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# *The Process of Codification in Russia: Lessons Learned from the Uniform Commercial Code*

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On the basis of his participation in the drafting of uniform legislation in the United States and the codification of civil law in Russia and its neighbouring states, the author draws conclusions about the virtues and dangers of the process of drafting uniform legislation. The greatest virtue of creating uniform legislation is that the process can unite legal talent from the various states or subjects of a federal system. The resulting code can thus bring not only the benefits of uniformity, but also of quality. On the basis of quality, a codification can spread beyond the borders of the originating state, as was the case with the nineteenth-century English *Sale of Goods Act*, Article 9 of the *Uniform Commercial Code*, and the *Civil Code of the Russian Federation*.

However, there are dangers in borrowing codifications. A common law jurisdiction can borrow a codification from another common law jurisdiction because they share basic legal assumptions and can make creative use of case law in the codifying jurisdiction. Russia was wise to reject the idea of borrowing from common law jurisdictions and to draw heavily on its own history and the civil law tradition in creating a civil code. Now it faces the difficult task of effective implementation of a market-oriented code in an economy suffering from seventy years of centralized mismanagement.

Ayant participé à l'élaboration d'une législation uniforme aux États-Unis et à la codification du droit civil en Russie et chez ses voisins, l'auteur formule dans le présent article ses conclusions quant aux avantages et dangers du processus d'élaboration d'une législation uniforme. Le plus grand avantage d'une législation uniforme est que son processus de création permet de réunir les meilleurs légistes des divers États ou sujets d'un système fédéral. Le code qui en résulte apporte ainsi les avantages d'uniformité mais aussi de qualité. Par sa qualité, une codification peut s'étendre au-delà des frontières de l'État dont elle est issue, comme il a été le cas avec le *Sale of Goods Act* anglais du 19<sup>e</sup> siècle, l'article 9 du *Uniform Commercial Code* et le *Code civil de la Fédération russe*.

Cependant, il existe des dangers dans l'emprunt des codifications étrangères. Une juridiction de common law peut emprunter une codification d'une autre juridiction de common law puisqu'elle en partage les principes juridiques fondamentaux et peut faire un usage créatif des arrêts jurisprudentiels dans la codification de ses lois. La Russie a eu raison, dans la création de son Code civil, de ne pas s'inspirer des juridictions de common law mais plutôt de faire appel à sa propre histoire et aux juridictions de droit civil. Elle fait maintenant face à la difficile tâche de mettre en œuvre un code conçu pour une économie de marché dans un pays dont l'économie souffre de soixante-dix années de gestion centralisée mal dirigée.

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## Introduction

The detailed provisions of the United States' *Uniform Commercial Code* ("U.C.C.") cannot be exported to countries of other legal traditions. However, the American experience may be instructive in outlining what problems to avoid and what guidelines should be adopted for any country attempting to codify its commercial legislation. In particular, the U.C.C. may inform the current Russian experience with its Civil Code. Such a comparison is appropriate given that both the United States and Russia are federations whose respective neighbours share similar legal traditions—Canada on the one hand, and the newly independent states that emerged from the Russian/Soviet empire on the other.

There are a number of very different reasons for the promotion of uniform commercial legislation. One popular justification is the general convenience of having a single set of rules for transactions taking place in various jurisdictions. Codification also provides an opportunity for modernization of the law. In the United States, recent U.C.C. drafting projects have been devoted largely to accommodating the computerization of business transactions. In Russia, codification included the obvious task of accommodating the country's transition to a market economy. Experience with the uniform law drafting process both in the United States and in Russia, however, shows the overriding importance of an entirely different reason for the promotion of uniform commercial legislation.<sup>1</sup> Law reform, including legal drafting, is an immensely complicated and expensive task, particularly when attempted at the local level.<sup>2</sup> When the Soviet Union fell, the number of persons qualified to draft market economy-oriented civil legislation was very limited because the Soviet legal system had been largely based on criminal and administrative law. The civil law which did exist served mainly to assist the operation of the state planning system. Because the small group of experts in civil law was concentrated in Moscow and a few other large cities in Russia, very few of the eighty-nine constituent subjects of the Russian Federation—and very few of the former Soviet republics—had the legal expertise required to draft a complex code governing business relationships. The United States has always had many more legal professionals than Russia, and a much higher percentage of American lawyers have had substantial experience in commercial matters. Nevertheless, the vast majority of American states lack a sufficient number of legal experts who are able and willing to draft codifications that have the magnitude of the U.C.C. Thus, purely

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<sup>1</sup> The author has had the opportunity to participate in the drafting process in the United States as a member of the American Law Institute, Members Consultative Groups on Uniform Commercial Code Articles 2 (Sales), 2A (Leases), and 2B (Licenses); on *Restatement (Third) of the Law of Unfair Competition* (1995); and as co-reporter for the *Uniform Simplification of Land Transfers Act* (1976). In addition, he has had the opportunity to observe the drafting process in Russia and its neighbours as a participant in various programs financed by the United States Agency for International Development.

<sup>2</sup> See R.A. Posner, "The Cost of Rights: Implications for Central and Eastern Europe—and for the United States" (1996) 32 *Tulsa L.J.* 1.

practical considerations in both countries have dictated that legislative drafting be done on a nation-wide basis rather than at the local level.

## I. Model Legislation or Federal Legislation?

Once a decision was made to draft commercial legislation on a nation-wide basis, a decision had to be reached on how uniform legislation was to be enacted. In the United States, this decision was made in the late nineteenth century, at a time when prevailing constitutional doctrines limited federal power to enact commercial legislation. The influential members of the legal profession at the time concluded that the best approach would be to draft uniform legislation for enactment by each individual state. The 1993 *Constitution of the Russian Federation* gave the federal government exclusive jurisdiction to enact legislation on civil law. It is likely that at the time this provision was drafted, the drafters realized that it would be impossible to push a market-oriented code through many of the legislatures of the eighty-nine subjects of the Russian Federation, and hoped that the 1993 elections would produce a majority of "reformers" in the State Duma. In addition, the drafters hoped that the *Civil Code of the Russian Federation*<sup>3</sup>—and the similar Model Civil Code drafted under the auspices of the Interparliamentary Assembly of the Commonwealth of Independent States—would serve as a model for the codes of other newly independent states.

## II. Borrowing and the Drafting Process

Both the American and the Russian experience suggest that the key to efficient drafting is borrowing.<sup>4</sup> In the United States, this practice started early, most notably with the borrowing of the English *Sale of Goods Act*<sup>5</sup> by Professor Samuel Williston<sup>6</sup> in the drafting of the *Uniform Sales Act* for the National Council of Commissioners on Uniform State Laws.<sup>7</sup> The Western European tradition came to the U.C.C. through its principal drafter, Professor Karl Llewellyn, who had strong ties to Germany.<sup>8</sup> The result has been an extensive discussion and debate on the nature of the debt owed by the U.C.C. to the European civil law tradition.<sup>9</sup> Similarly, the Drafting Commission

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<sup>3</sup> Part 1 was enacted in 1994: *Sobranie zakonodatelstva R.F.* (1994) No. 32, item 3301; and Part 2 was enacted in 1995: *Sobranie zakonodatelstva R.F.* (1996) No. 5, item 410 [hereinafter C.C.R.F.]. For the English-language translation, see P.B. Maggs & A.N. Zhiltsov, eds., *The Civil Code of the Russian Federation*, trans. P.B. Maggs & A.N. Zhiltsov (Armonk, N.Y.: M.E. Sharpe, 1997).

<sup>4</sup> On the long and honourable history of borrowing, see A. Watson, *Legal Transplants: An Approach to Comparative Law*, 2d ed. (Athens: University of Georgia Press, 1993).

<sup>5</sup> 1893 (U.K.), 56 & 57 Vict., c. 71.

<sup>6</sup> S. Williston, "The Law of Sales in the Proposed Uniform Commercial Code" (1950) 63 Harv. L. Rev. 561.

<sup>7</sup> 3B Uniform Laws Annotated (West 1992) 479.

<sup>8</sup> W. Twining, *Karl Llewellyn and the Realist Movement* (London: Weidenfeld & Nicolson, 1973).

<sup>9</sup> See e.g. P. Winship, "As the World Turns: Revisiting Rudolf Schlesinger's Study of the Uniform Commercial Code In the Light of Comparative Law" (1996) 29 Loy. L.A. L. Rev. 1143; W.D. Hawk-

that prepared a civil law codification in late nineteenth-century Russia relied heavily on foreign sources.<sup>10</sup> The same was true in the preparation of the 1922 *Civil Code of the Russian Soviet Federated Socialist Republic*, portions of which reproduce, for instance, articles of German and Swiss codes almost verbatim.<sup>11</sup>

The borrowing of statutory language presents particular problems when that language is the subject of judicial and scholarly interpretation in the home country. Because American courts were well aware of the English precedents in contract and sales law, the *Uniform Sales Act* brought along with it much of the English case law which was embodied in and had been used to interpret the *Sale of Goods Act*.<sup>12</sup> The case law was in English and both the case reports and the leading English treatises summarizing the law were readily available in the United States. The common law provinces of Canada have been able to draw on the *Uniform Commercial Code*.<sup>13</sup> Due to the shared legal tradition, common language, and availability of materials, they can interpret U.C.C. Article 9 in its full context:

The PPSA [*Personal Property Security Act*] has its genesis in the Uniform Commercial Code ... of the United States and is modelled on it. It is fitting and instructive to see what the American formulators, academic writers and jurisprudence have to say on the subject.<sup>14</sup>

However, foreign law transplanted into the Russian system has generally come without accompanying case law. There are three reasons for this: first, Russian legal thought is less receptive to case law than the legal thought of the Netherlands and Germany, the principal sources from which Russia borrowed, and certainly much less receptive to case law than the legal thought of the United States. Second, the case law related to foreign statutory sources is available only in foreign languages in Russia, but only a handful of Russian lawyers know Dutch, few can read German, and even fewer are comfortable with Anglo-American legal terminology. Third, almost no Russian lawyers or judges have access to usable collections of foreign legal materials.

A poignant example of the problems of transplanting legal institutions without their accompanying case law can be seen in the pledge (*zalog*) provisions of the

land, "The Uniform Commercial Code and the Civil Codes" (1995) 56 La. L. Rev. 231; R.M. Buxbaum, "Is the Uniform Commercial Code a Code?" in U. Drobnig & M. Rehbinder, eds., *Rechtsrealismus, Multikulturelle Gesellschaft und Handelsrecht* (Berlin: Duncer & Humbolt, 1994) 197; B. Kozolchik, "The Commercialization of Civil Law and the Civilization of Commercial Law" (1979) 40 La. L. Rev. 3; H. Kripke, "The Principles Underlying the Drafting of the Uniform Commercial Code" (1962) U. Ill. L. Forum 321; and R.B. Schlesinger, "The Uniform Commercial Code in the Light of Comparative Law" (1959) 1 Inter-Am. L. Rev. 11.

<sup>10</sup> *Redaktsionnaia komissiiia po sostavleniiu grazhdanskogo ulozheniia, Svod Zamiechanii* (1884).

<sup>11</sup> See G. Ajani, "By Chance and Prestige: Legal Transplants in Russia and Eastern Europe" (1995) 43 Am. J. Comp. L. 93.

<sup>12</sup> See Williston, *supra* note 6.

<sup>13</sup> See B. Geva, "Uniformity in Commercial Law: Is the UCC Exportable?" (1996) 29 Loy. L.A. L. Rev. 1035 at 1035, n. 4.

<sup>14</sup> *Royal Bank of Canada v. Agricultural Credit Corp. of Saskatchewan* (1994), 120 Sask. R. 205, 115 D.L.R. (4th) 569 (C.A.).

C.C.R.F. These provisions draw upon the model of German statutory law. But in Germany, banks and their lawyers use methods to protect creditors' interests in movable property which rely on judicial practice rather than statute.<sup>15</sup>

One reason that the U.C.C. is particularly unsuitable for foreign adoption is because it assumes the existence of large bodies of law outside the Code that contradict and override the statute's language. U.C.C. § 1-103 provides for applicable supplementary general principles of law:

Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

Such a provision would not be problematic for a Canadian province adopting its own version of Article 9 since the common law provinces of Canada have inherited the same general principles of law from England as from the United States. However, the reliance on general common-law principles obviously would create difficulties for the Russian adoption of Article 9.

These difficulties make one wonder why anyone would even think of transplanting the U.C.C. to Russia. One Russian author notes that at one time, Soviet propaganda considered the U.C.C. to be an American capitalist imperialist plot.<sup>16</sup> To some extent the Soviet propagandists were right in their apparently ridiculous charge that the United States government would try to replace Soviet law with the U.C.C. The United States government actually spent a huge sum of money translating the U.C.C. into Ukrainian in a project that envisioned the verbatim adoption of its language in Ukraine.<sup>17</sup>

### III. The Code and Prior Legislation

The relation of the U.C.C. to prior legislation was a much smoother process in the United States than the equivalent relation in Russia. While the U.C.C. replaced numerous prior uniform laws—such as the *Uniform Sales Act* and the *Negotiable Instruments Law*<sup>18</sup>—it merely fine-tuned the free market policies already in effect in the

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<sup>15</sup> See J. Hausmann, "The Value of Public-Notice Filing Under Uniform Commercial Code Article 9: A Comparison with the German Legal System of Securities in Personal Property" (1996) 25 Ga. J. Int'l & Comp. L. 427.

<sup>16</sup> A.S. Komarov, "The Uniform Commercial Code: A Russian Point of View" (1996) 29 Loy. L.A. L. Rev. 1085.

<sup>17</sup> "New Project Will Expand Your Practice Overseas" *BCD News and Comment* (16 May 1995), online: LEXIS (News Library, ARCNWS); and personal interviews by the author with the sponsors of the translation project.

<sup>18</sup> 3B Uniform Laws Annotated (West 1992) 506. The Law was approved by the Commissioners in 1896. It is no longer in force anywhere.

United States.<sup>19</sup> Furthermore, the fact that the U.C.C. preserved much of the common law—for instance, by maintaining contract law as a background to sales law—helped to minimize transition problems. The C.C.R.F. had the revolutionary purpose of providing a comprehensive replacement for the laws of the Soviet command economy and the hastily drafted legislation of the post-Soviet years. The C.C.R.F. alone, however, lacked both the breadth of coverage and the detail necessary to replace all prior legislation. For this reason, the transition provisions enacted with each part of the C.C.R.F. provided for the survival of various parts of the former legislation. Such provisions were the result of a combination of logic and politics. Logically, certain provisions of the 1964 *Civil Code of the Russian Soviet Federated Socialist Republic*,<sup>20</sup> the 1991 *Fundamentals of Civil Legislation of the U.S.S.R. and Union Republics*,<sup>21</sup> and various other legislative acts were repealed because the C.C.R.F. covered the same issues in more detail and better reflected the market-oriented policies of the mid-1990s. Some businesses and organizations chartered under repealed laws were required to reorganize in the new corporate forms of the C.C.R.F. However, politics prevailed in postponing the need to reorganize most businesses until specific additional statutes were enacted. This concession was sought and obtained by those who had seized control of privatized state industries and had cleverly drafted corporate charters to protect their control against dissident shareholders and hostile takeovers.

By far the most important political feature of the transition legislation was the postponement of the effect of the C.C.R.F.'s chapter on private land ownership until the passing of the *Land Code of the Russian Federation*.<sup>22</sup> The draft of Part 1 of the C.C.R.F. included a chapter providing for full private ownership of land. Since the Communist Party and its agrarian allies opposed private land ownership, President Yeltsin had to accept a compromise under which Parliament adopted Part 1 of the C.C.R.F., but suspended the chapter on land ownership until the adoption of a Land Code. The issue of private land ownership—particularly involving agricultural land—has remained deadlocked between the President and the State Duma ever since 1994. At one point, Duma purportedly passed a Communist-sponsored version of the Land Code over Yeltsin's veto, but Yeltsin claimed that Duma had allowed absentee voting in violation of its own rules. As this article is being written, no resolution of the deadlock has been found. Land law is highly controversial, even in the United States. Efforts by the National Council of Commissioners on Uniform State Laws to create a "Uniform Land Transactions Act" were largely unsuccessful.

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<sup>19</sup> However, one commentator, perhaps presciently, warned that the U.C.C. drafting process might be captured by banking interests: F.K. Beutel, "The *Negotiable Instruments Act* Should Not Be Amended" (1932) 80 U. Pa. L. Rev. 368.

<sup>20</sup> *Vedomosti S' ezda Narodnykh Deputatov R.F. i Verkhovnogo Soveta R.F.* (1964) No. 24, item 406 [hereinafter 1964 Civil Code].

<sup>21</sup> *Vedomosti S' ezda Narodnykh Deputatov S.S.S.R. i Verkhovnogo Soveta S.S.S.R.* (1991) No. 26, item 733 [hereinafter *Fundamentals*].

<sup>22</sup> *Vedomosti S' ezda Narodnykh Deputatov R.S.F.S.R. i Verkhovnogo Soveta R.S.F.S.R.* (1991) No. 22, item 768.

The long process of drafting the U.C.C. meant that both the bench and bar could be familiarized with it over a period of decades. In contrast, the revolutionary speed of change in Russia meant that there was no real time to teach or study the principles of the C.C.R.F. before its enactment. The radical nature of the changes require that lawyers and judges undergo extensive training. The Commercial Court system, with financial support from the foreign aid community, has attempted to provide all of its judges with literature and educational sessions on the new C.C.R.F. Nevertheless, some courts have lapsed into Soviet-era ways. The Deputy Chair of the High Commercial Court has commented that not all judges have accepted the major changes made by the C.C.R.F. For instance, he notes that despite the fact that article 174 C.C.R.F. clearly breaks with the Soviet principle of the restricted capacity of legal persons, a number of lower courts are using creative contract interpretation to resurrect the *ultra vires* doctrine abolished by the C.C.R.F.<sup>23</sup> One might compare some much-criticized early decisions under the U.C.C. that seemed to resurrect pre-U.C.C. law.<sup>24</sup>

#### IV. Status of the Codes

Russian lawyers who like the new C.C.R.F. call it the "Economic Constitution" or the "Constitution of the Economy."<sup>25</sup> This beatification of the C.C.R.F. is a political statement which serves a number of different goals. Essentially, these lawyers are trying to make a legal transplant on two levels. On one level, they have included many provisions in the new C.C.R.F. that can be traced directly to Western European and even American law. On another, higher level, they are trying to transplant into Russia the exalted symbolic and formal role that civil codes enjoy in Western Europe and—to a somewhat lesser extent—that the U.C.C. enjoys in the United States. In Soviet times, the real power system was very much at odds with the formal structure of national legislation. As Russia has moved in the direction of the rule of law, the formal hierarchy of sources of law, including the C.C.R.F., has taken on much greater importance. The result is a changed situation for ex-Sovietologists. Previously, they tried to penetrate Communist secrecy to find out how the law really worked. Now, with most of the secrecy gone and the rule of law emerging, they are paying increased attention to normal legal structure.

The C.C.R.F. caps a century of efforts to modernize Russian civil legislation. In the early years of the twentieth century, a Russian government commission published a civil law codification in draft form, along with extensive commentary. War and revolution prevented this draft from becoming law, but the drafters of the Civil Code of the new economic period drew on it—along with foreign sources—in a hasty effort

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<sup>23</sup> V. Vitrianskii, "Novyi grazhdanskii kodeks i sud" (1997) Khoziaistvo i pravo 6.

<sup>24</sup> See e.g. *Roto-Lith, Ltd. v. F.P. Bartlett & Co., Inc.*, 297 F.2d 497, 1 U.C.C. Rep. Serv. 73 (1st Cir. 1962).

<sup>25</sup> A. Makovsky, "Est' Kodeks?! (o priniatii Gosudarstvennoi Dumoi vtoroi chasti Grazhdanskogo kodeksa Rossiiskoi Federatsii)" (1996) *Ekonomika zhizn'* 1 at 39.



to provide a legislative basis for the emerging free market. The Civil Code was copied either closely or verbatim in the other Soviet republics. In 1936, perhaps to signify renewed emphasis on law as a force for organizing society, the Stalin Constitution included a provision for replacing the republic codes with a U.S.S.R. Civil Code. Russian experts in civil legislation continued to work on the drafts for a decade. Eventually, the Constitution was amended to provide for the passage of "fundamental principles" of civil legislation at both the national and republic levels. The result was the emergence of new republic codes in the 1960s. Then, during the dying days of Soviet power in the summer of 1991, the Soviet Union formally adopted the *Fundamentals*,<sup>26</sup> scheduled to take effect in 1992. However, the legislation did not proceed as planned, but the Russian Republic passed legislation putting these *Fundamentals* into effect temporarily, pending passage of a Russian Civil Code.

None of the post-Stalin codifications were suitable for a market economy, so the post-Soviet regime made the passage of the C.C.R.F. a high priority. The legislation is divided into three parts. Part 1 was enacted in 1994, Part 2 in 1995, but Part 3 still had not been enacted as of July 1999. The division into parts was purely a matter of practical expediency. The need for legislative reform was great, so the President's office made the decision to push for the enactment of Part 1 of the C.C.R.F. in the fall of 1994, and to move ahead again and enact Part 2 in the fall of 1995. Part 3 of the C.C.R.F. appeared to have a relatively low priority, perhaps because only minor changes were made to existing law.<sup>27</sup> There has been no rush to complete and submit it to Parliament. Hence, the 1964 Civil Code and the 1991 *Fundamentals* continue in force for the few areas not covered by Parts 1 and 2 of the new C.C.R.F. With the passage of Part 3, Russia will have—in creating a comprehensive Civil Code—finally achieved the dream of civil law reformers of the late imperial period.

In the United States, the drafters of the U.C.C. faced a long and difficult political process in attempting to get the U.C.C. adopted by the individual states. However, this process ensured respect for the U.C.C. because it encouraged universal acceptance of the legislation.<sup>28</sup> In Russia, because of the enduring public memory of the mock legislative process of the Soviet period, the task of earning respect for the C.C.R.F. will be much harder.

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<sup>26</sup> *Supra* note 21.

<sup>27</sup> The draft Part 3 of the C.C.R.F. deals with intellectual property, inheritance, and private international law. The intellectual property provisions summarize the existing rules of the copyright, patent, and trademark statutes. The inheritance provisions continue the existing rule of freedom to dispose of property by will—subject to certain rights for family members and dependents. The private international law provisions incorporate constitutional norms on the force of international treaties, and continue the approach of prior legislation in setting up rather formalistic rules for dealing with conflict of laws.

<sup>28</sup> Even Louisiana, the one civil law state, eventually adopted most of the U.C.C. See J. Zekoll, "The Louisiana Private-Law System: The Best of Both Worlds" (1995) 10 Tul. Eur. & Civ. L. Forum 1.

## V. The Code and Local Laws

The changes that have taken place in federal-state relationships during the century since the uniform-law movement started in the United States may be less than those that have occurred in Russia since drafting of the C.C.R.F. began in the early 1990s. At one time, the Russian President's office saw the C.C.R.F. as a way to overcome local resistance to market economy legislation. More recently, however, the President's office has seen local legislation as a way to overcome Duma's refusal to allow private land ownership. Article 71 of the 1993 *Constitution of the Russian Federation* placed civil legislation in the exclusive jurisdiction of the Federation.<sup>29</sup> Presumably the meaning of "civil legislation" in the Constitution is the broad meaning generally in use in 1993—which included statutes, executive edicts, and governmental resolutions. In the United States, the U.C.C. has no force other than the prestige of its drafters to ensure uniformity. The result has been the rise of numerous local variations. On paper, the Russian constitutional scheme would appear to guarantee uniformity in private law. The 1993 Constitution makes no differentiation among the various "subjects" of the Russian Federation. However, in fact, there are both formal and informal differences in the powers of the subjects. Some of the subjects have won concessions from the Federation by negotiation (*e.g.* Tatarstan) or force (*e.g.* Chechnya). It remains to be seen if these concessions will threaten the superiority and unity of Russian private law.

## VI. Protecting the Code from Other Law

One of the greatest problems of Soviet law was the existence of multiple legislative authorities. The Supreme Soviet, its Presidium, the Council of Ministers, ministries, and state committees all adopted legislation. The coordinating role of the Communist Party reduced problems of conflict of authority, but this role has, of course, disappeared. During the process of adopting the C.C.R.F. there was a struggle between Duma and the President over the future role of executive branch legislation. The result was a Duma victory leading to the inclusion under article 3(2) C.C.R.F. of a highly restrictive definition of "civil legislation": "Civil legislation consists of the present Code and other Federal statutes adopted in accordance with it ... regulating the relations indicated in Paragraphs 1 and 2 of Article 2 of the present Code." Previously in Russian legal usage, the term "civil legislation" had included statutes, edicts by the highest executive authority, and resolutions adopted by the government. Parliament adopted the narrower meaning of the term "civil legislation" in order to limit the power of the President and Cabinet. A number of provisions of the C.C.R.F. provide only very general rules and indicate that the remaining rules on the particular subject shall be those established by civil legislation. Because of the narrow definition of "civil legislation", only Parliament can establish supplementary rules in these areas.

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<sup>29</sup> Amendments to the previous Constitution had given more powers to the subjects of the Russian Federation in matters related to civil law.

In practice, during the Soviet period, ministerial and state committee orders tended to be enforced despite their lower rank within the theoretical hierarchy of legal sources which gave statutes greater authority. This was because ministries were real centres of power backing up their regulations. In an early decision, the U.S.S.R. Committee on Constitutional Supervision made an important statement in favour of the theoretical hierarchy of civil legislation, which placed the Civil Code at the top. It applied provisions of the 1964 Civil Code relating to the sale of goods in order to invalidate Ministry regulations that deprived consumers of their rights under the Code. This decision to some extent characterized the Civil Code as a quasi-Constitution following the end of the Soviet period.

Exclusion of outside law has been an issue for the U.C.C. as well. The general principles embodied in U.C.C. § 1-103 created problems for the banking industry lobbyists who controlled the drafting of U.C.C. Article 4A (Funds Transfers).<sup>30</sup> These lobbyists were unable to obtain language in the text of Article 4A that would exclude the operation of U.C.C. § 1-103. They did, however, manage to ensure the inclusion of the following language in the Official Comment to U.C.C. § 4A-102:

Funds transfers involve competing interests—those of the banks that provide fund transfer services and the commercial and financial organizations that use the services, as well as the public interest. These competing interests were represented in the drafting process and they were thoroughly considered. The rules that emerged represent a careful and delicate balancing of those interests and are intended to be the exclusive means of determining the rights, duties and liabilities of the affected parties in any situation covered by particular provisions of the Article. Consequently, resort to principles of law or equity outside of Article 4A is not appropriate to create rights, duties and liabilities inconsistent with those stated in this Article.

Undoubtedly, the drafters of the C.C.R.F., like the drafters of Article 4A, would have liked to immunize the C.C.R.F. against other legislation. The Constitution provides for two categories of laws: ordinary laws (requiring a simple majority for enactment, amendment, or repeal) and constitutional laws (requiring a two-thirds majority of the Duma and a three-fourths majority of the Federation Council for enactment, amendment, or repeal). A constitutional law cannot be repealed or amended by an ordinary law. The Constitution lists certain laws that must be passed as constitutional laws. The C.C.R.F. is not among them—perhaps because the drafters of the C.C.R.F. doubted their ability to obtain the number of votes required to pass a law al-

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<sup>30</sup> See generally A. Schwartz & R.E. Scott, "The Political Economy of Private Legislatures" (1995) 143 U. Pa. L. Rev. 595; K. Patchel, "Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code" (1993) 78 Minn. L. Rev. 83; E.L. Rubin, "Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4" (1993) 26 Loy. L.A. L. Rev. 743; W.D. Warren, "UCC Drafting: Method and Message" (1993) 26 Loy. L.A. L. Rev. 811; and E. Rubin, "Efficiency, Equity and the Proposed Revision of Articles 3 and 4" (1991) 42 Ala. L. Rev. 551. But see D.J. Rapson, "Who Is Looking out for the Public Interest? Thoughts about the UCC Revision Process in the Light (And Shadows) of Professor Rubin's Observations" (1994) 28 Loy. L.A. L. Rev. 249.

lowing the C.C.R.F. to be included—given the predictably large size of the Communist bloc in the Duma. The Constitution is not clear as to whether or not the Duma, on its own initiative, can pass constitutional laws on matters other than those for which the Constitution requires such laws.<sup>31</sup> In any event, though, no attempt was made to pass the C.C.R.F. as a constitutional law. The result is that while rhetoric deems the C.C.R.F. an “economic constitution”, it is in formal terms merely a second class law. Since the C.C.R.F. was headed for passage as an ordinary law rather than as a federal constitutional law, the drafters attempted to exalt the status of the C.C.R.F. by including the following language in article 3(2) C.C.R.F.: “Norms of civil law, contained in other statutes must [(*dolzheny*)] conform to the present Code.” There are a number of problems with this language. The Russian word *dolzheny* is ambiguous, and can mean either “should” or “must”. It is likely that such ambiguity is deliberate because elsewhere in the same article the language is clear and direct:

In case of contradiction between an edict of the President of the Russian Federation or a decree of the Government of the Russian Federation and the present Code or other statute, the present Code or respective statute shall be applied.<sup>32</sup>

Despite the language of article 3(2) C.C.R.F., under the rule *lex posterior derogat legi priori*, later ordinary statutes will prevail over the C.C.R.F. whether or not they formally amend it.<sup>33</sup> Hence, the drafters can only hope that the Russian Parliament will preserve the integrity of the C.C.R.F. by always amending its text when passing legislation which contradicts existing code provisions.

## VII. The Code and the Constitution

Legislative codes, being mere laws, are subject to judicial review—both in the Russian Federation and in the United States—for the purpose of determining their

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<sup>31</sup> L.A. Okun'kov *et al.*, eds., *Kommentarii k Konstitutsii Rossiiskoi Federatsii* (Moscow: B.E.K., 1994). Compare the comments to art. 76 (by A.V. Mitskevich) and to art. 108 (by A.I. Abramova & T.N. Rakhmanina). The commentary to art. 76 is silent on the issue of the possibility of Duma-initiated constitutional laws. The commentary to art. 108 indicates that the Constitution gives an “exhaustive list”. It is not debatable that the Constitution provides an “exhaustive list” of topics on which constitutional laws *must* be enacted. It is not clear if the comment is just stating this truism or if it is implying that laws not required by the Constitution to be enacted as constitutional laws may not be so enacted. The issue is an important one even if the State Duma has not yet attempted to enact a constitutional law on a topic where there is no requirement of a constitutional law. This is because the Constitution lists only the titles of laws that must be constitutional laws. If such laws cannot contain any matters that go beyond the scope indicated by their titles, then there is a fertile ground for constitutional litigation.

<sup>32</sup> Art. 3(5) C.C.R.F.

<sup>33</sup> See *e.g.* *Ministerstvo iustitsii Rossiiskoi Federatsii, Instruktivnoe pis'mo ot 03.07.95 N 06-112v-95*, regarding the C.C.R.F. displacing provisions of the *Code of Civil Procedure of the Russian Federation, Vedomosti S"ezda Narodnykh Deputatov R.F. i Verkhovnogo Soveta R.F.* (1964) No. 24, item 407, as am. by *Sobranie zakonodatelstva R.F.* (1995) No. 49, item 4696.

constitutionality. Because the U.C.C. is state legislation, it must meet the requirements of both the state<sup>34</sup> and federal<sup>35</sup> constitutions. In December 1997, the Russian Constitutional Court declared a provision of the C.C.R.F. to be unconstitutional.<sup>36</sup> Article 855 C.C.R.F. provides for an order of payment of debts. For example, various creditors of an enterprise may obtain court or administrative orders requiring payment of the company's debts out of its bank account. When new funds appear following the exhaustion of the account's balance, the bank is supposed to make the accumulated court and administrative orders in the priority specified by article 855 rather than on a first-come, first-served basis. The Russian Parliament had amended the original version of article 855 to subordinate tax claims to claims for unpaid wages. Nevertheless, in this particular case the tax authorities sent a letter to banks telling the banks to pay them first. The issue went to the Civil Bench of the Supreme Court, which ruled that the C.C.R.F. provision invalidated the tax law. The tax authorities appealed to the full bench of the Supreme Court, which suspended the Civil Bench decision. The full Bench sent a certified constitutional question to the Constitutional Court over issues related to the order of payment under the C.C.R.F. because of the conflict of the constitutional provisions entitling citizens to wages and requiring them to pay taxes. The Constitutional Court, in a somewhat muddled opinion, found for the tax authorities and invalidated the amended C.C.R.F. provision.

This particular case involved a political and economic issue of great importance. Russia still has many money-losing state enterprises that cannot afford to pay both their workers and taxes. The problems of unpaid back wages and taxes are the central difficulties of Russian economic reform. The court's decision in favour of fiscal responsibility may have been wise from the point of view of economic reform. The fact that the Supreme Court referred this issue to the Constitutional Court helped to stimulate worries that Russia would suffer from conflicts among its various court systems in deciding constitutional questions.<sup>37</sup> However, the Constitutional Court's

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<sup>34</sup> *Svensden v. Smith's Moving and Trucking Company*, 429 N.E. 2d 411, 444 N.Y.S.2d 904 (C.A. 1981).

<sup>35</sup> Drafters of the U.C.C. have carefully tried to avoid federal constitutional problems, but commentators have nevertheless suggested possible constitutional infirmities. See M.L. Moses, "The Uniform Commercial Code Meets the Seventh Amendment: The Demise of Jury Trials under Article 5?" (1997) 72 *Ind. L.J.* 681; and D.S. Karjala, "Federal Preemption of Shrinkwrap and On-line Licenses" (1997) 22 *U. Dayton L. Rev.* 511.

<sup>36</sup> Decision on the Verification of the Constitutionality of art. 855(2) C.C.R.F. and art. 15(6) of the Federal law *On the Fundamental Principles of the Tax System of the Russian Federation* in Connection With an Inquiry from the Presidium of the Supreme Court of the Russian Federation, 23 December 1997, No. 21-P (available in KODEKS, database 90). For information on the KODEKS Russian law databank, see online: Advanced Legislation Database of Russia On-line <<http://www.kodeks.net>> (date accessed: 23 May 1999).

<sup>37</sup> See P. Krug, "Departure from the Centralized Model: The Russian Supreme Court and Constitutional Control of Legislation" (1997) 37 *Va. J. Int'l L.* 725; and P.B. Maggs, "The Russian Courts and the Russian Constitution" (1997) 8 *Ind. Int'l & Comp. L. Rev.* 99.

confusing and unconvincing reasoning raises some uncertainty about the fate of other C.C.R.F. provisions in future proceedings.

### VIII. The Code and International Law and Treaties

Treaties, such as the *United Nations Convention on Contracts for the International Sale of Goods*,<sup>38</sup> prevail over code language in both the United States and Russia. The Convention is self-executing in the United States<sup>39</sup> as well as in Russia. This is reflected in the text of the Constitution and under article 7 C.C.R.F., which addresses the Code's relationship to norms of international law:

Generally recognized principles and rules of international law and the international agreements of the Russian Federation are, in accordance with the Constitution of the Russian Federation, a constituent part of the legal system of the Russian Federation.

International treaties of the Russian Federation shall be applied to the relations indicated in Paragraphs 1 and 2 of Article 2 of the present Code directly, except in cases when, from the international agreement, it follows that the issuance of a domestic state act is required for its application.

If an international treaty of the Russian Federation has established rules other than those that are provided by civil legislation, the rules of the international treaty shall be applied.<sup>40</sup>

While the C.C.R.F. may be characterized as a "Constitution for the economy," international agreements of which Russia is a party remain a more authoritative source of law than the C.C.R.F. and the *Constitution of the Russian Federation*. Many lawyers—myself included—think that a primary feature of commercial law in the twenty-first century will be unification on an international level. Inevitably, this unification will diminish the importance of national codes, and at the same time cause such codes to be brought in conformity with international rules.

### IX. Who Interprets the Code?

The method of enactment of the U.C.C. in the United States has produced serious problems for the goal of uniform interpretation. The existence of a Permanent Editorial Board with the power to recommend changes to overcome "bad" court decisions

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<sup>38</sup> 11 April 1980, 1489 U.N.T.S. 3.

<sup>39</sup> See R.E. Speidel, "The Revision of UCC Article 2, Sales in Light of the United Nations Convention on Contracts for the International Sale of Goods" (1995) 16 Nw. J. Int'l L. & Bus. 165; and P. Winship, "Domesticating International Commercial Law: Revising U.C.C. Article 2 in Light of the United Nations Sales Convention" (1991) 37 Loy. L. Rev. 43.

<sup>40</sup> This article presents a difficult problem of translation and interpretation. Does the Russian word *dogovor*, here translated as "agreement", include executive agreements that have not been ratified by Parliament? If not, are they included indirectly because generally recognized principles of international law require that states obey executive agreements?

provides at least partial relief. Likewise, the existence of a permanent civil law drafting group in the Russian President's office offers a method for correcting problems of interpretation of the C.C.R.F. The United States has managed to survive under a system where each state's court system and the various Federal Courts of Appeal interpret the U.C.C. In Russia, the Supreme Court and the High Commercial Court are courts of last resort that operate closely in the interpretation of the C.C.R.F. For instance, on July 1, 1996 the Plenum of the Supreme Court and the Plenum of the High Commercial Court jointly adopted an important resolution on the application of Part 1 of the C.C.R.F.<sup>41</sup> The Constitutional Court has interpreted the 1964 Civil Code in deciding the constitutionality of particular provisions.<sup>42</sup> In deciding the case discussed above, it necessarily had to interpret the Civil Code.

## X. The Other Codes—The Transplant Transplanted

With the exception of Louisiana, the U.C.C. is virtually untransplantable to a non-common law jurisdiction. Russian private law, in contrast, is proving quite transplantable to the private law systems of its neighbours that share a common legal background. During the Soviet period, Russian private law specialists dominated the process of codification not only in Russia, but also in the other republics. Both the first and second generation of republic codes copied the Russian codes closely. The *Fundamentals* were drafted by a group generally represented by the Russian Federation and the other republics. In 1994, many of the survivors of this group along with some younger legal scholars began work on a Model Civil Code of the Commonwealth of Independent States. Part 1 of the Model Code closely followed the already-drafted C.C.R.F. Parts 2 and 3 of the Model Code were drafted in parallel with the C.C.R.F. so that the ideas of leading lawyers from Kazakstan, Ukraine, and other newly independent states found their way into the C.C.R.F. It now seems likely that most of the former Soviet republics (Georgia is an exception) will adopt some variation on the Model Code or the C.C.R.F. The reason is simple: the C.C.R.F. and the Model Code, while oriented toward a free market, use familiar terminology, concepts, and institutions. They will be much easier to digest for a bench and bar trained in the Soviet era. This is a wise choice and it reflects the decision of the American states in the early

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<sup>41</sup> Postanovlenie "O netokotorykh voprosakh svyazannykh s primeneniem chasti pervoi Grazhdanskogo kodeksa Rossiiskoi Federatsii" *Rossiiskaia gazeta (vedomstvennoe priolozhenie)* (10 August 1996) 12.

<sup>42</sup> *Konstitutsionnyi Sud Rossiiskoi Federatsii*, Opreделение ot 27 sentiahria 1995 goda, "Ob otkaze v priniatii k rassmotreniiu zhaloby grazhdanina Kozyreva Andreiia Vladimirovicha" *Rossiiskaia gazeta* (22 November 1995) 3 (role of courts with respect to art. 7 of the 1964 Civil Code, now art. 152 C.C.R.F.); and *Konstitutsionnyi sud Rossiiskoi Federatsii*, Postanovlenie ot 16 ianvaria 1996 goda N 1-P, "Po delu o proverke konstitutsionnosti chastei pervoi i vtoroi stat'i 560 Grazhdanskogo kodeksa R.S.F.S.R. v svizi s zhaloboi grazhdanina A.B. Naumova" *Rossiiskaia gazeta* (25 January 1996) 6.

nineteenth century not to abandon the English common law in favour of the Napoleonic Code.<sup>43</sup>

## Conclusion

Whatever the political arguments, there is one technical reality. While in the majority of former Soviet republics codes are still drafted in the Russian language, they are now created using American word processing programs and all drafters have access to electronic mail. The result is an acceleration of the process of mutual influence as legislation moves from republic to republic much more quickly. Likewise, in the United States, drafts of the U.C.C. are posted on the Internet<sup>44</sup> and debated in Internet discussions groups and in private electronic mail correspondence. These improved communications can serve to speed up and democratize the process of modernization and unification of commercial legislation.

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<sup>43</sup> As an administrator of United States foreign aid contracts, I tried to support the Model Code drafting effort, but met continued resistance from those in the United States government who thought that the Model Code was part of a conspiracy to re-establish the U.S.S.R. I argued quite the contrary, that the speedy adoption of an easily absorbable legal basis for a market economy would be the best means of avoiding a lapse back into Communist central power.

<sup>44</sup> See online: Uniform Law Commissioners Drafts <<http://www.law.upenn.edu/bl/ulc/ulc.htm>> (last modified: 20 May 1999).



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