptcy estate for the purpose of selling the property (assets) and settling debts with the creditors in the order of priority stipulated by Article 64 of the RF Civil Code.

It is once again necessary to turn our attention to the order of priority for settling the claims of creditors and, in particular, to the fact that the 1997 Russian bankruptcy law—following the Civil Code—gives priority to the claims of the debtor's employees for payment of salaries owed before the claims of secured creditors.

Special attention should be paid to the position of secured creditors. In accordance with the RF Civil Code (Art.64), property (assets) serving as a pledge is (are) not excluded from the total estate of a debtor, and a creditor with a secured claim does not have the possibility of recovering the pledge outside the order of priority. In addition, a secured creditor is in the third, privileged position, ahead of not only the majority of other creditors with respect to civil-law obligations but also the claims of the state with respect to the payment of taxes and other mandatory payments. Moreover—and contrary to all other legal systems—Russian legislation stipulates that a secured creditor will have his claims settled from all of the debtor's property, not only from the pledge. Secured creditors also enjoy certain advantages in the creditors' meeting when adopting its main decisions. In particular, concluding an amicable settlement with a debtor

requires a unanimous decision by all secured creditors (provided at least one-half of all the other claimants also agree).

When considering the provisions on the order of priority for settling the claims of creditors, one should not ignore the fact that the 1997 federal bankruptcy law—following the Civil Code—gives preference to the claims of the debtor's employees for payment of salaries before the claims of secured creditors.

The social aspect of such a manner of resolving this issue needs to be underlined. The point here is that the legislation of a variety of countries—giving preference to secured creditors—nonetheless resolves the problem of protecting the interests of a debtor's employees in a different manner. For example, German legislation foresees compensation for the losses incurred by the employees of a bankrupt debtor: the unsettled claims of these employees for the payment of salaries arising during the course of three months prior to the beginning of bankruptcy proceedings are indemnified by a special fund financed by deductions from payments made by all employers. US legislation regulates in detail questions related to the payment to the employees of bankrupt debtors of funds stipulated by collective bargaining agreements and, for the portion not covered by such agreements, of a variety of insurance payments.

The absence of similar provisions that protect the rights of the employees of insolvent debtors and liquidated legal persons in Russian legislation is an additional argument in favor of refusing to allow secured creditors to have priority in satisfying their demands.

At any point during an *arbitrazh* court's hearing of a bankruptcy case, the debtor and the creditors have the right to conclude an *amicable settlement agreement*. The conclusion of an amicable settlement—which calls for a delay or extension of the period for meeting liabilities, concession of the debtor's right of claim, performance of the debtor's obligations by third parties, a reduction in debts, etc.—is a normal way of concluding a bankruptcy case. The prior legislation, however, put virtually insurmountable obstacles in the way of amicable settlements: within two weeks after the confirmation of an amicable agreement by an *arbitrazh* court, the claims of creditors were to have been settled in the amount of no less than 35% of the total debt.

The 1997 law removed this and other obstacles standing in the way of reaching an amicable settlement, which has become a matter for the free will of the parties to decide. The only condition for confirmation by an *arbitrazh* court of an amicable settlement is that a debtor clear his debts to creditors of first and second priority: regarding the claims of individuals with respect to whom the debtor is responsible for inflicting harm to

their life or health; with respect to severance payments and the payment of the salaries of individuals working in accordance with an employment contract and for the payment of remuneration with respect to copyright agreements. The confirmation by an *arbitrazh* court of an amicable settlement necessitates the termination of bankruptcy proceedings. If an amicable settlement is concluded during the stage of receivership, then the decision of an *arbitrazh* court to recognize a debtor as bankrupt and to begin receivership is not subject to enforcement.

As we see, in conducting practically all bankruptcy procedures, one of the most important actors is the temporary or external manager or the receiver, who, in accordance with the law, is given a single title: the bankruptcy commissioner (*arbitrazhnyi upravliaiushchii*).

In accordance with the 1997 Federal Law, an individual who is registered as an entrepreneur and who has the requisite knowledge may be appointed as a bankruptcy commissioner. Bankruptcy commissioners work on the basis of licenses granted by the State Agency on Bankruptcy and Financial Recovery. Regarding questions of social security, the bankruptcy commissioner should be made equal to the manager of the debtor organization.

Remuneration, as a rule, consists of two parts: payment for every month that the commissioner performs his functions in the amount determined by the creditors' meeting and confirmed by an *arbitrazh* court; and additional remuneration paid in accordance with the results of his work.

Bankruptcy Characteristics of Various Categories of Legal Persons

One of the principal disadvantages of the earlier law on bankruptcy was the one-dimensional approach taken with respect to all categories of debtors when applying bankruptcy procedures. The law did not make any distinction among legal persons and individual entrepreneurs; among large enterprises (often the only one in a particular population center) and intermediary organizations that did not possess any of their own property; among commercial enterprises and agricultural (farming) operations; among industrial enterprises and credit institutions. And the evidence of bankruptcy was also the same for such debtors, as were the procedures applied to them, and the rules for *arbitrazh* courts to hear cases.

The 1997 Federal Law takes full account of the specifics of different categories of debtors and stipulates the corresponding features of the application of different bankruptcy procedures. This refers to such categories of debtors as legal persons: city-forming, agricultural, insurance organizations; banks and other credit institutions; securities professionals;

as well as individual debtors, including individual entrepreneurs and agricultural (farming) operations. Let us look more closely at the bankruptcy characteristics of several categories of debtors.

By *city-forming organizations*, the law means such legal persons the workers of which—including the members of their families—comprise no less than one-half of the total population of the corresponding population center (Art.132).

In defining the bankruptcy characteristics of a city-forming organization, the law takes into account the possible social consequences of its liquidation. This, in particular, is the reason for the inclusion in the list of participants in the bankruptcy proceedings of a city-forming organization of the relevant body of local self-government. An *arbitrazh* court may also invite to participate in the same capacity federal executive bodies and executive bodies of the relevant Subject of the Russian Federation.

Upon the request of the above-mentioned bodies, an *arbitrazh* court may introduce external management in relation to a city-forming organization even when the creditors' meeting votes to declare the debtor bankrupt and to begin receivership. In such a case, however, the relevant bodies provide a guarantee with respect to the debtor's obligations and also assume an obligation to take on secondary liability in relation to its creditors.

In addition—upon the request of the above-mentioned bodies—external management may be extended by an *arbitrazh* court for a period of no more than one year. Thus, the total duration of external management—and, consequently, the period of operation of the moratorium on settling the claims of creditors—can total two and one-half years. During this period, the relevant bodies can institute measures directed towards the financial recovery of the city-forming organization by investing in its activities, employing its workers, and creating new jobs. Under exceptional circumstances, the period of external management may be extended for a period of up to ten years upon condition that the debtor and its guarantor settle accounts with creditors no later than two and one-half years after the introduction of external management (Art.135).

The Russian Federation, a Subject of the Russian Federation, or a municipality—through their authorized bodies—may at any time prior to the completion of external management settle accounts with all of their creditors or in another manner settle the claims of creditors with respect to financial obligations or mandatory payments.

During the process of external management, a city-forming organization may sell the enterprise as a "going concern" which would allow it to receive the funds necessary to settle accounts with creditors—without

resorting to the liquidation of the debtor—while also retaining jobs. Moreover, upon the request of a state body or body of local self-government, the enterprise may be sold at an auction under certain mandatory conditions, including the retention of jobs for no less than 70% of the enterprise's employees; in case the enterprise's profile may be changed, the buyer will be required to provide retraining or reemployment for the enterprise's workers. In case a city-forming organization is declared bankrupt, the bankruptcy commissioner must offer to sell the enterprise as a going concern. And only if such an auction does not yield a buyer will the bankruptcy commissioner be able to sell the enterprise's assets separately.

The provisions regarding the bankruptcy of a city-forming organization also apply to other organizations that have more than 5,000 employees.

The *bankruptcy of agricultural enterprises* has certain distinguishing features that are determined, first of all, by the particular nature of their activities; as a rule, these are connected with the use of plots of land (principally for agricultural purposes), and, second, by the seasonal nature of their work.

In accordance with the 1997 Federal Bankruptcy Law, agricultural enterprises are legal persons the primary activity of which is the cultivation (production only or production and processing) of agricultural products, the income earned from the sale of which comprises no less than 50% of the enterprise's total income (Art.139).

The essence of the *first* special rule regulating the bankruptcy of an agricultural enterprise is that agricultural enterprises or small agricultural (farming) operations are given priority right to purchase the real estate of a bankrupt agricultural enterprise. Plots of land may be disposed of in the amount permitted by land legislation.

The *second* special rule involves an extension of the period of external management of an agricultural enterprise because of the seasonal nature of its work and the need to wait for the completion of the corresponding period of agricultural work. Also taking into account the possible time necessary for selling the cultivated (processed) products, the legislator considered it possible to increase the period of external management to one year and nine months. In addition, if—during the period of external management—there were natural disasters, epidemics, and the like, then the period of external management of an agricultural enterprise may be increased by an *arbitrazh* court for one additional year. Thus, the maximum period of external management is two years and nine months (in general, the maximum period is one and one-half years).

In all other matters, bankruptcy proceedings of an agricultural enterprise are instituted in accordance with the general rules.

The bankruptcy of *banks or other credit institutions* is carried out in accordance with the special Federal Law "On the Insolvency (Bankruptcy) of Credit Institutions". The regulations of the Federal Law "On Insolvency (Bankruptcy)" should be applied in the absence of special rules.

It is impossible not to notice the difference in the consequences of an *arbitrazh* court's initiation of bankruptcy proceedings in relation to an ordinary debtor and to a bank. The decision of an *arbitrazh* court to accept a petition to launch bankruptcy proceedings in relation to a bank—more often than not—causes panic among creditors, provoking them to withdraw the money they have in accounts and investments in the bank in question. By losing its clients' money, the bank loses its solvency in addition to its clients.

At the same time, the prior law did not contain any regulations limiting the group of creditors that could initiate bankruptcy proceedings in relation to banks or to make it more difficult to present such claims in comparison with a bankruptcy petition in relation to an ordinary debtor.

One of the ways of resolving this problem is to exclude individual investors from among those creditors that can present a bankruptcy petition in relation to a bank by guaranteeing (or through mandatory insurance) their banking deposits.

A second way—which is included in the draft Federal Law "On the Insolvency (Bankruptcy) of Credit Institutions—is the introduction of special preliminary procedures preceding the initiation of bankruptcy proceedings in an *arbitrazh* court.

This allows bankruptcy proceedings of a bank to be initiated in an *arbitrazh* court only after a creditor has complied with a mandatory, thoroughly regulated procedure by which the Central Bank considers a creditor's petition to revoke the license of a particular commercial bank. Thus, the financial standing of the bank will be determined by the Central Bank, taking into account an entire range of indicators characterizing its solvency.

If there are no indicia of insolvency, the Central Bank will refuse to revoke the bank's license, and—in doing so—will exclude the possibility of initiating bankruptcy proceedings, while the creditor is limited to an ordinary lawsuit based on civil-law obligations. If any signs of insolvency are found, the Central Bank can take measures aimed at recovering the bank's solvency by introducing a temporary administration or suggesting that its founders (participants) reorganize the bank by merging with another bank that is sustainable and stable in its commercial undertakings. And only the absence of such possibilities will lead to the initiation by an *arbitrazh* court of bankruptcy proceedings in relation to an insolvent bank.

Individual Bankruptcy

The bankruptcy of an individual who is not an entrepreneur is a new institution for Russian legislation. As has been noted, the majority of legal systems have rules that regulate the insolvency of individuals. The earlier Russian law stipulated the possibility of bankruptcy only of individuals who were entrepreneurs, although it did not in any way regulate the specifics of such bankruptcy. Meanwhile, the institute of individual bankruptcy is considered in developed legal systems to be one of the most effective means of protecting individuals who—because of circumstances—fall into difficult financial straits; this allows them, in a single act, to wipe out the burden of debt and make a fresh start. Not only individual entrepreneurs may find themselves in the position of a debtor with a back-breaking burden of liabilities; so can any individual who has taken out a loan from a bank, purchased real estate or other expensive goods or services on credit, etc. And this is why the 1997 Federal Law "On Insolvency (Bankruptcy)" has a special chapter regulating the specifics of individual bankruptcy.

The basis for declaring an individual bankrupt is deemed to be the inability to meet financial obligations or to pay taxes and make other mandatory payments in connection with an excess of debt in relation to the value of the individual's property (assets). Bankruptcy proceedings in relation to an individual may be initiated by an *arbitrazh* court upon a petition from the individual himself or from his creditors. Once bankruptcy proceedings have been instituted, others may also file claims against the individual, including in connection with causing harm to one's life or health, the recovery of alimony, and other obligations of a private nature. If such claims are not filed, however, they are not discharged following the completion of the bankruptcy procedure—unlike the individual's other obligations.

After an individual settles accounts with his creditors—using the revenues earned from the sale of his property, with the exception of property that, in accordance with procedural legislation, cannot be used to satisfy a judgment—the individual, who has been declared bankrupt, is released from all of his debts, including those that have not been discharged.

If an individual entrepreneur is declared bankrupt, this also means that he loses his state registration as an individual entrepreneur, and any licenses granted to him for conducting various types of entrepreneurial activities are annulled.

The provisions on the bankruptcy of individuals who are not entrepreneurs generated the largest number of objections during the adoption of the draft new law. The main argument of the opponents of the introduction of the institution of individual bankruptcy was that this institution does

not comply with the RF Civil Code. With respect to this point, it should be noted that the absence in the provisions of the Civil Code of an article dedicated specifically to individual bankruptcy—when there are articles regulating the bankruptcy of individual entrepreneurs (Art.25) and legal persons (Art.65)—does not in any way suggest a prohibition on including such rules in the Federal Bankruptcy Law.

Moreover, the realization of a range of provisions contained in the Civil Code—in our view—is in principle impossible without regulating the procedure for recognizing an individual as insolvent. *First* and foremost, this relates to the rules stipulating the secondary liability of the founders (participants) of a legal person for leading it into bankruptcy (Arts.56 and 105), as well as the provisions on the liability of persons who, on the basis of the law or founding documents of a legal entity, act in its name (Art.53, para.3). In such situations, the amount of liability of individuals who are not entrepreneurs may exceed the value of their property severalfold, which would have severe negative consequences both for those individuals and for their other creditors (for example, for their children who receive child-support payments). The very same problems could arise upon the realization of other provisions of the Civil Code that establish the secondary or joint liability of individuals with respect to the debts of legal persons. The only solution to this problem is the introduction of the institution of bankruptcy for individuals who are not entrepreneurs.

In addition—from the point of view of protecting the rights and legal interests of creditors—it is impossible to explain why they have the right to petition an *arbitrazh* court for the bankruptcy of an individual entrepreneur who has not paid for a small portion of goods transferred to him but, at the same time, cannot initiate bankruptcy proceedings against the former manager of a bank who has not repaid millions in loans.

There is also a *second* part to this problem. Global practice stems from the fact that the institution of individual bankruptcy (so-called consumer bankruptcy) is good for *conscientious* individuals, insofar as it allows them—in the course of one proceeding—to free themselves from debt by using their property (assets) to settle accounts with their creditors.

Nonetheless, in accordance with Article 185 of the 1997 Federal Bankruptcy Law, the provisions on the bankruptcy of individuals who are not entrepreneurs will enter into force only from the moment of the introduction into force of rules on the bankruptcy of individuals, which will be introduced as amendments to the RF Civil Code. The problem is that, at present, we are just seeing the formation of the service of bailiffs, on whose shoulders will lie responsibility for enforcing judgments of *arbitrazh* courts on individual bankruptcy.

This circumstance does not mean, however, that the provisions on individual bankruptcy contained in Chapter IX of the Federal Law will

not be applied until the introduction of the relevant amendments to the Civil Code. According to the rules in this chapter, bankruptcy procedures will be carried out in relation to individual entrepreneurs and small agricultural (farming) operations, which will allow for the development of practical experience with respect to enforcing judicial decisions regarding individual bankruptcies.

Russian Bankruptcy Law in Practice and its Impact on the 1998 Bankruptcy Law

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Introduction

The Law of 19 November 1992 "On Insolvency (Bankruptcy) of Enterprises" that entered into force on 1 March 1993 (hereinafter "the 1992 Bankruptcy Law") is a typical example of a first-generation transition law. For various reasons, the law had a very slow start, including: the lack of familiarity with the enforcement of bankruptcy, a reluctance to declare enterprises bankrupt with a view to its negative effects, and the payment crisis that turned healthy enterprises into insolvent enterprises. Moreover, the 1992 Bankruptcy Law was very rescue-oriented and debtor-friendly. Also, as a result of the rather narrow definition of the concept of bankruptcy, it appeared difficult to enforce the law in practice. Case law has revealed many shortcomings of the 1992 Law, which necessitated the drawing up of a totally new bankruptcy law (hereinafter "the 1998 Bankruptcy Law"). The new law contained many novelties that were clearly practice-driven.

The objective of the present study is to examine the extent to which the novelties contained in the 1998 Bankruptcy Law were caused by the shortcomings of the 1992 Bankruptcy Law. First of all, however, a short survey of the 1998 Bankruptcy Law will be provided below.

The 1998 Bankruptcy Law

In accordance with Article 185, the Law of the Russian Federation "On Insolvency (Bankruptcy)" of 8 January 1998 entered into force on 1 March 1998.[1] As of the same date, the 1992 Bankruptcy Law was repealed (Art.186). Since there are already several commentaries to the 1998 Bankruptcy Law,[2] I will not go into great detail below; rather, I will provide an overview of its major, new features.

The most important difference from its 1992 predecessor is that the definition of bankruptcy was changed, now meaning that: "the debtor

1 *Rossiiskaia gazeta* 20 and 21 January 1998.

2 *Cf.*, for instance: Iu.P. Orlovskii, (ed.), *Kommentarii k Federal'nomu Zakonu Rossiiskoi Federatsii "O nesostoiatel'nosti (bankrotstve)"*, Moscow 1998; Sarah J. Reynolds and William B. Simons, (eds.), "The Legal Regulation of Bankruptcy: Russian Legislation and Models for the CIS" (Special Issue), 25 *Review of Central and East European Law* 1999 Nos. 1-2.

William B. Simons, ed.
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did not fulfill its obligations within three months after they became due [to be fulfilled]." As a result, the fine-tuning of the 1992 Law ("incapacity to pay the creditors' claims [...] in connection with the excess of the debtor's obligations over its assets or unsatisfactory structure of its balance sheet") was dropped. The new definition is more or less in line with that of Articles 25 and 65 of the Civil Code: "incapable of satisfying the claims of creditors". However, it would have been preferable if the 1998 Law would have used the same definition as the Civil Code in order to avoid confusion.

Further novelties include:

(a) The introduction of supervision (*nabliudenie*) as of the moment bankruptcy proceedings commence, with the objective of safeguarding the assets of the debtor and assessing the latter's financial position;
(b) A more prominent role for creditors reflected in the introduction of the meeting of creditors and the committee of creditors vested with specific powers;
(c) The procedure of sanation (*sanatsiia*) has been left out;
(d) External management aimed at restructuring and amicable settlement;
(e) Special procedures have been introduced for different categories of bankrupt persons, including:
    — "city-forming organizations";
    — agricultural organizations;
    — credit organizations;
    — insurance organizations;
    — stock brokers; and
    — citizens, individual entrepreneurs, and farmers.

When examining court cases under the 1992 Bankruptcy Law, it becomes evident that the 1992 Law had many gaps and inconsistencies that needed to be addressed. Most of them led to adjustments in the 1998 Law. With regard to such court decisions leading to practice-driven changes in the law, the following categories of judgments in bankruptcy cases can be distinguished:

(a) Broadening the grounds for bankruptcy;
(b) Filling in gaps;
(c) Clarifying obscure provisions;
(d) Improving protection for creditors;
(e) Improving administrative procedures;

(f) Increasing efficiency;
(g) Sharpening definitions;
(h) Adjusting to international standards; and
(i) Including edicts and decrees in the law.

Broadening the Grounds for Bankruptcy

In a number of cases, courts have refused to hear a case even if the enterprise was, in fact, bankrupt, relying on the fact that the debtor's assets still exceeded its debts, although the debtor could not satisfy its creditors' claims.

For instance, in the 1993 case of bankruptcy proceedings against Bratsk *Lesopromyshlennyi Kompleks* (*LPK*, Forest-Industrial Complex) initiated by the closed joint-stock company *Irkutskenergo* for failing to pay its electricity bill to the latter for the period from August to November 1992 (*i.e.*, prior to the entry into force of the 1992 Bankruptcy Law, although this was not an issue, despite the fact that the decree on the entry into force of the 1992 Bankruptcy Law made no provision for debts that arose prior to the date of entry into force, *i.e.*, 1 March 1993), the Irkutsk *Oblast' Arbitrazh* Court rejected the petition submitted by *Irkutskenergo,* holding that Bratsk *LPK* was a solvent enterprise as it had substantial financial resources consisting of:

— A significant number of debtors with large debts;
— Finished products with a high degree of liquidity; and
— The debts for the given period had been paid as of the date of the court session.

This decision was in line with the requirements of Article 1 of the 1992 Law, which connects the nonpayment of debts by the debtor to:

(1) Its debts exceeding its assets; or
(2) The unsatisfactory structure of its balance sheet.

The court did not, however, examine the nature of the outstanding debts owed to Bratsk *LPK*, in particular, whether these were "bad debts" or the like.

Under the 1998 Bankruptcy Law, debts owed to a debtor against which bankruptcy proceedings have been instituted may not be taken into consideration when establishing whether the debtor failed to pay its debts during a period of not less than three months from the moment payment was due (Art.3).

In August 1993, *Vachskii* Commercial Bank and the closed joint-stock company *Zvezda* filed a request with Nizhegorod *Oblast' Arbitrazh* Court to declare *Zvezda* bankrupt. The court rejected this request—insofar as it was made by *Zvezda*—determining that it was not supported by any documents evincing a resolution of the supreme body of the joint-stock company, as was required by the 1992 Bankruptcy Law (Art.5(1)). The court found, however, that the joint-stock company's debts to the bank exceeded the amount of 500 minimum wages and that there were further indications allowing for the assumption that the company was insolvent. Furthermore, a financial-research institute found that *Zvezda*'s financial and economic position had worsened since early 1992 and that its balance sheet had an unsatisfactory structure. As a result, the court concluded that the company was insolvent. However, the bank submitted a request to impose external management upon the company. Apparently, the bank did so with the simultaneous withdrawal of its petition to initiate bankruptcy proceedings—under Article 6(4) of the 1992 Law, a creditor may withdraw its petition before the court commences its proceedings—but based on the circumstances, it became evident that the court had already initiated its proceedings on the basis of Article 8. The court granted this request despite clear signs of *Zvezda*'s insolvency. In its request, the bank relied on the following:

— Profitability of the enterprise in the past;
— The enterprise's reputation for its products (knives);
— The demand for the products made by the enterprise;
— The availability of raw material;
— The state of the company's production equipment; and
— The availability of potential buyers of the products.

Apart from citing these arguments put forward by the bank with apparent approval, the court pointed out that the bank also proposed a number of measures to restore the enterprise's solvency. As a result, the court honored the bank's request to appoint an external manager proposed by the bank for a period of eighteen months, with a simultaneous freeze upon performance of the enterprise's financial obligations.

In fact, this decision was in line with the principles of the 1992 Bankruptcy Law, *i.e.*, that forced liquidation should be an ultimate means after measures for restructuring have failed. In Western practice—even in countries with rescue-oriented bankruptcy law—enterprises in such a precarious financial position as the above-mentioned joint-stock company would not have been easily awarded relief from their debtors. Creditors

(including banks) would have been more aggressive in seeking payment for their outstanding claims, or other solutions would have been tried, including debt-for-equity swaps followed by a thorough restructuring of the insolvent enterprise.

Filling in Gaps

In a number of cases, the RF Higher *Arbitrazh* Court has adopted decisions with regard to the imposition of a moratorium on payments by the debtor, where the law failed to provide adequate and clear guidance. These omissions were rectified by the 1998 Law.

In its survey of April 1995, the Higher *Arbitrazh* Court discussed the issue of whether—during the period of moratorium of all payments due by the debtor in the case of external management under Article 12 of the 1992 Law—the moratorium also applied to interest and penalties agreed upon prior to the introduction of the external management.[3] The court ruled that such interest and penalties were due but were to be paid only upon the termination of the external management. The same rule is now contained in the 1998 Bankruptcy Law.[4] The Higher *Arbitrazh* Court has also taken the same position with regard to obligations of the debtor toward the budget.

Strangely enough, the Higher *Arbitrazh* Court failed to rule on the question of whether interest would be due if nothing had been agreed upon in the relevant contract. The 1992 Law did not answer the question of whether the provision of the Civil Code on the payment of legal interest should apply. The new law, however, stipulates that interest shall be due over the amount of claims of creditors as of the moment of the introduction of external management in accordance with Article 395 of the Civil Code.

With regard to a moratorium, the Higher *Arbitrazh* Court has also held that the moratorium may not be partial and can only apply to creditors of the first and second rank.

In the bankruptcy proceedings of the open joint-stock company *Miasomoltorg*, a regime of external management was introduced with a simultaneous moratorium on all payments.[5] In spite of such a moratorium, the Komi branch of Russia's *Sberbank* remitted a sum of 59,600 rubles from the company account of *Miasomoltorg* to the state budget and the Pension Fund. A claim made by *Miasomoltorg* with the Komi *Arbitrazh* Court was rejected, as were appeals against this decision. The RF Higher *Arbitrazh*

3 *Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii* 1995 No.7, 90.

4 See Art.70(2), para.4, 1998 RF Bankruptcy Law.

5 *Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii* 1997 No.12, 64-65.

Court heard the case in a protest procedure and held that—according to Article 12(3) of the 1992 Bankruptcy Law—the introduction of external management with regard to an insolvent debtor entails a moratorium on all payments due by the debtor. The relevant provision does not provide for a partial moratorium nor does it stipulate that the moratorium applies to creditors of the first and second rank only. According to Article 64 of the Civil Code, the state budget and funds like the Pension Fund hold the fourth rank in the priority order for the satisfaction of claims of creditors. As a result, *Sberbank* was not entitled to make the payment and was, therefore, bound to return the amount, as well as pay a penalty.

Unlike the 1992 Law, which provided rather summarily for a moratorium, the 1998 Law contains a separate article on the moratorium (Art.70). This same Article also provides for a general moratorium on all payments due by the debtor but admits a number of exceptions to the moratorium. It distinguishes, *inter alia*, between mandatory payments that were due before the introduction of the moratorium and those mandatory payments that only became due after the introduction of the moratorium. The aforementioned case of the external management of *Miasomoltorg* did not specify whether the mandatory payments to the budget and the Pension Fund had already fallen due before the introduction of the external management. Under the 1992 Law, such a difference was not relevant, but it would have been relevant under the 1998 Law. However, the rationale of the distinction is not obvious other than for reasons of tax efficiency. But in that case, all mandatory payments should be paid irrespective of their being due before or after the introduction of the external management.

In the case of the bankruptcy of Penza Watch Factory, the Higher *Arbitrazh* Court ruled that a moratorium did not extend to wages.[6] As the 1992 Law did not explicitly provide for such an exemption, the Higher *Arbitrazh* Court had to take recourse to a rather complicated reasoning. As a result, the court, in fact, overruled its earlier decision in the above case of the bankruptcy of *Miasomoltorg*, where it held that with regard to a moratorium, no distinction was to be made among the different categories of creditors, whereas in the bankruptcy of Penza Watch Factory, it did in fact make such a distinction. It held that in accordance with Article 1 of the 1992 Law, a moratorium would apply to claims of creditors named in Article 1 of the law with regard to payment of goods, works, and services, as well as with regard to mandatory payments to the budget and non-budgetary funds. As a consequence, a moratorium would not apply to creditors of

6 Decision No.3343/97 of 30 September 1997 on the bankruptcy of the joint-stock company Penza Watch Factory, *Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii* 1998 No.1, 70-71.

the first and second rank.[7] Under Article 64 of the Civil Code, claims of employees for their wages are considered to be of the second rank. Therefore, a moratorium would not extend to wages. The new Bankruptcy Law also rectified this omission in that under Article 70(5):

> "A moratorium on the satisfaction of claims of creditors shall not extend to claims regarding debts for wages, payment of remuneration of copyright, alimonies, as well as compensation for damage caused to life and health."

In another case of external management, the Higher *Arbitrazh* Court held that an *arbitrazh* manager—a person appointed by an *arbitrazh* court who has the task of external management of the debtor's assets—may not be restricted in fulfilling its powers by restrictions established by the director of the organization-debtor.[8] In this case, a creditor had filed a complaint with the *arbitrazh* court, arguing that under the charter of the company in debt (a joint-stock company), the general manager had no authority to enter into transactions with a value exceeding an amount of 10 million rubles without the consent of the board of directors. However, the *arbitrazh* manager had sold assets in the amount of 50 million rubles. The Higher *Arbitrazh* Court determined that the lower *arbitrazh* court rightly allowed the *arbitrazh* manager's transaction without the consent of the company's board. The court relied on Article 12 of the 1992 Law (6) (3), which reads: "disposes of [*rasporiazhaetsia*] the assets of the debtor". In the court's interpretation, this power was to be fulfilled "without any restrictions". And the court continued: "Restrictions of powers determined for the manager of the organization in debt shall not extend to the *arbitrazh* manager." This seems to be a rather far-reaching limitation of the text of Article 12 of the 1992 Law. Under the 1998 Law, this *lacuna* was also filled. Article 76(1), of the new law stipulates that:

> "the owner of the assets of the debtor or the management body of the of the debtor shall not be entitled to make decisions or otherwise to restrict the powers of the external manager [under the 1997 Law, the *arbitrazh* manager is now called the external manager] regarding the disposal of the assets."

In addition, Article 76 provides that—for large transactions (involving real estate or other assets with a value over 20% of the balance-sheet value of the total assets at the moment of the conclusion of the transaction)—the

7 The Higher *Arbitrazh* Court made the same decision in a similar case (or perhaps it was the same case—no details have been provided). See *Obzor praktiki primeneniia arbitrazhnymi sudami zakonodatel'stva o nesostoiatel'nosti (bankrotstve)*, Case No.12, *Informatsionnoe pis'mo* No.20 of 7 August 1997, *Rossiiskaia gazeta* 18 October 1997 (*Vedomstvennoe prilozhenie*).

8 *Obzor praktiki primeneniia arbitrazhnymi sudami zakonodatel'stva o nesostoiatel'nosti (bankrotstve)*, Case No.5, *Informatsionnoe pis'mo* No.20 of 7 August 1997, *Rossiiskaia gazeta* 18 October 1997 (*Vedomstvennoe prilozhenie*).

consent of the meeting of the creditors or the committee of the creditors is required unless the law or the external management plan provides otherwise. Apparently, the rule on the non-application of restrictions upon the *arbitrazh* manager has been mitigated, *i.e.*, the external manager has to seek consent from the creditors instead.

Clarifying Obscure Provisions

In various cases, provisions of the 1992 Law appeared to be unclear. The Higher *Arbitrazh* Court sought to clarify the position in a number of questions, including:

(i) Which persons may be declared bankrupt?
(ii) Which persons are entitled to initiate bankruptcy proceedings?
(iii) Which state bodies are authorized to initiate bankruptcy proceedings?
(iv) Which body of a company is authorized to file a bankruptcy petition?

Which Persons May Be Declared Bankrupt?

The 1992 Law provided for the bankruptcy of enterprises without providing a definition of enterprises. Moreover, under the 1992 Law, natural persons, even private entrepreneurs, could not be declared bankrupt. However, Part I of the new Civil Code, which entered into force on 1 January 1995, has introduced a number of new items with regard to bankruptcy, thereby amending the 1992 Bankruptcy Law. The new provisions include the possibility of declaring a private entrepreneur bankrupt (Art.25); they have also amended the priority order for the payment of the creditors' claims in the bankruptcy proceedings (Art.64), exempted so-called treasury enterprises from being declared bankrupt (Art.65), and finally—under a simultaneous reference to the grounds contained in the Law on Insolvency (Bankruptcy)—reduced the grounds for a bankruptcy declaration to just simply, "if a [legal entity] is unable to satisfy the claims of creditors".

The above clarification was contained in a "Survey of the Practice of Application by *Arbitrazh* Courts of the Legislation on Insolvency (Bankruptcy)" issued by the Higher *Arbitrazh* Court.[9] Apparently, the Higher *Arbitrazh* Court wished to bring to the attention of the lower *arbitrazh* courts the fact that the new Civil Code had amended the 1992 Bankruptcy Law. It is not quite clear whether the Higher *Arbitrazh* Court also wanted to

9 Attachment to Informational Letter of the Higher RF *Arbitrazh* Court of 25 April 1995 S1-7/OP-237, *Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii* 1995 No.7, 83.

emphasize that the grounds for bankruptcy should be applied in a stricter manner ("if [a debtor] is unable to satisfy the claims of creditors").

Which Persons Are Entitled To Initiate Bankruptcy Proceedings?

Article 4 of the 1992 Law provides that the debtor, creditor or creditors, as well as the procurator (*prokuror*) may commence bankruptcy proceedings—if the latter has discovered indications of fraudulent bankruptcy. According to data in a 1996 article by Higher *Arbitrazh* Court Justice N.A. Veseneva, 11% of all requests were submitted by debtors, whereas approximately 70% of all requests were submitted by creditors.[10] This leads to a conclusion that approximately 19% of all bankruptcy cases were initiated by the procurator. As regards the question of which persons can be regarded as creditors, Justice Veseneva referred to a case dealing with the question of whether a beneficiary to a sales contract of a depositary certificate can be regarded as a creditor entitled to initiate bankruptcy proceedings. In this case, the joint-stock company *Kairos* filed a claim with the Moscow City *Arbitrazh* Court to commence bankruptcy proceedings against the *Promyshlennyi* Bank but was refused on the grounds that the holder of a depositary certificate was not among the persons entitled to initiate bankruptcy proceedings within the meaning of the 1992 Law. The supervisory collegium of the RF Higher *Arbitrazh* Court satisfied a protest filed against this decision, arguing that:

> "a depositary certificate should be considered to be a negotiable instrument evidencing the deposit by a client of cash and certifying its right to receive in a specified period of time the principal amount and interest."

The supervisory collegium concluded that the holder of a depositary certificate must be considered a creditor and, therefore, was entitled to file a claim to commence bankruptcy proceedings against its debtor.[11] A special law, the 1998 Law "On Insolvency (Bankruptcy) of Credit Organizations", now governs the bankruptcy of credit institutions.

Which State Bodies Are Authorized To Initiate Bankruptcy Proceedings?

Under Article 1 of the 1992 Law, insolvency also includes the inability to ensure mandatory payments to the budget and extra-budgetary funds. In this respect, the question arises as to which state bodies are entitled to initiate bankruptcy proceedings, as the law remains silent with regard to this issue. With a view to solving this problem, the Higher *Arbitrazh*

[10] N.A. Veseneva, "O nekotorykh voprosakh praktiki primeneniia arbitrazhnymi sudami Zakona Rossiiskoi Federatsii "O nesostoiatel'nosti (bankrotstve) predpriiatii"", *Kommentarii k sudebno-arbitrazhnoi praktike*, 3rd ed., Moscow 1996, 62-63.

[11] *Ibidem,* 63-64.

Court published a letter on 25 April 1995 explaining that a number of state bodies are entitled to act as a creditor in bankruptcy proceedings on behalf of the state. Such bodies include the Pension Fund of the Russian Federation, the Ministry of Finance, and the Federal Administration for Matters of Insolvency (Bankruptcy) at *Goskomimushchestvo* of the RF. However, this list is not exhaustive, which unfortunately did not fully clarify the existing position.

In a further decision quoted by Justice Veseneva,[12] the Higher *Arbitrazh* Court overruled a decision of the Irkutsk *Oblast' Arbitrazh* Court rejecting a request for bankruptcy of the small enterprise *Avers* made by the local Tax Inspectorate in connection with the nonpayment of a tax liability of 15 million rubles due to both federal and local tax authorities. However, the amount due to the local tax authorities was less than the required 500 minimum wages. As a result, the Irkutsk *Arbitrazh* Court concluded that despite the general power of tax authorities to act as a creditor on behalf of the state in bankruptcy proceedings, the local tax authorities could act as a creditor for the local authorities only. Since the claim of the latter did not exceed an amount equal to 500 minimum wages, the Irkutsk Tax Inspectorate was not entitled to initiate bankruptcy proceedings, as a consequence of which its claim was rejected. This decision was overruled by the Higher *Arbitrazh* Court on the grounds that:

> "legislation in force did not contain a prohibition on the filing by tax inspectorates with an *arbitrazh* court of a request to declare enterprises bankrupt in the event of nonpayment by them of amounts due to the budget."

Apparently, the thrust of this statement is that having accepted the view that tax inspectorates must be considered as creditors acting on behalf of the state, all aggregate amounts due must be taken into consideration, irrespective of to what level of tax inspectorate they may be due.

Another state official entitled to commence bankruptcy proceedings against a debtor is the procurator. Under Article 7 of the 1992 Law, the procurator had such a right where s/he had found signs of fraudulent bankruptcy or in other events provided for by Russian legislation. In a case of the *Arbitrazh* Court of Omsk *Oblast'* of 1995, however, the latter refused to hear a case brought by the procurator against the commercial bank *Kapital* on the apparent misinterpretation that a procurator was entitled to file proceedings in the case of fraudulent or fictive bankruptcy only. *Quod non.* The Higher *Arbitrazh* Court overruled the decision of the *Arbitrazh* Court of Omsk *Oblast'*, holding that the procurator may also commence proceedings with a view to protecting state and social interests in accordance with the Law "On the Procuracy of the Russian Federation" and the Code of

[12] *Ibidem*.

Arbitrazh Procedure of the Russian Federation. In the present case, the procurator's grounds to act was protection of social interests evinced by letters of a number of natural persons who had deposited cash with the bank and subsequently had allegedly been deceived.[13]

Under the 1998 Law, tax and other bodies authorized in accordance with a federal law have explicitly been empowered to initiate bankruptcy proceedings (Art.6(2)). This means that the state bodies listed in the above letter of the Higher *Arbitrazh* Court of 25 April 1995 (the Pension Fund of the Russian Federation, the Finance Ministry, and the Federal Administration for Matters of Insolvency (Bankruptcy) at *Goskomimushchestvo* of the RF) lost their power to initiate bankruptcy proceedings unless they have been authorized to do so by a federal law. This rectification of an alleged lack of authority to initiate bankruptcy proceedings would, in my view, have been more appropriate if an exhaustive list of such bodies would have been included in the new 1998 Bankruptcy Law. Now, the relevant federal laws have to be examined to determine whether or not such authority has been granted (there is no federal law on the Ministry of Finance or the (now) Ministry of State Property—was such an authority granted under the Federal Law "On the Cabinet of Ministers"?). In any event, in my view, a prudent *arbitrazh* court would—relying on Article 6(2)—wish to see the respective state body demonstrate its authority to initiate bankruptcy proceedings.

Authorized state bodies are considered to be subject to the same norms that are applicable to creditors (Art.11(3)). Obviously, the 1992 Law was rectified on this point, too.

Which Body of a Company is Authorized to File a Bankruptcy Petition?

Under the 1992 Law, the enterprise in debt may itself file a request with an *arbitrazh* court to commence bankruptcy proceedings. According to Article 5(1), such a request must be made on the basis of a relevant decision of the owner of an enterprise in debt, or of the body authorized to manage the assets of the enterprise, or of the managing body of the enterprise that is authorized to make such a decision in accordance with the founding documents. Apparently, the *arbitrazh* court is bound to verify the enterprise's authority to file bankruptcy proceedings. In the case of the bankruptcy proceedings initiated by the Syktyvkarsk joint-stock company *Bakalei*, the Higher *Arbitrazh* Court of the Komi Republic rejected the petition which has been filed by said company on the grounds that it had been filed following a decision of the board of directors, whereas the company's

13 *Ibidem,* 65-66.

charter stipulated that a decision on the liquidation of the company could be made only by the general shareholders' meeting.[14]

As an objection to this decision, it can be argued that initiating bankruptcy proceedings is not the same as a decision on the liquidation of the company, as bankruptcy proceedings need not necessarily lead to a company's liquidation. As a result, the board of directors could have been empowered to initiate the proceedings if such authority was not allocated to the exclusive power of the general shareholders' meeting. The 1998 Law is clearer on this point, as Article 7 specifies that a debtor may initiate bankruptcy proceedings on the basis of a decision of the body empowered to decide on its liquidation.

Improving Protection for Creditors

In a case cited in a 1995 survey, the Higher *Arbitrazh* Court found that creditors were allowed to join their claims in a joint petition. A similar decision was rendered in a 1996 case. This improvement has also been included in the 1998 Law (Art.36).

A first issue is whether a creditor has the option to choose:

(a) To levy execution on its debtor's assets for nonpayment of its claims, *i.e.*, a procedure under the Code of Civil Procedure; or
(b) To initiate bankruptcy proceedings.

Some *arbitrazh* courts have ruled that creditors must first follow the enforcement procedure under the Code of Civil Procedure, and if that fails, they may initiate bankruptcy proceedings. Due to the fact that the 1992 Bankruptcy Law does not explicitly require plurality of creditors, there is confusion as to this issue. If the requirement of plurality of creditors applies, a single creditor has no option other than seeking to levy execution on the debtor's assets in case of nonperformance of the debtor's obligations. Barenboim argues that a creditor should have the choice between both procedures.[15] However, in a bankruptcy case heard by the Amursk *Oblast' Arbitrazh* Court, the court held that, as in a bankruptcy request against a *sovkhoz*—there was one creditor only—the request should be rejected.[16] The new 1998 Bankruptcy Law is not very clear either on the idea of plurality of creditors, which may lead to the conclusion that under

[14] Decision of the Higher *Arbitrazh* of the Komi Republic of 2 March 1995 in JSC *Bakalei*, quoted in Veseneva, *op.cit.* note 10, 62.

[15] Barenboim, *Rossiiskaia Iustitsiia* 1995 No.3, 28.

[16] *Ibidem*, 28-29.

the new Bankruptcy Law, a bankruptcy proceeding may be commenced if there is a single creditor only.

In a letter of the Ministry of Justice and the Higher *Arbitrazh* Court of 6 July 1994,[17] both bodies stated that a creditor has both options available: it may either file a petition to initiate bankruptcy proceedings or may request the court to levy execution on the assets of its debtor. The Higher *Arbitrazh* Court also pointed out that—unlike many *arbitrazh* courts had ruled in practice—a prior court judgment for enforcement of a claim upon the debtor's assets does not prevent the commencement of bankruptcy proceedings against the same debtor.

In my view, the Higher *Arbitrazh* Court has made it insufficiently clear that—where it is evident a debtor is unable to satisfy the claims of its creditors—one of the basic principles of bankruptcy, *i.e.*, to create a possibility for all creditors to submit their claims and to satisfy as many of them as possible in a fair and transparent manner without prejudice of any of the creditors, should entail that creditors are estopped from filing claims against the debtor and, rather, are entitled to commence bankruptcy proceedings.

In a case quoted in the survey of practice in bankruptcy cases of April 1995,[18] a petition was submitted to commence bankruptcy proceedings against a joint-stock company that was in debt with respect to a supply contract. Other creditors that were known to the *arbitrazh* court were invited to appear at the court hearing. However, none of them, including the Tax Inspectorate and the Pension Fund, submitted claims for outstanding debts. The Higher *Arbitrazh* Court held that the fact that none of the creditors had appeared at the hearing and that no other claims had been submitted, thus leaving one creditor only, did not impair the *arbitrazh* court from hearing the case.

Although the 1998 Bankruptcy Law seems to begin from the premise of plurality of creditors—for instance, Articles 11-17 deal with the meeting of creditors and the committee of creditors—the new law does not explicitly rule out the concept of a single creditor only.

Improving Administrative Procedures

If a debtor petitions for bankruptcy, certain documents on its debt position have to be submitted. It was unclear what would happen if these documents were not submitted. The Higher *Arbitrazh* Court found that in such a case, the Tax Inspectorate, the State Property Committee, and

[17] No.06-73/54-94, No.S1-7/OZ-476; reference made in: *Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii* 1995 No.7, 84.

[18] *Ibidem*, 88.

the Pension Fund should be consulted. However, the 1998 Law provides that in such a case, the petition must be rejected.

In a bankruptcy case, the question arose as to what an *arbitrazh* court may do if the debtor does not submit documents on its debt position. According to the Higher *Arbitrazh* Court, the court is then entitled to submit an appropriate request to the relevant tax authorities, the Federal Administration for Bankruptcy Matters at *Goskomimushchestvo*, the debtor's bank or other credit institutions that service the debtor, the RF Pension Fund, and to other agencies that—in the view of the court—may have such documents.

These aforementioned persons are more or less the same as those listed among the persons that are invited for the hearing of the *arbitrazh* court at which a decision will be made on the petition for bankruptcy proceedings (Art.10(1), 1992 Law).

The Higher *Arbitrazh* Court did not rely on any provision of the 1992 Bankruptcy Law. Article 5(3), provides that the debtor—when petitioning for the commencement of bankruptcy proceedings—must submit a list of its creditors and debtors with a calculation of its outstanding debt and the debt owed to it. Apparently, the above case was initiated by the debtor and not the creditor(s). Furthermore, the debtor must submit a balance sheet and other accounting documents. Failing to submit the accounting documents, the *arbitrazh* court may order another auditor to draw up a balance sheet at the expense of the debtor. However, under the 1992 Law, no sanction had been provided for failing to submit documents on the debtor's debt position. The 1998 Law stipulates, however, that petitions that do not meet the requirements of the Bankruptcy Law must be returned by the *arbitrazh* court (Art.43).

Increasing Efficiency

There are two types of liquidation: *voluntary* and *mandatory* (*involuntary*). Liquidation takes places in accordance with the procedure set out in Articles 61-64 of the Civil Code. In the case of mandatory liquidation, where a court declares an enterprise bankrupt, the priority order of Article 64 of the Civil Code is followed for the satisfaction of claims of creditors.

What mutual relationship exists between both liquidation procedures? Can they be fulfilled simultaneously, or does the commencement of a voluntary liquidation block the possibility of initiating bankruptcy proceedings aimed at a forced liquidation? According to the Higher *Arbitrazh* Court, the fact that an organization is in a state of liquidation under Article 61 of the Civil Code (voluntary liquidation), and that a liquidation commission has already started its work, does not prevent a creditor from filing

a petition to initiate bankruptcy proceedings.[19] As a result, an *arbitrazh* court may not refuse to hear such a case if the requirements for filing an application have been met.

Furthermore, the Higher *Arbitrazh* Court has held that it may be appropriate to forbid the liquidation commission from performing certain acts with regard to the assets of the debtor. Although this is not clear from the short description of the case, it must be assumed that if the application has been awarded to commence bankruptcy proceedings, the normal procedure of the Bankruptcy Law should be followed, terminating at the same time as the procedure for voluntary liquidation. This would entail, *inter alia*, that a bankruptcy administrator is appointed and that the liquidation commission should be dissolved. On the other hand, one wonders whether it is efficient to terminate the voluntary liquidation and start a mandatory liquidation procedure, since—under a voluntary liquidation procedure—a creditor's rights are more or less sufficiently guaranteed. Of course, an advantage of mandatory liquidation is that the procedure takes place under the supervision of an *arbitrazh* court.

What is missing in the above case—of an organization in liquidation for which a petition to initiate bankruptcy proceedings has been filed—is a clear criterion as to when such a petition will be granted and when it will not. The 1998 Bankruptcy Law stipulates such a criterion: if the value of the assets of a debtor in liquidation is not sufficient for the satisfaction of all outstanding claims, the mandatory liquidation procedure that is outlined in the Bankruptcy Law (Art.174(1)) must be followed. The new law provides for a simplified liquidation procedure for a debtor in liquidation (Arts.174-176). If the liquidation commission or liquidator finds that the value of the assets is less than that which is required for the satisfaction of the claims of the creditors of the debtor in liquidation, the commission (or liquidator) is obliged to file a petition with the *arbitrazh* court. As a result, the voluntary liquidation would be replaced by mandatory liquidation proceedings—a far better procedure than that proposed by the Higher *Arbitrazh* Court in its 1995 survey.

Sharpening of Definitions

In several decisions, the Higher *Arbitrazh* Court has ruled that penalties, fines, etc., may not be included in the total amount of 500 minimum wages. This rule has been included in the 1998 Bankruptcy Law (Art.4(3)).

Both the 1992 and 1998 Laws stipulate that bankruptcy cases may be heard by an *arbitrazh* court "if the total amount of the claims against the debtor is not less than 500 minimum wages, as established by the law"

19 *Ibidem,* 85.

(Art.3(3), 1992 Law; Art.5(2), 1998 Law) or 100 minimum wages for an individual entrepreneur (Art.5(2), 1998 Law). In its 1995 survey,[20] the Higher *Arbitrazh* Court pointed out that the amount of 500 minimum wages does not include penalties, fines, sanctions, etc., that are due for late payment of mandatory contributions to the budget or non-budgetary funds. In that conclusion, the Higher *Arbitrazh* Court relied on the definition given in Article 1 of the 1992 Law: "the incapacity to satisfy the claims of creditors for the payment of goods (works, services), including the incapacity to provide mandatory payments to the budget and non-budgetary funds." It found that—unlike lower *arbitrazh* courts—this definition does not include fines, penalties, or other financial sanctions for late payments of these mandatory payments to the budget and non-budgetary funds. This conclusion should have resulted in these penalties' being taken out of the amount of 500 minimum wages, which, *in casu*, should have led to the rejection of the petition since, as a result, the total amount of the debts remained under the critical limit of 500 minimum wages.

This principle—which could be defined as that only principal financial obligations will be taken into account and not subsidiary obligations arising from a principal obligation—which was not contained explicitly in the 1992 Law, has been included in the 1998 Law. Moreover, the definition of what should be included in the amount of financial obligations and mandatory payments has been specified in more detail. Under Article 4(2), of the new law, the definition is no longer claims of creditors for "payment for goods (works, services)" and "mandatory payments to the budget and non-budgetary funds" but, rather, "indebtedness for goods that were transferred [to the debtor], works that were performed, and services that were rendered", as well as "amounts of loans with the calculation of interest due by the debtor". Debts do not include payments for compensation to citizens for damage to their health and life, payment of royalties for copyright, or obligations toward the founders or participants of the indentured legal entity. Penalties and fines for non-performance or improper performance of a financial obligation are also excluded from the amount of 500 minimum wages. Article 4(3) contains the rule that fines, penalties, and other financial sanctions for nonpayment of mandatory contributions to the budget and non-budgetary funds are excluded from the total amount of the indebtedness for declaring a legal entity or a private entrepreneur bankrupt. Moreover, the 1998 Law provides for the moment at which this total amount of debt needs to be established: when a court judgment has entered into legal force, when there are documents evincing that the debtor has recognized the claims of the creditors, or in

[20] *Ibidem*, 84.

other cases provided for by the present law. Also, the 1998 Law provides for a procedure to establish the amount of the debt if the debtor challenges the creditors' claims (Art.4(5); Art.63).

In another case described in its 1995 survey,[21] the Higher *Arbitrazh* Court held that more than one creditor may file petitions for initiating bankruptcy proceedings as long as the total amount of the claims is not less than 500 minimum wages. Furthermore, the court ruled that all creditors-applicants should have the same procedural rights. From this ruling, it looks as if the Higher *Arbitrazh* Court wants to determine the following:

(a) A petition to initiate bankruptcy proceedings must be filed by one creditor with a claim of not less than 500 minimum wages;
(b) Several creditors may file such an petition; their joint claims must also be not less than 500 minimum wages.

It seems that these requirements are not fully in line with what the 1992 Law stipulated in Article 3(3):

> "Cases on insolvency (bankruptcy) of enterprises shall be heard by an *arbitrazh* court if the claims to the debtor amount in total to a sum of not less than 500 minimum wages as established by the law."

From this, it does not follow that if a creditor wishes to initiate bankruptcy proceedings against a debtor, its claim alone must already be no less than 500 minimum wages. If it is able to demonstrate that there are more creditors and the total amount of the outstanding debt is not less than the amount equal to 500 minimum wages, then the *arbitrazh* court must hear the case.

Also, the 1998 Law does not require a creditor who files a petition to initiate bankruptcy proceedings to prove that its claim alone exceeds 500 minimum wages (*cf.* Art.35, which deals with the petition of the creditor: in its petition, it must indicate the amount of its claim; it is not required, however, that the claim exceeds 500 minimum wages).

Furthermore, the 1998 Law provides for the possibility of a creditor's petition being based on joint claims for different obligations (Art.36(1)). Also, several creditors may join their claims and file one petition to an *arbitrazh* court (Art.36(2)). It is likely that in the latter two cases, the amount of the outstanding debt owed to the creditor(s) who have filed a petition must not be less than the required amount.

[21] *Ibidem*, 85.

Adjusting to International Standards

The 1992 Law did not provide for participation of foreign parties. However, court practice has allowed foreign parties to participate. The 1998 Law explicitly allows participation of foreign parties.

In the practice of some *arbitrazh* courts, foreign parties were blocked from filing a petition to initiate bankruptcy proceedings, relying on the argument that the 1992 Law failed to make such provisions.[22] In its 1995 survey, the Higher *Arbitrazh* Court ruled that under Article 3(2) of the 1992 Law, the Code of *Arbitrazh* Procedure applied in matters that had been provided for by the 1992 Bankruptcy Law. Said *Arbitrazh* Procedure Code allowed the participation of foreign parties in cases heard by Russian *arbitrazh* courts. Also, in its ruling, the Higher *Arbitrazh* Court determined that foreign parties should submit their petitions to *arbitrazh* courts and not to a court of general jurisdiction.[23]

The 1998 Bankruptcy Law includes special provisions on hearing bankruptcy cases with a foreign element. Under Article 1(5), it has been provided that international agreements to which Russia is a party have priority over the present law where the international agreement contains provisions that differ from the 1998 Law. Subsection 6 of Article 1 stipulates that the present law also applies where foreign parties participate as creditors unless international agreements provide otherwise. Furthermore, Article 1(7) stipulates that foreign court judgments in bankruptcy matters must be recognized in the Russian Federation in accordance with international treaties to which Russia is a party or on the basis of reciprocity. Also, Article 11(1), deals with the position of creditors and allows the participation of foreign creditors.

Including Edicts and Decrees in the Law

Several court judgments have dealt with the bankruptcy of so-called "city-forming enterprises" (*gradoobrazuiushchie predpriiatiia*). A 1994 decree provided for the sale of such debtor enterprises. In principle, a city-forming enterprise was not to be declared bankrupt. The 1998 Law contains a separate chapter on city-forming enterprises but allows their bankruptcy under certain conditions. A special procedure has been introduced for the sale of such enterprises when they are in debt. On the basis of a 1994 presidential edict,[24] the Russian Government issued a Decree "On the Procedure of Designating Enterprises as City-Forming and Details of the

22 *Cf.*, Barenboim, *op.cit.* note 15, 29-30.

23 *Op.cit.* note 17, 86.

24 Edict of the President of the Russian Federation No.1114.

Sale of Enterprises in Debt That Are City-Forming".[25] Under this decree, which approves a statute with the same title, city-forming enterprises are defined as enterprises in debt if:

(1) They employ not less than 30% of the total number of employees in enterprises of a city (or village); or
(2) Their balance sheet includes objects of the social-communal sphere and engineering infrastructure that services not less than 30% of the population of the city (or village).

The statute provides for a procedure to determine whether an enterprise in debt should be considered "city-forming", as well as for the sale thereof. The sale may be carried out in two ways:

(1) the enterprise is sold as a whole with the preservation of its legal status; the sale takes place through a tender under the following conditions:
    (a) if the enterprise employs not less than 30% of the total number of employees in the given city or village, the number of personnel must be preserved;
    (b) a minimum starting price may not be fixed;
    (c) objects of engineering infrastructure that service the population of the city or village and that have been included on the balance sheet must be excluded from the enterprise's assets;
(2) the enterprise is liquidated and its assets are sold at an auction or through a tender; the sale must be carried out under the following conditions:
    (a) the decision on the liquidation of the enterprise and the subsequent sale of its assets must be made in agreement with the respective executive body of the Subject of the Federation;
    (b) objects of engineering infrastructure that service the population of the city or village and that have been included on the balance sheet must be excluded from the enterprise's assets.

[25] Decree of the Government of the Russian Federation of 29 August 1994 No.1001 "On the Procedure of Designating Enterprises as City-Forming and Details of the Sale of Enterprises in Debt That Are City-Forming", *Sobranie zakonodatel'stva Rossiiskoi Federatsii* 1994 No.19 item 2217.

So far, there have been a number of court decisions pointing out that city-forming enterprises may not be declared bankrupt and cannot be subject to liquidation, given their special status.

Such a case is the bankruptcy proceeding of *Skopinskii stekol'nyi zavod* (Skopin Glass Factory),[26] where the glass factory was declared bankrupt and a bankruptcy administrator was appointed despite the fact that the creditor, *Riazan'energo*, requested the appointment of external management. The Higher *Arbitrazh* Court held that the Riazan' *Oblast'* Court unjustifiably failed to take into account a number of facts, including the city-forming nature of the glass factory:

> "The Court did not take into consideration the fact that the factory is a city-forming enterprise that provides one of the villages with heat, as well as hot [water] and drinking water as well as electricity to consumers not only of the Skopnenskii *Raion* of Riazan' O*blast'*. The liquidation of that enterprise would cause harm to the social sphere of the city and the region, as well as result in the need for employment of 1,100 employees, which would cause numerous difficulties due to the weak industrial development of the region."

As a result, the *oblast'* court's decision to commence liquidation of the glass factory was overturned and the case returned to the same court for reconsideration taking into account the arguments put forward by the factory.

Another bankruptcy case involving a city-forming enterprise was that of the Bokov Linen Factory in the Semenov *Raion*. In a decision of the Nizhegorod *Oblast' Arbitrazh* Court,[27] the court decided to impose external management for a period of twelve months despite the request of the claimant, *Nizhegorodpromstroibank*, to liquidate the enterprise as it had failed to fulfill its financial obligations *vis-à-vis* the bank. Apparently, one of the arguments for the *arbitrazh* court was the city-forming character of the linen factory. It provided heating for a large apartment building and operated cleaning installations (probably sewerage) and equipment for the supply of hot water. The costs for operating these installations weighed heavily on the factory's budget, as it had to take huge loans in 1993-1994 to purchase fuel that had not been compensated by the local government.

The 1998 Law provides for special procedures for a number of specific categories of legal persons as well as natural persons. A special bankruptcy procedure has also been provided for "city-forming organizations" (Arts.132-138). This procedure applies to enterprises that employ not less than half the population (including the employees' families) of a commu-

26. Decision of the Higher *Arbitrazh* Court of 28 November 1995 No.6419/95, *Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii* 1996 No.3, 58-59; *Zakon* 1996 No.3, 99-100.

27 Decision of 28 September 1994 No.21-118, *Zakon* 1995 No.6, 110-111.

nity and to enterprises with more than 5,000 employees. Evidently, the requirement of the enterprise's maintaining the community's social assets has been left out. The procedure provides for external management of the city-forming enterprise, whereby a state body may warrant the enterprise's obligations. In principle, a city-forming enterprise may be sold during the period of external management but only on the condition that at least 70% of the employees remain employed; in the case that the enterprise's profile is changed, its employees will be retrained or other employment will be found for them.

Conclusions

From the above survey, it becomes clear that the 1998 Bankruptcy Law is—to no small extent—the product of court practice based on the 1992 Law. Many court decisions have rectified, clarified, supplemented, and interpreted a law that was difficult to apply for various reasons. The Higher *Arbitrazh* Court assumed its responsibility and rendered, in most cases, a judgments that were just and fair within the framework of the law in force. At the same time, it signalled through its judgments that the 1992 Law was ready for replacement. As a result, in the case of bankruptcy law, one may conclude that the decisions of the Russian Higher *Arbitrazh* Court have proved to be a rich source for the new Russian bankruptcy law.

Postscriptum: A New Russian Law on Bankruptcy

On 26 October 2002, the President of the Russian Federation signed the Law "On Insolvency (Bankruptcy)" into a law. The Law entered into force thirty days after the date of its publication, *i.e.*, as per 2 December 2002. The new Law is now the third bankruptcy law in a period of ten years. The 1992 Law, which entered into force in March 1993, was distinctly debtor-friendly and was subject to strong criticism.

In 1998 as we have highlighted above, a second version of the bankruptcy law entered into force. This 1998 legislation was generally regarded as being more creditor-friendly and, eventually, turned into an instrument for hostile take-overs due to various reasons, including the alleged ignorance of bankruptcy judges and administrators but, also, due to the undue influence to which the latter were allegedly subject by interested parties.

Further flaws of the 1998 Law included:

— violation of the rights of the debtor, as bankruptcy proceedings were often initiated under fictitious documents or involved minor amounts of money without giving the debtor the possibility to satisfy its outstanding debt;
— violation of the rights of minority creditors;
— poor protection of secured creditors;
— violation of the rights of the state as a creditor in indebtedness involving tax payments;
— lack of transparency of the bankruptcy proceedings, the inadequate regulation thereof which allowed "*arbitrazh* managers"—as the administrators are called in the Russian bankruptcy proceedings—and other participants in the proceedings to allegedly abuse their powers;
— directing assets of the debtor in favor of a restricted number of creditors in the course of the external management or the bankruptcy procedure;
— the absence of effective mechanisms for imposing liability upon *mala fide arbitrazh* managers.

The new Law seeks to address the many of the above shortcomings. The 2002 Law "On Insolvency (Bankruptcy)" contains 233 articles and 12 chapters, including

I. General Provisions (Arts.1-29)
II. Prevention of Bankruptcy (Arts.30-31)

III. Bankruptcy Proceedings with the *Arbitrazh* Courts (Arts.32-61)
IV. Supervision (Arts.62- 75)
V. Financial Restructuring (Arts.76-92)
VI. External Management (Arts.93-123)
VII. Bankruptcy Proceedings (Arts.124-149)
VIII. Amicable Settlement (Arts.150-167)
IX. Details of Bankruptcy of Separate Categories of Debtors, Legal Persons (Arts.168-201) (general provisions; bankruptcy of city-forming [*i.e.*, large enterprises on which a great part of a city is dependent] organizations; bankruptcy of agricultural organizations; bankruptcy of financial organizations; bankruptcy of strategic enterprises and organizations; bankruptcy of subjects of natural monopolies)
X. Bankruptcy of Citizens (Arts.202-223) (general provisions; individual entrepreneurs; individual farmer households)
XI. Simplified Procedures of Bankruptcy (Arts.224-230) (bankruptcy of a debtor-in-liquidation; bankruptcy of an absent debtor)
XII. Final and Transitional Provisions (Arts.231- 233).

The 2002 Law distinguishes between the insolvency of natural persons and legal entities. Both categories will be considered insolvent when they do not fulfill their financial obligations during a period of not less than three months after these obligations have become due. As regards natural persons, an additional condition applies, *i.e.*, the requirement that the amount of their indebtedness exceeds the value of their entire property.

The 1992 Law included this criterion for legal entities, too, but it was dropped as most enterprises had assets with a value exceeding the amount of their obligations and, rather, were simply short of cash to satisfy their obligations. In addition, the 2002 Law requires that the total amount of debts shall not be less than 100,000 rubles (appr. 3,000 US dollars) for legal entities and 10,000 rubles (appr. 300 US dollars) for natural persons.

Petitions to initiate bankruptcy proceedings may be filed by the debtor, creditors, and the so-called "authorized bodies", which are federal executive bodies authorized by the Government to submit claims on behalf of the state regarding unpaid tax liabilities and other mandatory payments, as well as mandatory payments to the budgets of the "Subjects of the Federation", *i.e.*, the 86 "states" that jointly make up the Russian Federation. In a number of cases, the debtor is even obliged to file a petition to initiate bankruptcy proceedings, for instance, if the satisfaction of the claims of one single creditor (or several creditors) would make it impossible for the debtor to fulfill its obligations towards other creditors (including the tax authorities).

The court system which has jurisdiction to hear bankruptcy cases is that of the *arbitrazh* courts, a rather confusing term used to indicate the system of commercial courts, which hears all types of commercial disputes among enterprises. Apart from *Arbitrazh* courts, the Russian court system also has courts of general jurisdiction and a Constitutional Court. International commercial disputes are often heard by the International Commercial Court of Arbitration attached to the Russian Chamber of Commerce and Industry in Moscow. The *arbitrazh* court of the *raion*, where the debtor has its registered seat or—in the case of a natural person—has his permanent residence, is competent to hear the case. Bankruptcy cases may not be heard by private courts, including commercial *arbitrazh* tribunals.

The person who is appointed by the *arbitrazh* court to administer the bankrupt assets is called the "*arbitrazh* manager". To qualify for such an appointment, the *arbitrazh* manager must be a Russian citizen with higher education and who is registered as an individual entrepreneur. Further requirements include not less than two years employment experience in a "leading" (management) function; having passed a theoretical exam for the preparation of *arbitrazh* managers; having held a traineeship of not less than six months as the assistant of an *arbitrazh* manager; the absence of a criminal record evidencing that the person has not committed any economic crimes or crimes of so-called "medium-seriousness" (or worse); membership of a professional organization.

One of the targets of the 2002 Law is to raise the professional standards of the *arbitrazh* manager. Instruments for achieving this goal include professional training, the exam, mandatory membership in professional organizations that monitor their members activities, and mandatory insurance with a coverage of professional risks of not less than 3 million rubles (appr. 100,000 US dollars), as well as drawing up a code of conduct. The professional organizations of *arbitrazh* managers—which are called "self-regulatory organizations"—have been accorded a substantial role in educating and monitoring their members. They may issue their own regulations and standards with which their members must comply.

The Law provides for five different insolvency procedures:

— Supervision;
— Financial restructuring;
— External management;
— Bankruptcy proceedings;
— Amicable settlement.

In principle, bankruptcy will lead to liquidation, whereas the other procedures will lead to corporate rescue. The procedure of financial restructuring is new. Supervision is aimed at preserving the assets of the debtor, conducting an analysis of the financial status of the debtor, and compiling a register of all outstanding claims, and conducting a first meeting of the creditors. Financial restructuring is aimed at restoring the debtor's solvency and settling its debts. External management is also aimed at restoring a debtor's solvency. Bankruptcy intends to pay the debtor's creditors in an even and proportional manner. An amicable settlement can be reached at any stage of the proceedings with the resulting termination of the proceedings through an agreement between the debtor and its creditors.

As regards these different procedures, it should be noted that there is no mechanism according to which a specific procedure can be selected. Currently, the differences between supervision, financial restructuring, and external management are not substantial since they are all aimed at restoring the enterprise's solvency. Therefore, in my view, it would be preferable to join them into one financial restructuring procedure.

Apart from the above procedures, the Law also provides for so-called "pre-judicial restructuring", *i.e.*, the possibility of obtaining funds from creditors to restore solvency in exchange for assuming certain obligations.

One of the new features of the 2002 Law is a strengthened role for the state due to the fact that, previously, the state often was the big loser in bankruptcies. Apart from the aforementioned "authorized bodies", which may file claims on behalf of the state, a second important state agency is the so-called "regulating body", the main task of which is to supervise the self-regulatory organizations of *arbitrazh* managers.

Another new feature is that, when filing a petition to initiate bankruptcy proceedings, the applicant must submit a document evidencing that the claims have been confirmed by a relevant judgment of a court of law (or an arbitral award). Claims submitted by authorized bodies and relating to unpaid tax liabilities must be confirmed by the tax or customs authorities. The background of this requirement is that, in the past, numerous fictitious claims had apparently been used to initiate bankruptcy proceedings.

Changes have also been made in the order of priority of payment of creditors' claims. After having settled expenses for the bankruptcy procedure itself—such as court expenses and remuneration of the *arbitrazh* manager—claims of creditors must be satisfied in the following order:

(a) claims of citizens for damage to life or health;

(b) claims of employees and claims for royalties arising out of copyright; and
(c) claims of all other creditors.

As regards claims which have been secured by a pledge against the assets of the debtor, the secured creditor is to be satisfied on account of the collateral prior to all other creditors with the exception of the case where the claims under items (a) and (b) arose prior to the contract under which the pledge was established.

Another new feature includes transparency. The new law provides for the possibility to sell the insolvent enterprise through an open auction. Closed auctions are allowed only under certain, strict conditions. The initial price is established by a meeting of creditors based on market values as determined by an independent and certified valuator. Moreover, the initial price must not be less than the value indicated by the debtor when filing its petition for initiating bankruptcy proceedings. In addition, collateral may only be sold at open auctions.

Finally, some statistics:[28]

Bankruptcy cases heard by Russian Courts in 2000-2006							
Number	***2000***	***2001***	***2002***	***2003***	***2004***	***2005***	***2006***
Petitions filed for declaring bankrupt			106647	14277	14090	32190	91431
Petitions accepted by the court	19041	47762	94531				
Financial restructuring procedures			-	10	29	32	
External management		1299	2696	2081	1369	1013	947
Competition proceedings (*konkursnoe proizvodstvo*) initiated	15143	38386	82341	17081	9390	13963	76447
Incl. state unitary enterprises			643	511	623	718	747
Incl. municipal unitary enterprises			1055	623	916	1175	1947
Refusal to declare debtor bankrupt			241	688	163	308	737
Amicable settlement			403	170	150	84	106
Bankruptcy proceedings completed			44424	56440	20116	18812	60848

In conclusion, the 2002 Law most definitely provides for a better balance between the interests of debtors on the one hand and creditors on the other. It appeared that many of the flaws of its predecessors were due to the parties involved, in particular, the *arbitrazh* managers and the *arbitrazh* judges. Better training and professional organization—coupled with a greater degree of transparency—should provide for open and fair bankruptcy procedures under which the interests of all parties involved can be taken into account.

28 *Osnovnye pokazateli raboty arbitrazhnykh sudov Rossiiskoi Federatsii v 1992-2006 gg.*, reproduced at <www.arbitr.ru>.

Entrepreneurs and Consumers as Subjects of Civil Law

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Introduction

Russia's transition to a market economy has placed on emphasis on two groups that received scanty attention under the previous RSFSR Civil Code of 1964,[1] namely entrepreneurs and consumers. At the time that Code was formulated, individual entrepreneurship was illegal[2] and consumers were not at the forefront of economic priorities. As with quality control, consumer protection was dealt with (if at all) through administrative means.[3] The 1994 Russian Civil Code[4] has—in this area as many others—switched the priorities; now there are a number of provisions that pay particular attention to the duties of entrepreneurs and to the special needs of con-

1 Of 11 June 1964, *Vedomosti S"ezda narodnykh deputatov RSFSR i Verkhovnogo Soveta RSFSR* 1964 No.24 item 406. English translation by Albert K.R. Kiralfy in William B. Simons, (ed.), *The Soviet Codes of Law*, in F.J.M. Feldbrugge, (ed.), *Law in Eastern Europe*, No.23, Alphen aan den Rijn 1980, 387-541.

2 For example, under Arts.153 and 154 of the RSFSR Criminal Code of 27 October 1960, criminalizing, respectively, "private entrepreneurial activity and activity as a commercial middleman" and "speculation".

3 There is quite a large literature on this issue, of which three examples are Donald D. Barry, "From Administrative Law to Administrative Science", in Peter B. Maggs, George Ginsburgs, (eds.), *Soviet and East European Law and the Scientific-Technical Revolution*, New York 1981, 132-169; A. Gorlin, "Observations on Soviet Administrative Solutions: The Quality Problem in Soft Goods", XXXIII *Soviet Studies* 1981 No.2, 163-181; M.R. Hill, "The Administration of Engineering Standardisation in the USSR", 37 *The Quality Engineer* 1973 No.2, 39-43.

4 Part 1 adopted by the State *Duma* on 21 October 1994, *Sobranie zakonodatel'stva Rossiiskoi Federatsii* 1994 No.32 item 3301, Part 2 adopted by the State *Duma* on 22 December 1995, *Sobranie zakonodatel'stva RF* 1996 No.5 item 410. English translation of Part 1 by Ger P. van den Berg and William B. Simons in "The Civil Code of the Russian Federation, First Part", 21 *Review of Central and East European Law* 1995 Nos. 3-4, 259-426. See, also, *The Civil Code of the Russian Federation, Parts 1 and 2*, (Peter B. Maggs and A.N. Zhiltsov, trans.), Moscow 1997, and a translation of Parts 1 and 2 by William E. Butler in *The Civil Code of the Russian Federation*, London 1997, 1-503. Unless otherwise indicated, for the sake of consistency, quotations from the Code are taken from that Butler translation. Butler, *Civil Code of the Russian Federation*, Oxford 2002, contains Parts 1, 2 and 3 of the Code. Part 4 of the Code on Intellectual Property is in force from 1 January 2008. It is not considered here.

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sumers. On the whole, the result is a balanced set of statutory provisions that one might hope (and foresee) will be applied in the courts to build up an effective and predictable commercial jurisprudence.

In this exposition on entrepreneurs and consumers as subjects of civil law, there are two pieces of legislation that will not be examined in detail. *First*, there is what might be regarded as the main precursor to the new Russian Civil Code, the USSR Principles (*Osnovy*) of Civil Legislation of 31 May 1991,[5] which were applied on the territory of the Russian Federation following the RSFSR Supreme Soviet decree of 14 July 1992 "On the Regulation of Civil Legal Relations During the Period of Conducting Economic Reforms".[6] There are clear signs that some initiatives in the USSR Principles were expanded in the new Russian Civil Code,[7] but there will be no detailed textual comparison in this chapter.

Second, as this chapter focuses on the provisions of the Civil Code itself, there will not be discussion of the specific law of the Russian Federation on the protection of consumer rights of 1992, which entered into force on 7 April of that year. On this, readers are referred to a discussion of the working of the law in Pamela Jordan's interesting article "Russian Lawyers as Consumer Protection Advocates: 1992-1995".[8]

The intent of this chapter is to highlight the provisions in the Russian Civil Code[9] that specifically focus on entrepreneurs and consumers, within the context of the Code as a whole. On the one hand, for entrepreneurs, the Code's main concern is to emphasize their right to conduct entrepreneurial activity; on the other, for consumers, it is to provide protection in situations where, to put it briefly, there might be inequality of bargaining power.

5 Adopted by the USSR Supreme Soviet on 31 May 1991, *Izvestiia* 25 June 1991, 3-7. English translation by William E. Butler in *Basic Legal Documents of the Soviet Legal System*, 3rd ed., New York/London/Rome 1992, 97-180.

6 *Vedomosti S"ezda narodnykh deputatov RSFSR i Verkhovnogo Soveta RSFSR* 1992 No.30 item 1800.

7 For example, the USSR 1991 Principle's Arts.100 and 129, "transport organizations in common use" and "responsibility for harm caused as a consequence of defects of good and work" seem to have informed the Russian Civil Code Art.426, discussed below, and Art.1095 "grounds for compensation of harm caused as consequence of defects of good, work or service".

8 3 *Parker School Journal of East European Law* 1996 No.4-5, 487-517.

9 This chapter discusses provisions in Parts 1 and 2 of the Code; Part 3 had not been passed at the time of writing. However, as Part 3 contains Section V, Inheritance Law and Section VI, International Private Law, it contains little mention of either consumers or entrepreneurs, apart from (for consumers) Art.1177 delineating the rules for inheriting rights connected with participation in a consumer cooperative, and Art.1212 dealing with the law subject to application to a contract with the participation of a consumer. Of particular relevance to entrepreneurs are Art.1211, defining the significant party to decide jurisdiction for cross border contracts absent a choice of law clause, and Art.1221 which gives the victim choice of law for issues of law subject to application to responsibility for harm caused as consequences of defects of good, work or service.

Rights to Be an Entrepreneur

The basic principles of the Code specified in Article 1 include the equality of participants, freedom of contract (Art.1(1)), and free movement of goods and services (Art.1(3)). The Code is clearly frameworked for a market economy; to that end, it includes the useful notion of the "customs of business turnover" in a number of provisions (Arts.5, 312, 451(2)(ii), *et al.*) fulfilling an analogous role to the customary implied terms in English contract law.

Article 2(1), para. 3, defines entrepreneurial activity as:

> "autonomous activity effectuated at one's own risk directed toward the systematic obtaining of profit from the use of property, the sale of goods, the fulfillment of work, or the rendering of services by persons registered in this capacity in the procedure established by law [...]."

Article 18 includes in the content of legal capacity of citizens to "[...] engage in entrepreneurial and any other activity not prohibited by law [...]", and Article 22 protects the legal capacity of citizens, specifically including at section (2) their entrepreneurial activity, from unwarranted deprivation or limitation. Individual entrepreneurship by a citizen is allowed, with state registration, under Article 23, with the provisions relating to insolvency in Article 25. The finding by a court of insolvency of an individual entrepreneur causes his registration to lose force (Art.25(1)).

There are a few other specific articles facilitating entrepreneurial activity that bear mention. Article 184 allows commercial representation, defined in Article 184(1):

> "a person who permanently and autonomously is representing in the name of entrepreneurs when they conclude contracts in the sphere of entrepreneurial activity shall be a commercial representative."

Under Article 358, a pawnshop may be licensed as an entrepreneurial activity, and under Article 665, there is a specific contract of finance lease, *i.e.*, lending property for "temporary possession and use for entrepreneurial purposes". Article 933 allows for insurance of entrepreneurial risk.

One provision that protects the entrepreneur from arbitrary activity by its contractual partner is in Article 315, which deals with performance before time. Basically, this is not permitted if "[...] connected with the effectuation of entrepreneurial activity" unless "[...] provided for by a law, other legal acts, or by the conditions of the obligation or arises from the customs of business turnover or the essence of the obligation". Thus, business plans cannot be disrupted by an overeager contractual partner's performing his or her obligation prematurely.

The rules on grounds of liability for breach of obligations in Article 401(3) impose strict liability where the violator is acting as an entrepreneur. The usual rule in Article 401(1) is that:

> "[...] a person who has not performed an obligation or who performed it improperly shall bear responsibility where there is fault (intent or negligence) except for instances where by a law or by contract other grounds of responsibility have been provided for".

The standard for fault is set in Article 401(1), para. 2:

> "The person shall be deemed to be not at fault if with that degree of concern and attentiveness that is required of him according to the characteristics of the obligation and conditions of turnover he has taken all measures for proper performance of the obligation."

But by Article 401(3):

> "unless provided otherwise by a law or by contract, the person who has not performed or who has improperly performed an obligation shall, when effectuating entrepreneurial activity, bear responsibility unless it is proved that proper performance proved to be impossible as a consequence of insuperable force, that is, extraordinary and unavoidable circumstances under the particular conditions. There shall not be relegated to such circumstances, in particular, a violation of duties on the part of the contracting parties of the debtor, the absence in the market of goods necessary for performance, and the lack of necessary monetary means on the part of the debtor."

This latter proviso is reminiscent of the English rules on frustration of a contract whereby a party is not excused breach—in other words, there is no frustration—merely because of their own bad planning or cash-flow problems. The rule is exemplified by the cases of *Davis Contractors Ltd v. Fareham Urban District Council*[10] and *Tsakiroglou & Co Ltd v. Noblee Thorl GmbH*.[11] In July 1946, Davis Contractors had undertaken to build 78 houses for Fareham District Council within an eight-month period. Unfortunately for Davis, the written contract did not include any provision for variation if materials and skilled labor were in short supply. That was indeed the case, unsurprisingly in the immediate post-war circumstances of the contract, and the building work took twenty-two months. However, both the Court of Appeal and the Judicial Committee of the House of Lords held that Davis was unable to claim that the contract had been frustrated by the delay. As Lord Radcliffe put it:

> "To my mind, it is useless to pretend that the contractor is not at risk if delay does occur, even serious delay. And I think it a misuse of legal terms to call in frustration to get him out of his unfortunate predicament."[12]

[10] [1956] AC 696.

[11] [1962] AC 93.

[12] Davis Contractors wanted the contract deemed frustrated so that they could claim a larger sum for the work done than the original contract price had been, under the restitutionary claim for *quantum meruit*. At risk of straying from the immediate

The Tsakiroglou case involved a contract for the sale and delivery of groundnuts from Sudan to Hamburg. The price was set on the basis that the shipment would go through the Suez Canal, although there was no stipulation as to route. After the contract was made but before performance, the Suez Canal was closed to commercial traffic as a result of the political crisis in 1956. The alternate route, round the Cape of Good Hope, was more than twice as long and doubled the shipping costs. The House of Lords held that the contract was not frustrated. It was still capable of performance, even at much greater expense and inconvenience.

Protection of Consumers

Turning to consider the provisions in the Russian Civil Code that give protection to consumers, it may be noted that the Code does not appear to give a definition of a consumer. However, it is assumed that its usage of the term will follow the definition given in the 1992 Consumer Protection Law, namely "a citizen who is using, obtaining, ordering, or intends to obtain or order, goods (works and services) for his own everyday needs".[13]

The Civil Code includes three provisions that provide very important general protection for the potentially weaker party to a contract. These are: Article 179 on duress and similar influences; Article 426, dealing with the institution of a public contract; and Article 428 on the contract of adhesion. The first and last of these apply irrespective of whether or not the person contracting is a consumer, but clearly will have special relevance in consumer cases.

The provisions giving protection against different types of illegitimate influence are in Article 179:

> "Invalidity of transaction concluded under influence of fraud, coercion, threat, or ill-intentioned agreement of a representative of one party with another party or confluence of grave circumstances."

A court may deem the transaction to be invalid at the suit of the victim. Then there is restitution of property to the victim (if possible, with

> topic, but as a colorful example of the pragmatic logic of a common-law judge, I cannot resist a quotation from another of the Law Lords hearing the case. Lord Reid, discussing the theoretical basis of the doctrine of frustration, cites the original view that it depended on an implied term:
> "I may be allowed to note an example of the artificiality of the theory of an implied term given by Lord Sands in *Scott & Sons v. Del Sel* [...]'A tiger has escaped from a travelling menagerie. The milkgirl fails to deliver the milk. Possibly the milkman may be exonerated from any breach of contract; but, even so, it would seem hardly reasonable to base that exoneration on the ground that "tiger days excepted" must be written into the milk contract'."

[13] Quoted from citation in Jordan, *op.cit.* note 8, 192.

monetary compensation to make up where restitution is impossible), and forfeiture to the state revenue of property received by the victim, as well as an indemnity of any actual damages suffered by the victim.

The institution of a public contract is more directly concerned with consumers. A public contract is defined in Article 426(1) as:

> "A contract concluded by a commercial organization and establishing its duties relating to the sale of goods, fulfillment of work, or rendering of services that this organization by the character of its activity must effectuate with respect to everyone who has recourse to it (retail trade, carriage by common-use transport, communications services, electric-power supply, medical, hotel servicing, and so forth) shall be deemed to be a public contract.
>
> A commercial organization shall not have the right to prefer one person to others with respect to the conclusion of a public contract except for the instances provided by law or other legal acts."

Article 426(2) then determines that:

> "The price of goods, works, and services, and also other conditions of a public contract, shall be established identically for all consumers except for instances where the granting of privileges for individual categories of consumers is permitted by law and other legal acts."

Article 426(3):

> "A refusal of a commercial organization to conclude a public contract when it is possible to grant the respective goods or services to the consumer or to fulfill the respective work for him shall not be permitted."

And an unjustified refusal to conclude a public contract may trigger obligatory procedure, whereby a court may compel the contract to be concluded by Article 445(4).

Article 426(4) specifies that:

> "In instances provided for by law, the Government of the Russian Federation may issue rules binding upon the parties when concluding and performing public contracts (standard contracts, statutes, etc.)."

If a public contract fails to conform to any such rules, or the general requirements in the first paragraph of Article 426, it is void.

The notion of a public contract is an interesting one, and a neat way of ensuring basic fairness at least between different individual consumers dealing with the same contractor.[14] Mediaeval English common law had a somewhat analogous institution with respect to certain trades, the so-called 'common callings'. These were usually defined as the common carrier, the innkeeper, the smith, and the farrier.[15] Anyone practicing one of the com-

[14] Dutch law has an analogous provision. Information from Ger van den Berg in discussion at the Leiden conference on the Impact of the Russian Civil Code on Legal Practice and Its Meaning for Comparative Legal Studies, 27-29 May 1998.

[15] The Compact edition of the *Oxford English Dictionary*, Oxford 1971, 946, defines a farrier as: "one who shoes horses; hence, also one who treats the diseases of horses."

mon callings was not allowed to refuse to contract with a member of the public who fulfilled the normal requirements of someone in need of their services; so for instance, the innkeeper could not refuse to serve a bona fide traveler. This principle was exemplified as recently as 1944, in the celebrated case of *Constantine v. Imperial Hotels Ltd.*[16] Learie Constantine was a renowned West Indian cricketer.[17] He had booked accommodation at the Imperial Hotel, but when he arrived was refused a room. At that time in England it was not unlawful, as it has been since the passage of the 1976 Race Relations Act and subsequent legislation, to discriminate on the basis of "colour, race, nationality or ethnic or national origins",[18] but Mr. Constantine was able to bring a successful action against the hotel based on their customary innkeeper's duty.[19]

In the Russian Civil Code, fairness between the contracting parties is assisted by the provision in Article 428 on contracts of adhesion (stan-

Common carriers were apparently much used. David Hey, *Family History and Local History in England*, London/New York 1987, (82) gives examples, *e.g.*: "The whole of England was linked by a network of carriers' routes. A 1787 directory of Sheffield, for example, shows that local people could take advantage of forty-two different services leading directly or through connections in distant towns to most parts of England, Scotland and Wales."

16 [1944] 2 All ER 171.

17 Born 21 September 1901, died 1 July 1971. *The Encyclopaedia Britannica* entry for him cites him as being a "Trinidadian professional cricketer, government official, and fighter against racial prejudice". In 1928 he became the first West Indian player to achieve the double of 1,000 runs and 100 wickets in a single season. "He was an extraordinary hitter and on of the greatest fast bowlers of all time." He was knighted in 1962 and made a life peer in 1969.

18 List taken from sec.1 (1) of the 1976 act.

19 To quote from the judgment of Birkett J. (at 171):

"The plaintiff's claim was simply that the defendants were innkeepers; that the Imperial Hotel was a common inn kept by the defendants for the accommodation of travellers and that they were under a duty in the circumstances to receive and lodge him; that they refused to receive and lodge him; that he was compelled to go elsewhere and was put to much inconvenience. No special damage was alleged or claimed. Counsel for the defendants conceded from the outset: (i) that the defendants, for the purpose of this case at least, were innkeepers and that the Imperial Hotel was a common inn; (ii) that the plaintiff came to the Imperial Hotel on 30 July 1943, and requested the defendants' servants to receive and lodge him as a traveller; (iii) that the defendants had sufficient room for the purpose of receiving him; (iv) that he was ready and willing to pay to the defendants all their proper charges and had in fact previously paid a deposit of £2 for the necessary accommodation; (v) that he was a man of high character and attainments, a British subject from the West Indies, and, although he was a man of colour, no ground existed on which the defendants were entitled to refuse to receive and lodge him. It is important that that should be known."

dard form contracts) whereby the party who has had the standard form imposed on it:

> "[...] shall have the right to demand dissolution or change of the contract [...] if the contract of adhesion, although not contrary to law and other legal acts, deprives this party of the rights usually granted under contracts of that type, excludes or limits the responsibility of the other party for a violation of obligations, or contains other conditions clearly burdensome for the adhering party that it, proceeding from its own reasonably understandable interests, would not accept if it had the opportunity to participate in determining the conditions of the contract. (Art.428(2))."

This provision applies whether or not the parties are consumer and seller or supplier, but there is a special provision if the adhering party made the contract "[...] in connection with the effectuation of its entrepreneurial activity", then the contract will not be dissolved if they "[...] knew or should have known on what conditions the contract was concluded". The 1977 English Unfair Contract Terms Act encapsulates an analogous idea in its requirement of "reasonableness" for the validity of exclusion or limitation clauses imposed by a standard form contract between businesses, or imposed on a consumer (sec.3), and the 1999 Unfair Terms in Consumer Contracts Regulations (originally 1994, based on European Council Directive 93/13/EEC) achieves much the same by its focus of good faith.

Under the Russian Civil Code, consumers are given extra protection by Article 400 when there is a contract of adhesion or other contract where the consumer is "creditor", and the contract purports to limit the liability of the "debtor" in the event of particular violations. In such a case, the agreement to limit liability is void:

> "[...] if the amount of responsibility for the particular type of obligations or for the particular violation has been determined by a law and if the agreement was concluded before the circumstances ensue that entail responsibility for the failure to perform or the improper performance of the obligation." (Art.400(2))

Under Section IV of the Code, where specific provisions for individual types of obligations are set out, there are also a number of useful provisions that specifically assist consumers. For instance, the contract of electric-power supply (defined in Art.539) places the obligation on the supplier, *inter alia* "[...] to ensure the proper technical state and safety of the electric-power networks [...]" (Art. 543) where the subscriber is a citizen using electric power for domestic consumption. Also, under Article 546, a domestic consumer may unilaterally terminate the contract with due notice (and settlement of the account). However, more frequently, the specific contracts—set out in Section IV of the Code—act both to impose obligations on entrepreneurs and to give consumers supplementary rights.

The Balance of Obligations

There are a number of examples of specific contracts balancing obligations. For instance, a retail purchase-sale contract (Ch.30, part 2) is defined in Article 492 as being between the "[...] seller effectuating entrepreneurial activity relating to the sale of goods" and a "[...] purchaser of a good intended for personal, family, home or other use that is not connected with entrepreneurial activity". In such contracts, the purchaser (effectively, a consumer) has the right to exchange (provided it is a non-foodstuff) for an analogous good of another size, form, dimension, style, color, or complement within fourteen days of the original transfer. If there is nothing suitable for exchange, the purchaser may get his or her money back instead. The only requirements for the purchaser are that the good has not been used, "has retained its consumer properties" and there is proof of its acquisition from the particular seller. Thus, the voluntary trade practice of some of the larger and friendlier Western department stores (in England, famously, Marks & Spencer) is embodied in the Russian Civil Code.

Article 730(2) dealing with domestic independent work contracts—perhaps the epitome of entrepreneur-consumer relations—defines the contract as a public contract, thus neatly ensuring a "level playing field" for the consumers. More generally, the contract of independent work (defined in Art.702) imposes very clearly the obligation of proper performance and liability for defects on the contractor (Art.723), although the customer is not without his obligations too, for example to assist, as appropriate (Arts.718, 719).

Another contract that by definition is between an entrepreneur and a consumer is the contract of delivery under Article 506. Article 519 sets the default position that the consumer may return incomplete goods within a reasonable time to be replaced with complete ones.

It may be noted, from the comparative perspective of a common lawyer, that the civilists' detailed enumeration of the parties' respective rights and obligations for typical contracts would appear to be an asset in avoiding consumer disputes. One thinks particularly of householders dealing with builders, plumbers, electricians, and so on, where the provisions of such articles as 715 (rights of a customer during fulfillment of work by independent work contractor), 718 (assistance of a customer), 721 (quality of work), and 731 (guarantees of rights of customer) give a framework that protects both parties by clearly defining the balance of their mutual obligations.

Causing Harm

Aside from contractual obligations, we should note that there is one important obligation, which arises as a result of causing harm, which is of particular interest with respect to our concern with entrepreneurs and consumers. Part 3 of Chapter 59 deals with compensation for harm caused as a consequence of defects in goods, works, or services. Article 1095 imposes a duty to compensate:

> "harm caused to the life, health, or property of a citizen or the property of a legal person as a consequence of design, prescription, or other defects of a good, work, or service, and also as a consequence of unreliable or insufficient information concerning the good (or work, service), shall be subject to compensation by the seller or the manufacturer of the good or by the person who fulfilled the work or rendered the service irrespective of their fault, and whether the victim was in contractual relationship with them or not.
>
> The rules provided for by the present article shall be applied only in the instances of the acquisition of the good (or fulfillment of work, rendering of service) for consumption purposes and not for use in entrepreneurial activity."

This clearly gives the consumer an advantage in bypassing the normal fault requirement for compensation for harm caused, set out in Article 1064 of the Russian Civil Code.

Conclusion

The foregoing enumeration of rights and duties in the Russian Civil Code—which particularly touch entrepreneurs and consumers—seems to evidence a commendable concern for both special groups. By the general rules on liability, duress, and contracts of adhesion, and the more specific requirements of individual obligations, a fair framework is achieved that should encourage entrepreneurship while supporting consumers from unwarranted exploitation.

Russian Civil Law Between Remnants of the Past and Flavor of the Present

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Introductory Remarks

In all countries, the civil law—especially, the law of property—is linked closely to the social and economic systems. This was particularly true in the Soviet Union. Despite the end of the Marxist experience of law, there seems little doubt that the transition to a market-oriented system of civil law in Russia cannot erase all the remnants of the past.

In order to attempt to characterize the new civil law in Russia, it may be of some interest to briefly study one example of such a remnant of the past before focusing attention on an institution—that of the trust—which is new in Russia.[1]

Remnants of the Old Times: The Right of Economic Management (*pravo khoziaistvennogo vedeniia*) and the Right of Operative Management (*pravo operativnogo upravleniia*)

According to Article 294 of the new Civil Code of the Russian Federation,[2] "a State or municipal unitary enterprise to which property belongs by right of economic management possesses, uses and disposes of this property within the limits determined in accordance with the present Code". In addition to this "right of economic management", Article 296 provides:

> "1. A Treasury enterprise and also an institution, with respect to property consolidated to it, within the limits established by a law and in accordance with the purposes of its activity, effectuates the planning tasks of the owner and the designation [*naznachenie*] of the property, the rights of possession, use and disposition thereof. 2. The owner of the property consolidated to a Treasury enterprise or institution has

[1] Especially, on the reform of property law, see G. Ajani, *Il modello post-soeialista*, Torino, 1997, especially 113 *et seq.* and G. Ajani, U. Mattei, "Codifying Property Law in the Process of Transition: Some Suggestions from Comparative Law and Economies", *Hastings International and Comparative Law Review* 1996, 117 *et seq*.

[2] Part One, adopted on 30 November 1994 (*Sobranie zakonodatel'stva Rossiiskoi Federatsii* 1994 No.32 item 3301); Part Two, adopted on 26 January 1996 (*Sobranie zakonodatel'stva Rossiiskoi Federatsii* 1996 No.5 item 410); Part Three, adopted on 26 November 2001 (*Sobranie zakonodatel'stva Rossiiskoi Federatsii* 2001 No.49 item 4552); Part Four, adopted on 18 December 2006 (*Sobranie zakonodatel'stva Rossiiskoi Federatsii* 2006 No.52 (I) item 5496).

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> the right to withdraw surplus or unused property or property not used according to its designation, and to dispose of it at its discretion."

The right of operative management was conceived by Venediktov after the end of the Second World War[3] and became one of the cornerstones of the Soviet law of property (see, *e.g.*, Art.94(2), 1964 RSFSR Civil Code). However, the right of economic management appeared much later: in the 1990 RSFSR Law "On Ownership" (Art.24) and the 1991 Principles of Civil Legislation of the USSR and the Union Republics (Art.43). Both concepts were intended to provide legal persons—who were not "owners" strictly speaking—with an economic basis which would enable them to participate in an autonomous way in civil law relationships.[4]

The right of economic management is provided for industrial enterprises (*proizvodstvennie predpriiatiia*) (Arts.113-114, RF Civil Code) and for institutions engaging in commercial activity while the right of operative management is foreseen for non-commercial institutions (*gosbiudzhetnye uchrezhdeniia*) and treasury enterprises (*kazennye predpriiatiia*). It is obvious that both these forms of property need to be understood in the light of the privatization process.[5] Russian authors have recognized these norms of limited rights *in rem* as bearing a risk of being abused by enterprises organizations (or their organs) in order to transfer property from the state to the private sector under conditions which are disadvantageous for the state.[6] It is for this reason that the content of these rights has been reduced in the new Civil Code as compared with the previous version.

According to Article 295(1):

> "an owner [*i.e.*, the state or other public entity] of property held in economic management, in accordance with a law, decides questions of the creation of the enterprise and the determination of the objects and purposes of its activity, its reorganization and liquidation, appoints the director of the enterprise, and effectuates control over the use thereof according to the designation [of the property] and preserves property

3 On the concept of "operative management", see G. Ajani, "Gestione operati", in *Digesto delle discipline privatistiche, Sezione civile*, VIII, Torino 1992.

4 In that sense, see *Kommentarii chasti pervoi grazhdanskogo Kodeksa Rossiiskoi Federatsii dlia predprinimatelei*, Moscow 1996, Arts.294-300, 262.

5 The first Russian Privatization Law of 3 July 1991 has been replaced, in the framework of the third stage of privatization of State property, by a new Privatization Law of 21 July 1997 (*Sobranie zakonodatel'stva Rossiiskoi Federatsii* 1997 No.30 item 3595; 1999 No. 26 item 3173). On this law, see A. Rohde, "Das neue russische Privatisierungsgesetz vom 21. Juli 1997", *Recht in Ost und West* 1998, 194-198, and the German translation of that law in *Recht in Ost und West* 1998, 198-203. Concerning the second stage (1994-1997) of privatization in Russia, see L. Riister, "Privatisierung und Strukturwandel russischer Unternehmen", *Recht in Ost und West* 1997, 237 *et seq.* The third stage of privatization was aimed—in particular—at privatizing commercial enterprises in which the State still held shares of stock.

6 See *Kommentarii*, *op.cit.* note 4, 264.

> belonging to the enterprise. The owner has the right to receive a portion of the profits from the use of the property in the economic management of the enterprise."

In other words (at least, theoretically), the organs of enterprise which enjoy a right of economic management may not decide to reorganize or to liquidate the enterprise—contrary to the provisions of Article 24 of 1990 RSFSR Law "On Ownership".

Furthermore, Article 295(2) provides that:

> "an enterprise does not have the right to sell movable property, which belongs to it by right of economic management, or to lease it, pledge it, contribute it as a part of the charter (contributed) capital of the joint-stock society or partnership or dispose of this property—by other means—without the consent of the owner.
>
> The remaining property, which belongs to the enterprise, is disposed of autonomously except for instances provided for by a law or other legal act."

Contrary to prior legislation, the new Russian Civil Code does not allow the state to arbitrarily limit the power of possession and use which is conferred upon an enterprise enjoying the right of economic management.[7] In particular, the state cannot deprive the enterprise of its property without its consent except in the case of liquidation or reorganization of the enterprise.[8]

In fact, the right of economic management leads to the transfer of responsibility for the activity of the enterprise from the state to the enterprise itself.

As far as the right of operative management is concerned, its content is less substantial as compared with the right of economic management. Here, the state cannot only withdraw surplus or unused property—or property which has not been used according to its destination (Art.296(2))—but an enterprise which enjoys the right of operative management "has the right to alienate or otherwise dispose of property allocated to it only with the consent of the owner of this property" (Art.297(1)). Such an enterprise can only autonomously dispose of the products/services which it has produced itself (Art.297(1) *in fine*). As far as the revenues of the enterprise are concerned, the distribution thereof is to be determined by the state (Art.297(2)). To the contrary, where an enterprise enjoys the right of economic management, the state only has a right to receive a portion of the profits (Art.295(1) *in fine*).[9]

The right of economic management as well as the right of operative management of property are enjoyed by the enterprise (or institution)

7 *Ibidem*, 264.

8 *Ibidem*, 265.

9 In case of an "institution" (*uchrezhdenie*) as opposed to an "enterprise" (*predpriiatie*), Art.298 provides that it does not have the right to alienate the movable property entrusted to it.

"from the moment of the transfer of the property unless otherwise established by a law or other legal acts or by a decision of the owner" (Art.299(1)).

Concerning the fruits, products, and revenue from the use of property held in economic management or operative management—as well as the property acquired by a unitary enterprise (or institution) by way of contract or on other bases—Article 299(2) provides that they will "enter the economic management or the operative management of the enterprise or institution in the procedure established by the present Code, other laws or other legal acts governing acquisition of the right of ownership". This means that these fruits, products, or revenues do not become the property of the enterprise (or institution) but, rather, remain the property of the state.[10]

As far the termination of the rights of economic management and operative management is concerned, this can occur:

> "upon grounds and in the procedure provided by the present Code, other laws or other legal acts governing the termination of the right of ownership and, also, in instances of the lawful withdrawal of the property from the enterprise or institution under a decision of the owner." (Art.299(3))

The reference to "acts governing the termination of the right of ownership" means that the requisition of the property—without the consent of the enterprise or institution—is permitted only if grounds for terminating the right of ownership are provided for by Article 235 of the Civil Code.[11]

According to Article 300(1):

> "in the event of the transfer of the right of ownership in a state or municipal enterprise as a property complex to another owner of state or municipal property, this enterprise retains the right of economic management of the property belonging to it."[12]

However, this article only deals with the case where an enterprise is transferred from one public owner to another (for instance, from the Russian Federation to a Subject of the Federation). If the new owner is a private (legal or natural) person, we are dealing with privatization.[13]

10 See *Kommentarii*, *op.cit.* note 4, 266.

11 *Ibidem*, 267.

12 A similar solution is foreseen in Art.300(2) for the operative management of an institution.

13 See *Kommentarii*, *op.cit.* note 4, 268.

A Novelty at the Border of the Russian Law of Property and Contract: The Trust

Introductory Remarks

The new Russian Civil Code has introduced the concept of the "trust" (*doveritel'noe upravlenie*) into the Russian legal system (Arts.1012-1026). However, it should be kept in mind that the Russian trust differs from the common law trust insofar as "the transfer of property to trust management does not entail the transfer of the right of ownership thereto to the trust manager" (Art.1012(1)).[14] In other words, the Russian trust has appeared in the legal horizon as the means for the founder thereof to realize his power of disposition without creating a new right of ownership over the transferred property. In fact, the trustee manager is a kind of representative (or agent) of the founder. Trust manager holds possession of certain property which must be managed in favor of the founder or of a third person (*i.e.*, the beneficiary).

Such a trust is at the border of the law of property and the law of contracts. On the one hand, Article 1012 is entitled "The Contract of Trust Management of Property"; on the other hand— although the trustee manager is not the owner of the transferred property—he can, for instance, enforce all claims to protect the property which only belong to the owner (Art.1020(3)).

On the contrary, the common law trust is not a contract: it exists as soon as the settler has created it—even before the appointment of the trustee and his agreement to act as such.[15] Furthermore, the trustee has a legal interest over the entrusted property and—from a continental law perspective—should be considered to be an "owner".

One can here recall the 1993 Edict of the Russian President "On Trust" which introduced a "genuine" trust into Russian law.[16] According to section 3 of the Edict, this entails the transfer of the right of ownership to the entrusted manager. However, this Edict has been repealed as

[14] See, also, Art.209(4) in the same sense.

[15] See *Megarry's Manual of the Law of Real Property*, 7th ed., London 1993, 273:

> "Trustees are usually appointed by the settlor when creating the trust. If he neither makes an appointment nor makes any provision for one, the Court may appoint trustees [...] A person appointed trustee need not accept the trust even if he had agreed to do so before it was created, provided he disclaims the trust before he has accepted it either expressly or by acting as trustee."

[16] *Sobranie zakonodatel'stva Rossiiskoi Federatsii* 1994 No.1 item 6.

a result of the adoption of the new Russian Civil Code.[17] What are the main features of the Russian trust?[18]

The Main Features of a Russian Trust

The Trustee Manager

Article 1015(1) provides that "an individual entrepreneur or commercial organization, except for a unitary enterprise, may be a trustee manager". Furthermore, when a trust is established on grounds provided for by a law, "the trustee manager may be a citizen who is not an entrepreneur or a non-commercial organization except an institution" (Art.1015(1)). Neither a state agency (agency of local self-government) (Art.1015(2)) nor a beneficiary (Art.1015(3)) may be a trustee manager.

As far as the rights and duties of a trustee manager are concerned, he "has the right—with respect to the entrusted property and in accordance with the contract of trust management—to perform any legal or factual act in the interests of the beneficiary" (Art.1012(2)). Nevertheless, in case of transactions involving property which has been transferred to trust management:

> "the trustee manager concludes a transaction in his own name indicating that—in doing so—he is acting as such manager. This condition is deemed to have been complied with if—when performing acts not requiring written formalization—the other party has been informed about the performance thereof by the trustee manager in such capacity and in written documents by making a notation "D.U." after the name of the trusty manager." (Art.1012(3))

The failure to observe this duty of disclosure is sanctioned by the fact that "the trustee manager personally bears liability *vis-à-vis* third persons and is liable to them with all the property which belongs to him" (Art.1012(3)).

Generally speaking:

> "the trustee manager effectuates—within the limits provided for by a law and the contract of trust management of property—the powers of the owner with respect to the property transferred in trust management. The disposition of immovable property by the trustee manager is effectuated in the instances provided for by a contract of trust management." (Art.1020(1))

Despite the fact that the trustee manager is not the owner of the entrusted property (Arts.209(4) and 1012(1)), he is nevertheless entitled—within the limits of the law and the contract—to possess (*vladet'*), use (*pol'zovat'sia*),

[17] See O.N. Sadikov, (ed.), *Kommentarii k Grazhdanskomu Kodeksu Rossiiskoi Federatsii. Chasti vtoroi*, Moscow 1996, 594-595.

[18] On the Russian trust see, for instance, A.V. Kriazhkov, "Doveritel'noe upravlenie imushchestvom v Rossii: formirovanie instituta i sfery primeneniia", *Gosudarstvo i pravo* 1997 No.3, 22-31.

and enjoy (*rasporiazhat'sia*)[19] movable entrusted property.[20] For immovable property, these powers exist only if they are provided for in the contract of trust management. In other words, the trustee can be seen as a "quasi-owner", who can even transfer the property to third parties.[21]

A duty of information is imposed upon the trustee manager insofar as he is required to "submit to the founder of the management and to the beneficiary a report concerning his activity within the periods and in the procedure established by the contract of trust management of the property" (Art.1020(4)). Another duty can be seen in the fact that the "trustee manager effectuates the trust management of property personally except in the instances provided for by section 2 of the present Article" (Art.1021(1)). However, he may delegate a portion (or all) of his duties to another person where he is empowered to do so by the contract of trust management of the property, where he has received the consent of the founder to do so in writing, or where he is forced to do so by virtue of circumstances.

As regards the liability of the trustee manager, Article 1022(1) provides that:

> "the trustee manager who has not displayed due diligence in the trust management of the property in the interests of the beneficiary or of the founder of the management will compensate the beneficiary for the lost advantage for the period of the trust management of the property and [compensate] the founder of the management for losses caused by the loss or damage to the property taking into account its natural wear and tear and also lost advantages. The trustee manager bears responsibility for losses caused unless it is proved that these losses occurred as a consequence of insurmountable force or of acts of the beneficiary or the founder of the management."

As Russian authors have underlined,[22] these two sentences—providing for liability of the trustee manager—appear to be contradictory. On the one hand, according to the first sentence, this liability has its roots in the absence of "due diligence in the trust management of property". In other words, here we are dealing with liability for fault. On the other hand, in light of the second sentence, the trustee manager is discharged from liability only where the losses are a consequence of insurmountable force or the act of the beneficiary or the founder the management. Here, we are dealing with strict liability. The contradiction ought to be resolved in favor of strict liability in accordance with Article 401(3) which—as a general rule—provides that a person who engages in entrepreneurial activity

19 The same trilogy as in the case of "*operativnoe upravlenie*" is to be found here.

20 See *Kommentarii*, *op.cit.* note 17, Art.1020, 606.

21 *Ibidem*, Art.1020, 606.

22 *Ibidem*, Art.1022, 608.

bears strict liability since there is no doubt that the trustee manager can be deemed to be engaging in "entrepreneurial activity".[23]

It should be added that the trustee manager has to indemnify not only the founder of the management for damages but, also, the beneficiary.[24]

If the trustee manager has concluded a transaction exceeding the power and authority granted to him or violating limitations which have been imposed upon him, the obligations which flow there from are to be born personally by the trustee manager (Art.1022(2)). Nevertheless, where a third person who participates in this transaction did not know—and could not have known—about such excesses (or violations), the damages which have been incurred can also be recovered from the trust property and—where this property is (assets are) also insufficient—from the property (assets) of the founder of the management which has not been transferred to trust management (Art.1022(2) in connection with (3)). In the latter case, the founder may require the trustee manager to indemnify him for losses which he has incurred.

Generally speaking, "debts relating to obligations which have arisen in connection with the trust management of property are paid out of the trust property" (Art.1022(3)). Despite the fact that the trustee manager does not become the owner of the trust property, if the latter is insufficient "recovery may be levied on the property of the trustee manager and—where his property is also insufficient—on the property of the founder of the management which has not been transferred to trust management" (Art.1022(3)).

The contract of trust management may contain a requirement for the trust manager to provide a security or bond (*zalog*) in order to indemnify losses which may be incurred by the founder of the management or the beneficiary as a result of the improper performance of the contract of trust management (Art.1022(4)).

The Founder of the Management

According to Article 1014, "the owner of property and, in the instances provided for by Article 1026 of the present Code, another person is the founder of the trust management". It may be observed, first of all, that not only an individual owner but, also, joint owners may be founders. For instance, spouses—who are the joint owners of a dwelling—may transfer it to trust management.[25]

[23] *Ibidem*, Art.1022, 608-609.

[24] For the determination of the amount of damages, see Arts.15 and 393, Civil Code.

[25] See *Kommentarii*, *op.cit.* note 17, Art.1014, 600.

In cases provided for by a law, persons other than the owner can appear as a founder; for instance, a guardian (in case of permanent management of the property of the ward, Arts.38, 42, and 43) or an executor of a will (Art.1026). In such cases, the founder acts in the interests of the owner himself.[26]

Where state or municipal property is transferred to trust management, only the organ authorized by the owner to dispose of such property can appear as a founder. In particular, where shares which belong to the state or to a municipality and which relate to an enterprise to be privatized are transferred in trust management, the founder of the management is the corresponding Property Fund. In such case, the beneficiary of the trust management may be the Property Fund itself or the corresponding financial agency which is authorized by the owner to accumulate the financial resources of the latter.[27]

The Object of the Trust Management

Article 1013(1) provides that "enterprises and other property complexes, individual objects related to immovable property, securities, rights, evidenced by paper securities, or other property may be an object of trust management". In other words, the objects of civil rights—which are enumerated in Article 128—may be the subject of trust management; for instance, several forms of property, copyrights (*inter alia* the right of location) as well as exclusive rights (copyrights, trademarks and so on). Nevertheless, "money may not be the autonomous object of trust management except for instances provided for by a law" (Art.1013(2)). Such an exception can be found in Article 5 of the 1996 Law "On Banks and Banking Activities"[28] according to which a credit organization which—on the basis of a license of the Bank of Russia—is authorized to engage in banking operations also has the right to conclude contracts of trust management of financial means and other property belonging to natural or legal persons. Trust management of financial means by non-credit organizations is possible only on the basis of a license issued in accordance with procedures set forth in Article 7 of the above-mentioned law.[29]

Occasionally, the possible object of trust management is clearly specified by law. For instance, according to Article 38, in cases of trust

[26] *Ibidem*, Art.1014, 600.

[27] *Ibidem*, Art.1014, 600.

[28] *Sobranie zakonodatel'stva Rossiiskoi Federatsii* 1996 No.6 item 492; 1998 No.31 item 3829; 1999 No.28 item 3459; 2001 No.26 item 2586; No.33 item 3424.

[29] See *Kommentarii*, *op.cit.* note 17, Art.1013, 599.

management of the property of the ward, only immovable property or valuable property of the ward can be an object of trust management.

Private property—as well as state or municipal property—can be the object of trust management. Nevertheless, according to Article 1013(3):

> "property in economic management or operative management may not be transferred to trust management. The transfer to trust management of property in economic management or operative management is possible only after liquidation of the legal person in the economic management or operative management of which the property is held or termination of the right of economic management or operative management of property and the entry thereof into the possession of the owner on other grounds provided for by law."

Strictly speaking, no industrial enterprise or state or municipal organization has any authority to transfer property to trust management as long as it is assumed that such enterprise or organization only enjoys a right of economic management or of operative management over such property. Only a specialized organ, which is directed by its owner to dispose of state or musical property, is authorized to transfer it to trust management (see, for instance, the Property Fund to which I have already made reference).[30]

Since the trustee manager is not the owner of the transferred property, Article 1018(1) provides that:

> "property transferred in trust management is separate from other property of the founder of the management and also from property of the trustee manager. This property is reflected in a separate balance sheet of the trustee management and an autonomous account is kept with regard thereto. A separate bank account is opened in order to settle accounts concerning activity connected with the trust management."

The rule of the separation of property in trust management knows only three exceptions:

(1) In the event of the bankruptcy or insolvency of the founder of the management, levy of execution on property transferred in trust is permitted (Art.1018(2)), being underlined however that in other cases of debts of the founder, levy of execution on property transferred is not allowed.[31]

(2) As stated in Article 1019(1), "the transfer of pledged property to trust management does not deprive the rights holder of the right to levy execution on this property".

[30] *Ibidem*, Art.1013, 599; according to an Edict of the RF President of 9 December 1996 (*Sobranie zakonodatel'stva Rossiiskoi Federatsii* 1996 No.51 item 764) shares of stock, which are held in state ownership, must be managed by trustees.

[31] Of course, the beneficiary's creditors cannot attach the entrusted property because the founder of the management remains the owner.

(3) If the transfer property is insufficient to cover the debts arising out of the activity of the trust management, the recovery can be directed in a subsidiary way—first against the property of the trust manager and, finally, against the property of the founder (Art.1022(3)).

The trust management of securities is subject to special rules (Art 1025). First of all, the trustee manager needs to be recognized as a licensed, professional participant in the securities market. At present, the list of agencies authorized to issue such a license—as well as the procedure for the issuance thereof—was set forth in two 1994 Edicts of the RF President.[32]

The situation has, however, changed recently. A license for activity concerning the management of securities is no longer required if the trust management is concerned only with the management of rights with regard to securities (see Law "On Securities" as amended 28 December 2002).

Under the provisions of Article 6 of the Law "On Banks", banks licensed by the RF Central Bank to engage in banking operations are authorized to conclude contracts, with natural or legal persons, for the trust management of securities. Other credit organizations have a right to engage in professional activity on the securities market only in accordance with federal legislation (see, for instance, the 1996 federal legislation "On the Securities Market").[33]

The Contract of Trust Management

As far as the substantive terms and conditions of a trust management contract are concerned, Article 1016(1) sets forth certain issues which are deemed to be essential terms and conditions of the contract (Art.432, RF Civil Code) and upon which the parties must agree:

(1) the composition of the property being transferred to trust management;
(2) the name of the legal person or the name of the citizen in whose interests the management of the property is to be effectuated (the founder of the management or the beneficiary);
(3) the amount and form of remuneration for the manager if payment of remuneration has been provided for by the contract;
(4) the duration of the contract.

Other conditions may also be deemed to be essential by one or by both parties to the contract.

32 See *Kommentarii*, *op.cit.* note 17, Art.1025, 611-612.

33 *Sobranie zakonodatel'stva Rossiiskoi Federatsii* 1996 No.17 item 1918; 1998 No.48 item 5867; 1999 No.28 item 3472; 2002 No.52(I) item 514.

It should be noted that the period of validity of a trust management contract cannot exceed five years (Art.1016(2)). In addition, a maximum period may be established by law, for instance, for individual types of property transferred to trust management. Furthermore, a contract of trust management of property cannot be concluded for the realization of a specific commercial act, for instance, in order to guarantee the contract of the purchase and sale of an automobile.[34]

An extension of the contract for the same period of time—and upon the same terms and conditions as were provided for by the contract originally—is foreseen in the absence of a declaration by either of the parties concerning termination of the contract owing to the end of the period of its duration (Art.1016(2)).

As far as formal terms and conditions are concerned, a contract of trust management of movable property must be concluded in writing (Art.1017(1)). However, the parties are not obliged to compile a single document; the offer and acceptance need only comply with the rules of Article 434(2 and 3) and of Articles 435, 436, and 438(3) of the Civil Code.[35] The contract enters into force once the offeror has received the acceptance of the offeree (Art.433(1)).

The contract of trust management of immovables is subject to more stringent formal terms and conditions. *First*, the contract "must be concluded in the form provided for contract of the purchase and sale of immovable property", *i.e.*, in writing in a single document (Art.550). According to this article, the notarial form is no longer required.[36]

Nevertheless, according to Article 7 of the 1995 law introducing the Russian Civil Code, until the entry into force of a Federal Law governing the registration of rights to immovables and contracts therewith (Arts.550, 560, and 574), the mandatory rules requiring the compulsory notarial certification of such contracts—established by legislation prior to the entry into force of the second part of the Civil Code—remain in force.[37]

Second, "the transfer of immovables in trust management is subject to state registration in the same procedure as is the transfer of the right of ownership to this property" (Art.1017(2)), *i.e.*, according to rules of Article 551 which, in turn, refers to the Federal Law "On Registration" (see, also, Art.131(6)). According to Article 6 of the above-mentioned introductory

34 *Ibidem*, Art.1016, 602.

35 *Ibidem*, Art.1017, 603.

36 *Ibidem*, Art.550, 123.

37 The Federal Law governing the registration of rights to immovables entered into force in early 1998. *Sobranie zakonodatel'stva Rossiiskoi Federatsii* 1997 No.30 item 3594.

law to the Civil Code, the rules established by Article 131 are to be applied until the entry into force of a Federal Law "On Registration".[38]

It is expressly stated in Article 1017(3) that "the failure to comply with the form of a contract of trust management of property or the requirements concerning registration of the transfer of immovable property in trust management results in the invalidity of the contract" with the consequences provided for in Article 167 of the Civil Code.

As far as the termination of a contract of trust management of property is concerned, Article 1024 provides for three forms of refusal which can lead to termination (see Art.450(3), RF Civil Code):

(1) The refusal of the beneficiary to receive the benefit (advantages) under the contract unless otherwise provided for by the contract;
(2) The refusal of the trustee manager or founder of the management to effectuate the trust management in connection with the impossibility of the trustee manager to personally effectuate the trust management of the property (in such a case, the latter is not entitled to claim remuneration for the entire period); and
(3) The repudiation by the founder of the management of the contract for reasons other than the impossibility of the trustee manager to personally effectuate trust manager of the property (in such case the manager is entitled, at the time of breach of the contract, to demand payment of the entire amount of his remuneration).

In addition, the contract may also be terminated upon:

(1) The death of the citizen or liquidation of the legal person who is the beneficiary unless otherwise provided for by contract;
(2) The death of the citizen who is the trustee manager, or he being deemed to lack dispositive legal capacity, to have limited dispositive legal capacity, or to be declared missing as well as insolvent (or bankrupt); and
(3) A declaration of the citizen, who was the founder of the management, to be insolvent (or bankrupt).

Where one party seeks to overturn the contract, "the other party must be notified thereof three months prior to the termination of the contract unless another term is provided for in the contract" (Art.1024(2)). The

[38] Rules on the registration of immovables may be found also in an Edict of the RF President of 28 February 1996 "On Complementary Measures in Order to Improve Mortgage Credit" (*Rossiiskaia gazeta* 6 March 1996). See *Kommentarii*, *op.cit.* note 17, Art.551, 125.

termination of the contract results in the transfer of the property trust management "to the founder of the management, unless otherwise provided for by the contract" (Art.1024(3)).

Some Comparative Thoughts

It is of interest to observe that, on the one hand, the English trust is founded on the legal interest of the trustee and equitable interest of the *cestui que* trust—the settlor having forfeited any interest in the entrusted property—and on the other hand, the Russian trust analyzed is a contract leading to the transfer possession of the entrusted property to an agent of the settlor who remains the owner. Another solution can also be imagined.

This is to be found in the new Civil Code of Québec which entered into force in January 1994 (Arts.1260-1298) and which is based on the so-called "*patrimoine d'affectation*".[39] In other words, the property which constitutes a trust is separated from the property of the settlor as well as from that of the trustee and the beneficiary. None of these persons has any right of ownership in the trust. The trust property has no owner, but rather only a person who has full management of this property (*i.e.*, the trustee), who must deal with the property in a way most advantageous for the beneficiary.

In a comparative law tour of the horizon, another solution exists for the administration of a third person's property in favor of the beneficiary, *i.e.*, the institution of "*bewind*" which has been adopted by the new Dutch Civil Code which entered into force in January 1992 (Book 3: Arts.126-165). The "*bewind*" is also based on the separation between the management and enjoyment of the property, but with a substantial difference as compared with the English trust or the continental "*fiducie*". In fact, the beneficiary is the owner of the entrusted property. Nonetheless, he is not permitted to sell such property to a third person without the consent of the "administrator".

Conclusive Considerations

Returning to the trust, it seems to be of great practical importance for this institution to be included in the new Russian Civil Code as the trust can play a role in the future which should not be underestimated.

Furthermore, the existence of the trust in the Russian civil law system is able to facilitate the accession by Russia to the 1985 Hague Conven-

[39] On the trust in the Civil Code of Quebec, see B. Dutoit, "Du Québec aux Pays-Bas: les mues du droit de la propriété dans deux codes civils récents" in *Rapports suisses présentés au XVe Congrès international de droit comparé*, Zurich 1998, 212 *et seq.*

tion on the Law Applicable to Trusts and on their Recognition,[40] despite the fact that one can wonder whether or not the Russian trust meets the requirements of Article 2 of the Convention. This Convention, which entered into force in January 1992, has been signed (or ratified) by states belonging to the common law system (Australia, Canada, Great Britain, Malta, and the USA) as well as by continental law states (Italy, France, The Netherlands, Luxembourg, and Switzerland). As a result of this Convention, the trust can be utilized more easily in international intercourse—even as among states from common law jurisdictions on the one hand and the civil law system on the other.

It is hoped that Russia will not stay out of this process.

40 Text reproduced at <http://www.hcch.net/index_en.php?act=conventions.text&cid=59>.

Reflections of Anglo-American Legal Concepts and Language in the New Russian Civil Code

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Since 1994, I have been involved in several large projects aimed at providing support to code drafting in the former Soviet Union. Doubting the utility of American advisers for this purpose, I have done my best to divert as much money as possible to other, clearly necessary uses, such as computers for legal drafting and electronic mail, as well as travel expenses to bring together the best experts from the former Soviet republics and Western Europe. The result has been that American advisers have appeared only sporadically and have had relatively little direct influence. Nevertheless, to my surprise, on examining the new Russian Civil Code, I see some reflections of Anglo-American legal concepts and legal terminology. First, I would like to discuss concepts, then terminology.

Concepts

General Principles

The most notable example of the influence of the United States is not in the text of the Civil Code. It is to be found in the notes accompanying the Part I of the Code, stating that it was adopted by the State *Duma* on 21 October 1994 and signed by the President of the Russian Federation on 30 November 1994. Surely the example of the United States was a prime moving force behind the decision of the Russian people to oust their dictatorial regime and replace it with a democratically elected government with a bicameral legislature and a strong presidency. Likewise, in putting the basic principles of a free-market economy in the first article of the Code, there must have been some thought of the example of the common-law countries. For, in fact, the common-law countries are a significantly purer model of market economics than the civil-law countries of Western Europe. In a recent authoritative economic study, eight of the twelve freest economies in the world were those of common-law countries.[1]

Federalism and the Code

The Russian Federation, like the United States, is a federal system. Article 1(3) of the RF Civil Code contains a principle of freedom of commerce

[1] See the Index of Economic Freedom at <http://www.heritage.org>.

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(goods, services, and financial assets may be moved freely about on the whole territory of the Russian Federation) that is strikingly similar to the restrictions on state power that the United States courts have imposed under the Commerce Clause of the United States Constitution. In both cases, the purpose is the same: to ensure that the constituent units of the federation cannot erect barriers that would destroy the unity of the free market. The 1993 Russian Constitution—in giving the federal government a monopoly of civil legislation—of course, goes further toward centralization than the common-law federations of Australia, Canada, and the United States, which have generally seen private law as a matter for the constituent political units. There is no doubt that a unified system of private law greatly facilitates commerce in a federal system. Because of the peculiar ability of the common law to disregard state and even national boundaries in building its rules, the common-law federations have managed to achieve this unity without centralized legislation. Russia has achieved the same end-result: a unified system. It, of course, could not use the alien common-law methodology of achieving this unity.

Specific Anglo-American Law Sources

There are very few legal concepts or institutions in the Code that clearly have a common-law source. Even where they do have an Anglo-American source, they typically have been radically changed to reflect the more prescriptive and/or more formal bent of the Russian lawmaker. A good example is the franchise contract, a legal institution that first gained prominence in the United States. The Code's provisions on the franchise contract (Arts.1027-1040) adopt the outlines of the American franchise contract, but as others have pointed out, it creates so many nonnegotiable rights in the franchisee as to make use of the contract unattractive.[2] More in the general spirit of American law is the Armenian Code version of the franchise contract, which makes all the rules dispositive. (It should be noted, however, that one group in the United States, new-car dealers, have lobbied through anti-cancellation provisions not dissimilar to the Russian legislation.) The drafters of the extremely strict franchise-contract provisions seem to have forgotten the fundamental economic law known to American economists as the "Bowl of Jello" theory. (If you push down on one side of a bowl of Jello, it will rise up an equal amount in another place.) The result of making the franchise contract highly unfavorable to franchisers is likely to be both:

[2] C.M. Wissels, "The Russian Civil Code: Will it Boost or Bust Franchising in Russia?", 22 *Review of Central and East European Law* 1996 No.5, 495-519.

(1) altering contracts so they achieve the economic purpose of the franchise contract without formally falling under the franchise-contract provisions; and
(2) use of vertical integration to avoid creating franchise relationships.

At first glance, the general provisions on lease (Arts.606-625) and in particular finance lease (Arts.665-670) might appear to be a Russian implementation of an Anglo-American concept. However, in fact they represent something quite different. Article 2A and Article 9 of the United States Uniform Commercial Code apply a famous American legal principle—I have in mind the principle, "If it looks like a duck, walks like a duck, and quacks like a duck, it is a duck"—to classify arrangements that are leases in form but secured transactions in fact as secured transactions, thus invoking the protections for third parties inherent in the registration provisions of Article 9. While Article 170(2) of the Russian Code deals with sham transactions, I really doubt that a Russian court would use this article to transform what was a lease contract in form but a pledge in essence into an agreement covered by the Code provisions on pledge. What is more likely to happen is that financing organizations may find the lease contract more attractive than the pledge contract and may use it to avoid the safeguards (such as judicial sale) found in the pledge law. This and the franchise situation may be cases where two wrongs make a right. The rejection of the American walks-like-a-duck principle allows businesses in Russia to avoid the overly detailed mandatory terms of one type of contract by fitting their transaction under another heading.

In corporate law, there are some reflections of Anglo-American concepts. There was, of course, considerable United States advice offered in the drafting of Russia's Law "On Joint-Stock Companies". Most interesting has been the American reaction to Article 105 of the Civil Code. The United States has gone further than almost any country in allowing piercing of the corporate veil. However, American investors were very upset at Article 105 of the Civil Code because of the very generalized language it used in describing circumstances when a principal company became liable for the debts of a subsidiary company. This worry reflected, to a considerable extent, a lack of understanding of (or a lack of faith in) the whole civilian method of drafting in general principles. American law has gone through two phases. Until perhaps the 1950s, it grew largely by accretion of judicial precedents. The result after several hundred years of English and American accretion of precedential law was the emergence of a highly detailed body of law based upon tens of thousands of court deci-

sions. Starting around 1950, as legal change came faster, statutes began to move ahead of judicial decisions as a source of law, but the statutes were drafted in a highly detailed manner, not in the short general phrases of European codes. American lawyers are comfortable with the widespread practice of piercing the corporate veil in the United States because the detailed precedential and statutory law lets them know with considerable precision when such piercing might occur. They were frightened by the lack of detail in Article 105 and imagined worse-case scenarios, much as American generals during the Cold War had sometimes seen nonexistent missile gaps. The result was an intense lobbying effort to secure more detail, an effort that was partially successful in the Law "On Joint-Stock Companies".

Common Treaty Source

The Russian Federation and the major common-law countries belong to a number of important treaties affecting private-law relations. In particular, they belong to the United Nations Convention on the International Sale of Goods and to a wide variety of intellectual-property conventions. The intellectual-property provisions of drafts of Part III of the Russian Civil Code have clearly reflected the treaty rules. Likewise, United States legislation embodies numerous rules taken from international intellectual-property agreements. The fact that the different treaties provide quite different treatment for various types of intellectual property have made it very difficult for the Russian code drafters to create rules for a general part of intellectual property. Despite urging by American experts (Professors James J. White and Robert S. Summers in particular), the provisions of Chapter 30 of the Russian Code on purchase and sale reflect relatively little of the United Nations Convention on the International Sale of Goods. The committee redrafting Article 2 of the United States Uniform Commercial Code has paid much closer attention to the Convention, although it has not always followed it.[3] Of course, in international sales contracts involving Russia and a common-law country, the Convention will apply since it supersedes domestic law.

Common Foreign Law Source

Sometimes, provisions in the Russian Code look like those of United States law because both are borrowed from the same foreign source. The most popular form of business organization in Russia, the limited-liability company, looks quite familiar to an American lawyer. But this is because

[3] See the comments in the recent drafts of revised Art.2 at <http://www.law.upenn.edu/bll/ulc/ulc.htm>.

nearly all the states of the United States have, in recent years, adopted limited-liability-company legislation based upon the same Western European models used by Russia.

Coincidence

Sometimes, resemblance is due to accident. One might think that the Russian Code's Unitary Enterprise (Arts.113-115) is alien to American thought. However, in fact the United States government creates numerous enterprises that manage but do not own property from the indivisible mass of government property. There even are different categories of enterprises: Recent court decisions, for instance have held the United States Postal Service to the same rules as private businesses, making the Postal Service in some ways equivalent to a Russian enterprise holding property under operative administration. However, I think any similarity between the Russian and American models in this instance is just a coincidence.

Rejection of the Common-Law Approach

An easier task than that set for this chapter would be to note the instances in which the Code drafters considered the common-law approach and deliberately rejected it. The most notable instance was the replacement of the misguided attempt to transplant the Anglo-American trust into Russian law[4] with the more civilian contract of entrusted administration in Articles 1012-1026. American advisers argued long and loudly against the idea of required minimum charter capital. They regarded the requirement as a totally illusory protection for creditors and shareholders and as a serious barrier to start-up businesses.[5] Nevertheless, the drafters rejected these arguments and put a charter-capital requirement in the Code (Art.99).

Not Even Considering the Common-Law Approach

The common-law rule allowing any person to change his or her name at any time with no formalities is so alien to the civil-law tradition and of so little importance in practice, that the drafters of the Code probably never even considered its adoption, opting instead (Art.19) for the standard civil-law approach of requiring compliance with legal formalities and recording in order to change one's name.

4 Edict of 24 December 1993 "On Trust."

5 Major American enterprises have been started with minimal capital in an ordinary one- or two-car garage. See <http://www.garage.com/famousGarages.shtml>.

Terminology

Methodology

In order to investigate the use of Anglo-American legal terminology in the Code, I used a computer to make an index of all the words used in the text of the Code.[6] Next, I read through this list to find what looked like English-language legal terms. Then, I tried to place these words in various categories of overlap. Here is what I found.

English Terminology in the Russian Code

(1) shared from Roman law: *emansipatsiia*/emancipation;
(2) shared Italian financial terminology: *del kredere*/*del credere*;
(3) borrowed English admiralty law: *charter*/charter;
(4) common international terminology long used in both English and Russian: *bank* and bank;
(5) borrowings from English to provide slightly differing shades of meaning from the traditional Slavic root word: *kontrakt*/*dogovor*;
(6) borrowings from English with little change of meaning from the traditional Slavic root word: *vvoz*/import;
(7) words transliterated from English legal terminology: *lizing*/leasing;
(8) words from other languages that are identical in form to English legal terms but quite different in meaning: *rent*/rent;
(9) words in which the Russian usage has deviated, over time, from the usage of the same international term in English: *arbitrazh*/arbitration;
(10) words taken from Anglo-American legal terminology but used with a totally different meaning in Russian: *kommercheskaia kontsessiia*/commercial concession. (In American legal terminology, a commercial concession is an arrangement whereby a governmental

[6] Here are some technical details that the reader may wish to skip. I started with the full text Cyrillic version of the Code found in the KODEKS databank. Then, I converted the Code to Latin letters using the free ACONVERT software package by Mr. Konstantin Gredeskoul (available at <http://www.ruscom.org.au/devel/>). Next, I used the ALWORDS program of the free ALEXA software package (available at <http://nora.hd.uib.no/lexainf.html>) to create automatically a list of all words used in each of the two parts of the Code and the frequency with which every word appeared. Then, I sorted the list in WordPerfect. The resulting index was crude because it treated every form of a Russian word, *e.g.*, *zakon*, *zakona*, *zakonom*, etc., as a separate entry. But it was a very useful tool for finding English needles in a Slavic haystack.

authority allows a private business to operate on government-owned premises. For instance, an airport authority may grant a concession to McDonalds to allow it to operate a fast-food restaurant at the airport terminal.)

English Terminology Not in the Russian Code

Most notable is the absence of the word *trast* (trust in English), reflecting the replacement of the short-lived Russian *trast* with the contract of entrusted administration. Some Anglo-American legal terms that have become a regular part of modern Russian legal terminology do not appear in the Civil Code because they are not related to civil law, *e.g.*, *antidemping*, *ofshor*.

Conclusion

This exercise made me very conscious of how Russian the Russian Civil Code is. I found no institutions lifted in detail from the common law. At the same time, I realized the importance of the ongoing process of internationalization of legal rules and legal terminology, which will inevitably bring a much greater convergence of the Russian and Anglo-American legal systems and languages in the twenty-first century.

Liability for the Improper Performance of Work Contracts in the New Russian Civil Code

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The "work contract" covers a wide and diverse variety of economic activities and obligations ranging from the repair of teeth to cars, from chimney sweeping to toxic-waste removal, from software design to the design and construction of houses. It thus represents the legal form for regulating important sectors and relations within market economies that will increase steadily with the growth of "post-industrialism".

It goes without saying, in line with good codification practice, that the Russian Civil Code devotes a detailed chapter (37) to this type of contract. It further corresponds to good codification tradition that a certain number of works, mostly those of a complex nature and having a commercial character, such as carriage (Ch.40), freight forwarding (Ch.41) and storage (Ch.47), are singled out for specific treatment. This is less obvious for certain other sub-categories, some of which specify the function of the parties, be they consumers (Arts.30 ff.) or the State (Arts.763 ff.), or the content of performance duties such as construction (Art.740 ff.), design and exploratory work (Arts.758 ff.), or scientific research, to which a whole chapter is devoted (Ch.38, Arts.769 ff.).

Of course, each legislator is confronted with the problem of adopting a convenient level of abstraction when establishing types of contracts that reflect specific obligations and their consequences (while, of course, the reciprocal obligation, payment of money, is uniform and does not lend itself to further distinction). The most appropriate criterion in this context seems to be the criterion of regulatory substance, among which the prerequisites and consequences of improper or non-performance play a predominant role.

If we take this criterion of non-performance, important differences in wording immediately become evident. The consumer work contract is a case in point. Although somewhat surprising from a systematic point of view, Article 739, which deals with improper performance, does not refer the consumer to the general provisions of work contracts, whose Article 723 establishes a detailed, generally appropriate, and practically tested set of remedies, but rather to Articles 503 to 505, *i.e.*, to the remedies in case of improper performance of retail sales. This sounds, of course, as if fundamental differences were established following a different distribution of risks, leaving the legislator without choice as to the necessity of

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singling out the consumer work contract as a special type. By comparing the content of Articles 503 to 505 and Article 723, however, it becomes apparent that the difference is much less dramatic than the reference technique leads one to assume. Indeed, one wonders why this reference has been used at all.

In fact, Article 723 provides for customer choices that well reflect the interest of the two contracting parties. The customer has the right to demand elimination of defects that can—under certain circumstances and under special conditions—be replaced by the delivery of a new work (Art.723(2)). He can claim a reduction in price or—**if contractually pro**vided for—compensation for any costs of elimination or compensation for damages (Art.723(3)). It is not explicitly said whether such compensation frees the debtor from specific performance, but this should be presumed to be the case in terms of Article 396(2). It is somewhat unusual that the different remedies have not been put into a chronological hierarchy, and it might be advisable that future interpretation introduces this in the sense that the right of the contractor to eliminate defects or to deliver anew precedes other remedies. This restriction of choice does no harm to the customer.

Notwithstanding the foregoing, the choices of remedies seem appropriate, even where the customer is a consumer. In fact, the reference to Articles 503 to 505 does not deprive him of these remedies since, in this respect, the norms coincide. This is why one wonders at first why Article 739 breaks away from the system of the work contract. There is, however, a difference. The application of Articles 503 to 505 leads to two additional remedies. The consumer may claim the costs for elimination of defects, even if not contractually provided for, or return the work/good and need not pay the price (Art.503(3)). These differences lead, in turn, to the question why these choices have not been granted to all customers in work contracts; the particular interest of the consumer is not apparent. It is the same contextual question to which I cannot provide a rationally based answer; that is why insurance (Art.742), compulsory production of documentation (Art.743), the right to associate an expert for inspections (Art. 749), or the obligation to comply with (environmental) law (Art.751) are restricted to the sole construction contract, whereas the compulsory character of state-regulated prices is confined to consumer work (Art.735). To my mind, all such clauses and articles are not *per se* limited to specific work contracts and should be applicable as general provisions for all categories, something that is now rendered difficult by the technique of very finely tuned sub-divisions.

There is one more particularity involving Articles 503 to 505. The latter article specifies that compensation for damage suffered does not free

the contractor from specific performance of the original obligation. This contradicts my reading of Article 723(3). The compilation of these obligations is reminiscent of central planning, when specific performance was of utmost importance as a means of fulfilling the planning network. This period has now gone, and market economies place their trust much more on compensation with abstract money than on concrete performance. Article 396(2) has come somewhat closer to that principle by freeing the debtor from performance after having paid compensation for non-performance. Article 505 provides differently. It is not clear to me why a provision that was crucial in a central planning network has survived in consumer contracts, leading to the (perhaps) unwanted consequence of limiting the amount of money that the consumer might receive as compensation. A formal advantage may, thus, turn into a material disadvantage.

As has been said already, Article 723 is the core provision for improper performance. In line with the general system of the Civil Code, it has to be seen within and fitted into the context of the "General Provisions" of Part I of the Civil Code, especially its Subdivision 4: "Transactions and Representation", the "General Part of the Law of Obligations" (Division III) and the other norms applicable for the work contract.

As to the General Provisions, it seems fair to assume that the voidability of the contract as a result of fraud, duress, etc. (Art.179), remains intact and is not supplanted by Articles 714 ff. The same is true in case of error as to capacity of the contractor to perform the work properly (Art.178). As to simple mistakes, it seems more appropriate for risk distribution that the specific norms of improper performance prevail and voidability of the contract be excluded.

The general part of the law of obligations is fully applicable unless otherwise explicitly replaced by specific norms. From this perspective, it seems superfluous and might lead to confusion if individual norms are singled out and declared applicable, as is done by Article 723(1) with regard to Article 397. Much could, and will have to be, said in this context by future case law and commentaries. I want to concentrate on one point because it has broad and dangerous implications and may destroy the balance of interests of contracting parties that have developed under long traditions of codification.

Articles 719 ff. are silent as to subjective grounds for liability of contractors. In most civil codes, the contractor has to guarantee proper performance and the appropriateness of the works and goods. From there, it follows that the elimination of defects, renewed performance, the replacement of goods, or the reduction in prices do not require fault. Fault of varying degrees is, however, required whenever the customer claims

compensation for damages. This distribution of risks is fair to both parties, creates incentives for proper performance, and makes it an essential part of the sphere of the contractor without overburdening him beyond normal means: if he is diligent, he does not have to fear compensation claims.

Article 401 establishes a completely different type of distinction, the economic and social rationality of which remains obscure to me. It establishes liability for the non-entrepreneurial contracting party only in cases of intent and negligence. The guarantee of proper performance of contractual obligations—a cornerstone of the law of onerous contracts—has gone. The risk of non-performance is with the customer, even though its roots fall clearly within the contractor's sphere. The normality of performance of contractual obligations should not be subject to fault. Any other solution is utterly unfair and far from a correct balancing of risks. This is all the more so in the context of the Civil Code, since Article 720 does not confer the right on the customer simply to refuse the improper work until acceptance and keep his money. This is, in itself, quite an unusual arrangement: the customer is obliged to inspect and accept the work and cannot simply reject it even if it is apparently not up to contractual or usual standards. He is exclusively referred to the set of secondary rights as established in Article 723. All in all, this interplay of rules may lead to grossly unjust situations for the customer. Only by way of overstretching Article 715 might a customer get out of the contract by cancelling it before completion of the work.

It is worth noting in this context that even the non-professional customer has an obligation to inspect the work if he does not want to lose the rights that Article 723 confers upon him—a burden that in other codes is only imposed on the entrepreneurial customer.

Contrary to the foregoing, Article 401(3) establishes strict liability for the entrepreneur. As much as this is correct for initial contractual performance, it seems to overburden him in case of damage claims. This is all the more so since Article 402 extends strict liability to the unintentional and non-negligent actions of employees. Note how long it took many traditionally capitalist countries to introduce strict liability for limited configurations and note also that there has been a coincidence in extending liabilities and the possibility of risk insurance. Of course, the norm is partly dispositive and well-organized enterprises with market power that can afford to pay lawyers will certainly play on that, unfortunately, also by limiting liability for initial performance, which is equally not *ius cogens*. The same will most probably not be true for the small and even for the medium-sized enterprises. Instead of encouraging these newly emerging

market participants, as is politically proclaimed, they risk being submerged by claims of strict liability.

As has been stated before, the choices of remedies as exposed in Article 723 itself correspond to well-established practice and balancing of interests between contracting parties. There is one exception, though, which unnecessarily complicates the situation where the contractor has to provide material. This corresponds, by the way, to the basic concept of the work contract as conceived in Article 704 and there is no need to consider it as a "mixed contract" (Art.421). According to Article 723(5), however, remedies for improper material are provided by reference to Article 475, while remedies for improper work continue to be regulated by Article 723. This split is far from necessary and not at all easy to operate, inasmuch as Articles 475 and 723 come to different conclusions. This is—despite much overlap (which, in turn, renders the reference superfluous)—partly the case since only the buyer has the right to declare the contract at an end and to reinstate the parties in their respective pre-contractual positions. In practice, the normal situation will occur where the material is transformed during the work process; it will be very difficult to clearly distinguish the different spheres and separate claims accordingly. It seems, therefore, to be more appropriate to recognize the economic unity (as Art.704 does) and establish one identical claim. It may be sought either in the law of the contract of sale or in that of the work contract, depending on the characteristic obligation. As a result, the meaning of Article 723(5) should be restricted as much as possible.

Tort Law, Including the Tort Liability of the State

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Russia's move away from the Soviet form of socialism has necessitated the creation of more complex political institutions: genuine parliaments rather than token bodies; electoral laws worth fighting over, because of their effects on the distribution of real political power; a federalism fraught with problems and uncertainties instead of quiescent regional administration. The list of such developments could be extended considerably.

So it is too with legal institutions. Civil law, for instance, embraces a much broader set of relationships than under the old system, requiring longer, more detailed, and more sophisticated laws. And within civil law, the same is true of tort law, the subject of this chapter. The 1922 RSFSR Civil Code contained fourteen articles on tort and ran some 600 words in length.[1] There were twenty-eight articles on tort in the 1964 Civil Code,[2] totaling over twice the length of its 1922 counterpart. The provisions on tort in part two of the new RF Civil Code, which entered into force on 1 March 1996, take up thirty-eight articles and comprise a body of law about six times that of the 1922 version. For the most part, these new provisions are not novel developments of the post-Soviet period. Many can be traced to articles in the 1922 and 1964 RSFSR Civil Codes. But the most direct influence comes from the USSR Principles (*Osnovy*) of Civil Legislation of 1991.[3]

What is also obvious about the new tort law is its greater practical importance: "Chubais to Sue Journalists for Libel";[4] "A court decided that a cork from a lemonade bottle can be dangerous to your health";[5]

1 *Grazhdanskii Kodeks RSFSR* (official text with changes to 1 February 1961, and with an appendix of article-by-Article materials), Moscow 1961.

2 *Grazhdanskii Kodeks RSFSR* (official text with an appendix with article-by-article materials), Moscow 1964.

3 Law of 31 May 1991, "The Principles of Civil Legislation of the USSR and Republics", *Veomosti S"ezda narodnykh deputatov SSSR i Verkhovnogo Soveta SSSR* 1991 No.26 item 733. These Principles replaced earlier Principles of Civil Legislation adopted in 1961. See *Vedomosti S"ezda narodnykh deputatov SSSR i Verkhovnogo Soveta SSSR* 1961 No.50 item 525.

4 "Chubais to Sue Journalists for Libel", *RFE/RL Newsline*, Part I, 24 November 1997.

5 Larisa Bazarova, "Sud reshil, chto probka ot limonada mozhet byt' opasnoi dlia zdorov'ia", *Izvestiia* 26 December 1995, 1.

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"St. Petersburg Governor Settles Suit Against Sobchak";[6] "The State will pay citizen V.G. Panskov 4,714,150 rubles and 79 kopeks for an illegal accusation of bribe taking".[7] Such headlines now appear regularly in the Russian and foreign press, demonstrating that tort law has come to occupy a significant place in the life of the law in Russia.

In this chapter, several aspects of the new tort law will be analyzed. *First*, a brief overview of the tort law provisions of the Russian Federation Civil Code will be given. *Second*, a more detailed examination of the code provisions on the tort liability of the state will be made. And *third*, some of the judicial practice in cases involving state tort liability will be reviewed.

The New Code Provisions: An Overview

Chapter 59 of the Civil Code ("Obligations Arising from the Causing of Harm") is composed of four parts: general principles of liability (Arts.1064-1083); compensation for harm caused to the life or health of a citizen (Arts.1084-1094); compensation for harm resulting from defects in goods, work, or services (Arts.1095-1098); and compensation for moral harm (*moral'nyi vred*) (Arts.1099-1101). Many of the 38 articles in the chapter are composed of multiple sections and sub-sections, thus yielding about one hundred separate provisions on tort.

General Principles of Liability

The most important provisions among the general principles in part one are these:

(1) That harm to the person or property of a citizen[8] or to the property of a legal person is subject to full compensation by the person who caused the injury (Art.1064).

6 "St. Petersburg Governor Settles Suit Against Sobchak", *RFE/RL Newsline*, No.188, Part I, 5 January 1988.

7 Sergei Mostovshchikov, "Za nezakonnoe obvinenie v poluchenii vziatok gosudarstvo zaplatit grazhdaninu Panskovu V.G. 4.714.150 rublei 79 kopeek", *Izvestiia* 15 October 1994, 5.

8 Typically (*i.e.*, in the 1961 USSR Principles, the 1964 RSFSR Civil Code, and the 1991 USSR Principles) the word "citizen" rather than "person", "individual", or some other more general term has been used in this context. Only in the 1922 RSFSR Civil Code (Art.403) was there reference to the causing of harm to "another person". Art.2 of the present Civil Code reads in part as follows: "The rules established by civil legislation apply to relations in which foreign citizens, stateless persons, and foreign legal persons participate unless otherwise provided for by a federal law." For a further discussion of this point with regard to the 1991 USSR Principles, see this author's "Tort Law", 2 *Soviet and East European Law* 1991 No.6, 9.

(2) That the basis for awarding compensation is fault on the part of the causer of the harm (Art.1064), although in some circumstances—principally where harm is caused by activity that creates increased danger for those coming into contact with it—compensation may be assessed regardless of fault (Art.1079). In cases involving increased danger, liability will not ensue if it is shown that the harm resulted from irresistible force or the intent on the part of the victim. In general, harm occurring as a result of the victim's intent is not subject to compensation (Art.1083).[9]

Beyond these general principles, a number of narrower provisions familiar to tort law are to be found in part 1:

— On the joint liability of two or more causers of harm (Art.1080);
— On vicarious liability of several kinds (of legal persons for their employees—Art.1068; of parents for minor children—Arts.1073-1075; of those responsible for the supervision of citizens who are adjudged incompetent or of limited competence—Arts.1076-1078); on the right to seek indemnification—the right of "regress" in Russian terminology—by the person who has been required to pay damages against the person who actually caused the harm—Art.1081);

9 Moreover, it is interesting to note that the new civil code contains several "socialist" elements that parallel provisions found in Soviet-era civil codes. Article 1064(3) provides: "Harm caused by lawful action is subject to compensation in cases specified by law", echoing virtually word-for-word Art.444 of the 1964 RSFSR Civil Code and Art.126(4) of the 1991 USSR Principles. Art.1083(3) states: "A court may lower the amount of compensation for harm caused to a citizen with consideration of his property status, with the exception of cases when the harm was caused by intentionally committed acts." The second section of Art.458 of the 1964 RSFSR Civil Code contained a similar provision regarding lowering the amount of compensation, with the exception concerning intentionally caused acts. Art.132(2) of the 1991 USSR Principles contained almost identical language (using the word "crime" instead of "acts"). Art.1064(1)(3) states: "It may be provided by statute or contract that the causer of harm must pay the injured party compensation above actual damages." Although there is no precise equivalent in the 1964 Civil Code, the 1922 RSFSR Civil Code contained two provisions arguably designed to achieve similar ends. Art.406 provided that based on the economic situation of the causer of harm and the injured party, a causer of harm who would otherwise not be liable could nevertheless be required to pay compensation. Art.111 stated that in determining the amount of compensation, the court in all cases should consider the economic situation of the causer of harm and the injured party. Contemporary sources indicated that in the later years of the operation of the 1922 Civil Code, these provisions (and, especially Art.406) were seldom applied. See, for instance, P.E. Orlovskii, (ed.), *Sovetskoe grazhdanskoe pravo: Tom II*, Moscow 1961, 395-396.

— On rules regarding contributory negligence on the part of the victim (Art.1083);
— On compensation beyond the amount of insurance (Art.1072);
— On compensation below the amount of actual damages, based on the economic situation of the causer of harm (Art.1083);
— On liability for the torts of state organs (Arts.1069-1071); and
— On certain defenses, such as necessary defense (Art.1066) and extreme necessity (Art.1067).

As suggested, by and large these provisions are not novel developments of the post-Soviet period. It is not surprising, therefore, that parallels are also to be found between Soviet and post-Soviet scholarly commentary on tort law. Perhaps most striking is the doctrinal analysis of the main conditions required for a finding of tort liability, the composite parts or elements of a tort (*sostav pravonarusheniia*). These are, according to a 1996 commentary on the new civil code:[10]

— The incidence of harm or damage;
— Illegal behavior on the part of the causer;
— A "causal connection" between the illegal behavior and the damage; and
— Fault on the part of the person causing damage (except when liability ensues regardless of fault).

The same four conditions were typically cited in analyses of tort law during the Soviet period,[11] and even in pre-Revolutionary Russia.[12]

Compensation for Injury to Life or Health

Part two of Chapter 59 deals strictly with compensation for personal injury and death—excluding property damage and other kinds of delictual liability. Although this part of the chapter is not restricted to circumstances where the injured party or decedent had a work relationship with the party required to pay the compensation, the implicit assumption of

[10] O.N. Sadikov, (ed.), *Kommentarii k Grazhdanskomu kodeksu Rossiiskoi Federatsii, chasti vtoroi (postateinyi)*, Moscow 1996, 655. See, also, M.Iu. Tikhomirov, (ed.), *Iuridicheskiia entsiklopediia*, Moscow 1997, 285.

[11] See, *e.g.*, V. Maslov, *Obiazatel'stva iz prichineniia vreda*, Khar'kov 1961, 9; L.A. Maidanik and N.Iu Sergeeva, *Material'naia otvetstvennost' za povrezhdenie zdorov'ia*, Moscow 1968, 14. This book also appeared in 1953 and 1962 editions and listed the same tort elements.

[12] See, *e.g.*, G. F. Shershenevich, *Uchebnik' Russkago grazhdanskago Prava*, 10th edition, Moscow 1912, 652-654.

these articles seems to be that this work relationship will exist much of the time. Among the matters covered are injury or death sustained in the course of employment or other contractual relationships (Art.1084); the scope and character of compensation, including the calculation of lost earnings and future earning potential (Arts.1085 and 1086); compensation to a minor and to those who have lost a breadwinner (Arts.1087, 1088, and 1089); subsequent changes in the amount of compensation, including increases based on a rising cost of living or a raise in the minimum wage (Arts.1090 and 1091); compensation of burial expenses (Art.1094); rules regarding the frequency of payments (Art.1092); and rules that apply in the event of reorganization of a legal person that is responsible for the payment of damages (Arts.1092 and 1093).[13]

As with part one of Chapter 59, the provisions in this part are considerably more detailed than in the earlier civil codes. Among the important innovations in the new provisions is the allowance of compensation for the future income that an injured party could have reasonably been expected to earn. As a 1996 commentary on the code put it, a provision of this kind "was unknown in [our] legislation earlier".[14]

Product Liability

Part three of Chapter 59 contains four articles on product liability ("compensation for harm resulting from defects in goods, work, or services"). The 1991 USSR Principles contained an article on this subject (Art.129). But the new provisions go further in several ways, most importantly by including defects in services (*uslugy*), in addition to goods and work, as a basis for possible liability, and by premising liability not on fault but on causation. A defendant may be released from liability by showing that the harm resulted from either irresistible force or from violation by the consumer of rules established for the use of the product or the results of the work or service. The new code provisions supplement and extend relevant provisions (Arts.12-14) of the 1992 Law "On Protecting the Rights of Consumers".[15] This law has been the subject of two important decrees

13 Two of the analogous articles in the 1964 RSFSR Civil Code (Arts.460 and 461, which were deleted from the code in December 1992) made the distinction between those tortfeasors who were and those who were not responsible for making the social insurance payments for the injured party. That distinction is not to be found in the new tort provisions.

14 Sadikov, *op.cit.* note 10, 687.

15 *Vedomosti S"ezda narodnykh deputatov Rossiiskoi Federatsii i Verkhovnogo Soveta Rossiiskoi Federatsii* 1992 No.15 item 766. Among the important differences between the 1992 law and the 1994 Civil Code: the latter specifies that the injured party may be a natural or legal person while the former only speaks of a "consumer"; and the latter specifies

of the Plenum of the Russian Federation Supreme Court, one before and one after the adoption of the new civil code.[16]

Compensation for Moral Harm

For most of the Soviet period, compensation was not allowed for "moral harm", *i.e.*, non-material injuries such as psychological damage, emotional distress, or injury to the honor or good name of a person. Compensation of this kind was seen as a "bourgeois" institution, and some writers were most vehement in condemning the practice.[17] Other scholars, however, took a different view. Particularly during more liberal periods a number of writers expressed support for compensation for moral harm, finding nothing alien to Soviet socialism in it.[18]

Once political restraints were loosened, therefore, it was not surprising to find that opposition to this form of compensation diminished. Article 131 of the 1991 USSR Principles contained a provision that for the first time allowed compensation for moral harm. Prior to this time, the only concession in the law with regard to non-material damage was the provision in Article 7 of the 1961 USSR Principles on protecting the honor and dignity of a citizen or organization. But the only remedy available to the injured party in that article was a court-ordered retraction of harmful untrue statements. An analogous provision was written into the 1991 Principles (Art.7). This article covered not only honor and dignity, but also "business reputation"—*delovaia reputatsiia*. And it provided not just for a retraction and a right to rebut libelous information, but also to

that liability to compensate will ensue regardless of fault. Both laws indicate that liability will be excused on the basis of irresistible force or the failure on the part of the consumer to follow the rules specified for the use of the product.

16 Decree No.7 of the Plenum of the Russian Federation Supreme Court, of 29 September 1994, "O praktike rassmotreniia sudami del o zashchite prav potrebitelei", *Biulleten' Verkhovnogo Suda Rossiiskoi Federatsii* 1995 No.1, 4-10. See, particularly, Art.13, 7. Decree No.2 of the Plenum of the Russian Federation Supreme Court, of 17 January 1997, "O vnesenii izmenenii i dopolnenii v postanovlenie Plenuma Verkhovnogo Suda Rossiiskoi Federatsii ot 29 Sentiabria 1994 g. No.7 'O praktike rassmotreniia sudami del o zashchite prav potebritelei' (s izmeneniiami, vnesennymi postanovleniiami Plenuma ot 25 aprelia 1995 g. No.6 i ot 25 Oktiabria 1996 g. No.10)", *Biulleten' Verkhovnogo Suda Rossiiskoi Federatsii* 1997 No.3, 4-7. See, particularly, 6.

17 See, *e.g.*, Maslov, *op.cit*. note 11, 9-10. Some pre-Revolutionary writers took the same position. See *ibidem*, 10 (quoting from a work by the writer G.F. Shershenevich) and also the sources cited in Donald D. Barry, "Soviet Tort Law", in Ralph A. Newman, (ed.), *The Unity of Strict Law: A Comparative Study*, Brussels 1978, note 18, 323.

18 See, *e.g.*, Maidanik and Sergeeva, *op.cit.* note 11, 8, 14-15, and sources cited at 15. The earlier editions of this book do not advocate compensation for moral harm.

"claim compensation for damages and moral harm incurred through the dissemination of such information".[19]

The new civil code provisions address the subject of moral harm more thoroughly. Two parts of the code are involved.[20] Chapter 8, which is found in Part One of the code, contains three articles on "Non-Material Assets and the Protection Thereof". Article 150 defines non-material assets (*nematerial'nye blaga*) broadly (to include "life and health, the dignity of the person, honor and good name, business reputation, the inviolability of private life, personal and family secrets, the right to free movement, the choice of a place of habitation and residence, the right to one's name, the right to authorship, other personal and non-property rights, and other non-material assets") and guarantees their protection. Article 152, "Protection of Honor, Dignity, and Business Reputation", parallels in many respects the just-discussed Article 7 of the 1991 Principles, including the provision allowing a suit for damages for moral harm. Article 151, on "Compensation for Moral Harm", states the general rule on the subject and provides a broad definition of moral harm:

> "If moral harm (physical or moral suffering) has been inflicted upon a citizen by acts violating his personal non-property rights or infringing on other non-material assets belonging to a citizen, as well as in other cases provided for by law, a court may impose the duty of monetary compensation for said harm on the offender."

The rest of Article 151 provides instructions to the court for determining the amount of compensation.

Part Four of Chapter 59 of the code, "Compensation for Moral Harm", supplements Article 151 with three further articles.

Part one of Article 1099 states that the grounds for, and the amount of compensation for, moral harm will be based on the rules provided in Chapter 59 of the code as well as the just-mentioned Article 151. Part two addresses the situation where moral harm arises from actions (inaction) that violate the property rights of a citizen. In such circumstances, compensation will be due "in cases specified by law". A commentary on the code notes that this formulation is more restrictive than Article 131

19 But as just indicated, not for the first time, as appears to be suggested in this recent commentary on tort law in the new civil code: "In this context [the ability to calculate material harm in monetary terms] the Russian Federation Civil Code has adopted the useful experience of developed foreign legal systems and now provides for monetary evaluation and, therefore, compensation also for moral harm." Tikhomirov, *op.cit.* note 10, 285.

20 Protection of dignity, honor and good name are also provided for in the 1993 Russian Federation Constitution. Art.21(1) states: "Human dignity shall be protected by the state. Nothing may serve as the basis for its derogation." Art.23(1) reads in part: "Every person shall have the right to [...] the protection of his (her) honor and good name."

of the 1991 Principles, but asserts that full protection of an individual's interests is provided for by the broad language of Article 151.[21] Part three of Article 1099 further emphasizes the distinction between material and non-material harm by stating that compensation for moral harm may be assessed regardless of whether any compensation for material harm is due.

Article 1100 specifies the circumstances where damage for moral harm is to be assessed regardless of fault: when harm was caused by a source of increased danger; when harm was inflicted as a result of unlawful conviction, unlawful criminal prosecution, unlawful holding in custody as a means of preventive detention or recognizance not to flee, or the unlawful imposition of an administrative sanction in the form of arrest or correctional work; when harm was caused by the circulation of information defaming one's honor, dignity, and business reputation; and in other cases specified by law.

Article 1101 deals with the measure of damages. It states first that compensation is to be made in money form, adding that such factors as the character of physical and moral suffering, the degree of fault of the causer (where fault is necessary), the factual circumstances of the case, and the individual characteristics of the injured party are to be assessed in making an award of damages.[22] In determining actual compensation, "the demands of reason and justice" are to be considered.

State Tort Liability[23]

The current civil code provisions on state tort liability are traceable, for the most part, to antecedents in Soviet-era legislation, particularly from the 1980s onward. Until 1962 the relevant law was Article 407 of the 1922 RSFSR Civil Code. It allowed liability for the administrative acts of the state "only in cases specially prescribed by law", of which there were few.

Article 89 of the 1961 Principles of Civil Legislation (which entered into force in May 1962) reversed the prevailing principle: state organs were to be liable according to the general tort rules unless otherwise indicated

21 Sadikov, *op.cit.* note 10, 706-7.

22 Some Soviet-era writers claimed that a major reason why there could be no compensation for moral harm was that such injury could not be expressed in money terms. See, *e.g.*, Maslov, *op.cit.* note 11, 9.

23 The following several paragraphs are based largely on a more extended analysis in Donald D. Barry, "Tort Law and the State in Russia," in G. Ginsburgs, D.D. Barry and William B. Simons, (eds.), *The Revival of Private Law in Central and Eastern Europe*, in F.J.M. Feldbrugge, (ed.), *Law in Eastern Europe*, No.46, The Hague, London, Boston 1996, 180-181.

by law. Two specific exceptions were stated in Article 89: liability for harm caused to organizations rather than natural persons was to be determined according to rules established by law; and liability for harm caused by the improper work-related acts of officials of the organs of inquiry, preliminary investigation, procuracy, and judiciary was to be permitted in cases and within limits specially defined by law.[24] The *first* exception received little attention from commentators and apparently did not serve as the basis for much judicial activity. The *second* exception was more important. Over the years a large amount of scholarly commentary was published urging the adoption of the needed special legislation. But it was about twenty years (May 1981) before the authorities finally acted.

In the meantime, the 1977 USSR Constitution was adopted. It declared a right to compensation for torts committed by state agencies and officials, with no exceptions mentioned (Art.58.3):

> "Citizens of the USSR have the right to compensation for damages inflicted by unlawful actions of state and social organizations, as well as officials, in the course of the performance of their official duties."[25]

Some commentators suggested that this constitutional provision, because of its higher status than code law, had, in effect, superseded the exception for the criminal justice organs in the 1961 Principles. But the adoption of the 1981 legislation indicated that the view of the authorities was otherwise.

This legislation (adopted originally as an edict of the USSR Supreme Soviet Presidium) partially filled the gap in the law regarding the liability of the criminal justice organs.[26] It provided, however, not for the *general* liability of these institutions, but for liability for certain specified acts, namely illegal conviction, illegal criminal prosecution, illegal holding in custody as a means of preventive detention, and illegal imposition of an administrative penalty in the form of arrest or correctional work. As will be shown, these grounds have been mentioned in all succeeding legislation. Under the edict, liability for these acts was to be regardless of fault.[27]

[24] Hereinafter these bodies will be referred to either as they have just been designated or as "the criminal justice organs".

[25] The same wording was used in the 1978 RSFSR Constitution and in the constitutions of the other union republics (Art.56).

[26] Edict of the Presidium of the USSR Supreme Soviet, 18 May 1981, "On Compensation for Damages Caused to a Citizen by Unlawful Actions of State and Social Organizations and Also of Officials in Fulfilling Their Official Duties", *Vedomosti S"ezda narodnykh deputatov SSSR i Verkhovnogo Soveta SSSR* 1981 No.21 item 741.

[27] On this matter see Donald D. Barry "Compensation for Damages Caused by the Acts of Soviet Criminal Justice Organs: The 1981 Legislation", 8 *Review of Socialist Law* 1982 No.4, 331-340.

A statute (*polozhenie*) attached to the edict spelled out the grounds for a compensation award. What was required was one of the following: an order of acquittal; the cessation of a criminal case because of the absence of criminal characteristics in the act, or the failure to prove the participation of the person in the commission of a crime; or the cessation of a case of administrative violation.

Because the edict and accompanying statute dealt with the subject in more detail than later legislation (both the 1991 USSR Principles of Civil Legislation and the new civil code), they have provided guidance in interpreting this subsequent law. As will be shown, this has been of considerable significance in judicial practice, and has aroused some controversy among commentators.[28]

The 1981 legislation was silent on the liability of the criminal justice organs for illegal acts other than those mentioned. Scholarly commentary of the time argued that such acts should fall under the general legislation on the liability of state organs, and the limited judicial practice of the period seemed to support this view.[29]

The 1991 USSR Principles were the next step in the statutory development on this subject. The provisions on tort liability of the state (Art.127) differed little from previous law. Part one of Article 127 stated that liability for illegal acts of state agencies in the sphere of public administration was to be determined according to the general principle of Article 126, *i.e.*, on the basis of fault. Part two of Article 127 specified the same four acts of the criminal justice organs (illegal conviction, etc.) for which liability would ensue regardless of fault, adding to the list a fifth act, illegal holding in custody as a means of recognizance not to flee (*podpiska o nevyezde*). Part three filled a gap in the 1981 edict by stating explicitly that harm caused by other illegal acts of the criminal justice organs would be based on the general principles of tort law (*i.e.*, normally on the basis of fault).

A matter left somewhat ambiguous in the 1981 and 1991 legislation had to do with the appropriate defendant in state tort cases. Article 89 of the 1961 USSR Principles declared that "state institutions" (*gosudarstvennye uchrezhdeniia*) would be liable for the tortious conduct of their officials. The 1981 legislation, in discussing general liability for the acts of state organs, was ambiguous on this point. It declared simply that harm inflicted

[28] By analogy with other tort law provisions, the view that state agencies should answer for the torts of their officials appears persuasive. The third sentence of Art.88 of the 1961 Principles states: "Organizations must compensate for harm caused by the fault of their workers in fulfilling work-related (service) obligations." Part 2 of Art.126 of the 1991 Principles reads: "A legal person or citizen must compensate for harm caused by its workers in fulfilling their work-related (service, official) obligations."

[29] See Barry, *op.cit.* note 27, 334.

on citizens by state and social organizations or their officials "will be compensated". But for the specified unlawful acts of the criminal justice organs, compensation was to be "by the state" (*gosudarstvom*).

The 1991 Principles (Art.127) preserved this distinction: "the state" was liable for the specified criminal justice acts, while all other state acts (including "other" criminal justice acts) were to be "compensated on general grounds" (*vozmeshchaetsia na obshchikh osnovaniiakh*).

The phrase "general grounds" as quoted above meant the basic provision on tort law, which required "the person who caused the harm" to pay the compensation (Art.126, 1991 Principles). Did this mean that the appropriate defendant in such cases was the state worker who actually committed the tort? Or would a doctrine akin to *respondeat superior* have the state agency answer for the wrongs of its employees? Judicial practice appears to have provided no clear answer to this question, but commentators seemed to assert that direct suits against officials in such cases were not intended.

The 1993 Russian Federation Constitution confirmed the view that the state would be responsible for the tortious acts of officials. Article 53 reads as follows:

> "Every person has the right to compensation by the state for harm caused by the illegal acts (or failure to act) of the organs of state power or their officials."

A 1994 commentary on Article 53 made the distinction between the specified unlawful acts of the criminal justice organs (illegal conviction, etc.) and all other acts of state organs.[30] For the former, it said, "the state compensates for the harm directly". For the latter the state agencies themselves are liable, and if these budget organs have insufficient means, "the state bears the additional liability".[31]

The new civil code provisions speak more explicitly to the matter of whether the state or particular state organs are responsible for compensation, as well as addressing the issue of whether individual officials can be sued for the torts of state agencies.

The New Code Provisions on State Tort Liability

Four articles in the new code address the issue of state tort liability. Article 1069 is the general provision:

[30] See, *e.g.*, L.A. Okunkov, (ed.), *Kommentarii k Konstitutsii Rossiiskoi Federatsii*, Moscow 1994, 168 (commenting on Art.53, 1993 RF Constitution).

[31] *Ibidem.*

> **"Article 1069. Liability for harm caused by state organs, organs of local self-government, and also by their officials**
>
> Harm caused to a citizen or a legal person as a result of the illegal acts (failure to act) of state organs, organs of local self-government or the officials of these organs, including as a result of the publication of an act of a state organ or organ of local self-government that does not correspond to a statutory law or other legal act is subject to compensation. Harm is compensated from the corresponding account of the treasury of the Russian Federation, the treasury of a Subject of the Russian Federation, or the treasury of a municipal formation."

The *first* thing to note about Article 1069 is that it repeats, almost word-for-word, Article 16 of the code (adopted as part of the first part of the code in 1994). The only substantial differences are that Article 1069 refers to "harm" (*vred*) while Article 16 speaks of "damages" (*ubytki*); and that Article 1069 refers to the treasury (*kazna*) while Article 16 does not. The concept of the treasury will be discussed below.

Second, for the first time the law on state liability distinguishes three levels of state activity: Russian Federation, federation Subject, and local government. *Third*, it makes clear that the state will be answerable for the illegal acts of its officials.

Although it is not spelled out in Article 1069, illegal acts or a failure to act is interpreted as involving only the administrative or authoritative-administrative (*vlastno-administrativnye*) functions of the state.[32] As has long been the case, harm caused by the economic and technical acts of state organs is governed by the general principles of tort law.

Special mention is made of harm resulting from the publication or issuance (*izdanie*) of acts that violate the law. This provision is said to be related to Article 13 of the Civil Code, which states that illegal acts of state organs that violate the civil law rights or legally protected interests of a citizen or legal person may be declared void by a court.[33]

Finally, the article makes explicit that the state (*i.e.*, the treasury) will compensate for harm caused by illegal acts of officials, suggesting that officials cannot be sued directly.[34]

[32] Sadikov, *op.cit.* note 10, 662.

[33] *Ibidem.*

[34] Accord on this point see *ibidem* (662, 666). But some legislation appears to contradict this position. For instance, Art.35 of the Federal Law "On the Procedure for Exit from the Russian Federation and Entry into the Russian Federation", adopted on 15 August 1996, reads as follows: "Officials by whose fault the rights a citizen of the Russian Federation, a foreign citizen or a stateless person to exit from or entry into the Russian Federation are violated will bear material and other liability for their decisions, actions (failure to act) that causes injury according to procedures established by the legislation of the Russian Federation." "O poriadke vyezda iz Rossiiskoi Federatsii i v"ezda v Rossiiskuiu Federatsiiu", *Rossiiskaia gazeta* 22 August 1996, 4. Moreover, if

Article 1070 deals with liability for the acts of the criminal justice organs:

> **"Article 1070. Liability for harm caused by illegal acts of the organs of inquiry, preliminary investigation, procuracy and court**
>
> 1. Harm caused to a citizen as a result of illegal conviction, illegal criminal prosecution, illegal holding in custody as a means of preventive detention or recognizance not to flee, illegal imposition of an administrative penalty in the form of arrest or correctional work is compensated in full measure, according to the procedure established by law, at the expense of the Russian Federation treasury and, in cases provided for by law, at the expense of the treasury of a Subject of the Russian Federation or the treasury of a municipal formation, regardless of fault on the part of officials of the organs of inquiry, preliminary investigation, procuracy and court.
>
> 2. Harm caused to a citizen or legal person as a result of the illegal activity of the organs of inquiry, preliminary investigation, or procuracy that do not involve the consequences specified in point 1 of this Article is compensated on the basis and in the manner provided for by Article 1069 of this Code. Harm caused as a result of the carrying out of jurisprudence [*pri osushchestvlenii pravosudiia*] is compensated when the fault of the judge is established by the sentence of a court that has gone into legal effect."

This article clearly distinguishes between the five listed criminal justice functions and other activities in which the organs of inquiry, preliminary investigation, procuracy and court might engage. It establishes, in the listed cases,[35] that the treasury of the Russian Federation (or of a Subject of the Federation or a municipal formation, in cases provided for by law) will be responsible for the compensation.

Two substantial objections have been raised by commentators regarding the five specified criminal justice acts listed in part one. *First*, it is asked why the list is so limited. There are other acts, analogous in nature and little different in seriousness and unjustness from some of the specified acts, that are left out. Among examples given: holding an innocent person as a suspect in the commission of a crime; incarcerating a citizen who has not committed a socially dangerous act in a medical facility for observation in order to get an opinion from forensic experts; applying involuntary medical procedures provided by law (*e.g.*, committing a person who has not carried out a socially dangerous act to a psychiatric facility). Yet because such situations fall outside the list of specified cases, the injured party would need to show fault on the part of the state, a difficult achievement when the criminal justice organs are involved.[36]

an official is found by a court to be acting outside the scope of his official duties, he may be adjudged liable to pay damages. See below, text accompanying notes 44 and 45.

35 Sadikov, *op.cit.* note 10, 665 says that there are no such cases at present.

36 B.T. Bezlepkin, *Sudebno-pravovaia zashchita prav i svobod grazhdan v otnosheniiakh s gosudarstvennymi organami i dolzhnostnymi litsami*, Moscow 1997, 88-93.

Second, part one of Article 1070 provides for reimbursement from the federal treasury "according to the procedure established by law". The law that this apparently refers to is the 1981 edict and its accompanying statute. So, even the newest code provisions are conditioned by Soviet-era legislation that is over twenty-five years old. One of the objectionable provisions of the 1981 edict states that there will be no compensation if a person has made statements that prevented the establishing of the truth and thereby helped bring about the situation that would later lead to the tort suit. Critics point out that particularly during the Soviet era but even thereafter, physical and psychological pressure on suspects or accused persons could easily lead them to make untruthful but incriminating statements.[37] Thus, they argue, a plaintiff should not be barred from compensation for statements that he was pressured or forced to make.[38]

In point two of Article 1070, there is no need to refer to the state because 1070 references Article 1069, where the liability of the state has already been mentioned. The last sentence of Article 1070—on the limitation on liability for the carrying out of jurisprudence—was not found in previous legislation and is less easy to explain. One commentator offers the view that the provision applies "where the judge did not merely make an error, but acted with intent, knowingly illegally or criminally dishonestly", as a result of which he was prosecuted and convicted.[39] But no analysis that has come to this author's attention has explained why this new provision was deemed necessary.

> **"Article 1071. Organs and persons acting in the name of the treasury in compensation of harm at its expense**
>
> In cases when, in accordance with this Code or other laws, the harm caused is subject to compensation at the expense of the Russian Federation treasury, the treasury of a Subject of the Russian Federation, or the treasury of a municipal formation, the appropriate finance organs will act in the name of the treasury if, in accordance with point 3 of Article 125 of this Code, this obligation is not placed on another organ, legal person, or citizen."

All three articles on state tort liability mention the institution of the treasury (*kazna*). The term had currency in pre-Revolutionary law,[40] but seems to have fallen into disuse during most of the Soviet period. Indeed,

37 V. Rudnev, "Vozmeshchenie ushcherba pri nezakonnom areste", *Rossiiskaia iustitsiia* 1997 No.12, 21; S. Narizhnii, "Kompensatsiia moral'nogo vreda postradavshim ot sudebno-sledstvennykh oshibok", *Rossiiskaia iustitsiia* 1997 No.10, 41.

38 Rudnev, *op.cit.* note 37; Narizhnii, *op.cit.* note 37, 40. See, also, B.N. Topornin and others, (eds.), *Konstitutsiia Rossiiskoi Federatsii: Kommentarii*, Moscow 1993, 281. This source asserts that Art.53 of the Constitution contains no such restrictions and that other law must be brought into conformity with it.

39 Bezlepkin, *op.cit.* note 36, 94. Sadikov, *op.cit.* note 10, 665-6, merely repeats the substance of what is stated in the code.

40 Shershenevich, *op.cit.* note 12, 137-8.

according to a recent authoritative source, it is "a concept that was unknown earlier in our civil legislation". [41]

The article serves the purpose of providing an identifiable source of funds in case of a successful tort suit against the state. [42] But as suggested by Article 1071's reference to Article 125 of the Code, other parties may be made responsible by law to pay compensation. Some statutes lay liability directly on state agencies for their torts, with the treasury to be available for subsidiary liability if necessary.[43]

State Tort Liability and Judicial Practice

Much of the tort law litigation discussed in the press and legal literature in recent years involves demands for compensation for moral harm. Two factors may help to explain why this is so. *First*, many people actually seem to be suing for moral damages. This remedy, so long unavailable under Soviet law, is now in vogue as people seek redress for injury previously beyond their reach. And *second*, courts in Russia, and especially the RF Supreme Court, appear to feel obliged to report and discuss cases in this area, in order to explain to lower courts and others how the law should be interpreted. These two factors seem, in turn, to have contributed to the considerable amount of discussion of the subject recently to be found in the scholarly literature. And if this is true with regard to tort law in general, it is also the case with the liability of the state. Many of the cases set forth below for discussion involve liability for moral harm.

The Proper Defendant

As discussed above, it is generally the case that a state organ or the state treasury will answer for the illegal acts of officials. The courts have begun to spell out the practical meaning of this principle. Thus, when a lower court found a local government liable for damages caused by the illegal prosecution of two individuals, the RF Supreme Court ordered a rehearing of the case in order to designate the appropriate federal organ of the treasury for purposes of compensation.[44] Elsewhere the Supreme Court has noted that the appropriate organ is the Finance Ministry of the Russian Federation, emphasizing that compensation is paid from the federal treasury, not from the resources of the ministry.[45]

41 Sadikov, *op.cit.* note 10, 667.

42 *Ibidem.*

43 "Nekotorye voprosy sudebnoi praktiki po grazhdanskim delam", *Biulleten' Verkhovnogo Suda Rossiiskoi Federatsii* 1997 No.10, 12.

44 *Biulleten' Verkhovnogo Suda Rossiiskoi Federatsii* 1997 No.1, 19, 20.

45 "Obzor sudebnoi praktiki", *op.cit.* note 42, 16, decision No.31-096-75 in the case of

But the state is responsible for compensation only if the illegal act in question falls within the sphere of official duties of the state employee who committed the act. Shorokhov sued for compensation for moral harm on the basis of an article that a procuracy official published in a newspaper. The plaintiff claimed that the information in the article was false and defamatory. The lower court awarded him five million rubles against the newspaper and one million rubles against the procurator. A protest by the Deputy Procurator of the Russian Federation sought to establish several grounds for overturning the decision. One of these was that the procurator was not the proper defendant. But the Presidium of the Supreme Court rejected the argument, stating that

> "the publication of an article in an organ of mass information cannot be considered part of the activity of the organ of state power for which she [the procurator] worked".

So the judgment against the individual procurator was allowed to stand.

When an employee of the Ministry of Internal Affairs exceeded his authority, resulting in the death of a minor, the court ordered the ministry to pay a substantial sum for moral harm and material damages, as well as a further amount for the plaintiff's attorney fees. The Collegium on Criminal Cases of the Russian Federation Supreme Court rejected the ministry's plea that the employee, in committing the illegal act in question, was not performing the function of an official. Since he committed the crime "while fulfilling his official duties", the collegium held, the liability of the ministry was confirmed.[46]

Liability of the Criminal Justice Organs

Liability for illegal conviction can ensue only when an individual has been "fully rehabilitated", *i.e.*, by a ruling by a court that the person was unlawfully convicted. Paskhalov's conviction was overturned on appeal for lack of the elements of a crime, but he was fined 100 rubles in connection with the same alleged infraction. So his was not considered a full rehabilitation.[47]

Kucherov. A puzzling thing about this decision is that the civil code article cited as applicable was 1068 (liability of a legal person or citizen for harm caused by its worker). Art.1069 (liability for harm caused by state organs) would seem to be the appropriate provision.

46 *Biulleten' Verkhovnogo Suda Rossiiskoi Federatsii* 1993 No.1, 5.

47 *Biulleten' Verkhovnogo Suda Rossiiskoi Federatsii* 1997 No.7, 14.

Matveev's illegal conviction served as the basis for a compensation award, but because the amount awarded was far below his claimed damages, Matveev appealed. The case shows that a range of factors—including Russia's transition to a capitalist economy and other changed circumstances—have complicated the job of the courts in this area. On review, the Collegium on Criminal Cases of the Russian Federation Supreme Court ordered the lower court to consider the following in calculating Matveev's damages: Matveev was the owner of a small enterprise and the chairman of the board of a joint stock company. His lost compensation should have been calculated for these functions, rather than on the basis of the wages of a manual worker or other employee. Moreover, Matveev was entitled to compensation for the attorney fees that he paid for his defense (up to 5% of the total compensation award, according to Art.91, Civil Procedural Code). Finally, the Supreme Court pointed out that since wage levels had risen considerably during the period of the litigation (between 1992 and 1996), the lower court should consider this development in arriving at the correct measure of damages. In the case just discussed, Matveev was suing only for tangible losses. Several cases show that the matter is more complicated when moral harm is at issue. A review of the statutory law will pinpoint the problem. Article 131 of the 1991 USSR Principles permitted compensation for moral harm based on the fault of the causer. Article 127(2) provided for liability regardless of fault for the five specified illegal acts of the criminal justice organs discussed above, this liability to be according to the procedure established by law. This last phrase is taken to refer back to the 1981 edict and accompanying statute. And since, the courts say, there was no liability for moral harm for the specified acts of the criminal justice organs under the 1981 legislation, there could be no analogous liability under the 1991 Principles.[48]

[48] *Biulleten' Verkhovnogo Suda Rossiiskoi Federatsii* 1995 No.1, 13 (No.3, case of Stepanovskaia); *Biulleten' Verkhovnogo Suda Rossiiskoi Federatsii* 1995 No.6, 2 (No.3, case of Polusitov) (an excerpt from this case also appeared in V.M. Zhuikov, (ed.), *Sudebnaia praktika po grazhdanskim delam* (1993-1996 g.g.), Moscow 1997, 288; *Biulleten' Verkhovnogo Suda Rossiiskoi Federatsii* 1996 No.10, 1 (No.1, case of Kozhkov).

This conclusion points out a further complicating issue in the interpretation of the law on this matter. The law on the introduction into force of part two of the Russian Federation Civil Code provided that Articles 1069 (on liability for injury caused by state organs) and 1070 (on liability for the acts of the organs of inquiry, preliminary investigation, procuracy and court) could be used in cases that took place as far back as 1 March 1993, if the harm caused in such cases remained uncompensated. But such retroactive effect was not provided for the articles on moral harm (1099-1101).[49] So the result, no compensation for moral harm, was the same.

As some commentators correctly point out, this interpretation is not the only reasonable or persuasive one regarding the situation at hand. At the time of the 1981 legislation, compensation for moral harm was not possible under *any* circumstances, according to the then-prevailing Soviet law, not just with regard to the specified torts of the criminal justice organs. But the 1991 Principles provided a *new* basis for compensation, for moral harm. It would be reasonable, therefore, from the effective date of the 1991 Principles, to apply the provisions of the 1981 legislation with due consideration for this new basis for tort liability.[50]

This problem was eliminated when part two of the new civil code came into effect. Among the circumstances in which moral harm will now be compensated, regardless of fault, are the five specified criminal justice acts (Art.1100).

No doubt the most famous recent case of state compensation for illegal arrest and incarceration involved former army general Valentin Varennikov.[51] Varennikov was taken into custody in August 1991 in connection with the abortive coup attempt by the State Committee for the State of Emergency. He was charged with treason and spent almost sixteen months in prison. When others arrested with Varennikov were amnestied, he insisted on having his case heard by a court. After acquittal by the court, he sued for damages for his illegal arrest and incarceration. The total award—for lost wages, attorney's fees, and other costs, calculated

49 "O vvedenii v diestvie chasti vtoroi Grazhdanskogo kodeksa Rossiiskoi Federatsii", Art.12. Text published in Sadikov, *op.cit.* note 10, xiv.

50 A. Erdelevskii, "Otvetstvennost' za prichineniia moral'nogo vreda", *Rossiiskaia iustitsiia* 1994 No.7, 37-38. Erdelevskii points out that the statute accompanying the 1981 edict states that compensation is to be permitted for "property damage, the restoration of work, pension, housing, and other rights, [as well as] compensation for *other damages*" (emphasis added) caused by the designated illegal acts. He believes that this provision allows compensation for damages not spelled out in the law at that time. Narizhnii, *op.cit.* note 37, 40 is in accord on this point.

51 Viktor Litovkin, "General Varennikov vkliuchil pravitel'stvu 'schetchik'," *Izvestiia* 21 July 1995, 2. The Varennikov compensation case is also analyzed in Bezlepkin, *op.cit.* note 36, 22-23.

on the basis of the changing value of the ruble—was estimated to be in the neighborhood of 80 million rubles.

Conclusion

Although the new Civil Code tort rules are much more comprehensive and detailed than their predecessors, their basic thrust is not dramatically different from that of Soviet-era legislation. During most of the Soviet period, it is true, there was no compensation for moral harm or damages arising from defects in products or workmanship. But these matters were addressed in the 1991 USSR Principles of Civil Legislation

What *is* different in the post-Soviet era is the amount of litigation involving the tort law provisions. Although no precise figures are available, a perusal of the reports from the Russian Federation Supreme Court, other legal literature, and even general news sources makes clear that a significant amount of judicial activity in this area is taking place.

Thus, an interesting picture emerges. The law being administered is directly traceable to the past. And, for the most part, the persons responsible for implementing the law bring to their task training and habits of mind developed during the Soviet period. With the political and ideological restraints of the past removed, however, a lively and open judicial practice in the field of tort law has developed.

One partial exception to this generalization may be in the area of the liability of the state and its organs. Several commentators have pointed to the difference between the broad constitutional right to sue the state ("Every person has the right to compensation by the state for harm caused by the illegal acts (or failure to act) of the organs of state power or their officials"—Art.53) and the more restrictive practice under the civil code and subsidiary legislation, particularly regarding the specified acts of the criminal justice organs.[52]

Of relevance to this discrepancy between constitutional norm and statutory provision is the matter of the direct applicability of the constitution—an issue of some controversy in current Russian law. Two constitutional provisions are relevant. The first sentence of Article 15 states:

> "The Constitution of the Russian Federation has supreme legal force and direct effect and is applicable to the whole territory of the Russian Federation."

Article 18 states:

> "The rights and freedoms of the person and the citizen have direct force. They determine the meaning, content and application of laws, the activity of the legislative and executive power and of local government, and are guaranteed by the judiciary."

[52] See, *e.g.*, N.M. Kolosova, "Konstitutsionnaia otvetstvennost'—samostoiatel'nyi vid otvetstvennosti", *Gosudarstvo i Pravo* 1997 No.2, 88.

What these provisions mean, according to Russian commentators, is that the days of the "declarative" constitutional norm, which can be implemented only when supplemented by subsidiary legislation, are over.[53] According to the Supreme Court, direct application of constitutional norms by the regular courts is appropriate in several circumstances, including:

> "when provisions that are contained in a constitutional norm do not, based on their meaning, require further regulation and do not contain references to the possibility of the norm's application in the context of the adoption of a federal law regulating the rights, freedoms, and obligations of a person and citizen [...]."[54]

Article 53, which makes no reference to supplementary legislation, would appear to be a norm of this kind. That this is the case should cast doubt on the Supreme Court's assertion that the Constitution has direct force. As the section of this chapter on judicial practice has shown, the Supreme Court has had several opportunities to declare the 1981 legislation to be in conflict with Article 53 of the Constitution, but has neither done so nor even discussed the matter in relevant cases. Moreover, even commentators who find the 1981 legislation to be in conflict with Article 53 see the proper remedy not in a court decision but rather in new legislation adopted by parliament.[55]

Thus, the question of whether or not the Constitution is directly applicable is far from settled. But if the Constitution is to be seen as a meaningful document, some move to assert its supremacy over obviously contradictory legislation should be of first priority.

53 Okunkov, *op.cit.* note 30, 58; V.M. Lebedev, "O nekotorykh voprosakh primeneniia sudami Konstitutsii Rossiiskoi Federatsii pri osushchestvlenii pravosudiia", *Biulleten' Verkhovnogo Suda Rossiiskoi Federatsii* 1996 No.2, 1.

54 Decree No.8 of the Plenum of the Russian Federation Supreme Court of 31 October 1995, "O nekotorykh voprosakh primeneniia sudami Konstitutsii Rossiiskoi Federatisii pri osushchestvlenii pravosudiia", *Biulleten' Verkhovnogo Suda Rossiiskoi Federatsii* 1996 No.1, 3. In connection with this decree, see Supreme Court Chairman V.M. Lebedev's discussion of this point and Constitutional Court Vice Chair T.G. Morshchakova's disagreement on the matter of direct application of the Constitution with regard to the issue of the unconstitutionality of a law. "Ocherednoi plenum Verkhovnogo Suda Rossiiskoi Federatsii," *ibidem*, 1-2. Justice Lebedev's advocacy of direct application of constitutional norms continued in Lebedev, *op.cit.* note 53, 1. Justice Morshchakova's further views on this conflict with the Supreme Court may be found in "Tamara Morshchakova: The Judicial Branch is Losing its Bearings", *Kommersant-Daily* 5 December 1997, 2, XLIX *The Current Digest of the Post-Soviet Press* No.50, 14 January 1998, 14. For a comprehensive analysis of this issue in English, see Peter Krug, "Departure from the Centralized Model: The Russian Supreme Court and Constitutional Control of Legislation", 37 *Virginia Journal of International Law* 1997 No.3, 725.

55 Topornin *et al.*, *op.cit.* note 38, 281; Narizhnii, *op.cit.* note 37, 41.

The Protection of Honor, Dignity, and Business Reputation under the RF Civil Code: Problems of Judicial Enforcement

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1. Part One of the Civil Code of the Russian Federation (hereinafter the "Civil Code"), which entered into force on 1 January 1995, contains Article 152, entitled "The protection of honor, dignity, and business reputation", which is found in Chapter 8 on "Immaterial Goods and the Protection Thereof".

In fact, Article 152 of the Civil Code provides for the protection of honor, dignity, and business reputation only in instances of the dissemination of harmful (*porochashchiaia*) false information. Infringements of one's honor and dignity expressed by the making of disparaging remarks are not—save for a sole single exception—encompassed by Article 152.

The protection of immaterial goods—including honor, dignity, and business reputation—is carried out in accordance with Article 150 of the Civil Code, using all of the measures stipulated by Article 12 of the Civil Code for the protection of any civil-law right, as well as by those means which are expressly set forth in the provisions of other norms.

Article 152 of the Civil Code describes additional means of protecting honor, dignity, and business reputation in the event of the dissemination of harmful false information, *i.e.*, the publication of a reply or retraction, or the retraction of the documents containing such information.

Article 152 regulates the protection of honor, dignity, and business reputation of citizens while it is only point 7 of said article that extends the rules on protecting a citizen's business reputation (contained in the previous points of Article 152) to the protection of the business reputation of legal persons.

According to Article 150 of the Civil Code, immaterial goods are possessed only by citizens. Herein is the major difference between citizens and legal persons. The business reputation of a legal person—as opposed to the honor, dignity, and business reputation of a citizen—is not therefore considered an immaterial good. For legal persons, business reputation has only material value and represents an absolute property right.

The sense of Article 152(7), firstly, is to be seen in proclaiming the business reputation of legal persons as an object of civil law and, secondly, in the application of the protection thereof in the event of the dissemination of information harmful to the business reputation of a legal person,

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along with general means of protection provided for by Article 12 of the Civil Code and other additional means of protection of rights set forth in Article 152.

However, it is obvious that moral damage—which, according to Article 151, represents physical and moral suffering—may not be inflicted upon legal persons. Therefore, the business reputation of a legal person cannot be protected by means such as compensation of moral damage.

The practice of Russian courts in hearing cases involving the protection of honor, dignity, and business reputation is still in the process of being formed.

In accordance with Article 19(4) of the Federal Constitutional Law "On the Judicial System of the Russian Federation", the RF Supreme Court has jurisdiction to issue Guiding Explanations (*raz"iasneniia*) on issues of judicial practice. This right of the RF Supreme Court flows from its jurisdiction as the agency that oversees the activities of the courts of general jurisdiction.

In accordance with its decree of 18 August 1992, "On Several Issues Arising during the Judicial Review of Cases Involving the Protection of Honor and Dignity of Citizens, and also the Business Reputation of Citizens and Legal Persons", in the wording of decree No.11 of the Plenum of 21 December 1993 (with amendments and addenda introduced by decree No.6 of the Plenum of 25 April 1995), the RF Supreme Court answered several questions that had arisen in the course of judicial practice. However, many questions which the courts have faced while reviewing specific cases remain unanswered—in any case, the courts themselves are not able to reach a solution in a uniformly appropriate fashion.

It should be noted that the above decree of the Plenum of the RF Supreme Court—and also decree No.10 of the Plenum of the RF Supreme Court of 20 December 1994, "On Several Issues Involving the Application of Legislation on Compensation of Moral Torts (Punitive Damages)", in the wording of decree No.1 of the Plenum of the RF Supreme Court of 25 January 1998—recognizes a legal person's right to claim compensation for moral damages. Concerning this issue—from my perspective—both these decrees contradict Article 151 of the Civil Code.

2. The protection of one's honor, dignity, and business reputation forms—without a doubt—a single problem, regardless of whether the infringement thereupon lies in the dissemination of harmful information or disparaging remarks.

Typically, the extension of civil law protection to honor, dignity, and business reputation represents an attempt by the state to reduce its own liabilities in this field.

An example of this is an appeal filed by E.V. Masiuk, a correspondent of the NTV television company, with the Khamovnicheskii *Raion* Court of the city of Moscow with a petition to instigate criminal proceedings against the editor-in-chief of the *Zavtra* newspaper, A.A. Prokhanov—under Article 130 of the RF Criminal Code—which envisages criminal liability for insulting remarks. Grounds for the claim were to be seen in the numerous disparaging publications in said newspaper *vis-à-vis* Citizen Masiuk.

Obviously, the object of infringement in the commission of this crime is the honor and dignity of a citizen—the immaterial good of said citizen which is protected by Article 150 of the RF Civil Code.

According to the current criminal procedural code, cases involving insulting remarks can be brought to a judge under a petition from the victim.

The court denied the Masiuk's petition and, instead, transferred it to the Prosecutor's Office, having notified the petitioner that the Prosecutor's Office must rule on the question of whether or not to institute proceedings. Given the presence of a petition from a victim, the court's actions directly contradicted the provisions of the criminal procedural code. After conducting an investigation, the Prosecutor's Office replied that it found no grounds for instigating criminal proceedings; yet it recommended that Masiuk turn to the court for protection of its honor and dignity in accordance with Article 152 of the Civil Code, which provides for civil liability for disseminating information damaging to one's honor, dignity, and business reputation.

In a certain sense, the court and Prosecutor's Office had turned down Masiuk's claim for protection of her honor and dignity by way of criminal court proceedings, ruling that she was able to achieve such protection through civil proceedings. At the same time, the Prosecutor's Office, as it turned out, did not distinguish between slander and the dissemination of harmful information.

In a certain sense, the Prosecutor's Office is correct insofar as the honor and dignity of a citizen is protected from infringement of all types by civil legislation. However, Article 152—which provides protection for honor, dignity, and business reputation from infringement consisting of the dissemination of false and damaging information—stipulates a special measure for protecting rights that have been violated, *i.e.*, the publication of a retraction. The more general Article 150 of the Civil Code, which Ms. Masiuk could have cited with regard to the protection of her honor and dignity from disparaging remarks, does not provide for any special measures for the protection of rights that have been violated. The only

relief that Ms. Masiuk could have claimed was compensation of moral damages.

In one instance, Article 152 of the Civil Code provides for the protection of honor, dignity, and business reputation of persons in cases involving disparaging remarks: Article 19(5), section Two of the Civil Code states that:

> "upon the distortion or use of the name of a citizen by means of or in forms that concern his honor, dignity, or business reputation, the provisions set forth in Article 152 of the present Code shall be applied."

In other words, in this case, the protection of one's rights may be affected by the means stipulated by Article 152: the publication of a retraction and compensation for moral damages.

Insofar as infringements of the honor, dignity, and business reputation of a person may be committed by various means—including physical means—it may make sense to devote one article of the Civil Code to the protection of the honor, dignity, and business reputation of persons from all types of infringement, and not only from slander. At the same time, the list of means of protection could be more comprehensive than that contained in Article 152.

At present, in applying Article 152, the courts often order those who violate rights to include in the text of a retraction an apology to the victim, which is not expressly stipulated by law. *I.e.*, the courts sense a certain inadequacy in the means of protection for the honor, dignity, and business reputation of a person at their disposal and thus add thereto on their own.

The developed system of civil law liability for infringement of the honor, dignity, and business reputation of an individual has one significant advantage over criminal law liability—no immunity can be invoked in such cases.

3. The first and possibly most complicated task before the courts—which hear cases involving the protection of honor, dignity, and business reputation—is to discern whether a plaintiff is contesting information (*svedeniia*) or something else, *i.e.*, an opinion, evaluation, or a conclusion. Theoretically, most agree that information (*svedeniia*) comprises facts, physical data—in short, anything that may or may not correspond to reality. However, in practice, it is extremely difficult for courts to distinguish information from opinions and views. In addition, due to the difficulty of this task, courts do not attempt—as a rule—to reach a resolution thereof.

In court practice, the only general reference made to this issue has been set forth in a ruling of the RF Constitutional Court of 27 September 1995; there, it denied the claim of the Minister of Foreign Affairs, A.V. Kozyrev. In his claim, Mr. Kozyrev argued that the judicial practice in applying Article 7 of the 1964 Civil Code—which corresponds to Article 152 of the present Civil Code—unfortunately did not distinguish between information and evaluative judgments, which lead to a violation of freedom of speech and the press guaranteed by Article 29 of the Russian Constitution. By refusing to rule on this claim, the RF Constitutional Court nonetheless indicated in its ruling that courts of general jurisdiction that hear cases involving the protection of honor, dignity, and business reputation must distinguish between the dissemination of false information and the expression of evaluative judgments, and must prevent the infringement of the constitutional rights and freedoms of citizens.

However, the Plenum of the RF Supreme Court, which supervises the courts of general jurisdiction, in its decree concerning issues in judicial practice involving the protection of honor, dignity, and business reputation (mentioned above), did not raise this issue. Therefore, the courts still are by and large unable to resolve this critical problem.

I am aware of only one ruling in court practice—of the Kuibyshev *Raion* Court of St. Petersburg of 7 December 1995 in the case of V.V. Zhirinovskii concerning the protection of his business reputation that was brought against several authors and *AOZT Izdatel'skii Dom Chas Pik*—in which the plaintiff was denied satisfaction of his claim on grounds that the article in question "states only the evaluation of a series of acts of the plaintiff and his statements, as well as the correspondence thereof, to acceptable standards of behavior". The court in its ruling wrote that "Articles 29 and 44 of the RF Constitution guarantee each individual the right of free thought and speech, no one may be forced to express opinions and convictions, or to refute such opinions and convictions"; the court further indicated that, in its opinion, "said article does not contain facts that are damaging to the business reputation of V.V. Zhirinovskii".

Unfortunately, it is not this ruling but, rather, a judgment rendered on 24 March 1998 by a Stavropol' court--in the case of the Stavropol' *Krai* organization of *Russkoe natsional'noe edinstvo* (the Russian National Unity Party [*SKO RNE*]) on the protection of business reputation *versus* G. Tuz, the author of an article entitled "Is Hatred Toward Fascists in Russians' Blood?" published in *Stavropol' Pravda*—which is more typical of contemporary judicial practice.

The court ruled that:

> "the following contents or information following therefrom the article by Galina Tuz published in *Stavropol'skaia Pravda* on 26 April 1995 (No.79) do not correspond

> to reality and damage the business reputation of the Stavropol' *Krai* organization of the Russian National Unity Party, stating that the Stavropol' *Krai* organization of the Russian National Unity Party is a fascist organization and is guided by fascist ideology in the widest sense of the word as German fascism from the WWII period (Hitlerism), which was expressed in the general context of the article, the banner of the article and in photographs of fascists as an illustration to the article, where reference which was made to Hitlerism in the epigraph to the article."

As is evident from the court's ruling, which literally reproduces the demands of the claim of *SKO RNE*, the latter objected to the characterization of the party as a fascist organization because the term "fascism" is connected in the general sense with Russia's enemy in World War II.

Leaders of the Russian National Unity Party repeatedly declared the relationship of its ideology with Nazi ideology and spoke admiringly of Hitler. However, the party had always sharply objected to the term "fascists" since—for historical reasons—this word in Russia has a highly negative emotional connotation. Although the article by Ms. Tuz—as expressly noted by the court in its ruling—was devoted only to ideology and did not contain any accusations by *SKO RNE* of having committed any specific acts, *SKO RNE* nonetheless decided that the definition "fascist" was damaging to its business reputation.

Therefore, the plaintiff did not contest either the information or the evaluative judgment. Rather, it contested the justification for using a term which was historically correct and true as to the substance thereof, but which carried—under the circumstances—a negative emotional connotation. The use of said term in relation to the plaintiff in another country or under different circumstances would not have caused such objections.

The court's decision to satisfy *SKO RNE*'s claim meant sacrificing the defendant's right to the freedom of thought and of speech and the freedom of academic analysis to the plaintiff's political interests, but not to the protection of the business reputation of the defendant from the dissemination of false information detrimental thereto.

Article 152 of the Civil Code served as the grounds for this judgment. The court went far beyond the framework of the law in this case because it was not capable of analyzing the text contested by the plaintiff. When a court interprets words as symbols and yet intentionally refused to determine the content thereof, it is impossible to talk about freedom of thought and of speech.

The problem of distinguishing information from evaluative judgments can arise in judicial practice from another point of view.

Courts encounter cases in which the author of a text expresses an evaluative judgment in such manner that the public accepts it as the communication of fact. The most widespread example hereof is an au-

thor who criticizes the opinions of others in such a way that an incorrect impression in made in the mind of the readers *vis-à-vis* the content of the criticized opinions.

An example of such a dispute was the claim filed by E.T. Gaidar with the Judicial Chamber for Informational Disputes attached to the RF President in connection with the publication of an article in *Nezavisimaia Gazeta*, in which a journalist distorted opinions that Gaidar had expressed on television. The distortion occurred in the following fashion: the author of the article—in describing the appearance of Gaidar—wrote that "actually", the words of Gaidar should be understood not as they were expressed literally but, rather, in a totally different way. Then, having written his own account of how the words of Gaidar had sounded "in fact", the author of the article went on to criticize the text he had written himself.

Shortly thereafter, another newspaper—*Sovetskaia Rossiia*—published the opinion written by the author of the *Nezavisimaia Gazeta* article regarding Gaidar's remarks, as though directly attributable to Gaidar. The latter circumstance attested to the fact that the article was seen by the public as an announcement of specific facts which supposedly took place, and not as an analysis of Gaidar's television appearance. Without a doubt, this was precisely what the author of the *Nezavisimaia Gazeta* article had in mind. The RF Judicial Chamber for Informational Disputes found the acts of the author of the *Nezavisimaia Gazeta* article to be incorrect (*nekorrektno*) and issued him a warning. Owing to its status, the Judicial Chamber could do no more; unfortunately, this case was not heard in a court of law.

The above instance shows that a court—in ascertaining the character of contested statements—cannot overlook precisely how they are seen by the public. It is important for a court to establish whether the public considers such statements to be a subjective, evaluative judgment or a communication of factual circumstances.

Yet, on the other hand, a court must carefully understand for itself whether the contested statement represents an author's exercise of the freedom of thought and speech or whether it is merely the communication of facts, without the expression of a personal opinion.

Therefore, judicial practice in these cases must depend—on the one hand—on the public's acceptance of various information, on its ability to analyze texts, and being used to the freedom of thought and of speech, and—on the other hand—on the good conscience of authors, on the absence of any interest on their part in influencing the public about something where they do not posses sufficient factual information therefor.

With regard to the latter—the good conscience of authors—the existence of means by which authors may infringe upon a person's honor,

dignity, and business reputation without grounds is unacceptable. Opinions formed conditionally on the basis of "unconfirmed reports", "preliminary information", etc. should in no way refer to the honor, dignity, or business reputation of a person since—for the public—such announcements are indistinguishable from direct confirmations.

3. Along with the difficulties related to the definition of the character of statements, courts often experience difficulty due to varying interpretations of the parties concerning, *first*, the content of such statements and, *second*, the degree to which a statement infringes upon the honor, dignity, or business reputation of a specific person.

An example of a serious study of the content of disputed statements, from my point of view, is to be seen in the hearing by the Timiriazev *Raion* Court in Moscow of a case involving the protection of honor, dignity, and business reputation filed by NTV correspondent E.V. Masiuk against the *Shchit i Mech* newspaper and the author of an article therein which claimed that Masiuk "fabricated materials about Dudaev and Basaev for money". In court, the defendants claimed that the words "for money" in the text of the article referred only to the fact that Masiuk received a salary from the NTV television company and nothing more. However, in reviewing the text as a whole, the court noted the claim that Masiuk received money was preceded by a discussion of corruption among journalists. Furthermore, in the final paragraph of the article, Masiuk was accused of having no principles or conscience. Taking this into consideration, the court concluded that the sense of the article was to be seen in conveying to the public that Masiuk received money from Dudaev and Basaev for her reports, and not in the confirmation that she was paid by her employer, the NTV television company. On these grounds, the court ruled in favor of Masiuk.

The opposite example is provided by a claim filed in the Gagarin *Raion* Court in Moscow by K.A. Liubarskii against the Loventa publishing house and S.S. Govorukhin, which after Liubarskii's death was continued by his widow.

Loventa's publication of the "Conclusions of the Parliamentary Commission Investigating the Reasons for and Circumstances Surrounding the Crisis Situation in the Chechen Republic", with commentary from the commission chairperson, RF State *Duma* Deputy S.S. Govorukhin, served as grounds for the cased filed with the court by Liubarskii. The publication of the "Conclusions" was not sanctioned by the RF State *Duma* and was the private affair of the publisher and commentator.

The published text of the "Conclusions" stated that "a certain halo of purity and nobility was created around the criminal regime of Dudaev". The "Conclusions" further mentioned that "no small efforts were made [to this end] by Andrei Fadin from *Obshchaia Gazeta*, Kronid Liubarskii from *Novoe Vremia* [...] and many others".

The authors of the "Conclusions" then wrote that "the commission has at its disposal a document from the Security Department for Emergency Situations which to some degree explains the behavior of the mass media". Following this, the "Conclusions" included the text of a report from the head of the State Security Department of the Chechen Republic, S.S. Geliskhanov, to the President of Chechnia, D.M. Dudaev, stating that the State Security Department had spent $1.5 million on payments for journalists in December 1995.

The text of the above report—which was published in the "Conclusions"—was accompanied by a comment made by the authors of the "Conclusions" stating that:

> "the commission does not have the right to interpret said document literally; money may have been spent not on buying [the loyalty of] journalists, but rather on their transportation, accommodation, lodgings, and other organizational costs."

Liubarskii viewed such information as a communication that he had used financial aid from Dudaev's government and that precisely this had explained the journalistic position he took while reporting and analyzing events in Chechnia. For this reason, he filed a claim for the protection of his honor, dignity, and business reputation against Loventa and Govorukhin, who had given the text to the press and who had also commented on its publication.

The court denied Liubarskii's claim stating that:

> "in the text which was contested by the plaintiff, the court has not found any information that infringes upon the honor, dignity, and business reputation of K.A. Liubarskii or that specifically referred to K.A. Liubarskii."

The plaintiff had submitted a letter to the court from several renowned Russian linguists in which they stated that—in their opinion—the text in question indirectly accused the persons names therein, in particular K.A. Liubarskii, of receiving money from the Chechen government. In this case, the opinion of the linguists did not enjoy priority over the opinion of other readers since the court was most concerned with how the text was received by its target audience—the general public.

The use of linguists here was a case of excessive insurance for one's position. Due to their expert status, linguists are more critical of texts than are other readers. For this reason, even if they had interpreted the text as an indirect accusation that of persons named therein had taken

money from the Chechen government, the average reader—not versed in the analysis of texts—would certainly interpret the "sensational" statement as a direct accusation of the persons who were named therein.

It is clear that a false indirect accusation is as unlawful as a false direct accusation—both can infringe upon the honor, dignity, and business reputation of a person.

Therefore, the court in this case turned Article 152 of the Civil Code from a provision that unconditionally prohibits infringements upon honor, dignity, or business reputation into one that determines how this nevertheless can be done.

An interesting analysis, not of a text but, rather, of an entire magazine column is given by a case heard by the Chertanov *Raion* Court in Moscow involving the protection of honor and dignity filed by a model against the *Andrei* magazine on the grounds that her photograph was printed next to a column describing how certain Russian women serve as living containers for the transportation of narcotics. The plaintiff claimed that readers could infer that the photograph was printed as an example of one such woman. The court ruled in favor of the model after she submitted in evidence to the court other magazines in which similar photographs were accompanied by a disclaimer stating that they had no relation whatsoever to the text.

The above examples show how the analysis of texts by a plaintiff and defendant can often differ, and also how often the intent of an author can differ from the public's interpretation of a text. In a majority of cases, this discrepancy can be explained—in my opinion—by the position taken by defendants once proceedings have been commenced. However, situations do exist where such a discrepancy exists objectively right from the very beginning.

Obviously, in many cases, conflicts can be resolved and rights that are violated restored by means of the publication, not of a retraction but, rather, of an explanation from the defendant. Unfortunately, Article 152 of the Civil Code does not provide for such a means of protecting rights that have been violated.

If the courts could make use of several various mechanisms to protect rights that have been violated, this would significantly increase their ability to resolve conflicts.

4. The genre of a publication cannot but be of significance in hearing cases of contested statements.

Article 57 of the RF Law "On the Mass Media" contains a list of instances where the mass media are relieved of liability for the informa-

tion which they publish. The content of this list is a function of the tasks which face the mass media.

First, the media are relieved of liability for the dissemination of information contained in mandatory or official announcements or speeches; *second*, if such information literally reproduces information distributed by other mass media that could be held liable for their acts; *third*, if the distributed material "is contained in authors' works put on the air without a preliminary recording, or in texts which are not subject to editing in accordance with the present law" (this refers to the Law "On the Mass Media", although in reality it does not contain a list of texts that are not subject to editing).

The latter case is apparently in need of an explanation. Technically, authors' works put on the air without a preliminary recording simply cannot be checked by an editor. Therefore, the public necessarily understands that what an author says here is his own opinion only if an editor—in the person of the host of the program—does not concur with the author's opinion.

If an editorial board does not agree with information contained in works submitted in advance, then it may decide to refrain from putting such works on the air and thereby from distributing inaccurate information which may be damaging to a person's reputation.

Nevertheless, there is certainly a genre of journalism that should not be subject to editing—the interview. First of all, interviews contain information about the interviewee himself. Therefore, editing an interview deprives it of all meaning. A pre-requisite for relieving the mass media of liability for the content of an interview must be the public's clear and certain understanding that a newspaper is not entitled to edit an interview and that only the interviewee is responsible for the content of an interview.

As far as we can see, a deciding factor in this issue is the understanding of the public of the character of distributed information. For a start, in any case, interviews—it seems to us—must be accompanied by a disclaimer that the interviewee is solely responsible for their entire content.

5. According to Article 152(7) of the Civil Code, regulations governing the protection of honor, dignity, and business reputation of a citizen also apply to the protection of the reputation of a legal person. What does the concept of "the business reputation of a legal person" mean? If a person has various spheres of activity in life—personal, professional, and political, then a legal person has only one sphere of activity—the achievement of its goals as set forth in its charter (*ustav*). The image of a legal person exists only in this field. The business reputation of a legal person is apparently

its image in the eyes of others, which allows it to function in accordance with the goals in its charter.

Article 152(7) of the Civil Code does not contain any restrictions relative to the types and spheres of activities available to legal persons the business reputation of which is protected by law. This means that the law protects the business reputation of any legal person striving to reach the lawful goals in its charter, while the word "business" reputation should not be understood as connected only to entrepreneurial activities. *First*, not only the business but also the moral aspects of a commercial organization in the eyes of others is important in order for it to successfully function. For example, this includes the social organizations and movements that it finances or the charitable projects that it supports. *Second*, a non-commercial organization also cannot successfully function without a suitable reputation.

The main difference between the protection of the business reputation of a legal person from that of a of a citizen lies in the fact that compensation for moral damages cannot be applied in cases of protecting the business reputation of a legal person.

In fact, however, the compensation of moral damages does not at play the role which it was accorded by the legislator. In cases of claims filed by citizens concerning the protection of honor, dignity, or business reputation, the fines that are imposed upon the violators take the place of compensation of moral damages. For a plaintiff, fines are important because they punish the violator and provide something in the way of a guarantee that the violation will not be repeated. For this reason, plaintiffs—as a rule—file large suits without justifying the amount claimed, while the court goes ahead and reduces the amount thereof several-fold without providing any motivation therefor.

The compensation for moral damages that is awarded in favor of a legal person has two explanations: *first*, the collection of monetary sums from a violator possibly can take the role of a fine charged for the legal violation committed; *second*, this could represent compensation for property damage caused by an infringement of the business reputation of an organization in cases where it is impossible or extremely difficult to determine the amount of damages caused.

With regard to the first explanation, the fine, apparently, should be collected for the benefit of the state rather than the victim. The RF Law "On the Protection of Consumers' Rights" stipulates—along with judicial protection of consumers' rights—the collection of fines by the court for the benefit of the state. Therefore, lawmakers in principle have made

allowance for combining compensation of harm inflicted upon a private person, with the collection of fines by the state.

As far as compensation property damage is concerned by means of collecting a certain amount for the benefit of a victim that does not require precise motivation, such a norm is contained in the RF Law "On Copyright and Neighboring Rights".

Therefore, the legislator had the opportunity to stipulate, in the RF Civil Code, the imposition of various types of fines upon persons who have infringed a person's honor, dignity, or business reputation. If the legislator has failed to do so, and instead has limited the remedies to compensation of proven property damage and moral damages, it has done so intentionally. One can raise the issue of amending existing legislation, but one type of damage remedy cannot be replaced by another in contravention of the legislation.

Differences in the goals of legal persons as set forth in their charters also entail differences in the approaches taken to disputes connected with their business reputation.

In accordance with Article 6 of the RF Law "On Non-Commercial Organizations":

> "social and religious organizations (associations) are deemed to be voluntary associations of citizens who according to procedure established by law have united on the basis of common interests for the satisfaction of spiritual or other non-material needs."

Consequently, a social organization should have, as one of its goals, the protection of the common spiritual interests of its members. These common spiritual interests—as a rule—are integrally connected to the honor and dignity of members of the social organization. At the same time, the business reputation of a social organization itself directly depends on the degree to which the group recognizes the spiritual interests which unite its members. Therefore, protection by a social organization of its own business reputation often overlaps with protection of the honor and dignity of its members.

This problem can be approached from another angle. Article 51(2), of the RF Law "On the Mass Media" prohibits journalists from:

> "disseminating information with the aim of discrediting certain categories of citizens according to sex, age, race or nationality, language, religious beliefs, profession, residence or workplace, as well as in connection with one's political convictions."

Insofar as the law prohibits such behavior, it is necessary to find a mechanism in the legislation for implementing this prohibition.

Such a legal mechanism certainly is to be seen in the protection of business reputation by social organizations uniting various groups of people. From this point of view, the Khoroshevskii *Raion* Court in Mos-

cow heard an interesting case involving a claim of the Russian Center of Hare Krishna Societies for the protection of its business reputation against the Sviato-Vladimir Brotherhood publishing house and the author of a brochure printed by said publisher who wrote that "Hari Krishnas kill dissenting sectarians by a shot to the head or by drowning" and that "a number of even externally respectable sects, for example [...] Hari Krishnas [...] have provisions in their program documentation which stipulates the neutralization and destruction of those who do not agree with their teachings".

The plaintiff felt that the above statements damaged its business reputation and prevented it from the normal exercise of its goals as set forth in its charter. At the same time, these statements could be qualified—using the terms of the RF Law "On the Mass Media"—as discrediting certain categories of citizens exclusively according to their "relationship to religious."

In its claim, the Russian Center of Hare Krishna Societies demanded retraction of the general character of the first opinion, insofar as the author wrote of murders as though such were acceptable practice among the Hare Krishnas, and also a retraction of the second statement.

The defendants claimed that the contested statements do not discredit the business reputation of the Russian Center of Hare Krishna Societies insofar as they referred to the Hare Krishna sect overall, and not specifically to those associated with the Russian Center of Hare Krishna Societies. Concerning the statements made in the brochure, the defendants maintained that they corresponded to reality.

In response to the defendants' first objections, the plaintiff in turn claimed that all members of the Hare Krishna sect form a uniform whole and, therefore, that the statements of the brochure's author discredit the business reputation of any Krishna organization, including the largest such organization in Russia—the Russian Center of Hare Krishna Societies.

In proving the grounds for their statements, the defendants submitted to the court proof of a murder committed by a member of one Hare Krishna sect in the United States some fifteen years previously. The defendants had no other information regarding murders committed by Hare Krishnas.

At a court hearing, the defendants also claimed that by Hare Krishna "program documentation" they were referring to ancient Hindu religious books.

Following the testimony of the defendants, the parties agreed to conclude an amicable settlement. In their agreement, the defendants first admitted that they had information only regarding one murder committed by a Hare Krishna member in the United States some fifteen years previously, and the plaintiff submitted to the court documents attesting to

the active participation of the directorship of the Hare Krishna organization of the United States in solving said murder. Second, the defendants clarified that Hare Krishna "program documentation" refers to ancient Hindu religious books.

In turn, the plaintiff claimed that instructional religious books can only be interpreted within the framework of the traditions of a given belief, and that the defendant's literal interpretation of the text of ancient Hindu religious books contradicts the religious traditions of the Hare Krishna sect as well as the interpretation of such books by practicing Hare Krishnas.

We can see that the right of a social organization to protect its business reputation represents a guarantee of the honor and dignity of the goals of a social group. However, insofar as the plaintiff in fact is a legal person, and the matter involved its business reputation, there could be no call in such a case for moral damages in accordance with existing legislation.

At the same time, this case shows that rights violated with regard to honor, dignity, and business reputation may be restored not only by means of the publication of a retraction of information that does not correspond to reality, but also by means of the publication of an explanation or additional clarifications by a defendant.

It is clear that in this case the conclusion of an amicable settlement was a means for the plaintiff to compensate for the absence of the opportunity to demand the publication of a clarification or additional information by the defendant.

In practice in Russia today, state bodies often have the status of a legal person. Does this mean that they also are entitled to file claims for the protection of their business reputation? The question has a practical meaning. There has been a case filed by the government of the City of Moscow with the Kuznets *Raion* Court in Moscow against E.T. Gaidar regarding the protection of business reputation.

According to the Charter of the city of Moscow, the government of Moscow is a legal person, which serves as grounds for it to consider itself as *first*, the holder of a business reputation, and *second*, to protect such reputation in court.

A public statement made by Gaidar regarding the fact that economic life in Moscow "is horribly regimented and bureaucratized", the result of which is "massive corruption" served as grounds for the claim.

The fact that the government of the City of Moscow filed a claim for the protection of its business reputation clearly contradicts the meaning of Article 152 of the Civil Code. Business reputation is an institute of private law since it has significance only in relations based on the free

will of parties and on obligations freely accepted by subjects of the law. In the absence of such freedom, which is precisely the case where relations of power (*vlastnye otnosheniia*) between parties are involved, business reputation loses its significance—in any case, for the subject that enjoys such a position of power. The possibility for the City of Moscow as an organ of state power to perform its functions is a factor not of its business reputation but of its authority of power. The business reputation of the City of Moscow in the sphere of public law does not exist since no one is entitled to choose whether or not to carry out the ordinances of the City of Moscow to which he or she is subject. The City of Moscow does have, of course, a business reputation as a legal person but only in that sphere in which it enters into relations with other subjects of the law on the bases of equality and autonomy of will, *i.e.*, in the sphere governed by private law and not by public law.

The statement by Gaidar related to the activity of the Moscow city government as an agency of state power governed by public law. The activity of the City of Moscow that is governed by private law was in no way touched upon by the disputed statement. It is possible, of course, that the statement of Gaidar could undermine the authority of the Moscow city government.

It would also be possible for the head of the Moscow city government or members thereof to file a lawsuit for the protection of their own personal business reputation as a citizen if the statements made negatively affected their honor, dignity, and business reputation. If the cause of action against Gaidar has as its goal the protection of the honor, dignity, and business reputation of the head of the Moscow city government who signed the petition for filing the lawsuit, then this is all the more reason not to substitute a means of protection that is provided for by law for the defense of one's rights with one that is not set forth in the legislation.

It is interesting to note that the plaintiff in this case did not contest the fact of corruption in the city administration but, rather, that there had been no causal connection established between this corruption and the degree of regulation of economic activity in the city. But no one can demand that the analytical conclusions of one person should coincide with his own. One should be free, in making an analysis, to draw one's own conclusions as to causal connections concerning events in their surroundings. The government of the City of Moscow disputed the value judgment relating to its public activities. Obviously, such a dispute has nothing to do with the business reputation of a legal person.

In discussing thee business reputation of legal persons, one can posit the question of whether or not the Russian Federation, Subjects of the

RF, or municipalities should be able to file lawsuits insofar as they are actors in transactions regulated by civil law? We think that they should not. The functioning of the rights of these subjects in the area of private law relations is totally subordinated to their public law activity. Extending civil law norms governing the protection of business reputation to these subjects would contradict this basic element of their existence. Furthermore, such an extension would lead to the unjustified expansion of the possibility for these subjects to influence private persons.

Legal persons are not only capable of protecting their business reputation; they can also infringe upon the honor, dignity, and business reputation of others. From this point of view, the most dangerous of these are state agencies.

However, not all agencies of state power are legal persons (we will not study the issue of whether or not they should be legal persons at all). If such an agency *i.e.*, the mayor of Moscow, who unlike the government of the City of Moscow is not endowed with the status of a legal person, publishes and disseminates a document containing information that damages the honor, dignity, or business reputation of an individual, then civil law legislation may not be used to protect such violated rights since only legal persons bear liability stipulated by civil legislation.

In this case, there is of course the possibility of applying administrative legislation. The RF Law "On Appealing in Court Acts and Decisions Violating the Rights and Freedoms of Citizens" offers the opportunity to citizens to petition a court to declare as unlawful the acts of "state agencies, agencies of local self-government, institutions, enterprises and their associations, social associations, and officials" expressed in the adoption and dissemination of such documents.

In the event that such acts are declared unlawful, the court is obliged to restore the rights of citizens which have been violated, while citizens are entitled to claim compensation for losses and moral damages caused by said acts in accordance with the provisions of the Civil Code. The means by which a court may restore rights which have been violated are not specifically stipulated by the RF Law "On Appealing in Court Acts and Decisions" referred to above.

The acts of state agencies and officials that may be contested in this way include the dissemination of all sorts of official information, letters, conclusions and informational letters.

The need to turn to the RF Law "On Appealing in Court Acts and Decisions" arises only in instances where unlawful acts have been committed by a subject that does not have the status of a legal person.

In particular, if the "Conclusions of the Parliamentary Commission Investigating the Reasons for and Circumstances Surrounding the Crisis Situation in the Chechen Republic" had not been published by the Loventa publishing house but, rather, only approved and distributed by the RF State *Duma* itself as its own document, then insofar as the *Duma* is not a legal person, the only means of protection for those whose honor and dignity have been infringed upon by the publication of the "Conclusions" would be to petition a court in accordance with the RF Law "On Appealing in Court Acts and Decisions". In the Russian Federation, state bodies are not immune from administrative liability.

The RF Law "On Appealing in Court Acts and Decisions", as follows from it title, only applies to citizens.

However, Article 46 of the 1993 RF Constitution accords to "each" (*kazhdyi*) person the right to appeal decisions and acts (inaction) of "agencies of state power, agencies of local self-government, social public associations and officials" in court.

Although Article 46 is located in Chapter 2 of the Constitution, titled "The Rights and Freedoms of Citizens", a widespread opinion exists—expressed in a decree (*postanovlenie*) of the RF Constitutional Court No.17-P of 24 October 1996 in a case involving the constitutionality of Article 2(1) of the Federal Law of 7 March 1996 "On Amendments and Addenda to the Lawof the Russian Federation 'On Excise Duties'"—that the constitutional rights of persons and citizens also belong to legal persons "to the degree to which such right may be applied thereto".

In our view, the main task before courts in considering cases involving the protection of honor, dignity, and business reputation is not so much in determining the accuracy or fallacy of disseminated information, as it is in determining what one may (or may not) say regarding others in a free society.

This circumstance pointedly characterizes the condition of minds in a society where freedom of speech has come into existence only recently, whereas previously subjective evaluations of events would have been unthinkable.

In addition, Russian society—as evident from the ruling on the case of the Russian National Unity Party—has become accustomed to dealing not with factual information or critical discussions but, rather, with symbolic meanings.

Today, judicial practice in cases involving the protection of honor, dignity, and business reputation reflect two contradictory tendencies: on the one hand, an attempt to ensure the protection of individuals' rights,

and on the other hand, the imposition of censorship of statements as well as the deprivation of the possibility for society to evaluate things itself.

This makes it all the more important to promptly establish judicial practice based on the Russian Constitution and generally accepted norms of international law. It seems that this will require the adoption of a new resolution of the RF Plenum of the Supreme Court which should assist the courts in clearly defining the difference between statements of various kinds so as to discourage any indirect infringement of honor, dignity, and business reputation, and to bring the practice of compensation for moral damages into accordance with the law.

Quite possibly, it would have made sense to have provided for a greater variety in the means for protecting—through court actions—the honor, dignity, and business reputation. But that is a matter for the legislator.

However, the deciding factor in the formation of judicial practice in the field of the protection of honor, dignity, and business reputation will be the experience of free social and political life, and the need to accept a variety of ideas and opinions. Judicial practice must itself, in fact, encourage freedom of thought and common sense to take root in society.

The Law of Inheritance of the Russian Federation: Some Characteristic Features

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1. At the time of this writing, the third (and last) part of the new Civil Code of the Russian Federation had not yet been completed. I had before me—as I wrote this article—an English translation of the draft of 29 January 1997.[1] Its Section IV contains the law of inheritance. As with many other parts of the Civil Code, this section has its roots in the 1993 Russian Constitution, notably in Article 35, para.4: "The right to inheritance shall be guaranteed." Such an explicit constitutional protection is rare, the moral justification of the right to inherit being considered in most countries to be a rather weak one. In The Netherlands, Professor Meijers—who laid the foundations for the new Dutch Civil Code—has even written that the law of inheritance is a clear example of a legal institution without any moral justification,[2] an opinion that suggests the view that private property after the death of the owner should be returned to the community or, at least, redistributed among its members according to criteria other than merely those of family ties or the will of the deceased. In the text that he had submitted to the Dutch government in 1954, however, there were no vestiges of this radical view. What he had proposed was, in fact, a technically renewed version of the traditional Dutch system.[3]

There is a parallel here with the Russian draft, which, in many respects, sticks to the Russian tradition expressed, for example, in the Russian Civil Code of 1922 (Arts.416-436), the Russian Civil Code of 1964 (Arts.527-561), and Articles 153-155 of the Principles (*Osnovy*) of Civil Legislation of the (former) USSR and the Union Republics of 1991. It should be remembered that even the constitutional protection of the right to inheritance is not a result of developments of the 1990s; rather, it goes back to the times of

1 The author was consulted on an earlier version of the draft in 1995.

2 E.M. Meijers, *Algemene begrippen van het Burgerlijk Recht*, Deel I, Leiden 1948, 78-79.

3 Time and again, this part of the new Dutch Civil Code has met with difficulties, leading to delay. The last of many versions was adopted in May 1998 by the Dutch lower house. But in May 1999, the Dutch senate was only willing to accept this version after the government had promised to reconsider the extreme limitations of the freedom to dispose of one's inheritance, particularly those in favor of the surviving spouse. A separate law for the entry into force of the new law of inheritance is being prepared. The necessary corrections may be inserted into this law. This means, in practice, a further postponement of some years.

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the former Soviet Union. The same provision is found in Article 10 of the USSR Constitution of 1936, the concept behind it being that in a country of victorious socialism—in which the exploiting classes have been eliminated—inheritance law cannot become a source of exploitation; rather, it should protect the personal ownership of the toilers, increase the productivity of labor, and strengthen the Soviet family, fortifying in this way the relations uniting the citizens of the USSR with socialist society.[4] As we shall see, some important elements of the law of inheritance even go back to the times before 1917.

This chapter intends to draw attention to some of the most characteristic features of this tradition and the difficulties that might be expected there from.

2. My first remarks regard the Russian system of access to the inheritance. The heir is obliged to accept the inheritance within a time limit of six months from the date of its opening, which is the day of the death of the individual concerned. Later acceptance is only possible with the consent of all other heirs who have accepted the inheritance or on the basis of an extension of the time limit granted by a court if it recognizes that there were adequate grounds for the delay. Access to the inheritance, moreover, requires a certificate of the right to inherit, issued by a notary at the place of the opening of the inheritance. This certificate is to be issued to the heirs who have accepted the inheritance on their application upon the expiry of six months from the opening of the inheritance. It may be issued prior to the expiry of six months if there is proof that no other heirs exist other than the person(s) who has (have) applied for the certificate. This system evolves from Articles 546, 557, and 558 of the Civil Code of 1964 (going back to Arts.425 and 435 of the Code of 1922) and has—for all intents and purposes—been maintained in the draft of January 1997. It applies to intestate succession, as well as to succession under a will.

It is interesting to compare this system with the various solutions that exist in Western Europe in this field.[5] Roughly speaking, they can be divided into three groups. In all three groups, there seems to be a relation between the admitting of holograph wills and the formalities required for access to the inheritance.

4 See the passages cited by V. Gsovski, *Soviet Civil Law*, Vol.I, Ann Arbor 1948, 619-621.

5 For a recent overview of the law of inheritance of Western European countries see D. Hayton, (ed.), *European Succession Laws,* Bristol 1998.

(a) In countries where a holographic will is normal, access to the inheritance can only be obtained by means of some form of interference of a court. The probation procedure and the "letters of administration" in common-law countries should be mentioned here, as well as the German *Erbschein*, which is issued by the *Nachlassgericht*, and the Swiss requirement of homologation of holographs by a court.

(b) In France and in Belgium, wills are usually made with the help of a notary, although often essentially still in the form of a holograph that is entrusted by the testator to the notary who takes it into custody. This leads, roughly speaking, to the following system. The holograph cannot be executed without the cooperation of the legal heirs or—where this cooperation is not forthcoming—without an order of the president of a court. In case of intestate succession, access to the inheritance can be obtained by means of an *acte de notoriété* of a notary, which gives the person indicated therein the position of "apparent heir". In Belgium, this rather complicated institution is only applicable as far as movables are concerned and is aimed at the protection of third parties even where the true heir turns up.

(c) The third group, to which The Netherlands belong, takes as a starting point that a will in practice is made in the form of a notarial deed. In The Netherlands, other forms are not entirely excluded but are only rarely applied. Even a holograph is only valid when it is put into the custody of a notary who has to draw up a statement certifying that s/he indeed received this will, which statement has to be signed by the notary, the testator, and two witnesses. In The Netherlands, access to the inheritance is given on the simple basis of a statement of the notary indicating who is entitled to the inheritance. This is sufficient in case of intestacy as well as in case of a will. This system is quite reliable because a Dutch notary who has been involved in drawing up a will is obliged to inform a central registration office of its existence, the date on which it was made, and the name of the notary in whose office it is kept.[6] That means that at the moment the testator dies, it is very easy to know at short notice if there is a will or, in case there are several wills, which one is the latest. Theoretically, this does not exclude uncertainties as a consequence of wills that are made abroad but, in practice, this complication rarely yields any significant problems.

6 Similar registrations exist in other countries, but it should be kept in mind that registration usually is not obligatory and that the possibility to make a holograph without interference of a notary will probably lead to gaps in registration.

Moreover, these problems are reduced considerably by a Council of Europe convention on the establishment of a scheme of registration of wills of 16 May 1972. This convention[7] obliges the contracting states to establish a scheme of registration of wills and to appoint a national body that, without any intermediary, is required to arrange for registration in other contracting states and to receive and answer requests for information arriving from the national bodies of other contracting states. The notary (or other person) who has recorded the will may request registration thereof not only in the state where the will is made or deposited but also through the intermediary of the national bodies in other contracting states.

Evidently, the Russian system belongs to Group C. Russian law requires, for a will, the notarial form with a few exceptions for emergency cases. Access to the inheritance can be obtained by means of a simple certificate of a notary. There is much to be said for this approach. It avoids interference of a court, which, in practice, often causes considerable delays in the countries that prescribe such procedures. It is not necessary to refer to Dickens' *Bleak House* to be aware of the classical danger of a court charged with *ex officio* investigations by judges who are hardly equipped for such tasks.

Still, it should be kept in mind that a registration—as prescribed by the convention of 1972—would be a useful guarantee against surprises that seem difficult to avoid in a large country wrestling with transitional problems, such as Russia. However, it seems too ambitious a task to organize such a registration on the ground. As a result, the task of the Russian notaries in this area is a heavy one and, if I am well informed, there is a shortage of well-qualified notaries in the Russian Federation. That means that the Russian system will depend heavily on the information given to the local notary by the next of kin or the close neighbors of the deceased. This explains the time limit for acceptance of the inheritance in relation to the time limit after the expiry of which the notary becomes entitled to issue the certificate giving access to the inheritance. Both time limits (of six months) obviously are based on the consideration that six months are usually necessary (and sufficient) to obtain all the information that can be expected from the two sources mentioned above.

The Russian system, notwithstanding these drawbacks, is for the time being probably the best solution. It is true that fraud and error in relation to wills of rich testators are a popular, though somewhat old-fashioned, subject for romantic detective stories. But, in practice, the environment of the deceased person, still under the impression of her/his recent death, usually is not reluctant to give honestly all the information needed to find out who is entitled to the inheritance. And this is obviously facilitated by the

7 The convention has had a moderate success, now being in force in Cyprus, Spain, Luxembourg, Turkey, Belgium, France, The Netherlands, Portugal, and Italy.

fact that a testator normally takes care to ensure that her/his will cannot be overlooked by informing her/his closest relatives where it is to be found.

3. An additional characteristic feature of the Russian law of inheritance is the circle of heirs in case of intestate succession and the system of obligatory shares (*legitim*). Interesting here is the rule determining the heirs of the first priority. The draft of 1997, similar to the 1964 Civil Code (Art.532), unites here the children, the spouse, and the parents of the deceased. This corresponds to the reality of Russian family life where children, parents, and grandparents often live together. It is also interesting to note the extension of each group of heirs, including the group of the first priority, to persons unable to work who were dependent upon the deceased for not less than one year prior to her/his death. Under the 1964 Code, continuing Article 418 of the 1922 Code, this means that children, spouse, and parents eventually have to share the inheritance with other relatives, such as brothers and sisters who are disabled, or even with disabled persons who are not relatives at all. Here, the 1997 draft brings some modifications. Persons who may be legal heirs on the basis of their family relation to the deceased and who are disabled succeed on the same footing as under the 1964 Code. But disabled persons who are not relatives can only become legal heirs when they have jointly resided with the deceased at the moment of her (his) death for a period of not less than one year prior thereto. Moreover, according to the draft, the dependent persons of each kind cannot succeed to more than one-fourth of the inheritance.

An obligatory share is accorded to children who are minors or who are disabled, as well as to a disabled spouse or disabled parents. In the 1964 Code (Art.535), other persons dependent upon the deceased are added to this list, regardless of family ties, but the draft seems to abandon this rule. Under the 1964 Code, the obligatory share is two-thirds of the share that would have been due in case of intestacy. The 1997 draft establishes the obligatory share as being one-half of the share that would have been due in case of intestacy.

The whole system seems to be influenced by a concept of the family as a collective unit where living together and dependence might be as important as ties of blood. One might suspect here a relation with the existing situation in urban areas,[8] as well as with local peasant customs as they existed in Tsarist times and inspired later by separate Soviet legislation

[8] See Art.292 of the RF Civil Code, which gives extensive rights to the members of the family of the owner of residential premises to enjoy these premises. Those rights are not terminated by the passing of ownership to another person.

concerning succession in farming families.[9] We see here, in fact, a typical social function of the Russian tradition, which has not lost its significance. At least it can be said that the actual situation is certainly no incentive to neglect this function.

A new development is the extension of the groups of intestate heirs that might be called to a succession on the base of family ties. The 1964 Code stops after brothers, sisters, and grandparents, forming the second priority. The draft gives brothers and sisters the second priority, grandparents the third priority, and adds aunts and uncles as a fourth priority. Moreover, it includes, in further priorities, even kin to the fourth, fifth, and sixth degree. Though the systems of priorities in Western countries vary widely, it can be said that drawing the line after kin in the sixth degree is in accordance with many jurisdictions, including the Dutch one.[10]

4. Another topic that should be mentioned here is the goods that are deemed to be part of the inheritance. Generally speaking, the answer is: all the goods owned by the deceased person. In contrast to the 1964 Code,[11] the 1997 draft expressly formulates this main rule. But it contains some interesting exceptions.

The first of these concerns rights that are deemed to be inseparably linked to the person of the deceased. These include, for instance, the right to alimony, the right to salary or pension and similar allowances, the right to compensation for damage caused to life or death, and personal non-property rights. There seems to be a certain degree of confusion here between two categories: rights that are so closely bound to the person of the deceased that, by their very nature, they must end at her (his) death, and on the other hand, rights that, although terminated as a result of her (his) death, accorded the deceased a money claim during her (his) life, which, at the moment of her/his death, was not yet paid. In the first case, there is no reason for a special rule: it is self-evident that no one can succeed as to rights that are terminated by the death of their owner. In the last case, there is no real objection to considering the already-born claim as a part of the inheritance; certainly there is no reason to free the debtor of her (his) obligation to pay what was already due. However, the draft comes here with another solution: in first instance, the claim is not part of the inheritance but should be paid to the members of the family who resided together with the deceased and to the

9 Comp. Gsovski, *op.cit.* note 4, 623 and Chs.18 and 21.

10 See Art.4:908 of the Dutch Civil Code and Art.4.2.6 of the draft of Book 4 of the new Dutch Civil Code.

11 Between 1922 and 1926, the Civil Code of 1922 permitted inheritance by law or under a will only to a maximum value of the estate of 10,000 gold rubles after deduction of the debts of the deceased. This maximum was abandoned in 1926.

latter's disabled dependants, regardless of whether or not these dependants resided together with the deceased. Only in default of such members of the family and such dependants, or if such persons fail to exercise their rights within four months after the opening of the succession, will the amounts due be included in the inheritance and only in that case will they be dealt with according to the rules of the law of inheritance. It is clear that this rule meets the interests of the persons who probably most need the money. We see here once again the social function of the Russian system.

There is another curious exception concerning the rights to a bank deposit. According to Article 561 of the 1964 Code, it is possible to instruct the bank to pay the deposit in the event of death to some other person, in which case the deposit forms no part of the deceased's estate. The result is that the rules of the law of inheritance do not apply. Under the 1991 Principles of Civil Legislation, this rule seemed to be abolished. But, as far as deposits in the savings bank of the Russian Federation are concerned, it was restored in a decree of the Russian Supreme Soviet of 3 March 1993. And it returns in the 1997 draft for all monetary funds deposited with banks or other lending institutions that are authorized to keep deposits. In this draft, this rule has been embedded in the law of inheritance in general. The deposit is deemed to remain a part of the inheritance and fundamentally the law of inheritance applies. The instruction to the bank indicating the person(s) entitled to the deposit in the event of death is considered to be a testamentary disposition, having the legal force of a notarially certified will.

The possibility of a separate disposition of a bank deposit in the case of death has been heavily criticized.[12] But it seems to serve an important practical need. As I pointed out under II above, the main rule of the Russian system of access to the inheritance is that, after six months from the opening of the succession, a notarial certificate is issued, which is required for such access. Without a special rule, it would impossible to access the deposit pending this period, which might be very inconvenient because the heir(s) often will have to take all kinds of (more or less) costly measures immediately after the death of owner of the deposit. The special rule under consideration here makes it possible to break through this impasse, under the 1964 Code because the law of inheritance does not apply, under the 1997 draft because it says expressly that—prior to the presentation of the notarial certificate—the heirs, indicated in the disposition with the bank, are entitled to receive from the testator's account a total amount not ex-

[12] Y.I. Luryi, "History of Soviet Inheritance Abroad", in George Ginsburgs, Donald D. Barry, William B. Simons, (eds.), *The Revival of Private Law in Central and Eastern Europe, Essays in Honor of F.J.M. Feldbrugge*, in F.J.M. Feldbrugge, (ed.), *Law in Eastern Europe*, No.46, The Hague, London, Boston 1996, 193-221, esp. 214-218.

ceeding 100 statutory minimum wages, which might cover the costs of the measures that cannot be postponed.

5. The last point that requires attention here is the position of the creditors of the deceased after the opening of the succession.[13]

It is a typical feature of the 1964 Civil Code that it is (more or less) blind to interests of creditors. In this field, the two parts of the new Civil Code in force now, the new Russian Law "On Bankruptcy", and the new legislation concerning enforcement proceedings have brought much improvement to the Russian legislative landscape. But the law of inheritance, including the draft of 1997, still turns a blind eye to this issue.

Article 553 of the 1964 Code (Art.434, 1922 Code) provides the only rule on the position of the creditors of the deceased. It states that a successor who has accepted the estate is liable for the debts of the deceased to the extent of the actual value of the estate passing to him under the succession. Fundamentally, this rule is maintained in the 1997 draft. Some provisions are added—for instance, co-heirs are jointly and severally liable—but each of these potential debtors is liable only to the extent of the value of her (his) portion, and what is to be done in the period before the inheritance has been accepted. But the two most important questions are not dealt with at all.

In the first place, one can think of the following question: is the value of the inheritance determined only by its assets or also by the debts? Second, there is the question of the position of the creditors of the deceased in relation to the creditors of the heir where both groups of creditors have recourse to the goods of the inheritance that have become the property of this heir.

In Western countries, the usual rule is that an heir who has accepted the inheritance is fully liable for the debts of the deceased. But an heir has the possibility to accept conditionally in this sense that he is only liable to the extent of the goods of the inheritance obtained by him: the acceptance *sous bénéfice d'inventaire*, a well-known institution of Roman law. In practice, this means that a liquidation procedure has been started, the creditors of the deceased are satisfied out of the goods that are sold as far as needed for this purpose, and the heir obtains what is left over after satisfaction of these creditors. This procedure is, of course, meant as a protection of the

[13] I limit myself to the position of the creditors of the deceased: creditors that already had a claim against the deceased at the moment of her (his) death. But an inheritance might have other groups of creditors: creditors with a claim concerning expenses for the administration and protection of the inheritance after this moment, creditors in respect of the costs of the funeral, or creditors with a claim imposed upon the heirs by the deceased in its will. Those groups might have different rights. But, in the text, this will be ignored in order make clear the main line of the system.

heir, just as the Russian rule limiting the liability of the heir to the value of her/his portion.

But there is an important difference. The Western rule is focused on the *goods* of the inheritance as an object for creditors upon which to take recourse. In case of a *bénéfice d'inventaire,* the creditors of the deceased can have recourse only to the *goods* of the inheritance and not to the *goods* of the heir(s), this recourse being effectuated in the framework of a liquidation procedure where the creditors of the deceased are entitled to submit their claims for satisfaction, while the creditors of the heir(s) are only entitled to exercise their rights with regard to the final balance. But the Russian rule refers only to the *value* of the inheritance as a limitation of the liability of the heir(s) for the claims of those creditors. This limitation seems to pose no obstacle for those creditors to take recourse to any of the goods of an heir, regardless of the way those goods became her/his property: out of the inheritance or otherwise. The only possible defense of the heir here seems to be that—by this recourse—the claims of the creditors of the deceased taken together can exceed the value of the inheritance (or the value of the part thereof to which the heir is entitled).

This difference may have important consequences for the creditors of the deceased as well as for the creditors of the heir.

A liquidation procedure, Western-style, gives, in fact, protection to the creditors of the deceased against the possibility that they have to share the proceeds of the goods of the inheritance with the creditors of the heir; this is especially important where the heir has more debts than goods (assets). In this sense, the former group of creditors has, in fact, a kind of factual preference for its claims to the goods (assets) of the inheritance above the claims of the creditors of the heir, who can only have recourse to what is left over after the liquidation. For that reason, they usually have the right to request such a liquidation procedure even where the heir(s) has (have) accepted the inheritance unconditionally. Again, this right has its origin in Roman law.

A simple example may illustrate the practical consequences of this and show the contrast with the Russian approach. Let us suppose that the value of the goods of the inheritance is 100,000, that the deceased had two debts of 45,000 each, that there is one heir who has assets only up to a value of 10,000 and debts up to 60,000.

A liquidation procedure, Western-style, leads to the following result. The two creditors of the deceased are fully paid out of the assets of the inheritance. The heir receives 10,000, which may be divided among her (his) creditors together with her (his) own 10,000. They will get in this way only one-third, or 33%, of their claims.

The Russian system, though different interpretations are possible, seems in any event to lead to quite a different outcome. In this system, fundamen-

tally, the creditors of the deceased and the creditors of the heir may have recourse to all the goods of the inheritance, as well as to the assets of the heir. This means that, in case of dividing the proceeds obtained by selling all these goods, each of those creditors gets 11/15 (approximately 73%) of her (his) claim,[14] which comes to 33,000 for each of the creditors of the deceased and to 44,000 for the joint creditors of the heir. But according to the limit of Article 553 of the 1964 Code, the creditors of the deceased cannot receive more than the value of the inheritance. Here we see the relevance of the first of the two open questions I mentioned above. If this value is deemed to be the value of the *assets* of the inheritance, the creditors of the deceased in our example do not exceed this limit, this value being 100,000. But if this value is deemed to be the value of these assets after deduction of the debts, the limit is easily reached: it is 10,000. The result would be that the creditors of the deceased get 5,000 each and that the creditors of the heir are fully paid. This last result seems very unreasonable, but most in accordance with the wording of the 1964 Code, as well as with the 1997 draft.

It seems to me that what is mostly needed here is clarification. Perhaps Russian practice has never been fully aware of the consequences hidden in Article 553 of the 1964 Code. In the new situation, where the law of inheritance as well as the protection of creditors have become far more important issues than in the past, clear choices must be made. For the creditors of the deceased, it is essential to have an instrument to enforce a liquidation of the inheritance, ensuring payment out of its assets. This must be seen as something different from the protection of heirs against those creditors in case of an insolvent estate. But in spite of this, the simplest solution for this protection seems to be to follow the same system that makes it possible to make one set of rules for both liquidation grounds.

This has the additional advantage that the heir, once the liquidation is completed, no longer has to worry about possible creditors of her (his) predecessor. To link her (his) protection to the value of the inheritance seems a rather ambiguous concept. This is true not only for the reasons explained here but also because of the difficulty to come to a satisfying way of estimating the value of assets that are not sold at all or have been sold at another moment than immediately after the succession.

6. This marks the end of my remarks. The law of inheritance is a part of civil law that is very much linked to the specific culture and tradition of a country. This makes every comparison between national systems somewhat speculative. Nevertheless, such comparisons may lead to a better understanding of national law, including technical points, and may in this way contribute to the creation of satisfying legislation in Russia as well as in The Netherlands.

[14] The sum of the assets being 110,000 and the sum of the claims of all the creditors involved being 150,000.

Private Law and Public Law

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We talk about private law and public law as if everybody knew what was meant when these words are being used about law. This probably holds true for lawyers and even law students, but not for the general population. Most people will have some sort of idea about labor law, or bankruptcy law, but the distinction between private law and public law, considered as most fundamental by most lawyers, means next to nothing to the man or woman in the street.

Is the problem perhaps avoidable, do we actually need the public/private law distinction? If we do not, the matter could be left to those inclined to such intellectual pastimes.

Unfortunately, the distinction between public and private law entails practical consequences, at least in continental legal systems, so it cannot be referred to the convenient and already very large file of problems that do not need a solution. To start at the simplest and most practical level: our law happens to be divided into two boxes; some of it has been put into the box marked "public law", and the rest into the box marked "private law", and the contents of these two boxes are treated somewhat differently. For the law student and the humble practitioner this may be enough to know. But the more discerning lawyer would of course like to know why some law goes into one box and some into the other.

Two thousand years of jurisprudence—because the distinction goes back at least as far as the Romans—have produced a vast body of literature containing answers to this question. The earliest solution was offered by the Roman jurist Ulpian who stated: "Public law is what regards the welfare of the Roman state, private law what regards the interests of individual persons; because some things are of public, others of private utility."[1]

Although the distinction was never quite forgotten in the following centuries—Grotius referred to it—the legal regimes of medieval Europe certainly tended towards blurring it. It was only when the modern state, as we know it, began to take shape in the nineteenth century that the debate about private against public in law was revived. This, incidentally, is an indication of where the nucleus of the problem lies.

[1] D. I.1.2. *Publicum ius est, quod ad statum rei romanae spectat, privatum quod ad singulorum utilitatem; sunt enim quaedam publice utilia, quaedam privatim.* The passage was included in the introductory chapter of Justinian's Institutions, which may explain why it was so well known.

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Rudolf von Jhering, perhaps the greatest legal mind of the nineteenth century, had argued the central importance of the concept of interests in jurisprudence, and from that point on, remembering Ulpian's position, additional answers could be formulated.[2]

Looking at the subjects of the interests, it has generally been observed that in public law at least one of the interested parties would be public authority in one form or another. Private law, on the other hand, concerned the legal relationships between private parties. (Of course public authority may also appear as a private party, *e.g.*, when it participates on the same footing as an individual citizen in a consumer contract.)

The presence of public authority (in one form or another) in public law relationships entails several other consequences. One is the inequality inherent in such relationships. Not only is the public party usually more powerful *de facto*, it is also either the creator of legal norms, or closely involved in the creation and enforcement of these norms. Dealing with a public party is therefore like playing chess against a player who may change the rules of the game. For this reason, the public party must be bound to stricter rules than his private counterpart. The exercise of a right or power granted by public law is generally considered to be limited by the purpose for which the right or power was granted. A private party may not abuse its rights, but is otherwise not questioned about the purpose for which it uses its right. A public party, even where it has been granted discretionary powers, may not exercise these powers as it sees fit, but should exercise discretion in order to optimally realize the objective for which the powers were granted.

The private/public dichotomy is closely related to, but not identical with another distinction: between so-called dispositive and mandatory law. All public law is mandatory, in the sense that free discretionary use—or non-use—of public powers cannot be allowed. The bulk of private law may be compared to a vast warehouse of legal instruments for the use of private citizens; they are free, however, to manufacture their own tools. Only in specific types of cases, usually in order to protect weak parties, public power intervenes and orders the citizen to use the tools from the warehouse.

The enforcement, in other words the procedural aspects, of private and public law may also differ in accordance with the inequalities outlined before. As a rule, the enforcement of private law depends on the interested private parties; they decide freely whether and how they want to enforce their rights. The public party in a public law relationship is normally obliged to enforce its right. Additionally, in many jurisdictions,

[2] R. von Jhering, *Der Zweck im Recht*, Vol.1, Leipzig 1877, Vol.2, Leipzig 1883.

special procedures and special administrative courts are available for the handling of public law disputes.

This has until now been a summary survey of the principal points where private and public law are supposed to be different. All of these points are open to criticism and indeed to such an extent that many scholars have concluded that, in the end, the distinction between private and public law is intellectually untenable. This is correct in the sense that no criterion can be found which will definitively and permanently allow us to distinguish between the two. On the other hand, the distinction refuses to go away, even if it is intellectually unsound. The reason for this is, I believe, that, although there are no watertight compartments in which logic compels us to place private and public law, the prominent presence of public authority as a participant in many areas of legal intercourse produces a sphere around itself which one can designate as public law. The stronger such presence, the more the legal relationships involved assume a public law character. This of course means that, as I see it, there is a gradual transition, a continuum, between private and public law. Some legal transactions, *e.g.*, the sale of second-hand furniture between private persons, are completely in the private sphere, while others, such as the adoption of the annual budget of the state in parliament, are completely in the public sphere. In many cases, however, private and public elements co-exist. This occurs not only when public authority, in one form or another, itself participates directly in a legal relationship, but also when public authority declares an interest and intervenes in a legal relationship between private persons. Such intervention may be effected in a general, abstract, way, by means of legislation, for instance when the legislator restricts individual freedom in labor or family law, or specifically, in an individual transaction between private persons, for instance when some kind of official permission or approval is required.

The reason for the existence and indeed the persistence, the ineradicability, of the private-public dichotomy in law is therefore the need to address the fundamental inequality which arises when public authority starts to participate as an actor on the legal stage. The many forms in which public authority may appear as a legal actor require a variety of devices to deal with this inequality. In American law, the doctrine of state action has been formulated on the basis of the text of the Fourteenth Amendment;[3] in European countries, including the United Kingdom, the public/private law division has been one of the answers, but every national system offers its own version of this division. Moreover, the private-public dichotomy is

[3] An extensive overview of the American approach to the problem may be found in a special number of the 130 *University of Pennsylvania Law Review* 1982 No.6, 1289-1580.

not the only device for dealing with the special position of public authority. Doctrines, such as those on human rights, or on general principles of public administration, serve closely related functions. It may be obvious, furthermore, that the private-public dichotomy in law is also intimately connected with basic questions of the philosophy of law and of the state, especially with the ideas of natural law and legal positivism. We shall return to this aspect briefly at the end of this chapter, after having had a look at the problem from the perspective of legal history.

Perhaps the most important insight gained by the considerations presented above is that we have made two boxes (to use this image once more) and stuck the labels "private law" and "public law" on them and have then proceeded to store all the different bits of law in either of them. We treat the contents of these boxes somewhat differently and before we put away a bit of law in one box or the other we have to decide therefore which treatment we consider most appropriate. The general underlying idea is that legal relationships in which the state or any other emanation of public authority plays a role of some significance should, in many cases, receive special treatment, because, again in many cases, the public partner in a relationship is too dissimilar from a private partner.

The second point to be made concerning the private/public law dichotomy from the perspective of legal history is the following. The dichotomy will only arise when the need is felt to distinguish between private and public law. Once the distinction is recognized one can, of course, apply it retroactively, in other words, identify certain elements of earlier legal systems as belonging to private, resp. public law, although these systems themselves did not make the distinction and had no reason to make it. This means that for the legal historian there are actually two questions to answer: When did lawyers and the law itself begin to make an explicit distinction between private and public law?, and: At which moment in history do we observe the emergence of legal rules which can be characterized as private, resp. public law? Moreover, these questions require separate answers for each legal system.

The first question is easy to answer, in a way. Not because it is easy, but because there is very little to go on. We know that Roman law knew the distinction already in the times of Ulpian and from that time on it has belonged to the *acquis* of European legal history. For other legal systems, as far as I am aware, lack of sources prevents us from coming up with answers.

The second question is far more interesting.[4]

4 The following discussion is based on the findings of a seminar on the early legal history of a great variety of cultures; see F. Feldbrugge, (ed.), *The Law's Beginnings*, Leiden 2003, especially my own paper on the *Russkaia Pravda* ("The Earliest Law of Russia and its Sources") and my "Concluding Observations".

A discussion of early legal systems often contains little more than the observation that such systems were rather primitive, and among the reasons for such a judgment one mentions the failure to distinguish between civil and criminal, and between private and public law.

It may be worthwhile therefore to investigate whether private law and public law, applying these concepts anachronistically, emerged at the same time in a particular legal system.

First of all, it would appear that the most fruitful approach would be to look at the emergence of law and of the state in the distant past by reference to present-day understandings of these concepts. We should examine how particular elements, which we consider to be important constituents of our legal system or of our state, were gradually formed or emerged. Both law and the state are then viewed as entities that took shape over time. It does not help our understanding very much if we employ some kind of timeless definition of law, or of the state, and then establish that at a given moment in a certain place law appeared or a state was born.

The second important insight is that this emergence of law and the state consists of two parallel processes, closely connected but nevertheless not fused from the very beginning. It has been demonstrated that reasonably sophisticated legal systems have existed in societies which lacked central authority of sufficient consistency and permanence to speak of the existence of a state. The Cheyenne Indians of the early nineteenth century, famously described by Llewellyn and Hoebel, are one example;[5] another one may be found in early Celtic Ireland, an essentially tribal civilization which was bound together by a common culture, religion, literature and legal system, but where any kind of central political authority was completely absent.[6]

Conversely, history and anthropology also show us well-defined states which functioned without articulate legal systems.[7]

The first step in the emergence of law is when dispute settlement is referred to a third party, somebody who is not a party in the dispute and whose views tend to be accepted by the conflicting parties. At some stage this most archaic institution becomes more elaborate: certain persons (*e.g.*, tribal elders) may emerge as regular arbitrators; dispute settlement may be based (in part) on previous decisions; dispute settlement may become more and more professionalized.

5 K.N. Llewellyn and A. Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence*, Norman, OK 1941.

6 See D. Edel, "An Emerging Legal System in an Embryonic State: The Case of Early Medieval Ireland", in Feldbrugge, *The Law's Beginnings*, *op.cit.* note 4.

7 See H. Claessen, "Aspects of Law and Order in Early State Societies", in Feldbrugge, *The Law's Beginnings*, *op.cit.* note 4.

In the final stage of development of early law, the dispute settling agencies reach out beyond the individual case before them and claim the validity of their decision for all future similar cases. The next step then is to discard the individual case altogether and issue an abstract decision for a particular legal dispute—the birth of legislation. Obviously, the emergence of true legislation implies the existence of the state. One could say, therefore, that the development of early law will, at a certain moment, produce the state; but at the same time, looking at it from the other end, the development of the early state will, at a certain moment, produce law, both in the form of legislation and through the monopolization of dispute settlement and enforcement.

Returning now to the public/private dichotomy in law, the question arises when it first became observable in legal history. In the view outlined above, one would expect this to occur at some moment after the emergence of an articulate state structure, possessing already a system of legislation. It is even possible to narrow down this moment more precisely. The reason behind the dichotomy, as we have argued, is the need to restore the balance in an otherwise unequal relationship between private persons and public authority in legal intercourse. Such a correction in favor of private persons will only take place when the state is confronted by countervailing powers of sufficient strength; it would be unrealistic to expect the early state to engage in self-limitation without any external prompting.

As a rule, an early state operates in a state of comparative weakness; it is still consolidating its position, its powers are not yet fully recognized. In such a situation one can expect other social actors to impose conditions and limitations concerning the state's monopoly of rule creation and enforcement. This need not lead inevitably to the emergence of a private-public dichotomy in law, but such a thing would be a fairly obvious device to select.

The distinction between private and public law was explicitly recognized by the Romans, but that does not mean of course that it did not exist beforehand. By this, I mean that there were different sets of rules in operation, some applying to private persons and others to public agents. This difference can indeed be observed at a very early stage, as could be expected in the perspective adopted in this chapter. In Roman law, the most archaic period is abundantly overgrown and obscured by more sophisticated later developments; in the laws of Celtic tribes, what is known of them, the absence of a central authority makes the search for institutions which could be designated as "public law" unpromising. Early Germanic and Slavic laws, on the other hand, yield sufficient appropriate illustrations of an incipient dichotomy. We shall present here some examples from the

earliest Russian law, the *Russkaia Pravda* (RP). The considerable mass of Germanic tribal laws, both the continental ones written in a corrupted Latin and the Anglo-Saxon ones (written in Anglo-Saxon), represent a great variety of stages of legal development, from the fairly primitive to the quite sophisticated. The complex of texts which form the *Russkaia Pravda*, on the other hand, consists of a chronological succession of additions, amendments, revisions of an original document, which allow us to follow the development of early law and legislation in considerable detail. In this chapter, only the principal points can be briefly indicated.

In the oldest layer of the RP (the so-called Pravda of Iaroslav) the state—in the person of the prince—is absent, and civil and criminal law have not yet grown apart: most of the rules, undoubtedly based on earlier customary law, deal with delicts/crimes against life and physical integrity.

In the following layer (usually referred to as the Pravda of Iaroslav's sons) the prince joined this system, almost as a private party, seeking similar or even improved legal protection for his servitors and officials.

Then the payment of private compensation was converted into the payment of a fine to the prince, and one could regard this as the birth of criminal law, clearly the oldest branch of public law.

In subsequent layers of the RP (in particular in the so-called Pravda of Monomakh, the principal component of the Extended Pravda) one finds more detail about procedural aspects, the role of the prince's court. Monopolization of dispute settlement, the integration of the prince's court in the social fabric, and the involvement of the prince's officials in the enforcement of judicial decisions constituted the main avenue for the progress of the state. There are numerous manifestations of this tendency in the later layers of the RP. The more explicit forms of public law—the regulation of legal relationships within the government and public administration themselves, not directly affecting the interests of individual citizens—are to be found only in later sources. The so-called Charter of Dvina Land of 1397 provides an example: it guaranteed a certain amount of judicial autonomy for local officials, forbidding the constables of the grand prince of Moscow to enter the territory. This is a clear illustration of the thesis that the emergence of public law properly speaking is prompted primarily by the need to limit the power of public authority, as the result of a bargain between the authority and a sufficiently strong counterpart.

The preceding argument about the private/public dichotomy in law, particularly as it appears in the perspective of legal history, implies

a specific way of looking at law. A few thoughts therefore, by way of an epilogue, concerning this approach.

The scholarly debate may concern all kinds of aspects of reality, of "what exists", of the world: the surrounding material world (the universe, nature in its countless manifestations, etc.) and humanity (the human mind, language, relationships between people, history, etc.). We have words to refer to these various objects of scientific investigation and sufficient consensus about the meaning of these words permits us to engage in meaningful discussions.

This would also apply to law, in the sense that people from different legal cultures are still able to discuss "law" without talking at cross-purposes. This even holds true diachronically: in other words, it is perfectly possible to examine Babylonian or Roman law on the basis of what is generally understood by the term "law" at present. Such an understanding is not based on a generally accepted definition of law, but rather on the acceptance of "law" implying a certain amalgam of concepts, institutions, relationships, etc. The practice of law usually requires precise definitions and is mainly concerned with the establishment of the exact scope of the definition (and therefore of the legal rule). But where there is talk of "law", one does not primarily think of any particular definition, but rather of "what lawyers do", of courts, procedures, legal documents, statute books, legal argumentation, law offices, legislation, and so on. Only such an intrinsically vague "definition" allows us to discuss law outside a very narrow framework.

If law in this sense is contrasted with other objects of scholarly investigation a curious point emerges. Or rather two. One is that—unlike the human psyche, language, human relationships and their history, and many other aspects of human existence—law was not always there; it emerged at a particular stage (and, looking at it from the point of view of the evolution of mankind, a rather late stage) of human development. The second point is that—unlike most other major aspects of human existence—it did not just emerge, as language presumably did, or happen (as history), but, rather, was consciously created in the course of a purposeful social process. Such a process inevitably implies a contractual aspect: "We agree that if A happens, B will also happen."

It follows from this view that law does not exist in the same way as language or history (or the human mind) exist. The latter are, in principle, to be regarded as given and they can be examined as such. Law is something we made ourselves and we can therefore unmake it, so that it does not exist anymore.

To return to the topic of this chapter: the private/public dichotomy in law is not some sort of mysterious and inherent quality of law which we discover by meticulous "scientific" investigation. It is a device invented by lawyers at a certain moment, when they considered it convenient. It is therefore also pointless to argue about what the real difference between private law and public law is. The difference is what you say it is; it is your choice. In that sense, and in that sense only, all the learned writers about the topic were right.

A Theory of Principles of Law: The Revival of a Forgotten Conception

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Aleksandr Gorovtsov (Alexandre Gorovtzeff)—formerly a professor at the University of Perm and then *privat-dotsent* at the University of Petrograd, while living in exile in France—published two volumes of a book *Etudes sur la principologie du droit* in 1928.[1] This publication summarized ideas which Gorovtsov had already expressed in earlier publications.[2]

Gorovtsov's studies covered the following basic questions of legal theory:

— the notion of the object in law and its significance for legal theory;
— the problem of distinguishing between private and public law in the light of his new notion of the object in law;
— the classification of legal disciplines, based on this notion.

The basic elements of this theory have retained their interest until the present day. At the beginning of his work, Gorovtsov remarks that the notion of the subject of law has been studied since the times of the Roman jurisconsults and has occasioned a considerable number of academic works, while the notion of the object of law has been virtually ignored over the centuries, having been reduced to the well-known notion of *res* (a thing).

Taking over the notion of *res* from private law, some authors have used the term in public law, assimilating it with territory, the only seemingly plausible *res* in public law.

Of the various philosophical conceptions concerning the object of law the three most important ones may be summed up as follows:

— an object is everything outside the subject of law;

1 *Etudes sur la principologie du droit; Première partie:Théorie de l'objet en droit*, Paris 1928; *Etudes sur la principologie du droit; Deuxième partie: Théorie du sujet de droit*, Paris 1928.

2 In *Revue du droit public*, April-June, 1925; *Revue générale du droit*, April-June 1927, July-September 1927; *Revue trimestrielle de droit civil*, October-December 1926, January-March 1927.

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— objects are all material things;
— objects are human actions.

Gorovtsov's point of view is close to the third variety; he argues that the "natural liberty" of subjects of law is itself an authentic object of law. This concept, enigmatic at first glance, is developed in the further analysis of his work.

The roots of this theory are in the view, produced by the genius of Roman law, of law being divided into two branches: the law of persons and the law of things, the latter including the law of obligations. The interests of human beings, connected with natural liberty and its inherent limitations, are the objects of law. This also applies to public law (to be understood as constitutional and administrative law, following Lorenz von Stein) where the same natural liberty of the subject of law—in this case the state—is the object, as well as its limitations by virtue of administrative law.

The author then proceeds to the two main objectives of his work: to establish a clear distinction between the categories of private and public law, based on the notion of the object in law, and to offer a consistent and reasonable classification of legal disciplines, to replace the illogical system prevailing until then. The overarching objective is to determine a common, organic and intrinsic principle for the domains of private and public law, resulting in the construction of a kind of tree with branches representing the various legal disciplines.

Gorovtsov underlines the importance of comparative law, not only as a historical or geographical comparison of different legal systems, but also as a comparison of different legal disciplines within a unified system, in order to deduce certain common principles. Such a generalization of legal principles should lead to a renovation of legal philosophy by creating a kind of "principology" aimed at a more concrete synthesis of the philosophy of law, suffering until then of an abstract and metaphysical character.

The eminent role of the "founder of comparative law", Immanuel Kant, is seen in the approximation of the notion of the object (usually understood as a material thing previously) with the subjects (p.11). Gorovtsov recalls how Kant defined law as a set of rules of behavior of subjects, constituting the restrictions of their natural liberty. He was followed in this respect by authors like Austin, Ortolan and Ahrens. In the works of Kierulff, Gierke and Bierling this approximation became more pronounced (pp.13-25). At the same time, these authors envisaged such a partially transformed notion of the object mostly by its application to private law, leaving aside the spheres of public law and international law. Nonetheless, every logically satisfactory theory of the object should be applicable to all branches of law.

Previous conceptions of the object of law implied the understanding of the object as a material *res*. But authors such as Gierke and Bierling had already indicated that an action or non-action of a subject of law may itself be regarded as an object, at least in such branches as public law and family law. Persons do not become objects of public or family law, but their liberty does (p.30). The real object indeed is the natural liberty of the subject itself. Thus, the person and his natural liberty are distinct things, only the latter may be an object of law.

The preceding points concern inter-individual relations. The picture is different, for instance, in international law, where persons cannot be subjects, because international law is inter-state law. Gorovtsov remarks that here too the natural liberty of the state, its sovereignty, is subject to limitations. If objects for Bierling may be material objects (*res*) and persons (human beings), for Gorovtsov, even if the object in law is understood as a complex phenomenon of natural liberty (pp.31-32), the object in public law is the natural liberty of the state with respect to individuals. Thus, natural liberty is common to all branches of law, public law, private law, and international law.

According to Gorovtsov, the object of law in private law is the natural liberty of the individual, in public law the natural (originally total) liberty of the state with respect to the individual, and in international law the natural liberty of the state with respect to other states (p.33).

In the same vein Gorovtsov regards the subject of law not as a concrete human being or a state, but as a person or rather his will—the legal personality that represents it. This part of the study is further developed in the second volume of the work, dedicated to the problem of the subject of law.

Gorovtsov then proceeds to a differentiation between two notions of objects: the "authentic" object or natural liberty, and the "practical" object. For the latter he proposes the term "sub-stratum". In private law, the real object of the title to property is the natural liberty of the owner, while the sub-stratum is the object of property itself. In public law, in the case of freedom of assembly, the real object is the natural liberty of the state; the sub-stratum the practical possibility for citizens to assemble. In international law, sovereignty is the object; the sub-stratum is the obligation to comply with international rules or to apply foreign law to foreign citizens (the latter in case of private international law) (p.38).

Sub-strata are further divided into concrete and abstract ones, the latter being interests of a physical, moral or economic type (p.39). Harmonizing these interests by introducing limitations at the level of concrete sub-strata is the essence of law.

The second part of the first volume is devoted to the problem of distinguishing between public and private law in the light of the theory of the object in law, derived from this new conception of the internal architecture of the law. Gorovtsov points to an ultra-statist theory of the interrelation between public and private law, wherein the former totally absorbs the latter. Another conception, known as "solidarism" (not to be confused with an identically named tendency in Russian history), affirms that the notion of contract unites the entire sphere of law (Duguit).

By contrasting two opposing viewpoints, those of Jellinek and of Stammler (following Blackstone, Locke, Montesquieu and Kant), Gorovtsov is prompted to introduce two categories: public law in a substantive and in a procedural sense (p.44). Public law in a procedural sense provides sanctions for (or approves) all other branches of law concerning private persons (from criminal law to civil law) and creates what are called "constructive norms" by Duguit. Public law in a substantive sense, according to Gorovtsov, creates "pre-constructive" rules or principles which establish a general system of dependence.

Gorovtsov argues that the existence of law as a single system can be proven in two different ways (p.48). *Firstly*, the existence of law is obvious in the pre-state era, as, for instance, in a relationship between two persons. *Secondly*, law exists in the regulations of international law, which is not to be considered a type of supranational law; if it were, it could be identified as public law functioning as supra-law in respect of private law (in this matter the author refers to the views of Petrazhitskii, according to whom international law is paradoxically closer to private law in its internal construction).

In the view of Gorovtsov, the discussion on the pre-eminence of either public or private law is very similar to the discussion on the priority of objective or subjective law. It is ignored that "subjective" rights are simply the interests of subjects in law, by which "objective" rights are transformed into "subjective" ones. Both of them are dependent upon interests. If two persons agree on furthering their interests in pursuing their harmony, their interests are becoming "interests-rights", acquiring the approval of objective law (pp.51-53).Through this approval, "interests-rights" are modified into subjective law. Analogically, the language of a single person (*homo solus*) is not a real language of communication, if there is no second person with whom to communicate, as "interests-rights" are not yet real law without the second person.

Private natural rights (the right to property first of all) preceded the birth of the state, because these rights are possible in relations even between two persons without any state involvement. On the other hand,

public "natural" rights (the freedom of movement, for example) follow the birth of the state. Gorovtsov concludes that the discussion on the pre-eminence of either private or public law has been deformed by a misconception concerning the substance (the interests), beyond the external forms of these two branches of law. He underlines their ultimate unity, adding that the primary distinction lies in the difference between public law in the procedural and in the substantive sense.

Next, the distinction between public and private law is examined. According to Ulpian's classical formula, private law concerns individual persons and public law the common good. Other authors, such as Savigny, Stahl, Jellinek, and Kavelin, criticized this understanding and offered somewhat different interpretations. In the view of Gorovtsov, the natural liberty of individuals is the object of private law and the natural liberty of the state the object of public law. This means that restrictions upon the omnipotence of the state, as well as upon individuals in their relationships with the state, constitute public law (p.70). As the individual enjoys a number of natural rights, so the state equally enjoys natural (sovereign) and "facultative" rights.

In order to be able to classify all specific legal disciplines in the first volume of his study, Gorovtsov refers to a certain kind of commonality of the material objects (sub-strata) of all of them. Starting from the distinction between public law in a procedural and a substantive sense, the author argues that the former plays a general role in regulating traditionally interpreted private and public law and their interrelationship. An example of this role may be seen in criminal law, which is neither public nor private law in the traditional sense of these terms, because—while mainly regulating relations between individual persons—it also protects the natural liberty of the state against anti-social elements. The special feature of criminal law is that it protects simultaneously the natural liberty of individual persons and of the state, and that it also provides the possibility of judicial remedy (pp.72-74). The conclusion must therefore be that criminal law is neither civil law nor public law (p.75). At the same time, the sub-strata (interests) of criminal law are located in public as well as in private law. The possibility of punishing individual persons by the public power is specific of criminal law; this is an element of public law in the procedural sense, exercising a function of "reparation".

The major division of law consequently is: private law and public law in a substantive sense on the one hand, and public law in a procedural sense on the other (p.76).

Gorovtsov then examines the public-private law dichotomy in international law. He regards this branch of law as neither belonging to private

nor to public law—although the notions of public and private international law seem to suggest a division of international law according to the public-private dichotomy. If private international law determines the applicability of national law to two or more elements of different states, it really is public law. But international law cannot be public law by itself, because there is no natural liberty which may be restricted, as ordinary national public law does. There is no single public power in international law, but a multiplicity of powers. International law is inter-public, inter-state, inter-national law (p.79) in the same way as private law is inter-individual law. International law is not public law in a genuine, substantive sense, but only in a procedural sense.

Gorovtsov also acknowledged the phenomenon, new to his time, and identified as international administrative law, what we would nowadays call the law of international organizations (p.81). In this case individual states, together with other entities, are subjects of common rules; international law plays the role of public law in a procedural sense. The direct and most important object of this type of international law is the natural liberty of its subjects (states); the sub-strata are the legislative, executive and judicial powers of the national states, which represent intermediary interests, connected with the interests of individual persons (sub-sub-strata) at the national level, both in private and in public law (p.81). The state and its powers, in other words, remain the intermediary between the economic, moral and physical interests of national populations on the one hand and international law on the other.

The last part of the first volume is devoted to the classification of the various legal disciplines on the basis of the new concept of objects in law. Human interests, according to Gorovtsov, are always the sub-strata of public, private or criminal law. But these interests are not the same for each of these branches (p.83). Property interests are always present. Certain moral interests, such as human dignity, may be the object of civil or criminal law. Public law is mainly concerned with physical interests as sub-strata. It is worth noting the the *Habeas Corpus Act*, protecting the physical liberty of persons, is an important source of public law (p.87). Physical interests also form the sub-strata of international law, especially where the regulation of military operations or of military occupation is concerned.

At the end of his first volume, Gorovtsov undertakes the ambitious task to propose a general definition of law. While Kant refers to the harmonization of natural liberty, Jhering to the protection of interests, and Korkunov to the delimitation of interests, Gorovtsov sees the role of law in the unification and harmonization of interests. This leads him to the

following definition: "Law is a set of rules of concordance of interests of its co-subjects by way of reciprocal limitation of their natural liberty" (p.92).

Gorovtsov's conception of the object in law involves the introduction of new notions which transfer the matter to another dimension, where interests representing concrete sub-strata are linked with abstract sub-strata (the natural liberty of persons, mainly human beings and states). This vision offers a new approach in looking at what are referred to as objects in traditional theories of law. An in-depth analysis of the infrastructure of law discovers new types of links and interdependencies between well-known elements.

If previous conceptions have been regarding the interaction between traditionally understood object and subject as, respectively, function and argument, depriving the object of its historically creative role, Gorovtsov's conception divides the traditionally understood object into a concrete and an abstract one, where the former forms the genuine sub-strata and the latter the abstract sub-strata, representing economic, moral and physical interests transplanted from social life and the social sciences.

Many decades after the publication of this conception, the discussion of the private-public dichotomy still follows the same path as in the days of Gorovtsov, encountering the same difficulties. In the meantime, life has moved on and we can now speak of the emergence of an international law above the states, a global law or world public order, and a growing impact of international organizations, despite all their deficiencies. The public law of a new world is emerging and, perhaps, a new natural liberty is beginning to appear, the liberty of mankind.

Gorovtsov's pioneering vision of the internal design of the principles of law, brilliant as it was, should now be redefined in view of the newly emerging conditions. As Mendeleev showed the way to discover new chemical elements with the help of his periodic system, so Gorovtsov's approach can help in drawing conclusions and making plans concerning the development of law. His conception retains its validity today and deserves to survive and be reborn.

Administrative Reform in Central and Eastern Europe: Extracting Civil Services from Communist Bureaucracies

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Introduction

When evaluating administrative reform in post-communist states more than a decade after the start of their economic, political, and societal transformations, the challenge of redefining the role of the state stands out as the most difficult aspect of the process. Undoubtedly, the creation of classical civil service systems—where, in many cases, none had existed before—presented its own significant trials and tribulations; but the real problem has been the extraction of modern administrations from the all encompassing embrace of the communist state. The challenge has not been simply one of physical extraction although questions of how, when, and how much of previous bureaucratic structures should (and could) be preserved have been also highly relevant. The re-creation of public administrations in a period in which the pendulum of societal development had swung away from the dominance of "public" and towards the private sphere—regaining lost ground in what seemed only a fair readjustment of the scales—has been tremendously difficult. In this chapter, I will offer a brief analysis of the process from a public administration perspective, discussing the challenges, the achievements, and the remaining obstacles to administrative reform in Central and Eastern Europe (CEE).

At the end of the 1980s, the domination of communist states and totalitarian regimes was rejected by the people from Berlin to the Balkans and from the Baltics to Central Asia. Even though the regimes that emerged differ dramatically, all of them initially had to face in one form or another the multiple challenges identified in 1991 by Claus Offe: transformation of property relations, transformation of the foundations of the political systems and constitutional rules and, last but not least, redefinition of identity and borders, the whole concept of stateness.[2] Administrative

[1] An earlier version of this work was presented at the 2003 anniversary conference of the Institute of East European Law and Russian Studies: "The Public Private Distinction: The East European Debates at the End of a Decade of Reforms", 26 September 2003, Leiden.

[2] C. Offe, "Capitalism by Democratic Design? Democratic Theory Facing the Triple Transition in East Central Europe", 58 *Social Research* Winter 1991 No.4, 865-892.

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Private and Civil Law in the Russian Federation 279-295

reform was not on this list as it was not considered to be the main area of reform in the early years of the post-communist transformations. Yet as economic and political reforms have progressed—in some countries faster than in others—a stage has been reached at which it has become clear that no market transformation can be complete without efficient administration and regulatory mechanisms that facilitate, rather than hinder, the operation of businesses. As the fundamental institutions of democracy started functioning in the states in transition, it became equally clear that democratic consolidations could not be complete without effective administrations to enforce the rules of the democratic game. In the eyes of the public, the new democratic institutions themselves were often synonymous with state administrations.

New thinking in the academic field has mirrored the new insights based on the decade of democratic experience. More and more in recent years, debates in the scholarly literature on democratization have stressed the role of the state for the success of new democracies. Scholars such as Linz and Stepan and Hanson have gone further by suggesting that—alongside the basic condition of "stateness" as a way of defining a demos and citizenship in a democracy—the existence of a usable state bureaucracy is also a must; without it, a state would not be able to carry out its crucial regulatory tasks related to the establishment of economic society.[3] Given the increasing interest in the role of the state in post-communist transitions, the first part of this chapter will start with a discussion of the importance of developments affecting the state in the post-communist contexts and will link these to the difficulties of creating functioning and legitimate bureaucracies in the context of post-communist transformations. The following section will, then, look at some of the major problems and obstacles in reforming post-communist administrations and will address the question why reforms have remained—for the first five years of CEE transitions—more rhetoric than a reality. The next section will briefly outline the main direction of reform—namely the definition of civil services as separate systems through the passing of civil service legislation. Then I will dwell on the problems which remain and which

3 J. J. Linz and A. Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America and Post-Communist Europe*, Baltimore/London 1996. Starting from the premise that "without a state, no modern democracy is possible", Linz and Stepan develop their analysis to suggest a usable bureaucracy is also vital for the functioning of the market (p.17, p. 13). Stephen E. Hanson suggests that an institutional definition of a consolidating democracy should involve a democracy in which there is a critical mass of officials to administer formally democratic institutions (S. E. Hanson, "Defining Democratic Consolidation", in R.D. Anderson, Jr., M. Steven Fish, S.E. Hanson and P.G. Roeder, *Post Communism and the Theory of Democracy*, Princeton/Oxford 2001, 141).

prevent the predominantly legal reform that has taken place so far, from leading to a change in bureaucratic behavior.

The chapter draws mostly on my research in administrative reform in Central and Eastern Europe and, in particular, focuses on the new EU member states as administrative reforms there have been under way for some time. However, two important points must be borne in mind when considering the differences and similarities of countries linked by a common past of communist regimes. *First*, in terms of actual developments in the area, it has to be noted the trend towards reforming post-communist administrations is not restricted to EU member and candidate states. In the last five years, a number of reforms have been started in Russia with the goal of reforming the state administration. These have comprised significant restructuring of Ministries, federal agencies, and other administrative units, functional reviews and reforms of regional government. In the case of Russia, however, it is too early to assess in what direction this process will unfold and what obstacles will be put in its way by bureaucratic resistance and institutional inertia.

Second, talking about common post-communist problems in reforming administrations might seem too far-fetched today when different transition trajectories have led to different outcomes in terms of democracy, but has a rationale, which is less historical than structural. Clearly small states like the Baltic countries, Hungary, Slovenia—where consolidated democracies seem to be already a reality for some time—present less of a challenge than, for example, Russia or the Ukraine. Yet there are still common features stemming from the common legacy that has been inherited by countries from the former communist bloc. Although geography nowadays appears to triumph over history in deciding the path and fate of states—especially those within the reach of the European Union—the common legacy has also meant common problems. So even though it is not justifiable any more to speak of states in the East of Europe as one group, the reflections on the challenges to public governance in Central Europe and the shaping of the new administrations should have some validity and resonance further afield.

Administrative Reform in a Post-Communist Setting

What is the significance of administrative reform in the light of the theme of this collection, the public-private distinction? In the first place, aspects of the public-private distinction have determined the character of reform in a post-communist setting; after all—whatever the precise starting conditions or the *status quo* at the start of post-communist transformations—the subject of reform was the public sphere, which was all encompassing

under communism. Therefore, administrative reform in post-communist states of CEE has not, in the first place, been reform of the type seen in the West in the last several decades, that is, New Public Management (NPM) reform.[4] It has not, like NPM, been a move of limiting bureaucracy and the state's involvement and replacing étatist practices with private management tools. The first priority in post-communist states has been different, namely to reclaim part of the public sphere that has to remain public. Metaphorically speaking, bureaucracies needed to be rescued from the vast totalitarian and authoritarian states in which they were embedded. The story of reform in a post-communist setting is—in the first place—the story of a struggle to find the boundaries and the legitimacy of public authority of administrations and civil servants that had served an oppressive state.

Starting reform from a system in which the public part of the public private equation dominated and became the sole controlling force of society meant that even states such as Hungary—which had historical experience with the emergence of a civil service based on professional principles—lost the concept of the service as a separate public body. This is hardly surprising, as outlining the function of public *versus* private service could have no real meaning under regimes in which there was officially very little "private". At best, states like Hungary or Czechoslovakia had professional experts, technocratic elites, and capable managers in their administrations, but these ultimately served the regime and not the people: they were "state servants". At worst, bureaucracies epitomized both the oppressiveness and arbitrary power of communist regimes and their inefficiency.

Not only were communist administrations indistinguishable from the all pervasive state, they were also penetrated structures in which the communist party bureaucracy served as a second tier of administration dealing with actual policy making.[5] The communist party bureaucratic structures were integrated in the administrations and dealt with issues such as personnel policy; often, they were the only units to have some policy planning and strategic functions.[6] The extraction of the parallel

4 On trends in administrative reform, see T. A. J. Toonen, "The Comparative Dimension of Administrative Reform: Creating Open Villages and Redesigning the Politics of Administration", in B.G. Peters and J. Pierre, (eds.), *Politicians, Bureaucrats and Administrative Reform*, London 2001, 181-201.

5 See, for example, T. Verheijen and A. Dimitrova "Private Interests and Public Administration: The Central and Eastern European Experience", 62 *International Review of Administrative Sciences* 1996 No.2, 197-218.

6 An additional source of communist party domination of the civil service was the fact that training of top level officials took place only in communist party training institutions, "academies" that focused on ideology rather than management.

communist bureaucracy—at least from the higher levels of administrations—in CEE has been a difficult process fraught with normative and policy dilemmas. Attempts at passing lustration legislation, for example in the Czech Republic, have been criticized by the Council of Europe as potential infringements of human rights and discrimination. Ultimately, the dilemma of how to deal with communist functionaries who had been performing (sometimes with years of experience and in good faith) key tasks in administrations remained unresolved. Instead, new elites in government engaged in large-scale dismissals—more often than not politically motivated—which resulted in high turnover and great instability in CEE administrations in the early 1990s. Even today, experts note the high politicization of personnel policy in the post-communist administrations. The redefinition of the interface between politics and administrations remains a common problem for post-communist administrations.[7]

An even more difficult aspect of the creation of the new administrations was linked to the redefinition of the role of the state in the economy. The task of conceptualizing reform was all the more difficult as, after the collapse of communist regimes, the pendulum of ideas about the public/private divide had swung to the side of the market, assuming that the cure for having had an all-pervasive state was for states to be pushed back as much as possible. At the same time, the multiple character of transformations in a post-communist setting and, in particular, the challenge of restructuring the system of property relations led to an unanticipated threat to the post-communist state. This threat arose early on in the process of extraction of state assets which took place parallel—and in some cases prior to—democratic transitions through privatization and restitution processes in which, on the one hand, state officials played a role and, on the other, the state was often stripped of its assets.[8] These transformation developments resulted in weak states, as pointed out by Krastev, in at least two senses. In the *first* place, many post-communist states were weak states in the sense of Joel Migdal,[9] lacking the capability of implementing their policy visions and of regulating society—a crucial

7 T. Verheijen, "Introduction", in *idem*, (ed.), *Politico-Administrative Relations: Who Rules?*, Bratislava 2001, 7.

8 On the issue of separation of party and state see Venelin I. Ganev, "The Separation of Party and State as a Logistical Problem: A Glance at the Causes of State Weakness in Post-communism", *East European Politics and Societies* January 2001 and I. Krastev, "The Inflexibility Trap: Frustrated Societies, Weak States and Democracy", *Report on the State of Democracy in the Balkans*, Centre for Liberal Strategies, Sofia (February) 2002.

9 J. S. Migdal, *Strong Societies and Weak States: State Society Relations and State Capabilities in the Third World,* Princeton 1988.

capability in a period of reforms. The emerged democracies showed to varying degrees the state weakness problem also in their ability to deliver public goods, of securing the rule of law and human rights of its citizens. *Second*, these states have often been "captured states", that is states in which a particular group of interests has dominated the policy process and shaped, often illicitly, the rules of the democratic game.[10]

The challenges to administrative reform were not identical with these forms of state weakness, but the functioning of administrations was clearly affected by them in terms of both the legitimacy of the post-communist administrations and their effectiveness and efficiency. In both respects, post-communist bureaucracies had heavy legacies to overcome. The overarching question of how far states' weakness can be addressed by strengthening bureaucracies without damaging democratic accountability and freedoms is still unresolved—a question which is more valid for Russia than for the Central and Eastern European states.

Defining the New Administrations

Given that the debate about the role of the state remained unopened throughout the 1990s, it is hardly surprising that administrative reform was not a priority in the early years of transition and in fact, as Verheijen claims, was practically neglected.[11] And yet, in the late 1990s, it became clear that without civil service reform both the functioning of the market and the legitimacy of governments would be undermined. In fact, some analyses such as the above-mentioned essay by Stephen Hanson have gone as far as to claim that—without a corps of officials prepared to enforce the laws of the new regime and obey the rule of law—we cannot speak of the consolidation of a democracy.[12]

Reform was on the cards but what kind of reform? Given that civil services had to be extracted from the convoluted Kafkaesque corridors of power of the communist state, what was required was a clear vision for a real revolution in public governance. Such a vision did not materialize. Instead, civil service reform, in particular, remained for quite a while the subject of empty rhetoric. Part of the problem was that, as mentioned above, the prevailing Western NPM model suggested limiting the role of the state and using a number of techniques from the toolkit of private management—and these were not directly applicable to the situation described above.

10 *Op.cit.* note 5.

11 *Op.cit.* note 4, 6.

12 Hanson, "Defining Democratic Consolidation", *op.cit*. note 3.

Administrative reform in Central and Eastern Europe had to confront a different set of problems than reform in OECD states. The most significant difference is perhaps that—while fiscal crises as well as the rise of neo liberal ideas have made New Public Management the most important administrative reform model for the West[13]—in the CEE states, NPM ideas have been eclipsed by the task of *creating* or in some cases *recreating* a classical civil service of a type that could not exist in the communist period. NPM approaches started developing from exactly the opposite direction to correct perceived problems with established state administrations that already existed as neutral, professional, career systems.

As discussed in the previous section, the challenge of creating modern administrations was part of the bigger puzzle of how to dismantle the totalitarian state, but preserve important functions of the state in general. Hardly any government or post-communist elite, however successful, handled this challenge very well. The inapplicability (or inadvisability) of applying NPM in its full blown version, however, meant that it was not clear what ideas could inspire the much needed reforms in Central and Eastern Europe. Even though a coherent model could not be imported from the West, nevertheless, administrative reform has been led—in almost all Central and Eastern European states but Hungary and to a certain extent Poland—by external advice and influences.

The reason for this was that—even when it became clear that administrative reform would require the securing, through legislation, of the role and place of the service *vis-à-vis* politics—political elites were reluctant to contemplate the adoption of legislation that would limit their power to hire and fire; a power that was used so widely in the polarized polities of CEE that every new government replaced not only the top but also middle level civil servants, thus weakening even more the administrations expert potential.[14] The reforms, when they were finally introduced, were the result of substantial external pressure and conditionality which were especially effective for those CEE states hoping to become EU members. The push from outside helped reformers by changing the domestic structure of opportunities and giving them a chance—even in states in which they were in a minority.

At their initial stage, reforms consisted above all of legislative change, adoption of laws on the administration and the civil services, which have outlined what a civil service is and who is a civil servant. These laws established—for the first time in modern history for most CEE states—

13 Toonen, "The Comparative Dimension of Administrative Reform", *op.cit*. note 4.

14 For an illustration of these processes, see the chapters in the volume by Verheijen, *Politico-Administrative Relations: Who Rules?*, *op.cit.* note 7.

the boundaries of their administrations as public bodies as well as creating some protection for the administration from political interference.[15] It is remarkable that no CEE country with the exception of Poland, which had a law from 1980s, had such legislation. Apart from Hungary that started its reform in 1992, most CEE states did not really start defining their administrations in legislative terms until the mid- and, in most cases, the late 1990s. Poland adopted its law on the administration in 1996 only to abandon it in favor of new legislation in 1998. The Baltic states started in the 1995-1996; but reform was piecemeal in the mid-1990s, and they only intensified their efforts towards the end of the decade. Bulgaria and Romania adopted their laws in 1998-1999, Slovakia in 2000 and finally—after prolonged political disagreement over securing the position of civil servants—the Czech Republic adopted its law in 2002. The civil service legislation adopted is summarized in Table 1.

Table 1: Civil Service Legislation in Some Central and Eastern European States[16]

State (EU or candidate EU member)	**Laws on the civil service or the civil servant**
Bulgaria	State Administration Law 1998 (amendment 2001, amendment 2003) Civil Service Law (adopted 1999)
Czech Republic	Civil Service Legislation (May 2002, (most provisions entered into force 2004)
Estonia	Public Service Act (adopted 1995, in force 1996), Law on the Public Administration 2001 (in force 2003)
Hungary	Civil Service Law/Legal Status of Public Officials (1992, amended June 2001)
Latvia	Law on Civil Service (1994), State Civil Service Law (adopted 2000, entered into force 2001)
Lithuania	Law on Officials (1995), Civil Service Law (1999, several amendments, latest 2002), Law on the Organization of the State Administration (1998)

15 Remarkably, this initial move of securing civil service positions seemed a development in the opposite direction to NPM reform measures which *inter alia* aimed to re-establish the control of politics over administrations. This makes sense taking into account the dramatically different starting positions of reforms outlined earlier in this chapter.

16 Reproduced with some updates from: A. Dimitrova "Enlargement, Institution Building and the European Union's Administrative Capacity Criterion", 25 *West European Politics* October 2002 No.4, 183.

Poland	Law (adopted 1996, revised), the new Law on Civil Service (adopted 1998)
Romania	Law on the Statute of Civil Servants 1999, Law on the Statute of Civil Servants (1999)
Slovakia	Civil Service Law (adopted 2001 after protracted debates and amendments)
Slovenia	Package of civil service laws (passed in 2002), in particular the Public Administration Law (2002), Law on the Civil Servants (2002), and others.

Alongside these basic laws, new legislation on free access to information has been adopted in CEE as a democratic innovation and part of the administrative reform package. In adopting such legislation, CEE states have converged with a group of forerunners in transparency and administrative reform, as not all states in Western Europe have access to information laws. Table 2 summarizes the adopted legislation and the restrictions imposed on it by another new wave of laws regarding classified information.

Table 2: Freedom of Information Legislation in CEE [17]

State	**Access to public information law adopted**	**Restricted by**
Bulgaria	Law (adopted June 2000, amended 2003)	Law on the Protection of Classified Information (2002)
Czech Republic	Law (adopted 1999)	Protection of Classified Information Act (adopted 1998)
Estonia	Public Information Act (adopted 2000)	State Secrets Act (1999, amended 2001)
Hungary	1992 Act on Protection of Personal Data and Disclosure of Data of Public Interest Excluding State Secrets: Article 19(3)	Act LXV 1995 on State and Official Secrets (amended 1999)
Latvia	Law on Freedom of Information (1998)	Exception to the freedom of information law, chapter 2, section 3; State Secrets Act 1997
Lithuania	Law on Provision of Information to the Public (2000)	Law on State Secrets and their Protection (1995)

17 Sources: A. Roberts, "NATO, Secrecy and the Right to Information", *EECR* 2002/2003 at <http://faculty.maxwell.syr.edu/asroberts/documents/journal/EECR_2003.pdf>, accessed 23 March 2004; Stability Pact for South Eastern Europe Media Task Force, summary by Y. Lange.

Poland	Act on Access to Information (2001)	Classified Information Protection Act (1999)
Romania	Law Regarding Free Access to Information of Public Interest (2001)	Law on Protecting Classified Information (2002), State Secrets Law (April 2002)
Slovakia	Freedom of Information Law (2000, entered into force 2001)	Law on Protection of Classified Information (2001)
Slovenia	Act on Access to Information of Public Character (2003)	Classified Information Act (2001)

As can be seen from Table 2, the democratic transparency gained with the access to information legislation has been curtailed by legislation on state secrets and classified information which has been adopted by a number of CEE countries as a condition for joining NATO.[18] Legislation on classified information has limited the scope of freedom of information acts and has made implementation more difficult as refusals to provide information—even in states in which the transparency laws are widely used by the public and NGOs—are not uncommon. The possibility of using classified information legislation as ground for refusals raises some doubts and worries about implementation.

On the whole, it can be said that—after some stops and starts—administrative reform has taken off in Central and Eastern Europe at the end of the 1990s and beginning of the 2000s as evidenced not only by the laws mentioned above, but also by other legislation regulating public procurement, budget laws and the wide spread use of e-government. Developments were also spurred by the creation of administrative reform strategies and action plans and by institutional restructuring underpinned by instruments such as functional reviews. The overall picture is one of a considerable move towards new administrative systems following the model of a neutral administration separate and (to a certain degree) insulated from politics.

The model followed has been closest to the classical Weberian bureaucracy model, stressing rule of law, hierarchy, separation of administration and politics. The push to institutionalize tenure was not unambiguous and was not accepted without resistance from politics. Quite a few of the laws, *e.g.*, the most recent Hungarian and Polish amendments, have institutionalized political cabinets and politically pointed employees which goes against the principle of the neutrality of the civil service. This—and the use of measures from the NPM toolkit (but not the whole philosophy) such as strategic planning, financial and budgetary audits, performance

[18] Roberts, *op.cit.* note 17.

related pay and indicators—have led some observers to conclude that the model followed is more of a mixed one between the classical admin and NPM.[19]

Why aim to create administrations, which come closer to the classical Weberian model, to the German or French tradition than to popular Anglo-Saxon ideas of administrative reform inspired by business and management principles? At first glance, one could be left with the impression that reformers in Central and Eastern Europe simply lagged behind in their reform ideas. However, the arguments offered above suggest that the starting position of reform in CEE required first establishing civil service systems which were stable and somewhat insulated from daily political interference and, then, dealing with issues such as performance indicators or quality control. The debate regarding the extent to which civil servants should have been offered job security in the new legislation is still open, and there are those who believe that more possibilities to hire and fire based on performance would have ensured more flexible and efficient administrations. However, there was a second set of factors, which ensured that new legislation leaned more towards the classical model than towards NPM—international factors.

The Role of International Factors in Reform

While domestic arenas and the interaction of important actors remained decisive for the success or failure of legislative reform, there was also constant and considerable pressure for change exercised by the European Union, the OECD, the World Bank, in some cases the IMF and NATO. Evidence that external pressures played a significant role can be found in the very array of civil service legislation adopted as a response to EU conditionality in almost all of the post-communist states.[20] After the meeting of the European Council in Madrid in 1995, the European Union made administrative capacity to implement its *acquis* a formal criterion for membership. Standards and principles for the development of the civil services were developed by the OECD's group SIGMA[21] at the request of the EU. Compliance with OECD criteria and standards and EU require-

19 See D. Bossaert and C. Demke, *Civil Services in the Accession States: New Trends and the Impact of the Integration Process*, Maastricht 2003.

20 *Op.cit.* note 15.

21 SIGMA stands for Support for Improvement in Governance and Management in Central and Eastern European Countries and it was established in 1992 as a joint initiative of the OECD Center for Cooperation with Non-Member Economies and the EU's PHARE program.

ments became a main condition for the success of new legislation which was often written with these criteria in mind.[22]

In defining standards for the emerging civil service systems, the OECD/SIGMA experts attempted to extract what they saw as principles common for European public administrations such as accountability, transparency, rule of law, predictability, effectiveness and efficiency.[23] OECD experts had even claimed that administrations of the EU member states were becoming more alike with time; thus, there was an emerging European Administrative Space. The existence of such a space is itself a disputed idea,[24] but—as a consequence of such ideas—OECD experts were able to formulate the general principles which were to underpin the civil service systems established with the new legislation.

For the CEE countries aiming to join the EU, the significance of the push from outside is also in the fact that the laws were reformed from above and—in only a very few cases—there has been sufficient domestic debate, among politicians, experts and the general public on the form and model of their civil service systems. The lack, in many CEE states, of public debate on issues of administrative reform is significant and may be expected to have some negative consequences in the future such as administrative resistance and inertia. Yet given the reluctance of political elites to protect civil servants from their own political interference, external pressure may have been—at least for some CEEs—the only way to start real reforms.

It is, however, too simplistic and Western centric—even if not uncommon—to explain post-communist administrative reform as a struggle between the good practices and principles disseminated by the West and the bad organizational legacy of in the East. A more realistic picture of the complex interplay between domestic and external factors would be a sequential one whereby once conditionality has helped tip the scales in favor of reform in the political arena, a process of lesson-drawing has started and has ensured that CEE states look to Western practices for inspiration for the exact shape of reform.[25]

[22] See, for example, the evaluation of the Polish law which states that: "[t]he system is compliant with the standards of political neutrality, impartiality and professionalism adopted in the EU member states and in the OECD countries" at: <http://usc.gov.pl/gallery/24/249.doc> accessed 23 March 2004.

[23] These principles were defined in an OECD/SIGMA paper, SIGMA 1999. "European Principles for Public Administration", *Sigma Paper No. 27*, CCNM/SIGMA/PUMA (99)44/REV1, Paris (OECD).

[24] Johan P. Olsen, "Towards a European Administrative Space?", *Arena Working Paper*, WP 02/26, 2002, at: <http://www.arena.uio.no/publications/wp02_26htm>.

[25] See the volume by F. Schimmelfennig and U. Sedelmeier, *The Europeanisation of Eastern Europe*, Ithaca, NY 2005.

Evaluating Progress Thus Far

The real question behind this story still is, however, whether the adoption of legislation and strategies for reform (as well as training) has led to a real change in the way administrations operate in CEE. A few years ago, the experts following attempts at administrative reform since the 1990s, evaluated them as a partial, not very successful, effort.[26] Today, there is—perhaps—more evidence that some of the rules introduced a few years ago are beginning to result in changes in behavior. The picture, however, remains a mixed one.

Officials themselves point to a sequence of reform steps: there is a unanimous belief that the installing of the rules has been a first step.[27] Some civil servants tend to find fault with the quality of the legislation, seemingly pointing to an explanation of remaining deficiencies linked to the character of the adopted rules. Mostly, however, those directly involved define the problems of reform in normative terms such as the lack of shared expectations and beliefs among bureaucrats regarding themselves: they should function as neutral and professional servants of the public rather than as authoritarian and arbitrary cliques. Thus, it seems as if the identity of civil servants, their self-image has been slow to change. They do not yet perceive themselves as servants of the public (the word "civil" servant does not even exist in many local languages) and even less so as service providers.

Although the progress made in some states—for example Estonia or Hungary—is much more significant than what has been achieved in Bulgaria, Slovakia, or Romania, on the whole, serious problem areas remain. The legitimacy of public service in Central and Eastern Europe is still quite low even if we factor in the fact that administrations all over the world are often criticized by the public. Perceptions of corruption are widespread from the Czech Republic to the Balkans.[28]

[26] For example, see T. Verheijen, "Civil Service Systems in EU Candidate States: Introduction" in T. Verheijen, (ed.), *Civil Service Systems in Central and Eastern Europe*, Cheltenham, UK 1999, 85-92 and *idem*, "Administrative Capacity Development: A Race Against Time?", *WRR Working Document 107*, (Scientific Council for Government Policy), The Hague 2000; also K. H. Goetz, "Making Sense of Post Communist Central Administration: Modernization, Europeanisation or Latinization?", 8 *Journal of European Public Policy* December 2001 No.6, 1032-1051.

[27] This paragraph is based on interviews with senior civil servants in Bulgaria in 2002.

[28] As witnessed in the last pre-accession report of the European Parliament which noted "persistent high level of corruption" in Latvia, "continuing damage inflicted by corruption in Poland" and in a separate report, the "high level of corruption" in Romania. See European Parliament, "Report on the Comprehensive Monitoring

Allegations of corruption often point not only to the phenomenon of using public positions for private gains as to the mistrust in authority and dissatisfaction with government. In fact, as Alina Mungiu-Pippidi has persuasively argued, "corruption is singled out only for a lack of a better word" to refer to a host of phenomena such as the "blurred boundaries between politics and business", "the partisanship of the media", "the failure of politicians to construct a public-interest space, a failure that leaves blatant partisan interests to reign over every aspect of life". It is, she suggests, an accountability deficit to which citizens refer when they answer questions on corruption in surveys or refer to it in daily discourse.[29]

Citizens' perception of a lack of accountability and service culture in the administration are a real indicator of the true state of reforms both in politics and administrations. Without further changes to respond to citizens' expectations, all legislative reform until now may be rendered useless. The overwhelming perception that bureaucracies do not serve the public represents a serious warning of the limitations of reforms thus far. However, if there is any reason for optimism, it is in the role that citizens themselves could play in making administrations (and politics) more accountable. However imperfect post-communist politics are, a generally free and fair electoral process—and the numerous mechanisms introduced to ensure accountability between elections—give citizens and non governmental organizations many more opportunities to hold elites and bureaucracies (more) accountable. Again, it is a fact of post-communist politics from Prague to the Black Sea that apathy and disenchantment with those in power (and the presumably reformed bureaucracies) are often the predominant responses of citizens. Nevertheless, the increasing use of a number of legislative instruments to challenge governments on issues ranging from human rights to access to information points to the emergence of an opposite tendency of civic activism. The new rules—for example the access to information legislation mentioned above—open the way for non-state actors to monitor the administration and name and shame bad practices. It cannot be stressed enough that none of the remaining tasks of administrative reform can be accomplished without citizen participation. This is also true of the fight against corruption in a narrower sense: however many committees on the fight against corruption governments establish, they will not go beyond strategy and top-down

Report of the European Commission on the State of Preparedness for EU Membership of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia" (COM(2003) 675–C5-0532/2003–2003/2201(INI)), Final A5-0111/2004, 25 February 2004 and European Parliament "Report on Romania's progress Towards Accession" (COM(2003) 676–C5-0534/2003–2003/2203(INI)) A5-0103/2004.

29 A. Mungiu-Pippidi, "Culture of Corruption or Accountability Deficit?", *EECR* Fall 2002/Winter 2003, 80.

approaches without a leap of faith on the part of every citizen that s/he can cope with bureaucratic procedures without needing the grease of a bribe.

After the stage of intense legislative reform in CEE, it is now becoming clear that it is time for efforts to implement adopted legislation and to introduce non-legal instruments (such as codes of ethics to support it). Implementation of the new legislation has clearly encountered obstacles—for example, in reported cases of circumvention of hiring through competition requirements in Bulgaria. It is also becoming clearer that reform is nowadays a question of creating a new generation of civil servants with different attitudes and the knowledge and skills needed to support a market economy. There is still a need for professional civil servants—not only in the sense of people possessing expertise and training in a particular field, but also in the sense of members of a profession who carry a set of internalized norms (such as a commitment to serving the public). The response of governments to this challenge has thus far mostly comprised training. Comprehensive training programs in Poland, Hungary, and the Baltic states and public administration schools created almost in every Central and Eastern European country have the potential of training the new generation of civil servants with a new mentality. However, personnel policies in the civil services themselves need to be adjusted in such a way that idealistic new recruits do not get absorbed in a culture of bureaucratic inertia, for example by linking pay closer to educational backgrounds or by using techniques such as rotation of personnel.

The need to overcome the bureaucratic mentality of the past is not only linked to the demands and expectations of citizens but, also, to the needs of business and the market. It is a question of limiting regulation by revising an overwhelming number of rules hindering business activities. Functional reviews and other diagnostic tools have been used as a means to identify possible cuts in overly heavy organizational structures, but institutional inertia and sense of self preservation often stand in the way of potential changes following such reviews. Still, with a view to facilitating business and fighting corruption, CEE governments have been advised by various international organizations and business representatives to limit the burden of licensing regimes and transfer licensing tasks to branch organizations. Today, measures to limit administrative and regulatory burdens on business are a task at least as important as the creation of the civil services themselves. They are also a component of reform that is likely to encounter much more resistance than the civil service legislation as it involves the streamlining of departments and units, which do not perform essential functions.

In Conclusion

The task of extracting the administrations from the ruins of the communist state—which threatened to bury public authority by delegitimizing it—has been one of the unforeseen challenges of the post-communist transformations in the last ten years. It is part of the bigger problem of weak states—that are unable to perform public policy functions effectively and are often dominated by networks—which undermine the ability of governments to uphold the rule of law. Administrative reform and reforms of the judiciary are both needed in order to strengthen the ability of post-communist states to deal with the real challenges of governance. The carrying out of such reforms—increasing the effectiveness of administrations without endangering fragile new democratic practices of accountability, openness, and transparency—will be a balancing act which will remain central to the success of post-communist transformations in the coming years.

Post scriptum

During the preparation of this article for print, there have been significant developments in public administration reform in Central and Eastern Europe. Even though it is not possible to summarize them here, one main trend should be highlighted: the reversal of some of the reforms through legislative amendments limiting the independence of civil services.

This process of backsliding has been analyzed and documented in a recent World Bank study (*EU-8: Administrative Capacity in the New Member States: The Limits of Innovation*, Washington, DC 2006) and should be taken into account when considering the state of administrative reform in the region.

La Propriété c'est le vol: "Property is Theft" Revisited

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Introduction

This chapter will limit itself to raising some questions about the impact of a property rights theory on social transformation. "Property is the key": with these words, Professor John Hazard opened the first chapter of famous book on *Law and Social Change in the USSR*.[1]

> "No branch of law has seemed more important to Soviet leaders than that which concerns property relationships. While the subject has been treated traditionally in other countries as the very heart of 'private law', it has always seemed to Soviet authors to contain a 'public' quality. It has been looked upon as the key to power."[2]

John Hazard stressed the originality of the Soviet property law system and its pivotal role in the allocation of wealth and organization of society. At the same time, he referred to Article 58 of the 1922 RSFSR Civil Code—which adopted the conventional language of continental civil law codes—to say that "within the limits set by law, the owner has the right to possess, use, and dispose of his property". Examination of the subsequent provisions of the code and of judicial decisions and administrative regulations at that time indicated the character of the limitations on property rights.[3] The fundamental interest of Hazards' approach was, however, to analyze the steps that were taken to utilize the formulae of the law and the institutions of the lawyer to direct social change.

It was Professor Raissa Khalfina of the Institute of State and Law at the Russian Academy of Sciences in Moscow, a specialist in Soviet civil law, who remarked in a personal conversation with the author of this chapter—which took place at the beginning of *perestroika*—"that you cannot go unpunished for a re-qualification of state property into private property, as it concerns different types of property, and behind this, different roles they have to play in society".

Today, when discussing the Yukos affair, many Russian and foreign commentators mention theft of state funds. But this analysis of privatization as robbery or theft is not without discussion. Such a qualification

1 J.N. Hazard, *Law and Social Change in the USSR*, London 1953, 1-33.

2 *Ibidem,* 1.

3 *Ibidem,* 21.

William B. Simons, ed.
Private and Civil Law in the Russian Federation 297-326

of privatization as theft of state property implies that one starts from the definition of state property as the "property of the whole people", which was indeed ideologically correct; however, not legally. Seen from a legal point of view, state property was the strange absolute and exclusive property ownership of the state as the sole legal subject being able to appropriate this kind of property. One can argue that the whole privatization process—with legal figures such as the leasing of state property, sale by auction and loans for shares—was set up to counter this reproach of robbery or theft, and to make the new private property legal; however, not legitimate.

In our view, the main challenge for the future of property ownership in Russia will be to re-design a balance between, on the one hand, the individual function of property ownership and other rights *in rem* (as the foundation and guarantee for personal freedom, creativity and entrepreneurship) and, on the other hand, the social function of property (as the basis for economic development, social justice, social peace, and public interest). This tension between the individual and the social function of private property ownership has increased in the course of privatization. Probably, such a development will ask in the near future for more differentiation in property rights and other rights *in rem* than that which the 1994 Russian Civil Code offers at this moment.

As a problem of transition and change in post-communist paradigms, the comparative property rights discussion is especially interesting from the point of view of legal reception. In the framework of post-communist transition, new concepts change labels on the old structures but are unable to put aside those old structures. This imposes a threat of semantic distortion of the new concepts, when the gap between legal appearance and reality becomes too broad. One concept, *in casu* private property—with an established connotation in the West—seems to relate to several levels of meaning, to several phenomena. Legal concepts, indeed, as "*faux amis*". [4]

Within the framework of this chapter, we will limit ourselves to the following question:

How to define the social function of property ownership when we can now observe that the political elite in Russia in general is "playing" with the legal concept of private property and that private ownership has even become the legitimation for a situation that clearly disbalances the public and the private?

In today's Russia, the elite has become so private-property based that its members risk to control the political process and the democratic

4 A. Nussberger, "Die Frage nach dem *Tertium Comparationis.* Zu den Schwierigkeiten einer rechtsvergleichenden Analyse des russischen Rechts", *Recht in Ost und West* 1998 No.3, 84.

procedures while—at the same time—an enormous problem of social justice arises among the population.

A Theory of Property

Since the nineteenth century, nearly all discussions on property relations have been dominated by the critique of socialists and Marxists on the system of generalized private property, which forms the basis of the Western market model of industrial society. As a counter-pole against the principle of private property, the pre-liberal tradition was placed on the foreground: the idea—which is common to all theories—of property that, in a golden age of humanity, a primitive or ideal communism existed.[5]

The liberal concept of property is expressed in the *Déclaration des droits de l'homme et du citoyen* of 1789 and in other documents of the bourgeois revolutions which put an end to feudality structures and royal absolutism. Property was considered in that framework as a "natural and inalienable right, one of the fundamental rights of man, which has to be guaranteed by governmental power without distinction" (Art.2, *Déclaration*). The same idea is repeated in the 1948 Universal Declaration of Human Rights (Art.17).

The right to property as a subjective right was, thus, presented as the natural consequence of recognizing the basic principle that a human being is the bearer of inalienable rights. The reasoning of John Locke—who is generally recognized as the founder of a liberal theory on ownership—can, indeed, be criticized from its ethically disputable grounds. The outgoing idea, formulated by Locke in his *Second Treatise of Government*, was that a human being is the absolute owner of her person and body and, consequently, also of the fruits of her labor. In this way, Locke was the first to make a case for property of unlimited amount as a natural right of the individual prior to governments and overriding them.[6] This "labor theory of property"—being the justification of all property—became the basis and framework for liberal capitalist property relations. From this philosophy, we come to the general legal formulation of property ownership in civil law countries: that private property ownership is the most absolute right of possession, use, and disposal and that state interference is not allowed—except in cases of expropriation for public use and with

5 F. Engels, *Der Ursprung der Familie, des Privateigentums und des Staats*, in: Marx-Engels, Augewählte Schriften, Vol. II, Berlin 1977, 155-301; J.J. Rousseau, *Du contrat social*, ed. Guillemin, Paris 1963, 292 (Discours sur l'inégalité parmi les hommes, second part).

6 C.B. Macpherson, *Property. Mainstream and Critical Positions*, Toronto, Buffalo 1978, 14.

due compensation to the owner. In other words, the state had as its most important duty to legally protect property as it was rightly acquired. This implies that existing property ownership is protected by law, while the sources and the social function of that property ownership are not further questioned by law.

Post-communist transition and privatization equally rely on this liberal theory, aiming at the legitimation of private property as, if not the sole, then in any case the most genuine form of property. The formula of private property ownership as an absolute right—that only can be taken for public use and with due compensation to the private owner—is typical for the new constitutions and civil law regulations in post-communist countries. However, in post-communist countries, this liberal theory of property ownership (and its legal expression in the so-called absoluteness of private property ownership) is introduced subsequently to (and imposed upon) a fundamentally different communist logic of property ownership.

The differentiation between individual property and collective, social property (*i.e.*, property with a social function and relevance for the collectivity) was remarkably underdeveloped by Soviet law and practice because law eliminated autonomous subjects of property where it concerned the most important wealth in society. This was, essentially, what was meant by a "single fund" and the "indivisible ownership" of state property. In this way, the individual function of property—as the basis for freedom (of the individual and of entrepreneurship)—was missing during "real socialism". The indivisibility of state property hampered differentiation and made it difficult to consider individual private property as a foundation for personal development and entrepreneurial initiative, even to speak about rights *in rem*—although the right of operative management or governance (*pravo operativnogo upravleniia*)—conferred upon state enterprises was, in essence, a strong real right to state property. Personal property was introduced by the 1936 USSR Constitution as fundamentally different from private property; this kind of property was highly functionalized by its aim (personal consumption and use only) and by its source (labor income only). Unfortunately, this reasonably consistent system of Soviet property law, based on the idea that production was the responsibility of the state, simultaneously supplied one of the principal components of Soviet totalitarianism.[7]

We should also bear in mind that, in Western Europe, this liberal theory of property ownership has been criticized from its very beginning. A liberal approach to property was seen by some philosophers and legal theorists as leading to a property ownership structure in society that fun-

7 F.J.M. Feldbrugge, *Russian Law: The End of the Soviet System and the Role of Law*, Dordrecht 1993, 229.

damentally contradicts social justice and is set against a well understood "labor theory of property". How to reconcile a liberal property right with the right of all individuals to use and develop their capacities? Liberal democracy faces this ethical dilemma to this very day. This brings us to Proudhon, as one of the most convinced protagonists of a re-thinking of the social function of property ownership.

Proudhon's Criticism of a Liberal Theory of Property Ownership

"*La Propriété, c'est le vol*" ("Property is Theft") is the provocative formula of Pierre-Joseph Proudhon (1809-1865) who—in opposition to Marx—developed a socialist, anti-authoritarian political philosophy. Through Mikhail Bakunin, Proudhon's ideas passed into the historic anarchist movement. Proudhon situates himself within a range of publications, questioning property ownership in the second half of the eighteenth century, of which Jean-Jacques Rousseau with his *Discours sur l'origine et les fondements de l'inégalité parmi les hommes* is another well known protagonist. In 1840, Proudhon wrote *Qu'est-ce que la propriété. Recherches sur le principe du droit et du gouvernement* and, in doing so, created a scandal because he affirmed that property is theft: "*La propriété, c'est le vol.*"[8]

Proudhon denounced private property in its social "deviation" (*détournement*) but, at the same time, opposed collective property,—advanced by communism—as he was persuaded that only a society without government is able to establish social harmony. The First International was, indeed, destroyed in the great fight between those who supported a libertarian socialism of the kind Proudhon had advocated and those who followed the authoritarian pattern, devised by Karl Marx. Kropotkin and Herzen were all his confessed disciples. Even Tolstoy sought him and borrowed the title and much of the theoretical background of his masterpiece *War and Peace*, from Proudhon's book, *La guerre et la paix*.[9]

8 "Si j'avais à répondre la question suivante: Qu'est-ce que l'esclavage? Et d'un seul mot je répondisse: C'est l'assassinat, ma pensée serait d'abord comprise. Je n'aurais pas besoin d'un long discours pour montrer que le pouvoir d'ôter à l'homme la pensée, la volonté, la personnalité, est un pouvoir de vie et de mort, et que faire un homme esclave, c'est l'assassinat. Pourquoi donc à cette autre demande: qu'est-ce que la propriété ? Ne puis-je répondre de même: C'est le vol, sans avoir la certitude de n'être pas entendu, bien que cette autre proposition ne soit que la première transformée ?"

P.-J. Proudhon, *Théorie de la propriété, suivi d'un projet d'exposition perpétuelle*, Paris 1890, 11.

9 P.-J. Proudhon, *What is Property? An Inquiry into the Principle of Right and Government,* with a New Introduction by George Woodcock, New York 1970, xiv.

Leo Tolstoi (1828-1910), indeed, in that same period raised his voice against private property: "Allowing property is allowing violence and murder." He condemned the exclusive private property rights of land owners (of which he was one) and even legitimated the act of theft of the fruits from the land:

> "He knows very well that not he is the thief, but the one who has stolen his land, and that all restitution he obtains from the one who has stolen from him, is a duty to his family."[10]

Tolstoi—as the father of Christian anarchism—was very close to the *mir,* the peasant community which intellectuals saw as a protection of Russian peasants against the harshness of upcoming capitalism.[11]

One can place Proudhon among the great socialist thinkers of the nineteenth century. Contrary to freedom and equality, the right to property is—according to Proudhon—not a natural right. Saint-Simon in that same thought speaks of "the most unjust of all privileges". Proudhon's intellectual heritage is claimed at the same time by anarchists, part of the socialists, extreme right and the (social) liberals. In his view, individual freedom has to be socialized. Proudhon differed from some of his successors in believing that the abuses of property could be brought to an end without the traumatic convulsions of a bloody revolution. Being an anarchist, Proudhon was convinced that social evolution would progressively lead to the deconstruction of the state.

Proudhon criticizes capitalist property which neglects the specificities of property owned by collective persons. He also opposed communism, which negates the autonomy of individuals and collectivities and only considers a global community. In this sense, Proudhon was taking into account the far reaching implications of a legal concept of private property, much more than did Karl Marx. For Marx, property relations were no more than an expression of existing production relations. But Proudhon—during his whole troubled life—did not stop to rethink the problem of property ownership, which he saw as the key for a future world. In his *Théorie de la Propriété*, he constantly asked himself how to also escape from both wild capitalism, creating inequalities and exploitation and from communism,

10 L. Tolstoi, *Sobranie sochinenii v 22 tomakh*, Vol. 22, Moscow 1985, 14.

11 "In our time property is the root of all evil and the suffering of men who possess it, or are without it, and of all the remorse of conscience of those who misuse it, and of the danger of collision between those who have (it) and those who have it not. Property is the root of all evil: and, at the same time, property is that toward (which) all the activity of our modern world is directed, and that which directs the activity of the world."
L. Tolstoi, *ibidem,* 16.

creating oppression and misery.[12] How to struggle against a vulture state that threatens the freedoms of citizens?

Ironically, Proudhon did not literally mean what he meant when he launched "what is property?" with a grand éclat by answering the question in the title with the phrase: "property is theft". His boldness of expression was intended for emphasis, and by "property" he wished to be understood as meaning "the sum of its abuses". Proudhon had no hostility towards property as "individual possession", the right of man to control her/his dwelling and the land and tools he needs to live. Indeed, he regarded it as the cornerstone of liberty; his main criticism of the communists was that they wished to destroy that liberty.

Proudhon believed in an immanent justice which man had perverted by creating the wrong institutions. Private property was incompatible with that justice, because it excluded the worker not only from enjoying the fruits of her/his toil but, also, from those social advantages which are the product of centuries of common effort. Justice, therefore, demanded a society in which equality and order exist together.[13] According to Proudhon, it is the state that organizes the wrong absolutism in favor of the owner and, thus, its abuse. The state in this way organizes usurpation.

It is clear from a reading of *What is Property?* that Proudhon is talking, mainly, about property in land and that his solution is almost wholly an agrarian one (the kind of solution that would have saved his father from bankruptcy). He seems to ignore manufacturing more complex than that carried out in small individual workshops. In this sense, Proudhon's approach to our highly sophisticated postmodern world seems to be obsolete and no longer applicable.

Nevertheless, that which could be observed during the past decade and a half in the field of privatization in the Central and Eastern European region seems to reflect this perversion of a liberating concept of private property by creating the wrong institutions. And, this time, it is not limited to land but, also, concerns other basic means of production, the major wealth of the country in energy resources and raw materials. What can be seen in most privatization cases is a form of collusion between the ruling elites and the state, organizing a shift from political and bureaucratic power to private property ownership for a small elite and excluding the majority of citizens from this redistribution of property ownership. All this is based on that absolute concept of private property ownership, which can be considered to be abusive—at least if we are prepared to turn to the meta-juridical social function of property ownership.

12 P.-J. Proudhon, *Théorie de la propriété, op.cit.* note 8, 11.

13 *Ibidem*, xiv.

The Social Function of Property

Private ownership can become a dangerous concept when it starts to cover a reality of "misappropriation". We should look at it in a careful way when we study privatization in Central and East European countries. What is exactly the role of this key concept? Comparative law is—to a great degree—inspired by the need for avoiding the pitfalls of homonyms. The false *déjà vu* is one of the greatest sources of error in comparative law.[14] In order to avoid this, we have to place ourselves outside the network of legal arguments and come back with a detached point from which the law appears in perspective, as a product shaped by society, the needs of which it is destined to serve.

If we are prepared to do so, we can follow the tradition of the legal philosopher Rudolf von Jhering and the sociologist Max Weber—the founders of what we would call a "social theory of law".[15] Weber relied on tools from legal science—in order to distance himself from social theory in its conventional form—and on meta-juridical ideas (such as the idea of law as a scheme of clarified ideal-typical definitions that self-consciously diverge from reality). Indeed, private property ownership of holdings such as Yukos—emanating from the public ownership sector—is not the same as private ownership of, for example, a car. But law works with such ideal-typical definitions as private property ownership and it self-consciously diverges from reality.

Usurpation, however, is not allowed. In the classical definition of private property—which goes back to late Roman law—ownership is considered as an absolute power (*dominium*). *Dominium est ius utendi et abutendi re sua, quatenius juris ratio patitur* (Property ownership is the right to use and to abuse one's property as far as legal reason allows). Where the limits of ownership as absolute power were defined in Roman law as "being in agreement with the legal ratio" the Code Napoléon (and other liberal codes of law in the nineteenth and twentieth centuries) defined ownership as a right to enjoy one's property in the most absolute way and to dispose of it, as long as the use of that property does not contravene laws and regulations. Afterwards, the social function of ownership was refined and elaborated in many theories basing themselves on the sociological reality of property rights.[16]

14 "Comparative Law as an Academic Subject", in *O. Kahn-Freund, Selected Writings*, London 1978, 285.

15 S.P. Turner and R. A. Factor, *Max Weber, The Lawyer as a Social Thinker*, London, New York 1994, 45.

16 See, for example, A. Belden Fields, *Rethinking Human Rights for the New Millennium*, New York 2003.

The Soviet system of property ownership introduced a fundamentally different logic into property law. Ideologically, property was the key concept of Marxism-Leninism as expressed in the Communist Manifesto: "*In diesem sinne können die kommunisten ihre theorie in dem einen Ausdruck 'Aufhebung des Privateigentums' zusammenfassen*".[17] The Soviet regime however, did experience the problem of setting up a new property structure. After a period of radical collectivization—which denied not only private property but, also, individual property rights in the absurd—the Soviet regime made some important concessions to the property of individual persons and, in this way, recognized the ineradicable urge to individual property as a price that had to be paid for a minimum of political loyalty.[18] This concession—which never received full recognition by law—was harmful for the purity of the communist system because it admitted the natural egoism of average people and (which was even worse) the cynical selfishness of political leaders. State property *de facto* led to an extremely privileged position for those who governed the political system, as the party elite obtained an almost unlimited power over national wealth without attribution of a legally defined ownership to this wealth.

In West-European liberal democracies, the object of this absolute power of the owner remained undefined. Only one important limitation was introduced: slavery and feudality were abolished. The revolutionary French Constitution of 1793 declared that a person could not sell himself or be sold, as it was not to be considered as an alienable property.

The functional approach—that was so typical in the socialist doctrine of property rights—to the contrary looked for differentiation of property and claimed a victory over the monistic concept of property in the liberal tradition. Capital—as the concentration and circulation of production means—is the product of collective labor and serves as an instrument for collective labor. By its nature, it has a public structure and *de jure* belongs to society, as represented by the state. It was Pashukanis who finally attacked the foundational idea of individual rights. In his *General Theory of Law and Marxism*, he repudiated the idea of individual rights as a leftover of capitalism.[19]

17 K. Marx, F. Engels, *Ausgewählte Schriften in zwei Bänden,* II, Berlin 1960, 418.

18 J. Hazard, I. Shapiro and P. Maggs, *The Soviet Legal System*, New York 1969, 385.

19 E. Pashukanis, "The General Theory of Law and Marxism", in B. Beirne and R. Sharlet, (eds.), *Pashukanis: Selected Writings on Marxism and Law*, Armonk, NY 1980.

Property Ownership in the New Russian Civil Code as a "Stretched Concept"

For Western observers, when reading the general section on property law of the new 1994 Russian Civil Code (Art.209), the (false) impression of "back to basics" is evoked: this is the well known private property concept of the Code Napoléon, which proved its flexibility by remaining unchanged for so many decennia in West European societies. But, at the same time, this recognition of private property ownership in the Civil Code involves—for those who lived under real socialism—a radical (and controversial) example of legal change. Old communist truths are rejected and new ones advanced in their place. This change in civil law clearly represents a revolution in which paradigms shift and a new web of interpretations is constructed on the remains of the old.[20] The problem of discontinuous legal change is especially acute for legislation which may not be subject to the same standards of coherence and precedence as judicial decisions.[21]

Our question is whether the concept of private property ownership, as defined by the new RF Civil Code, has not become the victim of "conceptual stretching". According to Sartori, the phenomenon of conceptual stretching occurs in social research when a clear concept is applied to all possible "applications" in a way in which the comparative test of the hypothesis becomes impossible. Now that the concept of private property ownership is introduced in Russian civil law—after a period of rigid hierarchical division of property rights—we can ask ourselves whether or not the concept of private property has been stretched to unacceptable extensions. This conceptual stretching does not imply that the new Civil Code does not contain any differentiation in property rights as to subjects, objects, and allocation of wealth. Our point, however, is that the radical change of paradigms in this field has created opportunities to legitimize the misappropriation of public wealth and natural resources.

Ownership and private property rights in post-Soviet Russia have become "omnibus data containers" that hopelessly lack discrimination and sharpness. After a process of getting away from "real socialist" classifications, Russian civil law (judicial practice) will be forced to look for a new typology of property rights, answering the desired future developments.

20 T. Kuhn, *The Structure of Scientific Revolutions* (1962), quoted by W. Oehler, "Working with a Code. Is there a Difference between Civil-Law and Common-Law People?", *University of Illinois Law Review* 1997 No.3, 711.

21 For an illustration, see Postanovlenie No.2/1 Plenuma Verkhovnogo Suda Rossiiskoi Federatsii i Plenuma Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii ot 28.02.1995 "O nekotorykh voprosakh, sviazannykh s vvedeniem v deistvie chasti pervoi grazhdanskogo kodeksa Rossiiskoi Federatsii", *Biulleten' Verkhovnogo Suda Rossiiskoi Federatsii* 1995 No.5, 1-2.

Rights *in rem* attributed to a non-owner could present an important opportunity for this much needed differentiation.

This is not just a theoretical game of comparative legal scientists. Taxonomic negligence can lead to dismal practical results. The point in the reasoning of Sartori is that the poorer the discrimination in our own concepts, the more facts are misgathered and, therefore, the greater is the misinformation that results.[22] An issue of typology is, indeed, an issue about the structures of the reality concerned. For the lawyer, taxonomic negligence can have even more important consequences: it can lead to abuse and distortions, so that law is no longer able to play its role in finding a balance between commutative and distributive justice.[23]

Normative regulations, elaborating the legal institute of ownership in a particular society, can be divided in two categories: institutional and technical norms. Institutional regulations represent the "hard core" of ownership. They answer to the question: which goods can be attributed to various subjects of ownership? To this hard core of ownership regulation belongs a second category, which can be defined as the content of ownership. What can a citizen or legal person do with this property? In which circumstances is the subject of ownership abusing the property? Technical norms, in their turn, presuppose the existence of these institutional choices. They function as a specific technical elaboration of property relations, as conditioned by institutional regulations. Technical norms regulate common property ownership, protection, acquisition, transfer, and termination of property rights. It was commonly accepted during Soviet times that, for comparative purposes, precisely the institutional differences in attribution and content of ownership made the difference between socialist and western property rights.

In particular, the institution of private property owes its specific legal regulation to its association with personal freedom. It is commonly accepted that this kind of ownership needs to be approached on several legal levels:

22 G. Sartori, *The Theory of Democracy Revisited,* Vol. 1, London 1987, 297.

23 These two categories of justice go back to the writings of Aristotle. Distributive justice was enclosed in the communist principle: "From each according to his capacities, to each according to his needs." Commutative justice is the one on which the concerned parties agree: it is honest, but not necessarily just. This kind of justice was translated in the socialist formula: "From each according to his capacities, to each according to his contribution." Post-communist transformation implies a change in commutative justice. The new institution of private property gives an answer to the claim for commutative justice, but the claims for distributive justice increase. See, also, R. Dworkin, *Taking Rights Seriously*, London 1977, 227 (on the difference between the right to equal treatment and the right to treatment as an equal).

(1) where it concerns the immediate allocation (*Zuordnung*) of goods or rights (intellectual property rights, for example), ownership is an absolute, exclusive right;
(2) bound to this allocation of goods and rights to the entitled person is the right to appropriation of income from these goods and the right of possession, use, and disposal to the entitled person, as well as the right to autonomously and privately decide on income from this property, its use, and disposal;
(3) from this broadly defined concept of property ownership, other connected institutions of private law are derived: enterprise law, right to lease, and "complementary" institutes with a public law character: competition law, construction law;
(4) constitutional protection of ownership aims at protecting owners or entitled persons against interference and taking by public authorities as far as public needs do not justify such interference.[24]

The new Russian Civil Code returns to the legal institution of private property. Private property is recognized as the basic form of ownership for citizens and legal persons. Article 212 recognizes private property alongside state property, municipal property, and "other forms of ownership". But Article 213 hesitates to repeat the concept of private property (*chastnaia sobstvennost'*) and prefers to refer to the property ownership of citizens and legal persons (*pravo sobstvennosti grazhdan i iuridicheskikh lits*). Nevertheless, there is no doubt that the basic paradigms on property rights were changed in a drastic way by the new Civil Code. Property rights and other rights *in rem* should no longer serve the requirements of a plan-organized economy but, rather, should induce flexibility in a market-organized society. This change in the social role of property rights is presented as having not only legal technical, but also practical, relevance; in this way, the western forms of credit guarantees and capital procurement became available. Ownership limitations are restricted; the principle of universality in appropriation capacities for legal subjects is introduced. As to content, there is no limitation in the form of social binding (function) of ownership. The classical guarantee of remuneration in case of expropriation is included in the 1993 Russian Constitution (Art.35).

The current concept of private property ownership in the new Russian Civil Code is an encompassing concept of ownership as an absolute right *in rem*. The general Article 209 (content of the right of ownership) contains the classical definition of property ownership as the right of

[24] H. Roggeman, "Zur Verhaltnis von Eigentum und Privatisierung in den postsozialistischen Ländern", *Recht in Ost und West* 1996 No.3, 89-90.

possession, use, and disposal of property (*imushchestvo*) which belongs to the owner. The owner can transfer property into the ownership of other persons, keep the ownership title and transfer the rights of possession, use, and disposal, hand over property as a pledge or otherwise encumber it, or dispose of it in other ways. The owner has the right at her/his discretion (*po svoemu usmotreniiu*) to perform with her/his property any activities which are not contrary to legislation and do not violate the rights and interests of other persons, protected by law (Art.197(2)).

In this way, Russia seems to evolve towards a liberal theory, looking at ownership as a fundamental freedom (Art.35, 1993 RF Constitution, is even more explicit in this perspective). The individual becomes entitled to guarantee for him/herself a material guarantee for freedom, a space for freedom in the material sense of the word and—at the same time—this ownership right enables that individual to develop her or his life in a responsible way. The basic assumption is clear: ownership is the most encompassing right to a good from which all other limited rights *in rem* are derived. This kind of private ownership should guarantee economic viability and freedom of entrepreneurship of the owner as a citizen and as an economic actor. But, at the same time, it forms the basis for unlimited enrichment and capitalist concentration of wealth in the hands of a few.

Such a "stretched concept of ownership" is extremely useful in the post-Soviet struggle for control of financial and natural resources. One could hardly imagine a better legitimation for holdings and other concentrations of financial-industrial capital so as to concentrate the basic wealth of Russia in the hands of a post-Soviet elite. The Russian Civil Code provides a basis for this kind of post-communist development in property rights. One could ask what is wrong with this and remark, in the words of the Chairperson of the RF Higher *Arbitrazh* Court, Dr. Veniamin Iakovlev, that: "this is not a question of insufficiency of the Civil Code, but an insufficiency of Russian commercial practice."[25] The question, however, is not only whether the Civil Code builds in sufficient mechanisms for control and attenuation of this neo-liberal approach but, also, how to evaluate this normative approach to property rights in a transition period.[26]

Certainly, the new 1994 Russian Civil Code places itself in a long tradition of civil law countries where—in contrast with the Common Law tradition—private-law civil codes exist as the source or reference

[25] Interview with the President of the RF Higher *Arbitrazh* Court, V.F. Iakovlev, with *Kommersant' Dengi* 18 October 2004 No.41 (496). Reproduced at: <http://www.arbitr.ru>.

[26] On the difference between "*libertés-résistance*" and "*droits-créances*", see G. Lebreton, "Un legs de l'U.R.S.S. à la C.E.I.: La Déclaration soviétique des droits de l'homme du 5 septembre 1991", *Revue du Droit Public et de la Science Politique en France et à l'Etranger* 1993, 281-313.

basis of the law-making or law-finding process.[27] The difference between the ownership concept of civil lawyers and the Anglo-American idea of property rights as bundles of rights is a typical example of this divergence. The European codification movements were based on the ideas of the Enlightenment era and on the common belief that there was a natural law to be recognized by reason and that society as a whole could be ordered by a system of legal rules, designed and enacted by the sovereign in accordance with the commands of the enlightened reason. In this holistic (or perhaps even somehow totalitarian) approach to law and legal order, the so-called natural-law codes were created, of which the French Civil Code of 1804 was the most shining example.[28] Around the turn of the twentieth century, the enlightened *citoyen* had been transmuted into the capitalistic leader of the industrial revolution: the bourgeois. In contemporary Russia, however, it is not the enlightened *citoyen* who is turned into a capitalist but, rather, the non-owning privileged and powerful member of the communist elite, who changes her power into property rights relating to the most important wealth in Russia. This happens while a mass of citizens—having lived under "real socialism"—remains impoverished and unprotected, unable to use its newly acquired private property rights.

This is, however, often presented as a sociological development that a Civil Code can hardly take into account. In Western Europe, the notion continues to survive that a civic society—to be well ordered—should be ruled by a more or less all-encompassing system of codified law. The idea persists that the Civil Code figures the legal pattern of civil life and the code is seen in civil law countries—as the *Bürgerliches Gesetzbuch* of 1896 and the Swiss *Zivilgesetzbuch* of 1907—"as a self-sufficient whole, taken to contain, in the form of logical principles inherent in its structure, its own method of development".[29]

27 Although common-law and civil-law systems are drawing closer to each other (the emerging of a category of European law has accelerated this process), there remains a difference in the notions of law and legal order, styles of legislation, judicial decision-making, and statutory interpretation: Oehler, *op.cit.* note 20, 711.

"The perceived difference between common-law and civil-law approaches—that one is bound by case precedent and the other to an unyielding code is, in the modern world, more apparent than real."

28 Oehler, *op.cit.* note 20, 713.

29 The civil-law judge can make use of a canon of interpretation techniques: the literal or grammatical interpretation, with further help provided by historic intent, the legal context or framework of the norm to be interpreted, teleological considerations and the legislative purpose or the *ratio legis*. Learned commentary on the legal norms in the code, condensing the systematic law, constitutes the primary tool of choice for the legal interpretation of civil law: Arthur Taylor von Mehren, "The Judicial Process in the United States and Germany" in *Festschrift für Ernst Rabel,* 1954, 67, as referred to by Oehler, *op.cit.* note 20, 714.

At present, however, in a post-communist situation, we can talk about an "extreme crisis of interpretation".[30] What is the kind of private property to which are we referring?

Breaking with the Continuity of the Past

We have already referred to the quality of internal consistency of the Soviet system of property rights. The division of possible subjects and objects of differentiated ownership forms was typical for the Soviet institution of property rights (socialist state, cooperative property, property of social organizations, and personal property). Personal property was presented as individual property to a very restricted circle of objects, to be situated mainly in the sphere of consumer goods and goods for personal use. State property—legally defined as an indivisible, exclusive, and absolute right—found its legitimation in the reasoning that the state represented the whole people as a collective owner of state property. In this sense, state property was in its content functional and social (collective), and exactly this content legitimized the exclusive attribution of this property to the state as the sole owner. The reasoning was that state property served the implementation of the plan and in this way—indirectly—the needs of the population.

Two categories of objects of property rights were, in particular, relevant during the Soviet period: res *intra* and *extra commercium* and production goods and consumer goods. The difference between movable and immovable goods had become irrelevant. All land had been nationalized, had become state property, and was governed by land law (*zemel'noe pravo*). Enterprises and other production means were operationalized as state property by legal persons *sui generis* (state enterprises, institutions), authorized by the state; but not owners however. The idea of *res nullius* was unknown, ungoverned property became state property. Personal property—the only available form of individual property—was considered as socially less important and derived from socialist property. Commercial activity by a private individual or legal person—or even an attempt to do so with the aim of gaining something out of this—fell under the criminal act of speculation (Art.154, 1960 RSFSR Criminal Code).

The new 1994 RF Civil Code is—without a doubt—anti-differential in its ownership concept (Art.209), but in the concrete allocation of wealth in society it introduces quite some limitations. The code distinguishes among three types of ownership: private, state and municipal, besides "other types of ownership". All these forms (the rights of these different

30 K. Segbers, *Post-Soviet Puzzles. Mapping the Political Economy of the Former Soviet Union,* Vols.1-4, Baden-Baden 1995, 145.

owners) are protected equally by law (Art.212(4)). There is, however, in Article 212 a *Gesetzvorbehalt*:

> "peculiarities of acquiring and terminating the right to property and the possession, use and disposal of it, depending upon whether the property is in private ownership of a citizen or a legal person or in state or municipal ownership may be established only by law."

The RF Supreme Court—in its legal practice—has tried to strengthen the autonomy of subjects of property rights. Organs of state power and government are forbidden to take any discriminatory legal measures by which the autonomy (*samostoiatel'nost'*) of separate economic subjects can be limited, especially when these limitations risk having an impact upon competition and, thereby, diminishing the interests of economic subjects.[31]

However, the question is not only whether the individual citizen is upgraded in her or his property rights but, also, which rights are attributed to those legal persons that have changed their label from state enterprises to commercial entities. For example, the Plenum of the RF Supreme Court was confronted with the question: at which moment does state ownership lose its qualification as "state"? Its answer was that property can only be qualified as "state" when the property is in state ownership and attributed to state enterprises and institutions in possession, use, and disposal. Property of various legal persons "new style" (*i.e.*, commercial entities), in the charter capital of which state assets are also included cannot be qualified as "state". The consequence is that theft of such property is to be qualified as illegal appropriation or waste of another's property and not as abuse of an official position (as it is the case with "state" property).[32] This is a clear example of "conceptual stretch". The former state property—which enters the "omnibus" category of private property—falls under the principle of "equal treatment" of all forms of ownership as well as under the liberal connotation of private property and loses its social (collective) function as "state" property.

As to the possible subjects of ownership, property can be divided in ownership of citizens, legal persons, the Russian Federation, the Subjects of the Russian Federation and municipal entities (Art.213). No distinction is made in the Civil Code between the legal capacities of citizens and legal persons. Citizens and legal persons can have in ownership any property, whatever the composition, quantity or value of the property acquired. Enterprises—which were converted from state enterprises into private

31 *Biulleten' Verkhovnogo Suda Rossiiskoi Federatsii,* 1995 No.4, 2.

32 "O nekotorykh voprosakh primeneniia sudami zakonodatel'stva ob otvetstvennosti za prestupleniia protiv sobstvennosti", *Biulleten' Verkhovnogo Suda Rossiiskoi Federatsii* 1995 No.9, 13.

structures—do not seem to fall under any special category but, rather, to follow the general (liberal) "regime" of property ownership. The point is that private property—being the philosophical and legal basis for a capitalist organization of the economy—"naturally" includes, *inter alia*, production means. By their very nature, these production means can only be controlled by few, certainly not by all the members of society. Here comes an important ideological "clash": socialist property was ideologically defined as property of the whole people and opposed to the idea of transformation of state property into private property belonging to few, a minority in society. Moreover, there is clearly a conceptual difficulty in making the difference between the ownership of an enterprise (or stock in an enterprise) and the ownership of the property used by that enterprise. In this sense, the ownership confusion extends to "ownership" rights in privatized joint-stock companies.

The objects of property ownership are now divided along the categories of movable and immovable property. This classification replaces the Soviet distinction between production and consumer goods. Special chapters are devoted to property rights and other rights *in rem* in land and dwellings or living space. We will not go into details on the content of the new Land Code of 30 October 2001 and its possible discrepancies with the Civil Code. Neither will we discuss the new Housing Code of 1 March 2005, which introduces such a radical shift from the state to the citizens-owners as to the responsibility for the management of apartment blocks and communal housing, that "Russians treat the new Housing Code as an infringement on one of their most important civil rights: the right to housing".[33] These two categories of immovables (land and dwellings) are not treated by the 1994 Civil Code as "full" objects of private ownership. In the wording of the Code, one can find a certain hesitation to recognize full private ownership to these special objects. This is certainly not a new phenomenon. Before the Revolution, the outstanding civilist Shershenevich broke a lance for the need to strengthen real rights in immovables. He pointed at the confusion which originated from the use of the term "ownership" (*sobstvennost'*) as a synonym for "use" (*pol'zovanie*) or "possession" (*vladenie*). In its turn, "possession" should be distinguished from the simple holding of a good on the basis of a contractual relation (*derzhanie*). Pokrovskii stressed that this confusion has its old roots in the special treatment of immovables (land and housing) in the allodial or patrimonial law (*votchinnoe pravo*).[34] He points to the public law character of land use in that time: a person did not possess land as a private person but, rather, as a member of the community. Her/his right was not founded

33 The Public Opinion Foundation at: <http://bd.english.fom.ru>.

34 I.A. Pokrovskii, *Osnovnye problemy grazhdanskogo prava*, 1917, re-published in the series *Klassika Rossiiskoi Tsivilistiki*, A.L. Makovskii, foreword, Moscow 1998, 199.

on a private act; it was created by the social, public-law division of land, which belonged to the community, between its members. The Russian Ruling Senate clarified, for example, that the use of land based on a lease could not be equalized with possession.[35]

The principle in the new Civil Code is that land, its subsoil, forests and waters which are not in private or in municipal ownership remains in state ownership. Here, the designation and functional approach of rights is clearly stronger, as the Civil Code specifies in Article 214: "insofar as this is not contrary to the conditions of use of the immovable property." Land has traditionally been removed from the commercial realm of "civil law relations", and the current Russian government is also confronted with the inertia on all levels with respect to full and unconditional legitimation of private property rights in land.[36] The whole of Chapter 17 (Property Ownership and Other Rights *in Rem* to Land) is devoted to the special approach to land. The reference to Article 209 is made under the restriction of a *Gesetzvorbehalt*: as far as land is not partially or completely made "*res extra commercium*" (Art.260, RF Civil Code). The functional designation of land (in priority for agricultural aims) defines the way in which land should be used (Art.260(2)). According to Articles 284 and 285, plots of land can be taken from the owner if the plot is not used according to its defined aim (agricultural use, living space) for a period of three years—or even sooner—when a serious violation (*gruboe narushenie*) of the law can be detected (against the rules of rational use or having a significant negative effect on the environment) (Art.285). The organs of local self-government are in charge of the control on land use. They can decide to confiscate the plot (*iz"iatie)* from the owner. When the owner does not agree with the decision, the organ of local self-government needs to request permission of the court to sell the plot (Art.286). This—in any case—is a far-reaching "limitation" of the right of ownership.

The same is true for property ownership (and other rights *in rem*) to living space (Ch.18). The owner has to exercise her right of possession, use, and disposal to a living place according to its aim. Also, here, the private character of ownership is clearly "overruled" by its social and collective character. For example, the rights of the members of the family are explicitly mentioned in Article 292. The organs of local self government can take residential property when it is used other than according to its social function or when the rights and interests of neighbors are systematically violated. The same is true when the owner relates in an "uneconomic" way

35 Kass. resh. 1909 No.6, cited by G.F. Shershenevich, *Uchebnik' Russkago Grazhdanskago Prava*, 9th ed., Moscow 1912, 238.

36 W.C. Frenkel, "Private Land Ownership in Russia. An Overview of Legal Developments to Date", *Parker School Journal of East European Law* 1996 No.3, 258.

(*beskhoziaistvenno*) to the property. The court can decide—after a warning by the organs of local self government—on the public sale of the living space (Art.293).[37]

State ownership is subject to decentralization and can take the form of federal ownership, ownership of the republics within the Russian Federation, ownership of provinces, regions, autonomous regions, autonomous national areas, or ownership of the cities of Moscow and St. Petersburg. The law defines which kinds of property can be exclusively in state or municipal ownership (Art.213(3)).

The problem of allocating state property among the various state bodies and jurisdictions of the constituent parts of the federation and the need for a precise definition of the content of federal and municipal property—as well as for a procedure for formalizing the right of ownership—was finally tackled in a decree dividing all state property among the various parts of the federation. However, this answer to the question of the precise locus of ownership and control was formulated only six months after the law on privatization. And even, afterwards, it was clear that an additional period was needed for further processes of registration and other administrative measures.[38] State property is deemed as remaining in federal ownership until the moment of determination of the corresponding owner. However, the idea of decentralized ownership is not clear. The whole process of decentralization was leading to confusion in the field of state property ownership.[39] A state register for assets in federal ownership was only started by *Goskomimushchestvo* at the end of 1994. The indications in this register were often contradictory and insufficient.[40] One of

37 V.M. Zhuikov, (ed.), *Sudebnaia praktika po grazhdanskim delam 1993-1996 g.g.*, Moscow 1997, 232-286.

38 Sarah Reynolds "Privatization and the Development of Russian Civil Law", in George Ginsburgs, Donald D. Barry and William B. Simons, (eds.), *The Revival of Private Law in Central and Eastern Europe,* in F.J.M. Feldbrugge, (ed.), *Law in Eastern Europe*, No.46, The Hague, London, Boston 1996, 228.

39 Decree (*Postanovlenie*) of the RF Supreme Soviet "On the Delimitation of State Ownership in the Russian Federation into Federal Ownership, State Ownership of the Republics within the Russian Federation, of Krais, Oblasts, Autonomous Oblasts, Autonomous Okrugs, of the cities of Moscow and St. Petersburg, and of Municipalities", 27 December 1991, *Vedomosti S"ezda narodnykh deputatov RSFSR i Verkhovnogo Soveta RSFSR* 1992 No.3 item 89 (Art.3).

40 In the register of *Goskomimushchestvo*, one could find—in the middle of the 1990s—121 state enterprises and more than 700 joint-stock companies in the sphere of the military-industrial complex; according to *Goskomoboronprom*, there were at that time some 500 state enterprises and more than 1200 joint-stock companies active in this sector. The registration of state property outside the country is even worse. O.V. Karaysheva, E.L. Gerasimova, "Nekotorye pravovye aspekty sozdaniia i vedeniia

the problems—which enabled illegal appropriation (*zakhvat*) of land—was the lack of a land registry (*kadastr*).[41]

Privatization

Privatization affects the institution of property rights in a fundamental way. The declared aim of economic transition is the realization of a market economy, based on private property ownership. In this way, private property ownership is defined as the final result of privatization. The need for a set of well-defined property rights is commonly accepted as a *conditio sine qua non* for large-scale redistribution of property.

However, privatization is not regulated by the Civil Code but, rather, by special legislation. The Civil Code's provisions governing property are written "for eternity"; privatization is a transitory phenomenon that requires a *lex specialis.* It cannot be denied, however, that both are linked to one another and that privatization makes it difficult for the new civil law property regulation to remain trustworthy. Privatization is enhancing the feelings of legal nihilism that live with the Russian population.

> "The ambiguity of the legal basis, the difficulty to find out the real purposes of the parties in privatization, the politization, the lobbying, the psychological pressure, among others, by the mass press organizations."[42]

The ideology of private property has led to a semantic confusion in the case of state enterprises that were transformed into commercial entities. In numerous instances, high ranking persons transformed their political power into economic power on the basis of the property they appropriated (were authorized to appropriate). Is this phenomenon to be qualified as enrichment of the *nomenklatura* or as initial allocation? One could, again, answer that this is a political rather than a legal question. Politics should be separated from economic power of private owners. Legal regulation is not affected by the problematic relation between public economy, state property, private commercial activity and private property. Economically and politically, the Civil Code is— to a large extent—neutral. The problem is, however, that the "stretched" concept of private property ownership, consolidated by the Civil Code, is used to legitimize the transfer of power positions into private property rights.

It cannot be denied that the essence of privatization (cfr. the law on privatization of state and municipal enterprises) is the unprecedented operation of "*razgosudarstvlenie*" (de-statisation) of property. Examples of

gosudarstvennogo zemel'nogo kadastra Rossiiskoi Federatsii v usloviiakh rynka", *Gosudarstvo i pravo* 1998 No.3, 28.

41 *Ibidem*.

42 N. Tkachev, "Nuzhna li Rossii takaia privatizatsiia?", *Zakonnost'* 1997 No.9, 11.

the creativity shown in the field of re-arranging property rights are numerous: the transfer of state property to the balance sheets of commercial structures or to their charter capital, the infringement of the rights of the labor collectives in the process of sell-off (*aktsionirovanie*) of enterprises, the transfer of enterprises by way of long-term lease (*arenda*) with the right of buy-out, the founding of autonomous legal persons with mixed capital on the basis of structural subdivisions of the enterprise, autonomous legal persons with mixed capital, the de-valuing the objects to be sold, the privatization of objects of social and cultural relevance. Enterprises in the sphere of high technology—incorporating the know-how of scientific collectives in the charter capital—have been sold for the "remainder value" (*ostatochnaia stoimost'*) of the intellectual property. In this way, the shares were not representative of the value of the know-how. Sometimes, intellectual property rights have not even been included in the charter capital. "Loans for shares"—as a privatization method—illustrates that even the pledge of shares in state enterprises, as a right *in rem* for the creditor, can lead to a privatization which is lawful but illegitimate.

Comments from Russian practicing lawyers make clear that they have problems with this re-naming (*pereimenovanie*) of state or social property to private property. [43] Cynically, procurator Tkachev adds:

> "History does not know one state where it would have been possible to steal, let us say, a shop, enterprise and even a whole sector. Here it is allowed. Admitted, what they steal, they do as if they buy (privatize)."[44]

Perhaps this is too extreme an interpretation of Proudhon's "*La propriété, c'est le vol*", since a drastic change in the economic organization of the country was much needed. Moreover, this criticism comes from the *Prokuratura*, which at that time was not particularly happy with the fact that the new 1995 law on the *Prokuratura* did not endow the *Prokuratura* with the power to supervise the legality of the activity of commercial entities. Demeaning privatization was a way to strengthen their claim for a right of control, referring to diverse problems connected with privatization. Nevertheless, there is much truth in their indignation. Rightly, they see the privatization process as over-politicized. The "*chinovnichii peredel' sobstvennosti*" (the bureaucratic repartition of property) is effectuated in the form of "fair" contracts, while the consequences of the deceit appear much later. *Prokuratura* officials complain that those who want to dissolve these

[43] Instead of talking about private property (*chastnaia sobstvennost'*), Tkachev uses the words "personal property" (*lichnaia sobstvennost'*) which is a strange mistake made in 1997—except, of course, if it was made on purpose. *Ibidem*, 14.

[44] *Ibidem*, 9.

contracts are accused of an anti-reformist attitude "aiming at discrediting the very idea of developing towards a market in Russia".[45]

The *prokuratura*'s claims before the court to declare such agreements void are based on the illegitimate character of sell-off of state property (*nepravomernogo otchuzhdeniia gosudarstvennogo imushchestva*).[46] In the most explicit cases, the privatization is illegal because it concerns forbidden objects—first of all in the military sphere (linked to state security) or to social infrastructure. It was, for example the Procurator General who introduced with success a claim to return to the local authorities 30 kindergartens which were included in the charter capital of *AO "Zil"*.

In the case of privatization, a claim to return the assets is often based on "*istrebovanie iz nezakonnogo vladeniia gosudarstvennogo imushchestva*" (claim for the return of state property from illegal possession), on the basis of which agreements and legal acts can be declared void. In many cases, the assets of a state enterprise are transferred by the director, who was not the owner but the holder of a right of operative management or economic governance (*khoziaistvennoe vedenie*).

Articles 301 and 302 treat the protection of rights of ownership and other rights *in rem*. The owner can reclaim her property from another's illegal possession (Art.301). Article 302 specifies that—if property has been acquired from the person who did not have the right to alienate it and if the acquirer was a good faith acquirer (did not know or could not have known that the seller was not the owner)—then the owner has the right to demand and obtain this property from the acquirer when the property has been lost by the owner or when the owner lost the possession of her property for reasons outside her will. The possessor in good faith can, in such a case, reclaim compensation for improvements, albeit not more than the amount of the increase of the value of the property (Art.303). This exactly makes restitution of property to the owner quite difficult. It becomes even more difficult when one reads Article 305 which concerns other rights *in rem*. According to this provision, the posessor (non-owner) of the property can use the same means as the owner for protection of her property (Arts.301-304) and can even defend herself as non-owner of property against the owner.

On the other hand, the *Prokuratura* bases its claims on the need to protect state and social interests (*isk v zashchitu gosudarstvennykh i obshchestvennykh interesov*). *Prokuratura* officials also profile themselves as protectors of social interests before the court—in particular, when they oppose the

45 *Ibidem*, 9.

46 V. Davydov, (RF Deputy-Procurator General), "Vtoroi etap privatizatsii neobkhodimo usilit' nadzor", *Zakonnost'* 1997 No.2, 9.

sell-off of objects in the social sphere (*rasprodazha ob"ektov sotsial'noi sfery*). They reproach the Supreme Court for having recognized the whole corpus of state enterprises, *kolkhozy* and *sovkhozy* as private and not official persons.[47] In this way, the Supreme Court excluded this former state sector from the sphere of criminal responsibility for abuse (*zloupotreblenie*) of state property. In their eyes, the whole system of legal protection received a blow from this "unfounded" decision. When they became "*chastniki*", these "leading people" were excluded from the circle of responsibility of the whole range of official offenses. Administrative responsibility for violations of privatization legislation is lacking completely. These new private firms are often even authorized by the Russian government.[48]

In order to question the functional relation between property ownership (as legal institution) and privatization, one should clearly define (standardize and differentiate) the concept of property ownership. This problem becomes more important now that the causal relation between privatization and efficiency is questioned and the liberal approach to private property rights—partially as a consequence of electoral results—is increasingly being replaced by the tension between privatization and social justice.

Towards a New Differentiation in Property Rights

There are limits to the change of institutions. As in Rome, in the beginning of the Republic, the citizens of Russia finally obtained recognition and protection of their civil and political rights, but at the same time the inequality of their living conditions grows. A society that changes its institution of property rights needs to decide at which inequality she is aiming.

In a post-communist situation, the transfer of property rights and the re-definition of the institution of ownership ask for a re-definition of the social function of ownership rights. Perhaps the crucial institutional factor of post-communist capitalism will not be private property in the classical sense of the word, but the rules of the game (the content of property and rights *in rem* to another's property), according to which property is organized. The wording of property rights and rights *in rem* in the new Civil Code hides two problems in this respect: on the one hand, the danger for distortion of the concept of private property, as it is used as a stretched concept in a transition period, while the privatization process

47 "O nekotorykh voprosakh primeneniia sudami zakonodatel'stva ob otvetstvennosti za prestupleniia protiv sobstvennosti", *Biulleten' Verkhovnogo Suda Rossiiskoi Federatsii* 1995 No.9, 13.

48 *Ibidem.*

still continues. On the other hand, the introduction of a liberal concept, which contains no indications as to the social function of ownership. Both remarks originate from an extra-legal sociological source but have their impact on the interpretation of current civil legislation.

First of all, the theory of private property as a basis for individual freedom is perhaps not enough valorized. This individual property should function as a personal island, small but sovereign for the physical person. A civil ownership, as a minimum to realize one's personal freedom in a post-communist society is necessary and should be elaborated. [49]

This first question (private property ownership as a basis for freedom) has to be distinguished from a second: private property ownership as the legal form for concentration of industrial and financial capital. The power elites do not seem to be prepared to give up their economic decision-making and (with that) their political power positions, and implicitly their chances for personal enrichment. In this sense, the claim for intervention powers—formulated by the *Prokuratura*—is remarkable (protection of rights of small shareholders, legality of activities of representatives of the state in joint stock companies, taking operational measures to dissolve illegal contracts linked to privatization, protest local normative acts which are against the federal legislation on privatization, assisting in the handling of bankruptcy cases). Some features of this evolution in legal practice are pointing at near-market reforms (*okolo-rynochnych*) where the public features of ownership are resisting against the "strong wind" of privatization. [50]

There is a need for differentiation in the roles and rights of the state with respect to its enterprises as well (is the state owner of the enterprise, owner of the assets used by the enterprise or regulator of economic and social interaction?). Probably it is not necessary to reject all tradition in Russian property rights regulation. The legal institution of the *dvor* for example was clearly a left-over of pre-revolutionary Russian law. It was ideologically rejected but legally regulated by the Soviet system. The *dvor* was not qualified as a legal person, but subject to rights and obligations to a certain extent. It concerned persons, living together, not necessarily relatives. The property of the *dvor* could not devolve through inheritance. This property of the peasant's household (which is defined as common property in Arts.257 and 258 of the new RF Civil Code) is not private property; it is also not individual property but works as a harmony of interests.

49 G. Nersesiants, "Kontseptsiia grazhdanskoi sobstvennosti", *Gosudarstvo i pravo* 1994 No.10, 44-45.

50 V. Parchevskii, (Procurator of Tver *Oblast'*), "Bank priznan bankrotom", *Zakonnost'* 1997 No.110, 4-7.

The Comprehensive and the Absolute Concept of Property

Any conception of property involves the balancing of individual and collective interests. This implies that the universally recognized idea that individual rights—protected under the rubric of property—must exist in a collective context. Property is increasingly viewed as a bastion against an ever encroaching state. This mythology of property—as that which represents the individual's protected sphere—has survived although the content of this myth (the definition of protected rights) has undergone continuous change.

In the course of history, property has been the medium through which struggles between individual and collective goals have been refracted. That is why protection of individual property rights has been highly valued in the framework of liberal democracy as protecting important values in society. However, reliance on an "objective" and "technical" definition of property leads to conflicting and contradictory results. Property is a concept with multiple meanings, but it has always retained a broad and a narrow meaning.

The broad meaning, including a comprehensive approach to property is often overlooked. The comprehensive approach incorporates the historical tension between the individual and the collective.

Property ownership—in the historical view—did not represent the autonomous sphere of the individual to be asserted against the collective. This tension—now seen as something external to the concept of property—was, in fact, internal to it. Historically, property included not only external objects and people's relationships to them, but also all of those human rights, liberties, powers, and immunities that are important for human well-being—including freedom of expression, freedom of conscience, freedom from bodily harm, and free and equal opportunities to use personal faculties.[51] This comprehensive approach incorporates the historical tension between the individual and the collective.

The comprehensive approach was pushed aside by an absolute interpretation of private property ownership, which became dominant in the end of the eighteenth century. Since then, an inherent tension has existed between the view that property is crucial to the development of personality or that property secures liberty and the simultaneous view that no redistribution of wealth was required: if property is necessary for the

[51] L. Underkuffler, "On Property: An Essay", 100 *Yale Law Journal* 1990, 129. "In a word as a man is said to have a right to his property, he may be equally said to have a property in his rights" (Madison, in his essay entitled *Property* (1792)). Under rights, he understands rights to freedom of conscience, freedom of expression, physical liberty, and the ability to use one's intelligence and creative powers which is, indeed, radically different from the ordinary understanding of property today.

development of personality or the maintenance of personal and political independence, it is difficult to see how its deprivation can be justified. Eighteenth century theorists attempted to circumvent this difficulty by stressing that it is the security of property and not property itself that ensures liberty. Relying on a Lockean tradition which emphasized rights as the object of legitimate government and, hence, the limit thereto, individual autonomy was conceived of as protected by a bounded sphere—defined primarily by property—into which the state could not enter. Since then, courts' formulations have all rested on the assumption that property is objectively definable or identifiable—apart from the social context—and that it represents and protects the sphere of legitimate, absolute individual autonomy. In this way, property draws a circle around the activities of each private individual; within that circle, an owner has a greater degree of freedom than without. Outside, s/he must justify or explain her actions and show her authority. Within, s/he is the master, and the state must explain and justify any interference.[52] The consideration of collective interests is a distinctly separate and second-order matter.

This is exactly the way property is approached in the new legal frameworks of post-communist market economies. They took up the powerful rhetorical image of property as that which confers upon the individual a bulwark of isolated independence, as the central symbol of the antagonism between private and public life. When this absolute approach to property is combined with seemingly absolute constitutional guarantees, a difficult problem arises. Rudolf von Jhering had already stressed that no property is independent of the interests of the community,[53] and many judges have explained that property is held under an implied obligation that the owner's use of it should not be injurious for society. But how far can this endorsement of radical individualism go without resulting in intellectual incoherence?

In a post-communist situation, the reasoning that material possessions bolster liberty—by making individuals independent from government—leads to an even more inescapable conclusion that some enjoy greater liberty or property than others.

The general feeling of inequality and misappropriation dominates the public debate in Russia since at least a decennium. Kargalitsky proposes a radical solution: the post-Elt'sin government will be forced to re-nationalize under the pressure of public opinion and good sense. He calls for a radical transformation of the structure of property ownership.

52 T. Reich, "The New Property", 73 *Yale Law Journal* 1964, 733.

53 R. von Jhering, *Geist des Römischen Rechts auf den verschiedenen Stufen seiner Entwicklubng*, 4th ed., Leipzig 1878, 7.

According to him, to imagine that the president could strengthen the state by 'putting pressure' on the oligarchs was absurd, since in modern Russia the state and the oligarchs are one and the same. The state apparatus was constructed in such a way as to serve the oligarchy, and the oligarchy has become closely intertwined with the bureaucracy. Consequently, a strengthening of regulation can only result in an intensification of the theft of state funds, to the benefit of the people who are supposed to be regulated. After seven years of neo-liberal experiments, a majority of Russian citizens are calling for a mixed economy with a dominant public sector. "An effective economic policy is impossible in Russia unless it is based on expropriation of the oligarchy and on the return to the people of the property stolen from them."[54]

Lilia Shevtsova argues that the current situation of big business in Russia will be considered illegitimate for a long time: "The oligarchs would help their own cause by becoming more socially active and spending their money on philanthropic pursuits. In fact, most oligarchs have started charities and foundations."[55]

Towards a Comprehensive Approach?

How to come to a new alignment of individual and collective interests and how to reduce the tension between the private and the public within the concept of property? How can the protection of private property lose its aura of illegitimacy? How can we come to a concept of property that includes an explicit acknowledgement of collective concerns?

— The most radical answer is repartition of property, expropriation of the oligarchs and returning property to its so-called "real owners". This is a new specter that haunts Russia and Eastern Europe: the specter of the re-division of property. This would involve a new revolution and re-nationalization and is, thus, a rather de-stabilizing answer to the situation.
— Should a new category of ownership be developed—public ownership for example—which would be different from state ownership and situate itself closer to municipal ownership? This kind of ownership would be exercised on behalf of the public entity by organs of public authority.
— A common law concept of property rights would bring Russia perhaps closer to a solution; but, in the past, it became clear that

54 B. Kagarlitsky, *Russia under Yeltsin and Putin. Neoliberal Autocracy*, London 2002, 289.

55 L. Shevtsova, "Clash of the Russian Titans", *Bangkok Post*, 2 August 2003.

Russian legal culture is not acquainted with common law concepts as trusts for example.[56]

— Should the oligarchs take the initiative to include the collective concern into their private property by fulfilling social functions (helping the poor, homeless, sustaining charities) without involving in politics? This practice has actually been developed in Russia (with the fund "*Otkrytaia Rossiia*", for example).

— Can we inspire ourselves on theories, as the one developed long ago by Calabresi and Melamed in their article—"Property Rules, Liability Rules, and Inalienability: One View of the Cathedral"[57]—which reveals the problems inherent to the use of an absolute approach to property and suggests how the comprehensive approach can resolve these problems. Under their analysis, entitlements created by property and tort law are of three types: those protected by property rules, those protected by liability rules, and those which are inalienable.

— One can also refer to the idea of corporate social responsibility, which in an EU-context have taken the form of corporate codes of conduct, sustainability reporting and multi-stakeholder initiatives.[58]

Radin focuses upon the extent to which "personhood" factors should affect the recognition of traditionally defined (individual) property rights.[59]

— If Russia would seek its inspiration in the jurisprudence of the European courts of Strasbourg or Luxemburg, it would hardly find an answer, although Article 1 of the first Additional Protocol to the European Convention for Human Rights creates an opportunity for fine-tuning of the legal concept of private property. The European Convention on Human Rights and its principle of equality and non-discrimination, indeed, leave an opening to a more comprehensive approach to property rights.[60] Under the Convention, the principal provision in the field of non-discrimination is Article 14.

56 E. Reid, "The Law on Trusts in Russia", 24 *Review of Central and East European Law* 1998 No.1, 43-56.

57 85 *Harvard Law Review* 1972, 1089.

58 Multi-stakeholder forum: <http://europa.eu.int/comm/enterprise/csr/forum.htm>.

59 V. Radin, "The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings", 88 *Columbia Law Review* 1998, 1667, 1676-1678.

60 O. M. Arnardottir, "Equality and Non-Discrimination under the European Convention on Human Rights", 74 *International Studies in Human Rights* 2003.

> In the sphere of property rights, Article 14 has to be considered in conjunction with Article 1 of Protocol 1. However, this wide margin of appreciation leads to findings of violations of Article 1 Protocol 1: "[...] only in the most extreme cases".[61]

More innovative research on the social function of property rights is needed both in Russia and in the European Union. This is a task for lawyers, historians, and social scientists. As Max Weber has underscored: social scientists have to worry about the social function of property rights.

Conclusion

As with many other questions, we have reached a breaking point in the relations between Eastern and Western Europe: either we come to a fruitful dialogue on property ownership differentiation, being both (East and West) aware that neither the nineteenth-century modern concept of ownership nor the "real socialist" one is adapted to the new conditions of life. Or we come to a new dividing line between cultures in ownership where the picture would be, on the one hand, the enlarged European Union, which follows the civil liberal model of property ownership and economic organization based on individual private property and, on the other hand, a consolidated CIS for which this model is not (or, at least, not to the same degree) an attractive perspective for the development of legal and economic policy.[62]

The positive evolution would be that the collapse of real-socialist concepts of property ownership calls for new efforts to look for a new theory of property rights. In a post-modern period, the modern institute of ownership underwent a remarkable change as to the context (social function) of this right. Social duty, co-decision of workers, protection of possession, and use became as strong as ownership and the regulating intervention of the state constantly has to be brought in harmony with the individual right of property. A modern concept of ownership as a *liberté* is introduced in Russia in times where the entire surrounding world tries to refine and (re)adjust ownership to protect citizens, and to respect the social function of different kinds of property. The Western concept of social property rights—according to which, in a social state, non-owners have a claim to social security and participation in the labor process as a general personality right—has been worked out by the *Bundesverfassungsgericht*, but

61 Y. Winisdoerffer, "Margin of Appreciation and Art.1 of Protocol No.1", 19 *Human Rights Law Review* 1998 No.1, 18.

62 H. Roggeman, *op.cit.* note 24, 94.

also by several Constitutional Courts in Central Europe.[63] However, the concept of social property is under pressure in Western Europe as well as it becomes watered down by recent enterprise closings (creating lay-offs), high state indebtedness, and European claims to budgetary constraints (the Maastricht norms and the Lisbon targets).

Phenomena as poverty and social exclusion show, in a very realistic way, the indivisibility of human rights: what do freedoms—such as property rights—say for those who live at the margin of society? Several blueprints for future social-economic development are in discussion here: should we, as Europeans, make the choice for the Rhineland model or for the American neo-liberal option? The Council of Europe will soon be confronted with the need to carefully study the broad category of social and economic rights. In that search for a new differentiation of a stretched concept, I presume that perhaps for the first time civil-law lawyers, common-law lawyers, and lawyers from the former socialist *Rechtskreise* can find each other in their common search for an acceptable classification of property rights.

Unless they confirm what Proudhon wrote in his *Théorie de la propriété*:

> "L'abus de la propriété est le prix don' vous payez ses inventions et ses efforts: avec le temps elle se corrigera. Laissez faire."[64]

63 See, for example, E. Klingsberg, "Safeguarding the Transition", 2 *East European Constitutional Review* Spring 1993 No.2, 44-48; H. Küpper, "Der Sparkurs der ungarischen Regierung auf dem Prüfstand des Verfassungsgericht", 40 *Recht in Ost und West* 1996 No.4, 101-102.

64 "The misuse of property ownership is the price that you pay for its inventions and its efforts: with time, it will correct itself: let it go." Proudhon, *Théorie de la propriété, op.cit.* note 8, 167.

Liberalism and Neo-Patrimonialism in Post-Communist Russia

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> "Though individuals may have possessions without government, the way a dog possesses a bone, there is no private property without government. Property is a socially protected claim on an asset—a bundle of rights enforceable in courts backed by the coercive power of government." Mancur Olson[1]

Introduction

The public-private distinction in the early twenty-first century is one of the most important issues in understanding contemporary political practice in post-communist Eastern Europe. In the epigraph above, Olson draws attention to the ancient Roman distinction between *possessio* and *dominium*, and the distinction can be applied not only to physical things but, also, to the ability to exercise political rights. Russians may today have become citizens, but how effectively can they exercise these rights? The sphere of private life and consumption has now been secured against the depredations of the former communist regime, but the public aspects of citizenship are still far from being fulfilled. The distinction between the public and the private raises fundamental questions about the nature of political power and the ways that traditional struggles to establish and defend liberal freedoms are being played out in this region.

For many, the fall of communism signaled the delayed reassertion of the onward march of liberalism that had been so rudely interrupted by the triumph of the revolutionary communist challenge in 1917. Others were not so sure. Liberalism presupposes spheres of life that are—as it were—"pre-political"; where the writ of government power is proscribed and where the individual can develop and defend their rights. The idea of a sphere of private concerns is at the heart of liberalism, but the degree to which liberalism can sustain an active public sphere is another question. Rights-based liberalism is certainly far from triumphant in large areas of the post-communist post-Soviet world, and even less so the philosophical basis to legitimize an active public policy within the framework of liberalism. Instead, an economistic view of liberalism appears to have

[1] Mancur Olson, "Why the Transition from Communism is so Difficult", 21 *Eastern Economic Journal* 1995 No.4, 437-461, at 458.

William B. Simons, ed.
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triumphed, with private property accepted but with a stunted development of a public sphere.[2]

At the same time, the patrimonial elements in the definition of public power inherited from the Soviet system still exercise a profound effect. Richard Pipes argues that the roots of patrimonialism reach back into the Tsarist era.[3] The state remains the largest employer, and the government does not easily restrain its hegemonic ambitions even in the economic sphere. On the basis of the Russian example, this chapter will argue that three fundamental principles of social organization remain in tension. The division is not only between state and market, but the whole ensemble of interactions that define both. The old-fashioned Soviet purposive nature of political power has given way to a new purposiveness of the post-communist regime: not to build socialism but to build the market. At the same time, the profound tutelary role of the state remains deeply embedded in political interactions and social relations.[4] Bonds of mutual self-interest transcend the distinction between the public and the private, between state and private property, and between individual rights of citizenship and the imperatives of state construction. The struggle to build communism gave way to "the transition" to capitalism and liberal democracy under the presidency of Boris Elt'sin in the 1990s. Rather than organic development, Russia embarked on yet another state-sponsored modernization project. Under Vladimir Putin in the 2000s, the reassertion of state authority appeared—to many observers—to signal the re-establishment of a patrimonial state that blurred once again the distinction between the public and the private.

Three Orders

In contrast to earlier "revolutions from above", the current re-modernization project is different because of its complexity, with some elements perpetuating earlier patterns of heavy-handed anti-liberal *dirigisme*, but other processes directly repudiating what are perceived to be traditional features of Russian political culture.[5] Under Elt'sin and Putin, at least three orders have emerged—each in tension with the others. The *first* is the tra-

2 See Jerzy Szacki, *Liberalism after Communism*, Budapest 1995.

3 Richard Pipes, *Russia Under the Old Regime*, Harmondsworth 1974; see, also, Richard Pipes, *The Russian Revolution*, New York 1991.

4 Peter Reddaway and Dmitri Glinski, *The Tragedy of Russia's Reforms: Market Bolshevism against Democracy*, Washington, DC 2001.

5 The idea that Soviet structures have been progressively restored as part of a natural process of "social regeneration" has been advanced by Alexander Zinoviev in numerous works. See V. Lupan, *Russkii vyzov*, translated and with an introduction by A. Zinoviev, Moscow 2001, 139-140.

ditional statist one (Napoleonic or Andropovist) in which the emphasis is placed on the power vertical. In this neo-authoritarian model, whenever a potential autonomous center of power—official or civil—emerges, the Kremlin moves to co-opt, incorporate, or suppress it. The *second* political order is that of liberal democracy, based on normative principles of universal citizenship, the electoral constitution of power and legal and political accountability.

The *third* is the world based on patronage and patrimonial relationships, in which horizontal networks create clusters that become remarkably impervious to the impartial operation of law and political power. The strongest of these developed in economic society where the fusion of bureaucracy and oligarchic networks—enjoying far greater financial and media resources than political parties—feed back to shape political space. There has been much discussion of the way that the state was "stolen" in the exit from communism;[6] the logic of the neo-patrimonial model of politics is that the state itself is privatized and turned to the advantage of a narrow elite group who undermine formal political institutions. These informal relationships were particularly strong in the regions, and they have been influential in other post-Soviet countries, notably Ukraine.[7] The weakness of the regulatory and legal system has allowed whole swathes of the Russian economy to become part of a system of "fragmented clientelism": "Sectoral governance is largely shaped by political markets dominated by a number of parallel agencies more clientelistic than collective in character."[8] In these circumstances, it is difficult to tell what is legal or illegal, and indeed what is public and private.

The presidency is the most powerful and, at the same time, the most controversial political institution in contemporary Russia. What has been dubbed a "hegemonic presidency"[9] affects all aspects of Russian political life and, under Putin, became the heart of what many see as a system of "managed democracy". Presidential hegemony, however, can take many different forms: patrimonial, paternalistic, power-maximizing, power-

6 Steven L. Solnick, *Stealing the Soviet State: Control and Collapse in Soviet Institutions*, Cambridge, MA 1998.

7 Hans Van Zon, "Neo-Patrimonialism as an Impediment to Economic Development: The Case of Ukraine", 17 *Journal of Communist Studies and Transition Politics* September 2001 No.3, 71-95.

8 Barbara Lembrusch, "Fragmented Clientelism: The Transformation of Sectoral Economic Governance in the Russian Timber Industry", in Vladimir Tikhomirov, (ed.), *Anatomy of the 1998 Russian Crisis*, Melbourne 1999, 238-258, at 239.

9 John P. Willerton Jr, "The Presidency: From Yeltsin to Putin", in Stephen White, Alex Pravda and Zvi Gitelman, (eds.), *Developments in Russian Politics*, 5th ed., Basingstoke 2001.

preserving or, ultimately, powerless (as many have suggested Elt'sin's leadership by the end had become). Whatever the precise form, the presidency became hegemonic in the sense that it is the core of the institutional arrangements of Russian governance and seeks to subordinate all these institutions to its leadership. It is equally hegemonic in that it seeks to dominate, if not control, political processes and outcomes as well. It is for this reason that the presidency is not only institutionally powerful but also politically controversial.

In structural terms, Russia's "hegemonic presidency" is embedded in a social context that is fragmented and part of a dynamic and fluid power and elite system. According to Weber, the boundaries of patrimonial are typically unclear, with the powers exercised by leaders and officials considered personal and derived from the relationship to the office-holder rather than a clearly demarcated and institutionalized office.[10] Although highly bureaucratized, the state does not function as a clearly delineated bureaucracy. To compensate, there is an expansive dynamic to the powers of office holders as they try to reduce risk by extending their authority. This process is characteristic not only of the state but also of all other social organizations; and, in our case, the legislature but it is equally applicable to ministries and enterprises.[11] In his study of China, Walder argued that authority patterns in enterprises were "neo-traditional", with the authority of the director reinforced by the party-state to reproduce in new forms traditional authority patterns of personal loyalty and discretionary powers of leaders.[12]

Putin sought to use statism and liberalism to challenge the entrenched neo-patrimonial structures inherited from Elt'sin. There remain disagreements, however, over how to evaluate the balance between these two. Many critical voices suggest that the first order greatly overshadows the second to establish a self-perpetuating ruling corporation, a type of elective monarchy that has not destroyed the patronage order but rendered it subordinate to the bureaucratic-authoritarian regime. The lack of independent democratic institutions and the presidency's attempts to bring all political processes under its control has apparently sapped the energies of the fledgling democracy that had emerged under Elt'sin. Rather than an impartial bureaucracy and ordered administrative system on the Napoleonic model, Jacobin state-building (where the emphasis is on the

[10] H. H. Gerth and C. Wright Mills, (eds.), *From Max Weber: Essays in Sociology*, New York 1946, 244, 297-298.

[11] Van Zon, *op.cit.* note 7, 73-74.

[12] Andrew Walder, *Communist Neo-Traditionalism: Work and Authority in Chinese Industry*, Berkeley 1986.

universal and homogeneous application of a single set of laws) has led to the erosion of federalism and the diversity of the 1990s.

Instead of the development of civic republicanism, a type of Jacobin republicanism has emerged to erode the federal rights of Russia's regions and the individual rights of citizens and economic interests. One of the conditions for the development of vigorous political and civil associations is the reassertion of an ordered state system, and Putin's restructuring of political space can indeed be seen as an attempt in the French republican state-building tradition to establish a single legal and political space. The fundamental question, however, is whether the government (and its apparatus) is willing to subordinate itself to the rule of law. Instead of a disciplined statist neo-authoritarian or liberal system emerging, the tenacious grip of embedded elite structures suggested that Putin's reforms could themselves become little more than a modernized version of neo-patrimonial clan-type politics. As long as the public sphere remains stunted and civic associations weak, informal and clientelistic relations will remain predominant, together with the lack of governmental accountability and strategies of elite incorporation rather than the pluralistic interaction of independent political and social actors.

Stability *versus* Order

On coming to power, Putin declared that his main task was—in the words of one commentator—"to transform Russia from a 'manually controlled' country into a fine-tuned mechanism functioning regardless of one person's will".[13] The shift, however, from neo-authoritarianism and patrimonialism to liberalism would prove more complex and contradictory than he imagined. The central tension of Putin's leadership is that his struggle for state reconstitution and liberal constitutionalism is conducted in traditional neo-patrimonial ways, a contradiction that has been both a source of his power and a clear weakness in that it has imbued all that he does with an inner tension.

To understand this we can introduce a set of contrasting concepts. A central feature of post-communist Russian politics is the tension between stability and order. This was a feature of Brezhnev's rule that in the end gave way to stagnation. Stability is the short-term attempt to achieve political and social stabilization without having resolved the underlying problems and contradictions besetting society. Thus, Brezhnev refused to take the hard choices that could have threatened the regime's precarious political stability, and thus his stability gave way to stagnation. Order in this context is something that arises when society, economy, and political systems are

[13] Marina Volkova, *Rossiiskaia gazeta* 26 March 2003.

in some sort of balance.[14] To a large extent, an ordered society operates according to spontaneous processes, whereas in a system based on the politics of stability, administrative measures tend to predominate. In an ordered society, there are clear rules of the game backed by the rule of law, secure property rights, and governmental accountability. In a stability regime, the bureaucrat exercises arbitrary authority and the government acts in a neo-patrimonial manner. The shift from stability to order is the politics of normalization. As Gleb Pavlovsky argued, the main source of conflict in the Russian political elite at this time is "resistance to normalization".[15] As far as he was concerned, Russia faced a choice between the rule of the new security establishment or "the financial rule of the seven boyars".

The attempt under Putin to "reconstitute" the state sought to root presidential power in the normative power of the constitution, and thus represented a bid to shift the basis of presidential hegemony away from dependence on oligarchic or other forces. There was an attempt to move away from "manual control" of political processes to allow a more self-regulating (autopoeic) system to emerge, to move away from stability towards order. In this context, arguments in favor of diluting the powers of the presidency or establishing greater parliamentary control over the government are not clear cut.

As Samuel Huntington noted, political order in changing societies sometimes requires the hard hand of the military or some other force that is not itself subordinate to democratic politics.[16] Putin—on a number of occasions—explicitly sought to distance himself from this sort of tutelary politics. For example, in his question and answer session with the Russian people on 19 December 2002, in response to a query about how the excesses of the media could be curbed, he insisted that "it is impossible to resolve this problem, *to resolve it effectively that is* [italics added], simply with some kind of tough administrative measures". This was linked in his view to the fact that the old Soviet-style politics that treated the whole population as infants was no longer viable since society had matured: "[...] our whole society is becoming more adult."[17] Rather than seeing politics as a cultural struggle

14 The Russian concept of *poriadok* (order) clearly comes with long historical, and mainly negative, connotations. The argument presented in this section tries to reclaim the concept for liberalism and, thus, to counter the profound prejudice in Russian society against the very idea of liberalism, associated in the popular mind (and not surprisingly), with the "anarcho-liberalism" that had emerged in the 1990s. This anarcho-liberalism was based on *proizvol* (arbitrariness) and lack of accountability at all levels.

15 *Izvestiia* 9 September 2003.

16 Samuel P. Huntington, *Political Order in Changing Societies*, New Haven, CT 1968.

17 V. V. Putin, *Razgovor s Rossiei: Stenogramma "Priamoi linii s Prezidentom Rossiiskoi Federatsii V. V. Putinym",* 19 December 2002, Moscow 2003, 14.

to impose a single truth, Putin appeared to accept a more pluralistic vision of societal diversity. It proved difficult, however, to give adequate political form and expression to this diversity.[18] In part, the problem lies in the very instrument that could establish a liberal order, the presidency.

The Presidency: The Struggle for Hegemony

François Mitterand referred to the post of president—as created by Charles De Gaulle in 1958—as a "permanent coup d'etat", and shortly before his death he warned that French political institutions "were dangerous before me and could become so after me".[19] Many felt that this warning was no less appropriate for Russia. The presidency there overshadows all other political institutions, to the degree that Klyamkin and Shevtsova call it an "elected monarchy".[20] The paradox under Elt'sin, however, was the emergence of a strong presidency in a weak state, something that created a whole range of power asymmetries and distortions. This was not a problem unique to Russia. As Stephen Holmes has argued, the "universal problem of post-communism is the crisis of governability produced by the diminution of state capacity after the collapse of communism".[21] The creation of the presidency had been intended to compensate for the weakening power of the Communist Party, and now it filled the vacuum created by the ebbing of state authority and the weakness of civic initiative.

The experience of Hungary and Italy in recent years suggests that presidentialism alone is not the main cause of democratic degradation, despite the arguments of M. Steven Fish.[22] In Russia, the most controversial

18 Russia is not the only country where democratic consolidation has lacked depth. András Bozóki notes how the coalition government of Victor Orban between 1998 and 2002 saw electoral victory as an opportunity to achieve a fundamental cultural change. The programme of "more than government change" saw one vision of Hungary being imposed on the rest. Bozóki notes that this sort of *Kulturkampf* politics has emerged in a mature democracy such as Italy, "where the former power of multiple parties has disappeared and the only frontline of political struggle lies between pro-Berlusconi and anti-Berlusconi people". András Bozóki, "Hungary"s Social-Democratic Turn", 11 *East European Constitutional Review* Summer 2002 No.3, 80-86, at 85.

19 Thomas M. Nichols, *The Russian Presidency: Society and Politics in the Second Russian Republic*, Basingstoke 2000, 2.

20 Igor Klyamkin and Liliya Shevtsova, *This Omnipotent and Impotent Government: The Evolution of the Political System in Post-Communist Russia*, Washington, DC 1999.

21 Stephen Holmes, "Cultural Legacies or State Collapse? Probing the Post-Communist Dilemma", in M. Mandelbaum, (ed.), *Post-Communism: Four Views*, New York 1996, 50.

22 M. Steven Fish, "The Executive Deception: Superpresidentialism and the Degradation of Russian Politics", in Valerie Sperling, (ed.), *Building the Russian State: Institutional*

aspects of the 1993 Constitution are those dealing with the presidency. As we know, the adoption of the new constitution took place in the heat of bitter conflicts over the most appropriate institutional arrangements for the newly independent Russia.[23] The framers of the constitution sought to avoid the instability and conflicts that had wracked late Soviet and early Russian politics by creating a firm source of executive authority; but—at the same time—they were keen to ensure that the new political system repudiated Russian imperial and Soviet authoritarianism to create a liberal and democratic system. In the event, they were perhaps more successful in enshrining the principles of liberalism than they were in ensuring the balanced democratic separation of powers. Nevertheless, for the first time in Russian history a constitution made a serious attempt to define, and thus to limit, state power.

The problem, however, is not that the constitution lacks the idea of the separation of powers, but that this separation is allegedly fundamentally unbalanced. The precise responsibilities of executive power outlined in Articles 110-117 of the RF Constitution are excessively wide and diffuse.[24] As Robert Sharlet puts it: "The Russian Constitution of 1993 created a strong executive presidency to which the government is subordinated within an imbalanced separation of powers arrangement. This constitutional model has been a major source of Russia's chronic crises."[25]

Russia's semi-presidential constitution, modeled on French lines, approximates the "presidential-parliamentary" type of mixed system that Matthew Shugart and John Carey consider the most unstable.[26] They distinguish between semi-presidential systems that oscillate between presidential and parliamentary predominance, as in the French Fifth Republic, which they call "premier-presidential", and systems that give the president greater powers

Crisis and the Quest for Democratic Governance, Boulder, CO 2000, 177-192; M. Steven Fish, "When More is Less: Superexecutive Power and Political Underdevelopment in Russia", in Victoria E. Bonnell and George W. Breslauer, (eds.), *Russia in the New Century: Stability or Disorder?*, Boulder, CO 2000, 15-34.

23 These are discussed in my "The Struggle for the Constitution in Russia and the Triumph of Ethical Individualism", 48 *Studies in East European Thought* September 1996 Nos.2-4, 115-157; also discussed in Richard Sakwa, *Russian Politics and Society*, 3rd ed., London/New York 2002, Chapter 3.

24 This is argued by K.S. Bel'skii, "O funktsiiakh ispolnitel"noi vlasti", *Gosudarstvo i pravo* 1997 No.3, 14-21.

25 Robert Sharlet, "Russian Constitutional Change: Proposed Power-Sharing Models", in Roger Clark, Ferdinand Feldbrugge and Stanislaw Pomorski, (eds.), *International and National Law in Russia and Eastern Europe*, in William B. Simons, (ed.), *Law in Eastern Europe*, No.49, The Hague, London, Boston 2001, 361.

26 Matthew Soberg Shugart and John M. Carey, *Presidents and Assemblies: Constitutional Design and Electoral Dynamics*, Cambridge 1992.

to form and dismiss governments independently of parliament, which they call "presidential parliamentary".[27] The former are considered more likely to create a stable democratic system since there is greater accountability to parliament, whereas in a presidential-parliamentary system the government is torn between accountability to both the president and parliament. While the French system's ability to flip between a presidential and parliamentary mode creates a "safety valve" which ensures that political tensions between president and parliament do not evolve into a constitutional conflict,[28] Russia's "presidential parliamentary" system engendered endemic conflicts under Elt'sin, and under Putin it seemed that the only way to resolve them was by ensuring a compliant legislature.

The Russian system meets the criteria established by Elgie, who defines a semi-presidential system as one in which there is a popularly elected, fixed-term president working with a prime minister and cabinet responsible to parliament.[29] The level of governmental accountability to parliament, however, is contentious since the government is appointed by the president and responsible to him or her. The government is chaired by a prime minister, but at the same time a large block of "power" ministries come under the direct responsibility of the presidency. Like the Tsar according to the 1906 Constitution, who reserved to himself responsibility for foreign policy, control of the armed forces and the executive, the 1993 RF Constitution (Art.80) grants the president control over four key areas: security, defense, home, and foreign affairs. Russia's presidency in effect acts as a duplicate government, with the functions of ministries often shadowed by agencies under the presidency. The prime minister exerts only partial control over his or her own ministers and is deprived of control over the so-called "power ministries" (*siloviki*) responsible for domestic security. The president plays an active role in the policy process, initiating and vetoing legislation. Elt'sin used his decree powers with great gusto, issuing over 1500 policy-relevant *ukazy* during his terms in office.[30] Thus, the nature of prime ministerial and cabinet responsibility to the *Duma* is episodic and unclear in the constitutional order that emerged in late 1993. The *Duma* has the choice of rejecting the president's nomination to the premiership and can adopt no-confidence motions in the cabinet, but other than that the lines of accountability between government and parliament are relatively weak.

27 *Ibidem*, 23-27.

28 Ezra N. Suleiman, Presidential and Political Stability in France", in Juan J. Linz and Arturo Valenzuela, (eds.), *The Failure of Presidential Democracy: Comparative Perspectives*, Baltimore 1994, 137-162.

29 Robert Elgie, (ed.), *Semi-presidentialism in Europe*, Oxford 1999.

30 Willerton, "The Presidency: From Yeltsin to Putin", *op.cit.* note 10, 29.

The government is subordinated to the president and, formally, does not have to represent the majority party or coalition in parliament.

Executive authority became more independent of the legislature, though it remained constrained by law and regulated by parliament within the framework of "delegated legislation". Remington stresses that the 1993 constitutional settlement—while indeed granting the presidency considerable powers as part of the "adaptive evolution" of the system in response to the chronic political crisis of 1990-1993—nevertheless provided significant "compensatory side payments" to other actors to ensure their participation in the new constitutional order. Paradoxically, according to Remington, the Russian parliament emerged as a more effective and representative body than earlier legislatures.[31] Many questions remained, however, including the limits to presidential power. Would a strong executive encourage the development of democracy in society or would it act as a substitute for popular democratic organization? Would not the "strong hand" inevitably take on aspects of the Bolshevism that it sought to extirpate and perpetuate, rather than overcome, traditions of authoritarianism and arbitrariness? While the 1993 Constitution embodies the principles of liberalism, it is predicated on the assumption that the strong president will also be a liberal. In the event of this not being the case, the authoritative (if not authoritarian) elements in the constitution could come into contradiction with its liberal provisions. Is this what has happened?

The question we ask in this chapter is whether this dual hegemonic ambition—to control the political process and to reduce the level of uncertainty in achieving outcomes (characteristic of all presidential systems)—has, in the Russian case, evolved away from the liberal separation of powers enshrined formally in the 1993 Constitution into something akin to a neo-patrimonial system where all institutions and political processes come under the tutelage of the presidency. In a country where the pluralistic countervailing civil society forces—typical of a mature liberalism—are weak, the presidency in Russia appeared to achieve this dual hegemony. Its leadership, however, was challenged by various projects to establish parliamentary hegemony.

Regime Politics: Liberal in Form, Neo-patrimonial in Content?

The dissolution of the Communist Party and the disintegration of the USSR created a power vacuum that was filled by a hegemonic presidency. Under Elt'sin, executive authority became relatively independent from the

[31] Thomas F. Remington, *The Russian Parliament: Institutional Evolution in a Transitional Regime*, New Haven, CT 2001.

legislature, a trend given normative form by the 1993 RF Constitution. Many functions of the old legislature—including some of its committees and commissions—were incorporated into the presidential system, providing yet more impetus to the inflation of the presidential apparatus. By the same token, some of the conflicts that had formerly taken place between the two institutions were now played out within the presidential system itself. The institutional aspects of this have been dubbed the politics of "institutional redundancy" by Huskey.[32] Instead of achieving the effective separation of powers, the new system established the duplication of powers. The Russian presidency began to take on the features of the Tsarist or Soviet systems, with weak prime ministers responsible mainly for economic affairs, a minimal separation of powers and with politics concentrated on the leader. Under Elt'sin, an unwieldy concentration of power was achieved, marked by corruption, clientelism, and inefficiency.

The constitutional order enshrined in the December 1993 Constitution, as we have seen, is focused on the presidency. When the president is weak, so is governance. The effectiveness of the state is dependent on the strength of the presidency in general and on the character of the incumbent in particular. It is this entwining of institutional and personal factors in a weak constitutional order and under-developed civil society that gives rise to what we call "regime politics". A regime here is defined as the network of governing institutions that is broader than the government and reflects formal and informal ways of governing and is usually accompanied by a particular ideology. The regime in Russia is focused on the presidency but is broader than the post of president itself. As suggested above, the power system focused on the regime could theoretically dispense with the presidency and, instead, could base itself on a parliamentary system, as had earlier occurred in Italy and Japan. In a parliamentary regime system, the power elite is less threatened by the emergence of an independent president appealing to the constitutional powers of the state to curb the political pretensions and social power of the regime bloc. A presidential regime system, however, allows greater room for manoeuvre for the chief executive. The presidency under Putin sought to free itself from societal pressures (above all in the form of oligarchs, regional barons, and parliamentary faction leaders) by appealing to the normative framework of the constitution.

State development in post-communist Russia has, thus, faced distinctive challenges. The country is not only a hybrid system in terms of democracy and authoritarianism, but is also one torn between the market and state patronage. Class and state power is highly fragmented, with the regime mediating between the former communist officialdom, the old

[32] Eugene Huskey, *Presidential Power in Russia*, Armonk, NY 1999.

economic monopolies, the rising oligarchic financial-industrial business interests, and sectors of the economy integrated into the international economy. It is indeed the absence of a hegemonic class that inhibits the development of an accountable regime, as Miliband has argued.[33] Where state power relies on a narrow group that is dominant but far from enjoying social and ideological hegemony, an authoritarian outcome is likely. As Fatton writes of the African context: "The non-hegemonic status of the African ruling classes deprives the state of the relative autonomy that makes reform possible, despotism unnecessary, and liberal democracy viable."[34] Putin precisely has tried to free the regime from being captured by a narrow elite group; but while struggling with this danger from the right, he has failed adequately to ensure governmental accountability on the left.

Personalized leadership inhibited the development of institutions. The political regime was focused on Elt'sin and the family and operated largely independently from the formal rules of the political system, whose main structural features were outlined in the Constitution. Behind the formal façade of democratic politics conducted at the level of the state, the regime considered itself largely free from genuine democratic accountability and popular oversight. These features, as Hahn stresses, were accentuated by the high degree of institutional and personal continuity between the Soviet and "democratic" political systems.[35] While a party-state ruled up to 1991, the emergence of a presidential-state by the mid-1990s had given way to a regime-state that perpetuated in new forms much of the arbitrariness of the old system. Both the regime and the constitutional state succumbed to clientelist pressures exerted by powerful interests in society, some of whom (above all, the so-called oligarchs) had been spawned by the regime itself.[36] These constituted a fluid ruling group.

The regime system can be seen as a dynamic set of relationships that include the president, the various factions in the presidential administration, the government (the prime minister and the various ministries), and the informal links with various powerful oligarchs, regional bosses, and other favored insiders.[37] The "family" represents one of the factions in the regime; another is the *Pitery* brought in by Putin to establish a power

33 Ralph Miliband, "State Power and Class Interests", *New Left Review* 1983 No.138, 57-68.

34 Robert Fatton, "Bringing the Ruling Class Back In", 20 *Comparative Politics* 1988 No.3, 254.

35 Gordon M. Hahn, *Russia's Revolution from Above, 1985-2000: Reform, Transition, and Revolution in the Fall of the Soviet Communist Regime*, New Brunswick, NJ 2002.

36 For details, see A. A. Mukhin and P. A. Kozlov, *"Semeinye" tainy ili neofitial'nyi lobbizm v Rossii*, Moscow 2003.

37 Sakwa, *Russian Politics and Society*, *op.cit*. note 23, 454-458; see, also, "The Regime System in Russia", 3 *Contemporary Politics* 1997 No.1, 7-25.

base of his own.[38] The question that we need to address is whether there is an ideological basis to the struggle between these groups: is the struggle between different types of hegemony, with one elite faction trying to defend state autonomy while another (conventionally known as "the family") promotes the predominance of societal pressures?

The regime in Russia—where legitimacy is ultimately derived from the ballot box—is caught between the legal order represented by the state (the formal constitutional institutions of administration and the rule of law), and the system of representative institutions (above all, political parties) and accountability (primarily parliament). The regime acts as if it stands outside the political and normative principles that it had formally sworn to uphold but, at the same time, is constrained by those principles. It is as much concerned with its own perpetuation as with the rational administration of the country. Similar regimes relatively independent of the constitutional constraints of the rule of law and of popular accountability had emerged in post-war Italy and Japan, and in general appear to be a growing phenomenon in post-cold war political systems.

Regime politics in post-communist Russia, therefore, is not like traditional authoritarianism, and the regime could not insulate itself from aspects of modern liberal democratic politics such as media criticism, parliamentary discussion and, above all, from the electoral cycle. The regime looked in two directions at once: forwards towards democracy, international integration, and a less bureaucratized and genuinely market economy; while at the same time it inherited, and indeed perpetuated and reinforced, many features of the past—bureaucratic arbitrariness in politics and the economy, a contemptuous attitude to the citizenry, knee-jerk anti-Westernism, pervasive patron-client relations, Byzantine court politics, and widespread corruption. If under Elt'sin this took patriarchal forms,[39] under Putin it was rather more patrimonial. Regime politics is parasitic on liberalism while undermining the genuine pluralism and individual responsibility and accountability that lie at the heart of liberal politics. It perpetuates a type of neo-patrimonialism in which the regime claims an exclusionary and priority relationship over the political nation and over the country's resources.

Ambiguities of State Reconstitution

Our model of Putin's presidency suggests a tension between the presidency and the regime, in which the former sought to gain greater autonomy from the latter by relying on a revived constitutional state and a reinvigorated

38 A. A. Mukhin, *Piterskoe okruzhenie prezidenta*, Moscow 2003.

39 Breslauer describes patriarchalism as "a form of personalism that treats the political community as a household within which the leader is the *pater familias*", *Gorbachev and Yeltsin as Leaders*, 176.

civil society and popular support. Our approach also suggests that three strategies are in tension with each other. Putin hoped to draw on the constitutional resources of the state to endow the presidency with greater room for maneuver while, at the same time, hoping to combine statism and liberalism to overcome traditional neo-paternalism. Between aim and achievement, however, there remained a gulf.

The potential and formal powers of the state remained enormous, and under Putin the reconstitution of the state became the central theme of his program. This was recognized by no less a figure than the oligarch Boris Berezovsky. Speaking on 23 February 2000 in his constituency (he had been elected a *Duma* deputy on 19 December 1999), Berezovsky said that: "For the first time in 15 years, power in Russia is being consolidated." He noted that: "a new stage of creating a strong state has begun. Russia will have neither a strong army nor a strong society without consolidating power."[40] At that time, he rejected claims that totalitarianism was being revived[41] although later (after Putin had targeted him as one of the most dangerous oligarchs who had abused access to the corridors of power) he was to argue precisely the opposite. Nevertheless, there cannot but be profound ambiguities between liberalism and state strengthening.[42]

The selective approach to the abuses of the Elt'sin era, the attack on segmented regionalism that threatened to undermine the development of federalism, and the apparent lack of understanding of the values of media freedom and human rights, suggested that Putin's reforms could become a general assault on the principles of federalism and democratic freedom. The assault against Mikhail Khodorkovsky's Yukos in the summer of 2003 can be seen as an attempt by the security-administrative apparatus (in the shape of Viktor Ivanov and Igor Sechin in the presidential administration) to halt the shift in the balance of power in Russia from the public to the private sector. In the best neo-patrimonial traditions, the old guard feared the development of autonomous sources of social, and thus of political, power. The dependence of the presidential regime on "power structures", as part of an unstable alliance of the presidency with the bureaucracy and the power ministries, suggested that rather than *reconstituting* the state—that is, drawing on the normative resources of the Constitution to establish the impartial rule of law—a less benign form of statism could emerge. The neo-*nomenklatura* bureaucracy tried to remain an independent political force. We call this the *reconcentration* of the state in which the rhetoric of the defense of constitutional norms and the uniform application of law throughout

40 *Newsline*, 25 February 2000.

41 *Nezavisimaia gazeta*, 24 February 2000.

42 Explored, for example, by Lilia Shevtsova, "Power and Leadership in Putin's Russia", in Andrew Kuchins, (ed.), *Russia after the Fall*, Washington, DC 2002.

the country threatens the development of a genuine federal separation of powers, media and informational freedoms, and establishes a new type of hegemonic party system in which patronage and preference is disbursed by a neo-*nomenklatura* class of state officials. There were many indications that United Russia sought to become the core of a new patronage system of the type that in July 2000 was voted out of office in Mexico after 71 years. The victory of this approach would represent a return to traditional patterns of patrimonial stability politics. As a recent study puts it:

> "this kind of stability does not yield breakthroughs in growth or prosperity: because the nomenclature only has an interest in providing the citizenry with minimum acceptable living standards, in order to protect itself from discontent. It has no interest in the development of entire societal layers that are economically and politically active and capable of independent social action."[43]

As always with Putin, his approach was contradictory. He both challenged the regime, and the neo-patrimonialism that it represented, in the name of the liberal constitutional state but, at the same time, hesitated to repudiate entirely the apparent stability and security offered by regime politics. The resurgence of the state under Putin was therefore torn between two forms, each of which gave rise to a distinctive type of statism. The first takes Putin's commitment to the maintenance of the principles of the existing Constitution at face value, and accepts that the attempt to establish the uniform application of constitutional and other legal norms across Russia in a uniform and homogeneous way represents a genuine attempt not only to undermine the neo-medieval features of governance that had emerged under Elt'sin but also reflected a commitment to liberal universalism.

From this perspective, we describe the attempt to reassert the prerogatives of the constitutional state against the neo-patrimonial features of regime politics as the *reconstitution* of the Russian state. Putin's statism represented an advance for democracy in the sense that the application of the law would be uniform for all, including regional bosses, oligarchs and, presumably, the regime and presidency itself. This is very much a normative (that is, legal and constitutional) reconstitution of state power. The type of system that emerges out of this is a *pluralistic statism*, a democratic statism that defends the unimpeded flow of law and individual rights while respecting the pluralism of civil society and federalist norms. Pluralistic statism takes as genuine Putin's commitments in his *Russia at the Turn of the Millennium* "manifesto" in the last days of 1999,[44] his state-of-the-nation speech of 8 July 2000, and many other statements arguing that a strong state should

43 Svetlana Babaeva, Georgy Bovt, "Putin's New Contract", *Izvestiia* 18 September 2003.

44 Vladimir Putin, *First Person: An Astonishingly Frank Self-Portrait by Russia's President Vladimir Putin*, with Nataliya Gevorkyan, Natalya Timakova, and Andrei Kolesnikov, translated by Catherine A. Fitzpatrick, London 2000, 209-19; Richard Sakwa, *Putin: Russia's Choice*, London/New York 2004, 251-262.

be rooted in a liberal economic order and a vibrant civil society. The choice ultimately came down to one between liberal statism and the recrudescence of neo-patrimonialism; although committed to achieving the first, Putin was not able to escape the second.

In the Russian context, state reconstitution would appear to enjoy advantages not available to countries still in the throes of the early stages of development.[45] The Russian state has not collapsed and, in certain areas, retains the ability to mobilize resources to pursue policies, if not effectively, then at least vigorously. Russia has enormous reserves of intellectual potential, a trained administrative elite, and the basic infrastructure of a modern state. Russia suffered not so much from a crisis of the state as a crisis of governance. Clearly, they cannot be separated, yet they are analytically distinct; the remedy for one problem is not the same as that for the other. Improvement of governance requires political institutionalization, that is, the process whereby organizations, procedures, and norms not only acquire legitimacy and stability but are conducted within the framework of law and in the spirit of state service. The response to a crisis of the state, by contrast, can take numerous forms, not all of them compatible with constitutionalism and the rule of law.

One of them is the neo-authoritarian statism identified above. In the transition from communism, many had called for a "firm hand", even of the Pinochet type where in Chile political liberty was traded in exchange for economic growth. Others have stressed the Bonapartist features of Putin's rule, a system defined in Marxist terms as "an authoritarian government that temporarily gains relative independence and reigns above the classes of society, mediating between them".[46] Medushevsky, for example, has developed this model, with the appointment of the *polpredy* (the presidential representatives at the head of the seven new Federal Districts) acting as the functional equivalents of the Napoleonic prefects.[47] For Lukin, the key point was to end "the excesses of the 'democratic revolution' while preserving its major achievements".[48] Putin certainly scraped off the revolutionary froth and tried to restore order, strengthen the constitutional state and improve the quality of governance, but these ambitious "post-revolutionary" tasks were entwined with the problem of the nature of the power system. While some have stressed the establishment of a system

45 For a comparative study, see Mark R. Beissinger and Crawford Young, (eds.), *Beyond State Crisis? Post-Colonial Africa and Post-Soviet Eurasia in Comparative Perspective*, Washington, DC 2002.

46 The definition is from Alexander Lukin, "Putin's Regime: Restoration or Revolution?", 48 *Problems of Post-Communism* July/August 2000 No.4, 47.

47 Andrei Medushevskii, "Bonapartistskaia model' vlasti dlia Rossii?", *Konstitutsionnoe pravo: vostochnoevropeiskoe obozrenie* 2001 No.4 (33)/No.1 (34), 8.

48 Lukin, "Putin's Regime", *op.cit.* note 46, 47.

of "managed democracy",[49] this chapter argues that Putin's project was far more complex and ambivalent.

Neo-Authoritarianism, Liberalism or Neo-Paternalism

While the presidency under Putin sought to carve out greater room for maneuver, Putin was hesitant to subordinate the regime entirely to the imperatives of the constitutional order or to the vagaries of the popular representative system (elections). Elt'sin earlier had feared that the untrammeled exercise of democracy could lead to the wrong result, the election of a communist government that would undo the work of building market democracy, threaten Russia's neighbors in pursuit of the dream of the reunification of the USSR, and antagonize the country's Western partners. It was for this reason that factions in the regime had called for the 1996 presidential elections to be cancelled. The dilemma was not an unreal one, and reflected the regime's view that the Russian people had not yet quite matured enough to be trusted with democracy. Like the Turkish military and the army in some Latin American countries, the regime considered itself the guardian of the nation's true ideals. This was the tutelary ideology explicitly espoused by some of the regime's policy intellectuals such as Gleb Pavlovsky and Sergei Markov, and it was not entirely devoid of rationality. A neo-traditional type of paternalism replaced the purposiveness that had characterized the Bolshevik and early Elt'sin years. However, we know that whenever the military acts against democracy as the "savior of the nation", the results are usually the opposite of those intended, and the regime's mimicry of the military stymied the development of a political order robust enough to defend itself against the enemies of democracy.

Thus, when Putin undertook the task of rebuilding the state, he was torn between a number of imperatives. The first and most obvious was his intention to clean up the regime's own act, to put an end to the most extravagant corruption and free access to political power by the oligarchs. This he managed to achieve relatively quickly by establishing the "rules of the game" and by imposing a policy of "equi-distance" on business leaders. The next task was to ensure the unimpeded and universal application of law throughout the whole country. While this began to rein in the regional barons, in certain cases (and, above all, in Chechnia) the writ of law was far from uniform. The predominance of the regime itself was not challenged, while within the regime Putin sought to broaden the autonomy of the

49 A. Verkhovskii, E. Mikhailovskaia and V. Pribylovskii, *Rossiia Putina: pristrastnyi vzgliad*, Moscow 2003.

presidency. While Putin stressed the strengthening of the state, too often it appeared that his interpretation of state strengthening was synonymous with the consolidation of the regime, and within the regime, the enhancement of the presidency. This was a strengthening that itself was more based on control and loyalty rather than trust. As McFaul put it,

> "it would be wrong to conclude that Putin is an 'anti-democrat'. The Russian president is simply too modern and too Western-oriented to believe in dictatorship. Rather, Putin is indifferent to democratic principles and practices, believing perhaps that Russia might have to sacrifice democracy in the short run to achieve 'more important' economic and state building goals."[50]

Here, McFaul is fighting the battles of yesteryear: although Putin was indeed committed to liberal economic reforms, of far greater importance for him was the restructuring of political space.

Putin's attempts to reconstitute the state as an independent political force began to threaten the privileges of the regime, and it was perhaps this more than anything else that explains the renewed interest in establishing a more parliamentary form of government. An autonomous presidency whose legitimacy was grounded in the legal-constitutional order represented by the constitutional state appeared far too dangerous for the regime. Parliamentary government appeared far more controllable and amenable to the instruments of power capable of being exerted by the rising capitalist class. However, as always with Putin, his approach was contradictory. He both challenged the regime, and the neo-patrimonialism that it represented—in the name of the liberal constitutional state—but, at the same time, hesitated to repudiate entirely the apparent stability and security offered by regime politics.

From the very first days of his presidency, Putin drew on constitutional resources to re-affirm the prerogatives of the state *vis-à-vis* segmented regional regimes. The struggle for the universal application of the rule of law, however, threatened to intensify at the federal level the lawlessness that characterized so much of regional government. Elt'sin's personalized regime represented a threat to the state, but its very diffuseness and encouragement of asymmetrical federalism allowed a profusion of media, regional, and other freedoms to survive. Putin's new statism carried both a positive and a negative charge: the strengthening of the rule of law was clearly long-overdue; but enhancing the powers of the regime and the presidency was not the same as strengthening the constitutional rule of law. The weakening of the federal pillar of the separation of powers was not likely to enhance the defense of freedom as a whole. The key test would be whether the revived presidency would itself become subordinate to the new emphasis on "the dictatorship of law", and thus encourage the development of a genuine ordered rule of

[50] Michael McFaul, "Indifferent to Democracy", *The Washington Post* 3 March 2000, A29.

law state, or whether it would attempt to stand aloof from the process and thus once again perpetuate the traditions of the "revolution from above", if only to put an end to the revolution, and thus perpetuate typical patterns of stability politics.

This is not the place to enter into details of the Byzantine maneuverings that have attended discussion over amending the Constitution.[51] What the debate over a shift from a presidential to a parliamentary republic suggests is not an attempt to undermine hegemonic power as such in favor of a more liberal and pluralistic political process, but a struggle between rival hegemonic forces. In that context, a hegemonic presidency may be a lesser evil than the hegemonic powers of oligarchical capitalism. A shift to a government based on a parliamentary majority may well signal the transition from a hegemonic regime system based on the presidency to one based on parliament, and, thus, undo the settlement imposed after October 1993. A state-centered hegemonic regime would give way to a societal-based one. Both types reflect the under-development of a robust pluralism that would underpin any genuinely liberal politics.

Conclusion

In the twilight years of Soviet power, the presidency emerged as an institution that could act as the functional substitute for the waning powers of the Communist Party. In the early years of independent Russia, the absence of adequately structured political forces in society—above all political parties—allowed a struggle for two contrasting hegemonic forces to emerge: represented by the presidency and parliament. In 1993, this struggle took on ever more entrenched forms and culminated in the violent resolution of September-October. Out of this conflict, a constitutional settlement emerged that codified the powers of a hegemonic presidency. The presidency became the core of a shifting structure of power that we call a regime system, in which the formal provisions of the constitution are adhered to but the spirit of constitutionalism is undermined by the ability of the regime to remove itself from popular and representative accountability. Instead of a party-state, a regime-state emerged.

Regime politics in the late Elt'sin years allowed social forces direct access to the resources of the state and a reconstituted neo-patrimonialism emerged where the emphasis was on informal ties and direct access to the state in a clan-type clientelistic system. The presidency, however, remained implicitly the gatekeeper, and under Putin the reassertion of state authority represented the robust reassertion of these gate-keeping

[51] For an indicative analysis, see Vladimir Pribylovsky, "Oligarchs, True and False", *Russia and Eurasia Review* 10 June 2003.

functions. Statist regime politics ensured that the constitution became the fundamental regulation mechanism of the Putinist system. Oligarchical interests were tempered by control exerted by the bureaucracy and state officialdom. Dissatisfaction with this state of affairs encouraged attempts to modify the constitution to create a parliamentary-based hegemonic regime system. Statist regime politics would give way to societal regime politics. In all of this, the liberal element remained undeveloped, and the distinction between the public and the private—including the impartial defense of the rule of law and private property—remained contested.

Putin's reforms had the potential to transform Russia's political space, but for that the neo-patrimonial regime management of political processes would have to give way to the autonomy of a genuinely liberal political market place. It was not clear that Putin was quite ready for that—or indeed whether the country was. Personalized and relations-based government would have to give way to a genuinely autonomous rules-based system. Factions in the presidential administration feared a shift to a more party-based government. Only when the regime is brought under the control of law and the Constitution—and within the ambit of political accountability—can Russia be considered to have achieved democratic consolidation. This would be a revolution every bit as significant as the fall of communism itself in 1991, and was the main challenge facing Putin's presidency. It is this process that we call the reconstitution of the state, literally rendering the political process and regime actors subordinate to the legal constitutional system and responsive to the needs of citizens. What Max Weber before 1917 had called "sham constitutionalism" in the Soviet epoch became "pseudo-constitutionalism", and in the post-Soviet years had become "quasi-constitutionalism". Now the challenge was to transform this quasi-constitutionalism into real constitutionalism where political institutions are subordinated to the rule of law and where human, civil, and property rights are defensible by law. Genuine liberalism would replace the statist struggle to manage democracy and the neo-patrimonial struggle for hegemony.

Politics of the Yukos Affair

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Prologue

During the 1990s in Russia, a small group of financially shrewd and, often, ruthless young men built industrial empires from privatized state property. These properties were obtained at fire sale prices under the El'tsin administration.[1] The group came to be called oligarchs, a term signifying the great wealth, power, and influence they had acquired. In the process of amassing their fortunes, however, the oligarchs cut many legal corners, trampled diverse laws, and corrupted numerous state and judicial officials. All, thus, became potentially legally vulnerable should the Russian state choose to take action.

Early in the Putin administration, the two most politically influential oligarchs, Boris Berezovsky and Vladimir Gusinsky, were relentlessly hounded and pursued by the state until both chose exile over prison.[2] In 2003, Mikhail Khodorkovsky, the wealthiest and most politically active oligarch, came into the state's sights. He became the object of criminal prosecution based on the Procuracy's extensive files of his legally questionable past behavior in the process of building Yukos, his vast oil empire. After proceedings of nearly two years, Khodorkovsky was convicted, sentenced, and incarcerated in a legal process marred by myriad and often egregious procedural and other violations committed by Russian law enforcement.[3]

[*] The author wishes to dedicate this essay to his long time colleague, collaborator, and friend Peter B. Maggs, distinguished holder of the Carney Chair in Law at the College of Law, University of Illinois at Urbana-Champaign.

[1] See D.E. Hoffman, *The Oligarchs: Wealth and Power in the New Russia*, New York 2002, and M.I. Goldman, *The Piratization of Russia: Russian Reform Goes Awry*, London 2003.

[2] P. Klebnikov, *Godfather of the Kremlin: The Decline of Russia in the Age of Gangster Capitalism*, New York 2000, and A. Jack, *Inside Putin's Russia: Can There Be Reform Without Democracy*, Oxford, UK 2004, 131-215.

[3] The Khodorkovsky defense team maintains an elaborate web site which has tracked the proceedings in considerable detail on a daily basis. See: <http://www.khodorkovskytrial.com> (hereinafter "Yukos Web Site").

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A discussion of the Yukos affair follows as a study in "illegitimate wealth facing arbitrary power".[4]

The Past Revisited

For an old hand at Soviet legal studies, the Yukos affair of 2003-2005 triggered a troubling sense of *déjà vu*. In post-Soviet Russia—where the commitment to the development of the rule of law has been marked by a number of forward and far reaching legal reforms[5]—the trial of Khodorkovsky and Platon Lebedev, a partner, which concluded late spring 2005, can only be viewed as a regressive step.

One is reminded of the concept of "dual Russia",[6] but with an ironic twist, to wit, Khodorkovsky—the principal defendant, heretofore the wealthiest and arguably the most influential private citizen in the country—had been expelled from Official Russia and cast into the depths of Popular Russia. Similarly, Stalin's prosecutor Andrei Vyshinsky comes to mind, in particular the dual policies he simultaneously administered, directing the development of the Soviet legal system while presiding over conspicuous displays of political justice.[7] In effect, in the Yukos affair, we have witnessed once again prerogative authority manipulating the normative process[8] as political expediency has trumped legality in a classic exercise of *ad hoc* legal policy or the circumvention of procedural and substantive due process of law.[9]

The routine is by now familiar from past experience—a suitable target for selective prosecution was chosen, and a political trial mounted under the guise of an ordinary criminal proceeding.[10] The whole affair took on the

4 Quoted in W. Thomson, "Putting Yukos in Perspective", 21 *Post-Soviet Affairs* 2005 No.2, 162.

5 See G.B. Smith, *Reforming the Russian Legal System*, Cambridge, UK 1996; R. Sharlet, "In Search of the Rule of Law", in S. White, Z. Gitelman, R. Sakwa, (eds.), *Developments in Russian Politics*, New York 2005, Ch.8; and R. Sharlet and F. Feldbrugge, (eds.), *Public Policy and Law in Russia: In Search of a Unified Legal and Political Space,* in William B. Simons, (ed.), *Law in Eastern Europe*, No.55, Leiden, Boston 2005.

6 R.C. Tucker, *The Soviet Political Mind*, rev. ed., New York 1971, Ch.6.

7 R. Sharlet, "Stalinism and Soviet Legal Culture", in R.C. Tucker, (ed.), *Stalinism*, New York 1977, 155-79, and R. Sharlet and P. Beirne, "In Search of Vyshinsky: The Paradox of Law and Terror" in P. Beirne, (ed.), *Revolution in Law: Contributions to the Development of Soviet Legal Theory, 1917-1938*, Armonk, NY 1990, Ch.6.

8 See E. Fraenkel, *The Dual State*, London 1941. The author is indebted to the late Darrell P. Hammer for introducing him to Fraenkel's concept which he later applied to the study of Soviet law.

9 See R. Sharlet, "Putin and the Politics of Law in Russia", 17 *Post-Soviet Affairs* 2001 No.3, esp. 228-30.

10 See O. Kirchheimer, *Political Justice*: *The Use of Legal Procedure for Political Ends*, Princeton, NJ 1961, Ch.1, and Ch.3, secs.1 and 2.

characteristics of a high profile show trial[11] in which power (once referred to as *partiinost'*) preempted legal process through a *sub rosa* combination of political imperatives and informal rules (previously called "instructive law").[12] In the hands of compliant prosecutors and pliable judges, this latter day shadowy "law" shaded the meaning and application of formal law.

Finally for the defendants, their courtroom defense of choice, of necessity, became the former dissident formula of legality *versus* political arbitrariness but was, ultimately, of no avail. As with Soviet prosecutions of dissidents in the past, the outcome was predictable and predetermined from the outset.[13] With Khodorkovsky and his fellow defendant now serving long terms, the question raised by the proceedings is:

> "Was the Yukos affair a one-off event—an unfortunate but temporary regression in Russia's promising legal development—or did it represent a baleful harbinger of a post-Soviet Russian jurisprudence of political expediency?"

The Yukos Affair: A Thumbnail Sketch of the State's Actions

My purpose in this chapter is to examine the politics of the Yukos affair rather than analyze the legal proceedings themselves.[14] In effect, I hope to explore the Putin administration's maneuvers and machinations along the interface of politics and law in contemporary Russia for the purpose of placing the Yukos affair within larger national—and even international political and economic—contexts.

However, first a brief history of the salient events and proceedings is in order. In summer 2003, Khodorkovsky's partner, Lebedev, was arrested for fraud and tax evasion. As a result, the Yukos corporation and its employees came under considerable investigative pressure. During the fall, Khodorkovsky himself was arrested on the same charges in a highly

11 On the modern version of the show trial, see K. L. Scheppele, "Show Case: The Terrorist Logics of the Spectacular Lawsuit", a paper presented at the Annual Meeting of the Law and Society Assn., Pittsburgh, PA 2003.

12 A former Soviet prosecutor, Fridrikh Neznansky, developed the concept. See his *The Prosecution of Economic Crimes in the USSR, 1954-1984*, Falls Church, VA 1985, 32-37 (R. Sharlet, ed.).

13 For the latest addition to the vast literature on the subject, see E. Gilligan, *Defending Human Rights in Russia: Sergei Kovalyov, Dissident and Human Rights Commissioner, 1969-2003*, London 2004, Ch.1.

14 Peter Clateman, an American attorney working for a Russian law firm in Moscow, wrote a series of online commentaries on the specific legal issues of the proceedings throughout the Yukos affair. His commentaries were distributed through *Johnson's Russia List* (<davidjohnson@starpower.net>) beginning November 2003, and including issues #7462, 8170, 8171, 8353, and 9020.

dramatic fashion marked with military precision—by masked police with drawn guns as his private jet was being refueled on a runway at a Siberian airport. The preliminary investigations of the defendants went on for months with additional charges added as investigators and prosecutors fine-tuned their indictments. Bail was consistently denied and pre-trial detention constantly renewed. In the course of long process, it was decided—rather than mount two separate overlapping trials—to bring the two executives to court together under a single indictment.

Finally, in June 2004, the criminal trial against the two men opened in a Moscow *raion* court, not long after the state began proceedings for huge back tax claims against Yukos in the Moscow *Arbitrazh* Court. In comparison with previous high profile prosecutions for financial wrong doings, the Khodorkovsky-Lebedev indictment withstood the scrutiny of Western experts who found it "well written and well pled".[15] After almost a year of criminal proceedings in May 2005, the Moscow *raion* court brought in a verdict of guilty on all counts against the two defendants. Both were sentenced to nine years minus time served. In the course of their long criminal trial, Yukos—Russia's largest and most efficient oil company—was effectively liquidated through the state's relentless legal actions which forced distress sales of company assets to satisfy confiscatory back tax judgments.

The legal teams for the two defendants promptly filed appeals to the first appellate level in the judicial hierarchy. In early fall 2005, their appeals were denied and the convictions confirmed, although two of the lesser charges were dismissed and sentences were reduced by a year. While further appeals are planned, both men began serving their sentences in the Russian penal system. Meanwhile, the state had opened a new investigation against Khodorkovsky and Lebedev on money laundering charges. Therefore, hypothetically, even after the Russian appellate process is exhausted—and if an ultimate appeal to the European Court of Human Rights in Strasbourg succeeds—the two men are likely to still remain in custody as the state proceeds against them in a second criminal case.[16]

Politics of the State's Case against Khodorkovsky

Although the state had a strong case against Khodorkovsky as principal defendant, it could just as easily have brought actions against other

15 Guy Chazan, "Russian Trial Opens Messy Chapter", *The Wall Street Journal* 16 June 2004.

16 I am indebted to Professor Stanislaw Pomorski of Rutgers University Law School, Camden, NJ for clarifying aspects of Russian appellate procedure, as well as the procedure of the Strasbourg court.

oligarchs on the basis of similar empire-building tactics. Why, then, Khodorkovsky?

When Putin came to power in 2000, he made clear his intention to restore the authority of the federal state as well as the office of the president, both of which had been weakened and eroded under his predecessor. Accordingly, in just over his first 150 days in office, Putin took on the runaway provinces, the most free-wheeling oligarchs who controlled the major independent media, and the contentious general staff.[17] Putin's watchword for his vigorous campaign to bring the Federation Subjects and the oligarchs back into line became the "dictatorship of law".[18] This first entailed reasserting the authority and supremacy of the Constitution and federal legislation over republics and regions which under El'tsin had begun to act independently of Moscow on the basis of ideas such as republic sovereignty and the supremacy of local law.[19] Eventually, order was restored in the provinces and Russia began to resemble the unified legal and political realm envisioned by the constitutional draftsmen of 1993.

The other area which drew Putin's attention—if the state and its Constitution were to be not just the *de jure* law of the land but *de facto* supreme authority as well—were the business practices of the several dozen oligarchs, most of whom had long played fast and loose with federal and regional law. However, because these men presided over significant sectors of the Russian economy which could be damaged by intemperate public action, a broadside offensive was out of the question. Instead, Putin initially targeted the media moguls Gusinsky and Berezovsky.

Through a set of swift actions involving threats of selective prosecution for past misdeeds, political intimidation, and even strong arm tactics, both oligarchs were soon "persuaded" to sell their major media properties to companies controlled by the state and chose exile over prosecution and inevitable incarceration.

Having given two conspicuous demonstrations of his determination to rein in the oligarchs, the president convened a meeting in mid-2000 with Russia's other business titans, warning them against further meddling in national politics, and vaguely implying that if they complied he would consider not re-visiting their high handed and even piratical privatization deals of the 1990s. At the meeting in the Kremlin, however, Putin spoke mainly in generalities and offered no guarantees. Nevertheless, most of

17 See "Putin Sacks a Bevy of Army Generals", 52 *The Current Digest of the Post-Soviet Press* 2000 No.31, 9.

18 See R. Sharlet, "Putin and the Politics of Law in Russia", 17 *Post-Soviet Affairs* 2001 No.3, 195-234, and R. Sakwa, *Putin: Russia's Choice*, London 2004, 90-92 and 138-40.

19 See J. Kahn, *Federalism, Democratization, and the Rule of Law in Russia*, Oxford, UK 2002, chs.5-9.

the oligarchs chose to believe that a kind of implicit social contract had been struck between them and the head of state; thereafter the majority refrained from behavior which might put them in conflict with the public authorities.[20]

The exception was Khodorkovsky who had become the wealthiest of the oligarchs through a combination of business acumen and unscrupulous tactics. While Berezovsky, in the words of his biographer, had been "a master of political intrigue"—both in the drawing rooms and back corridors of the Kremlin[21]—Khodorkovsky, by contrast, was confrontational with power. Previously one of the most skillfully predatory of the oligarchs, he had become a "born again" advocate of responsible corporate behavior.[22] Yukos, in turn, was transformed into a model of corporate transparency and good governance. In his new guise as the white knight of Russian capitalism, Khodorkovsky became a conspicuous player not only in domestic politics, but in foreign economic policy as well.[23]

In the State *Duma* dominated by the president's party, United Russia, Khodorkovsky had reportedly bought control of 100 votes, not enough to carry legislation, but sufficient to block bills deemed contrary to the interests of Yukos and the oil industry. In this spirit, Khodorkovsky's aggressive lobbying in 2001 and 2002—along with other oil companies—had succeeded in derailing legislation to raise taxes on oil products. Again in summer of 2003, his political interventions in the *Duma* resulted in watering down a strong administration tax bill on petroleum.[24] As the parliamentary elections approached that December, there were strong rumors that Khodorkovsky had offered $100 million to two liberal parties if they would run a common slate of candidates against United Russia. He had also spoken in favor of constitutional reforms toward reducing presidential powers in the direction of a parliamentary republic in spite of Putin's oft repeated statement that the Constitution required no revision for the foreseeable future. Finally, Khodorkovsky hinted at his own political ambitions in suggesting he might run for president upon the expiry of Putin's second and final term in 2008.

The young oligarch was equally bold on the international front, advocating a Russian oil pipeline to China and opening negotiations with

20 W. Thomson, "Putting Yukos in Perspective", 21 *Post-Soviet Affairs* 2005 No.2, 168-69.

21 P. Klebnikov, *Godfather of the Kremlin*, New York 2000, 319.

22 M.I. Goldman in P. Desai, (ed.), "Roundtable on Russian Privatization", 15 *Harriman Review* 2004 No.1, 17.

23 M.I. Goldman, "Putin and the Oligarchs", 83 *Foreign Affairs* 2004 No.6, 33-44.

24 A. Jack, *Inside Putin's Russia*, Oxford, UK 2004, 213.

US oil companies interested in acquiring a stake in Russia's oil fields. Khodorkovsky took his China pipeline proposal a step further, arguing if the state did not undertake the project, he would build his own pipeline, bypassing the state's pipeline monopoly, Transneft', and effectively privatizing foreign policy. His involvement in pipeline politics ran afoul of the Putin's administration preference for a route to the Sea of Japan which would permit Russian oil exports to Japan, South Korea, and the United States as well as to China.[25] Khodorkovsky's US oil talks were also unsettling to Putin's entourage which had already begun to worry about yielding pieces of Russian petroleum assets to significant foreign ownership. It was further felt that an American partnership would increase Khodorkovsky's sense of independence from Kremlin control.

The final straw, however—which may have clinched the administration's decision to target Khodorkovsky—was his criticism of the government on the issue of corruption at a public session with the president in early 2003. Putin did not take it well, reminding Khodorkovsky of his past tax evasion.[26] Given Berezovsky's downfall for far less, what could have motivated Khodorkovsky's persistent interference in politics in view of Putin's unequivocal warning to the business community? His fellow oligarchs had urged him to stick to business and cease and desist his political activities, to which he reasonably but naively responded that his constitutional rights as a citizen took precedence over the pact with Putin. Even Khodorkovsky's mother cautioned him to remember what country he lived in,[27] but all efforts to deflect him were to no avail. In view of his potential vulnerability to prosecution for past misdeeds, one can find no rational reason for his course of action.

The only conclusion possible is that Khodorkovsky's hubris, his extreme arrogance, as well as a seductive belief in his relatively recent celebrity in the Russian and world press, drove him to pursue a collision course with Putin, particularly at a time when the political pendulum was swinging back from freedom toward order. Khodorkovsky seemed unable to grasp that not everyone in Putin's circles appreciated his new self-image as a paragon of corporate ethics and champion of political democracy—both of which roles apparently gave him a false sense of security and invulnerability.

25 "Russian Oil: King Solomon's Pipes", *The Economist* 7 May 2005, 60.

26 Jack, *op.cit.* note 24, 213.

27 "Special Report: The Khodorkovsky Case", *The Economist* 21 May 2005, 27.

State Persecution under the Cover of Prosecution

The Yukos affair presented a paradox. In spite of its strong criminal case against Khodorkovsky and Lebedev, the state—from arrest through appeal—chose to gratuitously commit numerous and often egregious procedural violations, and engage in unremitting high profile harassment of the defendants, their lawyers, and nearly all associated with the proceedings. The conduct of the state authorities as such saddened and embarrassed many Russians as well as friends abroad who had long vested their hopes in Russia's steady progress toward the rule of law.[28]

In the pre-trial stage,[29] defense lawyers were unlawfully subjected to questioning, attorney-client privilege breached, hearings unjustifiably closed, bail arbitrarily denied, detention continuously extended without just cause, and search and seizure rules violated; there was constant pressure to commit self-incrimination, defendants were given insufficient time to read hundreds of volumes of case materials at the conclusion of the investigations, and the court's judicial independence was compromised by politically inspired administrative interference.[30] Violation of the defendants' procedural due process rights at the outset of the proceedings was so consistently flagrant that one can only imagine the prosecutor-general had been given political license to carry out a campaign of "shock and awe".

Most of the above violations continued during the trial phase, as well as additional procedural lapses by both prosecution and court. Attorney-client contacts were severely limited, evidentiary rules manipulated to favor the prosecution and disadvantage the defense, defense lawyers were detained and interrogated about their clients' cases, attempts were made to intimidate and disbar attorneys, the defense was refused essential expert witnesses, defense witnesses fearing reprisals were not called, prosecutors

[28] Repeatedly during the Yukos affair, Russia drew criticism from the Council of Europe of which it is a member state. See Yukos Web Site, "The Case: Timeline of Events", 7 October 2004, 19 November 2004, 25 January 2005 and 16 May 2005. At a press conference in Washington, DC on 31 May 2005, President George Bush commented that it looked like Khodorkovsky "had been judged prior to having a fair trial".

[29] See "Constitutional and Due Process Violations in the Khodorkovsky/Yukos Case", a "white paper" prepared by defense lawyers, fall 2003 (now available on the Yukos Web Site).

[30] Aside from an unseemly turnover of judges presiding in the tax case against Yukos in the Moscow *Arbitrazh* Court, Judge Olga Egorova (Chief Judge of the Moscow City Court system) was already notorious for bringing pressure to bear on subordinate judges on behalf of the Kremlin's interests. The wife of a *FSB* general, Egorova, had been hastily appointed chief judge just prior to the earlier proceedings against Gusinsky. Since 2000, she has forced the resignations of dozens of Moscow's judges in what can only be considered a virtual purge of independent-minded jurists.

periodically conducted trial by press, the court ruled for the defense on just three motions from over thirty filed, burden of proof was sometimes shifted to the accused, and, in general, defendants were denied fair trial under the provisions of the Russian Constitution and the relatively new post-Soviet Code of Criminal Procedure.[31]

Extra-judicial harassment was also a constant during the pre-trial and trial phases of the Yukos affair. It ranged from petty bureaucratic behavior to more serious heavy handed actions. On the lighter side, the Ministry of Agriculture opened an investigation of Yukos concerning "unsupervised mating of rabbits" on a farm belonging to a company affiliate,[32] while more portentously, the Natural Resources Ministry took an interest in Yukos's oil licenses. Periodic police raids were carried out on offices and homes of Yukos executives by masked, armed men with crow bars and sledge hammers which left behind physical destruction and disruption of business activities. Over 200 such raids took place in the course of the proceedings. No one associated with the defendants was spared. Warrantless searches of lawyers' offices and files also occurred. The raids even included an orphanage sponsored by Yukos as well as the school of Khodorkovsky's daughter.

When Khodorkovsky supporters held a noisy but peaceful rally outside the courthouse during the long reading of the 1300-page verdict, the police moved in, beating several protestors, and detaining 28. On another occasion, demonstrators obtained a rally permit, but when they arrived at the site, they found the street torn up and under repair.[33] An assistant prosecutor, standing on the proverbial courthouse steps, even implied that Khodorkovsky's elderly father might have been aware of transgressions by Yukos employees and, hence, complicit. Finally, when the Moscow *Arbitrazh* Court ordered Yukos's main oil producing asset auctioned off to pay back taxes, the winning bid—at a below market price—came from an unknown firm clearly fronting for a state oil enterprise with a business address listed above a provincial grocery in an obscure Siberian town.[34]

State persecution under guise of prosecution did not cease with reading of the guilty verdicts in late May 2005. The appeals process was consistently compromised by the authorities as well. In connection with

31 "Lawyers' writ of appeal on Mikhail Khodorkovsky's sentence", Yukos Web Site, "The Trial: Trial Updates: Appeals", and "The Rule of Law in Russia: Getting Khodorkovsky", *Johnson's Russia List* 23 February 2005, #9065, a summary of procedural violations during the trial reported to the Council of Europe by its representative, a former German Justice Minister.

32 Yukos Web Site, "The Case: Timeline of Events", 7 November 2003.

33 *The New York Times on the Web* (<http://www.nytimes.com>), 1 June 2005.

34 "Putin versus Khodorkovsky: 'Justice' Postponed", *The Economist* 30 April 2005.

preparing for the appeal hearing, defense lawyers were given access to official case files (400 volumes) as well as the seventeen-volume trial transcript, but under difficult working conditions, and—given the number of attorneys and the amount of reading involved—subject to a restrictive time limit. In addition, two lawyers—who represented Khodorkovsky on appeal—were denied contact with him. To add further pressure on the team, the appellate court moved up the date of its hearing.[35]

The court's appellate review in September 2005 was itself hasty and even rushed. Given the great volume of the case record to be examined, the court allowed itself insufficient time for a thorough and careful review and, then in an hour, reaffirmed the guilty verdicts with only marginal modifications. Meanwhile, the Procuracy drew public attention to its ongoing money laundering investigation of the defendants, including another dramatic document raid, this time at the offices of "Open Russia", a charity supported by Khodorkovsky. Lastly, immediately following the appeals decision—as a grand finale to what a former Russian prime minister referred to as a "judicial farce"[36]—the Procuracy and Justice Ministry took steps to disbar and revoke the licenses of the attorneys, while the immigration authorities moved against a foreign lawyer serving as a legal observer on the defense team, abruptly expelling him from Russia.[37]

The State and the Yukos Affair: Cost and Benefits

At the level of media images of the Yukos affair, the standoff between the authorities and Khodorkovsky was a draw, but in terms of the larger, strategic issues involved, the benefits to the state outweighed the costs.

Khodorkovsky's legal team—in addition to conducting his defense under difficult circumstances—mounted an extensive campaign to win sympathy for their client by emphasizing his newly assumed role as corporate statesman. This succeeded in winning a great deal of favorable press for Khodorkovsky abroad. Conversely, many better informed journalists as well as several foreign scholars struck a more balanced note on the proceedings. The more ardent media sympathizers of Khodorkovsky—and critics of Putin administration—referred to him as a "political prisoner" and even a "prisoner of conscience" although Amnesty International declined to adopt the case, while a British journalist referred to the trial

35 "The Appeal of Mikhail Khodorkovsky and Platon Lebedev", Yukos Web Site, "The Trial: Trial Updates: Appeals", 29 September 2005, 2-3.

36 Mikhail Kasyanov, Yukos Web Site, "The Case: Timeline of Events", 19 May 2005.

37 For the Canadian lawyer Robert Amsterdam's expulsion, see "Khodorkovsky in European Appeal", *BBC News: World Edition* (<http://news.bbc.co.uk>), 23 September 2005.

as a "Dreyfus Affair",[38] an allusion to Khodorkovsky being half Jewish. In rhetorical rebuttal, a trio of Russian and American experts commented "Khodorkovsky is no Sakharov".[39]

More balanced accounts of the Yukos affair took note of Khodorkovsky's past, while commenting critically on the state's conduct of the proceedings against him. As one international magazine put it: "a ruthless man sunk by an even greater ruthlessness than his own."[40] At the trial's conclusion, *The New York Times* editorialized while Khodorkovsky had been the "template for the breed" of predatory oligarchs, the trial had "the air of politically motivated vengeance and looting".[41] As to the defendant's recklessness in confronting power politically, a scholar commented: "Khodorkovsky was sailing not just close to, but right into the wind."[42] An authoritative article in an elite Western foreign policy journal concluded: "If it is difficult to defend Khodorkovsky and the other oligarchs, it is equally difficult to justify the methods Putin used against them."[43]

However, since media images pro and con have a relatively short shelf life, it is the Putin administration's broader aims in bringing the case—and to what extent they were realized—that one must evaluate to reach a cost-benefit tally of the long proceedings. On the cost side, clearly the administration suffered some short term bad press which was not effectively rebutted by spokesmen. In responding to more general criticism of Russia's slippage on the democracy path in early 2005, the best Defense Minister Ivanov could come up with was: "Democracy is not just a potato that can be transplanted from one garden to another."[44] On the conduct of the trial itself, Putin on a couple of occasions disingenuously commented that Khodorkovsky was, of course, innocent until proven guilty and noted that the proceedings could not be politically motivated since the defendant had never run for or held public office.[45]

Another near-term concern that the Yukos affair would scare off foreign investors was not realized. Regarding Khodorkovsky as a "trouble-

38 Anthony Robinson in *Prospect* (UK), *Johnson's Russia List* 17 March 2005, #9093.

39 M. McFaul, N. Petrov and A. Ryabov, *Between Dictatorship and Democracy: Russian Post-Communist Political Reform*, Washington, DC 2004, 297.

40 "Special Report: The Khodorkovsky Case", *The Economist* 21 May 2005, 27.

41 "Justice on Trial in Russia", *The New York Times* 19 April 2005, A20.

42 S. Kotkin, "What is to be done?", *Financial Times* 6 March 2004.

43 M.I. Goldman, "Putin and the Oligarchs', 83 *Foreign Affairs* 2004 No.6, 41.

44 "That Democracy is Not a Potato", *RFE/RL Newsline*, No.30, Part 1, 14 February 2005.

45 "Putin Denies Yukos Case is Politically Motivated", *Interfax* 21 November 2004.

some and hubristic oligarch",[46] the appetite of the Western oil majors for investing in the Russian fields remained generally unabated. Their main obstacle, however, was not the trial but new Russian legislation limiting foreign ownership of natural resources.[47] In the mid term, perhaps the greatest cost was to the reputation of the Russian legal system. In spite of the Justice Minister's public emphasis in 2004 on the priority of defending individual rights "against administrative arbitrariness",[48] the Yukos affair presented a decidedly different picture. Unfortunately, closer to the truth of the situation was an essay revisiting the traditional problem of Russian legal nihilism, published later that year by a young Moscow legal scholar. He wrote: "Thus, nihilism is a constantly changing, dynamic social phenomenon which has always existed and will continue to exist as long as society exists."[49]

However, on the positive side of the ledger, it must be acknowledged that the Putin team emerged from the Yukos affair with a number of significant gains. In the short term, Khodorkovsky's domestic political interventions were effectively stymied and any presidential aspirations he may have had for 2008 were conclusively blocked. The predictable outcome of the trial, no doubt, also had a further deterrent effect on other oligarchs and, thus, contributed to Putin's longer-term goal of rebuilding the authority of the state and the office of the president. In addition, the Yukos affair produced several strategic political economic gains for the state, including the collection of substantial back taxes while firing a warning shot across the bows of major scofflaws,[50] preventing foreign operational control of Russia's oil fields, and—in the *de facto* re-nationalization of Yukos—taking a major step toward establishing Russia as a major oil superpower on the state capitalist model of Saudi Arabia.[51]

In Lieu of a Conclusion

Finally, we re-pose the question raised at the outset: was the Yukos affair a singular, aberrant event in Russia's long march toward the rule of law or

46 "Yukos, Putin and the Oligarchs", *The Economist* 1 January 2005, 49.

47 A. Ostrovsky and K. Morrison, "Russia bars foreign-owned firms from key assets", *Financial Times* 10 February 2005.

48 Iu. Chaika, "Za edinoe pravovoe prostranstvo", *Rossiiskaia iustitsiia* 2004 No.2, 2.

49 V.G. Safonov, "Poniatie pravovogo nigilizma", *Gosudarstvo i pravo* 2004 No.12, 68.

50 A Putin aide stated in *Izvestiia* that a key aim of the Yukos affair was "to teach companies to pay their taxes", *Johnson's Russia List* 31 March 2005, #9108.

51 Except for the US and UK, Russia is the only major oil exporting country where the state does not hold a dominant position in the industry. See P. Lavelle, "What Does Putin Want?", 103 *Current History* 2004, 314.

does it portend a possible negative trend toward "judicial counter-reform"[52] in Russia? Ample signs suggest pessimism, but an answer at this time—in the wake of the main proceedings—would be premature. Better to await further Russian legal developments which may clarify the direction in which Putin is leading the country during his second term.[53]

[52] See P.H. Solomon, Jr., "Threats of Judicial Counterreform in Putin's Russia", 13 *Demokratizatsiya* 2005 No.3, 325-345.

[53] Research for this chapter was completed in 2006.

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