
Stability and Transition in the Civil Code of the Russian Federation

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This article describes the new *Civil Code of the Russian Federation* ("C.C.R.F.") as being one of the major pillars of stability in a country which is plagued by the many complex problems of transition, as well as by a tradition of legal nihilism. It places the C.C.R.F. into the broader context of the history of European codification where the core has remained clear but certain areas were continually contested. Examples are the methodological question of finding a convenient level of abstraction, the division between a civil and a commercial code, and the place of family law and consumer protection. These important areas are exemplified by a number of salient topics that the legislator could have improved by eliminating remnants of central planning and Soviet practice. Two examples are singled out: first, the unitary and fiscal state enterprises, and the forms of property and management which correspond to them are inconsistent with the running of a market economy. Second, certain aspects of contract law and certain types of contracts which foresee a distribution of risk do not seem to adequately reflect legitimate interests of market participants, be they individuals, enterprises, or the State.

Cet article décrit le nouveau *Code civil de la Fédération russe* comme étant un des piliers principaux de stabilité dans un pays tourmenté par de nombreux problèmes complexes reliés à la transition et par une tradition de nihilisme judiciaire. L'auteur place le Code dans le contexte plus large de l'histoire de la codification européenne, où, bien que l'esprit ait toujours été clair, certains domaines furent continuellement contestés, comme, par exemple, la question méthodologique cherchant à trouver un niveau commode d'abstraction, l'établissement d'une division entre un code civil et un code commercial, ainsi que la place du droit de la famille et de la protection des consommateurs. Ces domaines importants sont exemplifiés par plusieurs domaines saillants que, d'après l'auteur, le législateur aurait pu améliorer en éliminant les vestiges de la planification centralisée et de la coutume soviétique. Deux exemples sont soulignés: premièrement, les entreprises unitaires et d'état fiscal, ainsi que les types de propriété et de gestion qui y correspondent, sont incompatibles avec l'économie de marché; deuxièmement, certains aspects du droit des contrats, ainsi que certains types de contrats prévoyant une distribution du risque, ne semblent pas toujours refléter de façon adéquate les intérêts légitimes des personnes qui participent au marché, qu'ils soient des individus, des entreprises ou l'État.

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Revue de droit de McGill 1999

To be cited as: (1999) 44 McGill L.J. 259

Mode de référence : (1999) 44 R.D. McGill 259

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Introduction

Professor Makovsky is undoubtedly right when he characterizes the new *Civil Code of the Russian Federation*¹ as a “truly important statute,” and its adoption in 1995 an “extraordinary event in modern history.”² Among many other things, it has brought some continuity and stability into the Russian legislative process by creating a real framework for personal, economic, and property relations of natural and legal persons, both nationally and internationally.

By its comprehensive nature, the C.C.R.F. has channeled the turbulent and chaotic first years of Russian law-making not only by disciplining the panoply of Russian legislators, but also by instilling consistency and maintaining long-term perspectives which many of the self-proclaimed international experts in legal development could not achieve.³ The supply of specialists who are driven by a mixture of crusading spirit and greed has certainly not dried up, but their numbers have been reduced. The C.C.R.F. is a real milestone, and arguments alleging “Soviet legal nihilism” on all kinds of topics, from trusts to travel contracts, will be more difficult to sustain.

In addition—and less obvious to western appreciation—the C.C.R.F. marks a final point and substantive decision in a long debate of Soviet scholars. It draws a clear line between private and public law, and refuses to pursue complex legislation which had as its focus the integration of public and private, administrative and civil, and substantive and procedural regulations into one comprehensive piece of “economic law”. Complex legislation is far from dead. In the Ukraine, for example, the supporters of “complex legislation” are politically stronger than in Russia, and the Verkhovna Rada stages bitter parliamentary fights over an “Economic Code” and a “Civil Code”—which are totally contradictory in approach and partly contradictory in content, yet both were presented simultaneously for adoption. Russia has resisted the adoption of a legislative practice which is guided by the methodological error that law “mirrors” the economic structure and, accordingly, that a mixed economy must be mirrored by mixed law.

Having paved the way through all these intellectual, political, social, and economic contradictions and discussions, the legislator has created a civil code which forms part of the tradition of continental-European codification without renouncing its own “personality”.⁴ In recent decades, this tradition of comprehensive codification has

¹ 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).

² A.L. Makovsky, “Preface to the English Translation of the Civil Code” in Maggs & Zhiltsov, *ibid.*, xlix at li.

³ R. Knieper & M.M. Boguslavusky, *Concept for Legal Counselling in Transformation States* (Eschborn: Deutsche Gesellschaft für Technische Zusammenarbeit, 1995) at 6.

⁴ See Makovsky, *supra* note 2.

been looked upon with growing skepticism. The new *Nederlands Burgerlijk Wetboek* and the broad consensus and move in all Commonwealth of Independent States ("C.I.S.") countries toward systematic codification—of which the C.C.R.F. is but one example—believe such criticism and demonstrate a vigor of comprehensive codification which might well ease the way to a uniform European Civil Code.

I. A Critical Summary of Structure and Content

A. Structure

Seen from traditional civil codification practice, the C.C.R.F. is comprehensive in its structure: Division 1 (articles 1 to 208 C.C.R.F.) contains "general provisions" encompassing—besides methodological, philosophical, and pedagogical basics—the law of persons, objects, transactions, representation, and time periods and limitations. Division 2 (articles 209 to 306 C.C.R.F.) systematizes the right of ownership in the Latin concept of *ius in rem*, curiously including some contractual encumbrances—such as servitudes—while excluding others—such as pledges and mortgages—which have found some consideration in the law of obligations. Division 3 (articles 307 to 453 C.C.R.F.) follows the classical codification technique of abstraction by stating general principles, valid for all types of obligations, and from which contractual obligations are singled out (articles 420 to 453 C.C.R.F.). Division 4 (articles 454 to 1109 C.C.R.F.) coincides with Part 2 and regulates—somewhat surprisingly—all "individual types of obligations"—*i.e.*, several types of contracts as well as non-contractual obligations such as tort and unjust enrichment.

At the time of writing this article, Part 3 of the C.C.R.F. was still a draft. If the drafters have their way, it will lump together diverse subjects such as intellectual property, the law of inheritance, and private international law. In intellectual property law, there is an obvious disequilibrium between authors' rights and other intangible rights. Authors' rights have been regulated in detail, based on the World Intellectual Property Organization Model Law—thus moving toward international harmonization. Other intangible goods are only regulated by general principles and require further special legislation. This approach is an unfortunate example for the continuation of the Soviet codification technique. Division 7 of Part 3 is devoted to private international law which, unlike the Ukrainian draft, excludes procedural provisions but includes rudimentary provisions of the law of foreigners which is not part of the conflict of laws provisions.

B. Content

The C.C.R.F. has a relaxed approach to some methodological issues, which have at certain times caused passionate debates with ideological overtones.

1. General Provisions

“Germanic” authors around the turn of the century had criticized the German legislators for drafting a “General Part” to the *Bürgerliche Gesetzbuch* because it was found to promote Roman abstractism as opposed to ethnic and popular concreteness.⁵ The Swiss *Zivilgesetzbuch* of 1907, to the satisfaction of both observers and drafting participants, did not include a “General Part”.⁶ Modern drafters have realized that the decision for or against including such general parts is one of convenience and technicality, and not one of ideology and cultural characteristics. When opting for general provisions, Russia was not engaging in a commentary on fundamental legal bases, but rather it sought to exploit the advantages of a highly abstract formula as a way to considerably abbreviate the text.

2. Commercial Law

Similar considerations are at play with regard to commercial law. It is subject to special legislation in countries such as France, Germany, and Austria, and there were times when this very fact was taken as evidence for a special, class-related law.⁷ Over the decades, practical necessity and experience have demonstrated that commercial relations do not substantially differ from any other non-hierarchical contractual relations. It might be appropriate to accentuate certain rights and obligations of business entities as opposed to non-professionals, but these particulars can easily be integrated into a general civil code. The 1942 *Civil Code of Italy* was the first to successfully adopt such an approach. The C.C.R.F. has done the same, as has the Dutch *Nederlands Burgerlijk Wetboek* and the 1997 *Civil Code of Georgia*. It is one of the paradoxes of legal drafting in countries in transition that theory triumphs over experience. In Russia, for example, some admirers of the French and German system keep requesting a special commercial code such as in France or in Germany, against French and German expert advice and despite the fact that the topic is well taken care of in the civil codes of these two countries.

3. Consumer Protection

Consumer protection, which over the past decades has stirred some methodological controversy in traditionally capitalist economies, has unfortunately not been treated with the same unequivocal thoroughness by the Russian legislator. Consumer protection has been highly visible as a serious and salient debate, considered by some as a new field of law. In continental Europe, it has led to a series of special statutes which change civil legislation primarily in the spheres of contract and tort law. These

⁵ O.V. Gierke, *Der Entwurf eines bürgerlichen Gesetzbuches und das deutsche Recht* (Leipzig: Duncker & Humblot, 1889) at 582.

⁶ F. Wieacker, *Privatrechtsgeschichte der Neuzeit*, 2nd ed. (Göttingen: Vandenhoeck & Ruprecht, 1967) at 486-91.

⁷ M. Weber, *Wirtschaft und Gesellschaft*, vol. 2 (Tübingen: Teil, 1922) at c. 7, § 8.

statutes are intended to re-equilibrate the interests of consumers and suppliers by way of insisting more on *ius cogens* than classic liberal codification doctrine would dictate. This is certainly a shift in attitude, but is by no means a structural revision of civil legislation. The multitude of new acts is a result of the fact that most civil codes are of an older date than comprehensive consumer protection, and that it seems technically easier to leave the main code intact and attach small pieces of law to it than to attempt a systematic revision.

A new civil code, which has to be elaborated in any case, could and should make an effort to consolidate consumer protection laws with other civil legislation. In recent years, the Dutch and Georgian legislators have aptly demonstrated the viability of such an approach, while the new Russian law gives the impression that the State Duma could not make up its mind. On the one hand, the C.C.R.F. follows modern trends by integrating a full range of the typical consumer protection issues—such as the public contract—by which enterprises are obliged to conclude agreements on equitable terms,⁸ the protection of parties to contracts of adhesion against unfair clauses,⁹ strict product liability,¹⁰ and strict liability for legal but dangerous enterprises.¹¹ These points not only demonstrate the potential for integration of consumer protection into the C.C.R.F., but cover much of it—although more could have been added without systemic problems. On the other hand, the Duma has not resisted the temptation to imitate trendy European Union concepts when in 1996 it adopted a “Consumer Protection Law”. This is an act of pure symbolism, and is superfluous to the extent that it creates special legislation at a moment when it would have been easy, elegant, and much clearer to anchor consumer protection within the C.C.R.F.—thereby giving it generality, visibility, and dignity.

4. Family Law

Family law is a different matter. According to early revolutionary conviction, the family under capitalism was an institution of property, exploitation, and dominance. This view was also demonstrated by the fact that family law was part of civil law (*i.e.*, the law of commodity exchange). It was only a small step from there to the proposal that family relations be taken away from socialist civil law. In effect, this is what happened.

Revisiting the views both on the family and on civil law, it seems fair to reassess the decision and reopen the C.C.R.F. to family relations—thus ascertaining their contractual, non-hierarchical character. Other texts, such as the *Civil Code of Georgia* and the draft Ukrainian Civil Code, have embarked on this road without encountering problems. The C.C.R.F., however, has resisted for no apparent structural reason.

⁸ Arts. 421, 426 C.C.R.F.

⁹ Art. 428 C.C.R.F.

¹⁰ Arts. 1095-98 C.C.R.F.

¹¹ Art. 1079 C.C.R.F.

II. A Critical Analysis of Salient Features

The first two parts of the C.C.R.F. have been enacted under the difficult and tense social and economic circumstances of the new Russian Federation. All in all, the result is remarkable and there is no doubt that it is a welcome addition to the family of continental European codes. There is equally no doubt that the achievement was eased by that fact that Russia has always been part of this family despite its communist rule and ideological deviations.

A civil code is not a document of transition. Its very purpose is to provide a stable framework for market transactions and personal relations in responding to and shaping long term structures of civil, capitalist societies which do not vary in a business-cycle manner. It reflects this basic continuity, leaving fine-tuning and dynamics to individual contracts, which in turn are bound by legally-expressed fundamental policy considerations of appropriateness, efficiency, and fairness. This intricate interrelation between stability and flexibility, between *ius cogens* and *ius dispositivum*, has assured the long-lasting longevity of continental civil codes. These codes express this interrelation by defining and rigorously enforcing legal norms, rights, and obligations while at the same time allowing for autonomy of actions, contracts, and statutes.

The C.C.R.F. does not deviate from these notions of codification, thus paving the way for its own longevity. It accepts and reasserts the nature of physical and legal persons, property rights, torts, and contractual obligations as universal principles of economies based on monetary exchange that were established in the course of a long, non-national history of law. Within this setting, it allows for the freedom of contract,¹² for the freedom to fill the forms of legal persons by statutes,¹³ and for the freedom to undertake risky ventures.¹⁴

With all these carefully drafted principles acknowledged and in place, it would have been reasonable and convenient to avoid incorporating and maintain legal concepts which have been developed in response to the necessities of a centrally planned economy. This is, however, not always the case. The consequence, at best, will be that such norms and forms will not be used and applied in the long run and simply fall into factual *desuetudo*. At worst, they will create confusion and will be exploited skillfully in order to unduly shift risks between private persons and/or between the public good and private vices, as has been and is amply demonstrated by the virtually uncontrolled economic management of unitary enterprises¹⁵—clearly a strange beast in the family of legal persons.¹⁶

¹² Art. 421 C.C.R.F.

¹³ Arts. 48ff. C.C.R.F.

¹⁴ Art. 1079 C.C.R.F.

¹⁵ Art. 114 C.C.R.F.

¹⁶ Art. 48 C.C.R.F.

The following analysis by no means attempts to undo or replace conscientious decisions of social and legal policy. It focuses instead on technical and systematic issues which have important practical implications.

A. Unitary Enterprises

In considering unitary and treasury enterprises,¹⁷ it is obvious that their structure and operation differ from classical concepts of the legal person, although they are explicitly defined as such.¹⁸ Such a statement does not seem to shock many modern legal theorists who have long ago given up the search for an intrinsic substance to the legal person—the *personne morale*. The nineteenth century philosophical debate regarding assimilation of the legal person to the physical person, leading to theories of legal fiction and substantial personality, are no longer significant.¹⁹ The legal person is a creature of positive law. It is therefore up to the legislator to define its existence, characteristics, and organization. There are, however, limits to this freedom. One is of a hard and legal character, and the other is of a soft and factual character. The legal one is constitutionality, the factual one is the overall consistency of the legal system.

The Russian unitary and treasury enterprises are legal persons without property.²⁰ They have the right of economic management²¹ or operative administration.²² The right of management implies the right to possess, use, and dispose of goods—which corresponds to classical and constitutional²³ definitions—with the exception of immovables,²⁴ and within the limits provided by law insofar as they are *intra vires*.²⁵ Liability provisions are scattered and far from being comprehensive. Their general thrust is to separate the funds of the unitary enterprise from the other property of the State, which is the only organization in civil law to have access to such type of limited liability. Article 126 C.C.R.F. exempts the State unequivocally from liabilities of unitary enterprises. Articles 61(4), 63(6) and 115 C.C.R.F. partly contradict article 126 by introducing subsidiary liability for treasury enterprises with operative administration and excluding them from general liquidation proceedings, while articles 56 and 114 C.C.R.F. repeat the principle of article 126, but at the same time introduce an important exception. If bankruptcy (*i.e.*, the definite situation in which liability materializes) is caused by the owner of the unitary enterprise (*i.e.*, the State or municipalities), the owner bears subsidiary liability as well. Given the broad decision-making and supervisory powers which article 295 C.C.R.F. extends to the owner, it is not difficult to

¹⁷ Arts. 113-15 C.C.R.F.

¹⁸ Art. 48 C.C.R.F.

¹⁹ See generally R. Knieper, *Gesetz und Geschichte* (Baden-Baden: Nomos Verlag, 1996) at 61ff.

²⁰ Arts. 113, 115 C.C.R.F.

²¹ Art. 114 C.C.R.F.

²² Art. 115 C.C.R.F.

²³ *Constitution of the Russian Federation*, art. 35.

²⁴ Art. 295 C.C.R.F.

²⁵ Arts. 113ff., 294 C.C.R.F.

imagine that creditors will always try to link business failures to one of the debtor's decisions. This is sufficient to establish at least one contributing factor (*i.e.*, a cause) to the bankruptcy.

Practical implementation will show how the vague formulation of article 56 C.C.R.F. will be interpreted. However, the two possible results are far from satisfactory. If a narrow interpretation prevails and state liability is restricted, Russian law will be confronted with the awkward situation of having created a totally exceptional limited liability of an owner, available exclusively to the State. If the interpretation moves more toward the direction of a generalized subsidiary liability of the State in case of bankruptcy, this will certainly protect creditors but financially burden the State (*i.e.*, the public good), increasing the possibility of collusion and other forms of unprofessional and reckless management of state enterprises facilitated by the sketchy provisions of the C.C.R.F.

Legal persons have been created in order to render the separation of property from physical persons possible. It is the only viable construction to limit liability which normally covers all personal property. The principle is universally accepted. The totality of assets of any person secures the satisfaction of any creditor's claim. There are some extremely rare and tightly circumscribed exceptions—inheritance law is one, and highly personal objects in forced execution is another—but the principle is clear. Each person's liability is unlimited, which implies the corresponding principle that the legal capacity of a person is defined by the potential of holding property rights. The C.C.R.F. follows this rule.²⁶ The right to hold property is a fundamental, inalienable right of physical persons—this is the *raison d'être* for the establishment of a legal person. Its legal construction has been described as the "greatest single discovery of modern times. Even steam and electricity are far less important than the limited liability corporation, and they would be reduced to comparative impotence without it."²⁷ This strong conviction is based on the fact that the "discovery" leaves the principle of unlimited liability of persons untouched, and yet limits the liability of physical persons. It construes a person which bears liability with all its property and assets. Property, legal capacity, and liability thus remain unseparate; the fundamentals of market economies remain respected. It is common knowledge that the term "limited liability company" has always been a misnomer—we are accustomed to it and can live with it. It is equally accepted that a legal person cannot exist without property. If physical persons do not respect this principle and misuse the form, they risk having the corporate veil pierced and being held individually liable. The effective transfer of capital (*i.e.*, property) is essential for the establishment of legal persons, and is carefully scrutinized by law.

Corporate management serves the purpose of professional administration and protection of creditors and shareholders alike. Cogent law gives corporate manage-

²⁶ Arts. 17, 18 C.C.R.F.

²⁷ W. Kolvenbach, *Bhopal—Storm over the Multinationals? Zeitschrift für Unternehmens—und Gesellschaftsrecht* (Berlin: de Gruyter Verlag, 1986) at 61, citing N.M. Butler (1911).

ment structure and orientation, and formulates liability for sub-standard performance. The roles, rights, and obligations of owners/shareholders, managers, supervisory bodies, and independent accountants are well elaborated and standardized in concert with the potential for liability and the risks inherent in the business administration of collective and detached property.

The precision with which responsibilities and liabilities of different actors are established has allowed the legislator to overcome the early standard of the *ultra vires* doctrine and to introduce unlimited legal capacity of legal persons in business. This evolution has rightly shifted risks away from business partners and creditors to the company, whose business behavior can be controlled by owners and by elaborate checks and balances. In continental Europe, this has been achieved by modernizing company laws. The common law has—despite doctrinal continuity—practically solved the problem by statutory practice. Russia has not yet followed the general trend.²⁸

The C.C.R.F., to a large extent, builds on these principles. Universally accepted forms of incorporation such as partnerships,²⁹ limited liability companies,³⁰ and joint stock companies³¹ are recognized. Business and market rationality are recognized, although it is highly questionable whether it was good codification practice to elaborate these general norms, which are insufficient to be operational anyway and necessarily refer to special legislation for further detail, thus not paving the way to swift reforms.

Yet there is more in the new C.C.R.F. It also perpetuates some of the legal forms which the *Civil Code of the Russian Soviet Federated Socialist Republic*³² had elaborated in 1964. These forms made sense in a system where all property was in the hands of the State, where the question of individual liability was marginal at best, and where some autonomy had to be given to management of decentralized entities without property in order to make the system work. The unitary enterprise and operative management were practical ways out of the immobility of a centrally planned economy. The legal structure centers around management, not around liability nor around decentralized property, of which management is but a function. In open contradiction to the concept of the private legal person, the unitary enterprise is not an institution of private law. It has not been created to reconcile the principle of unlimited liability in a social system based on decentralized property. Instead, its focus is the interrelation of state powers and management. In this regard, the C.C.R.F. fixes the autonomy of management but also insists on state supervision. This is not the only ambiguity. The text neither details substantive powers of one or the other party involved, nor establishes clear and operational procedures by which sound management could function

²⁸ Art. 49 C.C.R.F.

²⁹ Arts. 66-86 C.C.R.F.

³⁰ Arts. 87-95 C.C.R.F.

³¹ Arts. 95-104 C.C.R.F.

³² *Vedomosti S' ezda Narodnykh Deputatov R.F. i Verkhovnego Soveta R.F.* (1964) No. 24, item 406 [hereinafter 1964 Civil Code].

with regard to owners, employees, supervisory bodies, etc. During the period of central planning this might not have been seen as a gap, since vagueness was normally filled by state and party decisions. With their disappearance, the normative framework needs to be much more elaborate and explicit. The sketchy character of norms invites collusion and irresponsible business behaviour. The fate of Russia's state enterprises can be taken as empirical evidence of such legal shortcomings.

The norms regarding the regulation of property and liability are as sketchy and contradictory as those regarding management. While article 113 C.C.R.F. denies property to unitary enterprises, it attributes special funds and assets to them, which "belong" to them and over which they have the kind of power that is normally reserved for an owner. The "real" owner, in turn, can take a non-defined "part" of the profits.³³ The owner should equally be allowed to take property back, since there is no norm to prevent it. Article 114 C.C.R.F. tries to attenuate the consequences, but does not go far enough. Therefore, the property relations between the owner and the enterprise are far from clear, but there seems to be a parallel. In pre-capitalist European law, a notion of "split property" existed; the lord held *dominium plenum*—which conferred the final right of disposal—while the vassal held *dominium utile*—which conferred the right of use and possession. Traces of the concept can still be found in article 357 of the Austrian *Bürgerliche Gesetzbuch* of 1811 as well as in English common law. It was, however, successfully contested by Kant, Hegel, and nineteenth century European legislators,³⁴ and disappeared from codification practice. It seems that it has made a strange reappearance under the very different ideological assumptions of central planning, but definitely has no place in market economies.

The lack of consistency with respect to liability has already been addressed. The apparent clarity of separate liabilities of the unitary enterprise on the one hand and the State on the other—expressed in article 126 C.C.R.F.—is partly revoked by other norms. Both sets of provisions deviate from the intrinsic connection of property and unlimited liability.

A critical appraisal of the foregoing sort may be accepted (or rejected) as a judgment over the quality of the legal text. It may be taken as an occasion to reconsider and eventually amend the C.C.R.F. in order to bring it in line with more traditional and generally accepted principles of legal persons, property, liability, and management which are by no means alien to Russian law. In fact, internal and external consistency and coherence of laws are important values, but they seem to be neglected by lumping classic capitalist and communist forms of corporations together as legal persons.

³³ Art. 295 C.C.R.F.

³⁴ I. Kant, *Die Metaphysik der Sitten*, 2nd ed. (Wiesbaden: Insel Verlag, 1789) at 382; G.W.F. Hegel, *Grundlinien der Philosophie des Rechts* (Frankfurt am Main: Suhrkamp Verlag, 1821) at § 62-63. For a detailed discussion, see Knieper, *supra* note 19 at 202ff.

Can one go further and not only complain about the professional quality of the text but also attack its legal validity? Can one say that a legal text is not only bad but also without binding force? A law can be invalid if it contradicts more important norms. This is explicitly recognized by article 125 of the *Constitution of the Russian Federation*. The problem is to define the higher-ranking norm properly. Even if reference to Kelsen is rare these days, codified legal systems are based on positivism and do not—or only under extreme circumstances—accept natural law argumentation. The fact that there is a generally accepted core standard to determine the nature of a legal person, or that there is a traditional natural link between property and liability, is not a sufficient reason for rendering invalid a positive law which deviates from such concepts. The legal person is a creature of law and the legislator is free to decide what a legal person is.

There are, however, guidelines for and limits to the legislator's freedom. The legislator cannot act against fundamental social and economic national objectives to the extent that they are embedded in the Constitution. The *Constitution of the Russian Federation* accords "legal force and direct effect"³⁵ to the rule of law and democratic order, to rights and liberties of all persons,³⁶ to the equality of all,³⁷ to free entrepreneurial and other economic activity,³⁸ and to private property.³⁹ It perpetuates the Soviet notion of different forms of property but neutralizes its effect by insisting on their equality,⁴⁰ and it forbids laws which belittle human and civil rights and dignity.⁴¹

According to well-established constitutional doctrine, laws violate the rule of law and civil liberties if they are so ambiguous, so void of coherence, and so contradictory that their content, scope, and meaning do not disclose themselves. The C.C.R.F. attributes civil rights—the most important of which is property—to legal persons⁴² and then creates unitary enterprises as legal persons who cannot own property. It also accepts the general principle that all persons bear liability for debts with all of their property⁴³ and then makes exceptions for those legal persons whose funds are in the immediate ownership of the State. These are certainly inconsistencies and contradictions, but they do not transcend the framework of comprehension. They represent a type of unfortunate political compromise which often leads to a lack of legal coherence, but whose basic idea is still recognizable. Therefore, they cannot be characterized as violations of fundamental constitutional provisions.

³⁵ *Constitution of the Russian Federation*, art. 15.

³⁶ *Ibid.*, arts. 1, 18.

³⁷ *Ibid.*, arts. 5, 6, 8, 13, 19.

³⁸ *Ibid.*, art. 34.

³⁹ *Ibid.*, arts. 8, 35.

⁴⁰ *Ibid.*, art. 8.

⁴¹ *Ibid.*, art. 55.

⁴² Art. 49 C.C.R.F.

⁴³ Arts. 56, 307ff. C.C.R.F.

On the other hand, the Constitution assures free economic activity and it forbids any privilege and discrimination of the different forms of property. The C.C.R.F. limits the liability of the State in the context of unitary enterprises. No other person has access to such type of limited liability, and no reason is given except that the State is the owner of the goods. Nobody else could create a legal person and still reserve its property while at the same time limiting liability. The valid argument that public funds need protection could be pursued with more success if the State's property were transferred and if comprehensive management duties were introduced. The fact that the State acts through an intermediary that disposes guaranteed funds and bears unlimited liability would help if property were transferred to it. This is not the case. This is why, in my view, the liability provisions of the unitary enterprise do not stand the test of constitutionality. These provisions grant privileges to the State (*i.e.*, to one form of property) which reflect the old system of state monopolies and are no longer justified by substantive arguments. In addition, they infringe upon economic freedom because the State may participate in the market by using a legal device which prevents "normal" creditors from acceding to all property to satisfy their claims.

These are all important shortcomings. Serious thought should be given as to whether the structure of unitary enterprises should be abandoned and simply let *desuetudo* reduce the practicality of the relevant legal provisions—even if powerful interests are dissatisfied. One might also amend the C.C.R.F. and delete the respective norms and institutions which made sense as a corrective of state monopoly property, but which have become dysfunctional in a market system.

B. Special Types of Contracts

Not surprisingly the most voluminous part of the C.C.R.F. is devoted to "Individual Types of Obligations."⁴⁴ What is surprising is that this section has not been divided further, by grouping contractual⁴⁵ and non-contractual⁴⁶ obligations into two separate divisions. This is, however, only of subordinate importance.

In general, the structure and content of Part 2 corresponds to well-established codification practice. It assembles the traditional and predominant types of contracts as they have been elaborated in other civil and commercial codes, and includes tort and unjust enrichment. Modern developments generally have been integrated.

As in the case of legal persons, the legislator has maintained some of the previous law of economic contracts. This law evolved in the Soviet era in response to the needs and structure of a centrally planned economy and was codified mostly in the 1964 Civil Code. It is linked to an economic system and not to a culture of national legal history. Thus, it would be erroneous to appraise these laws as specifically "Russian"

⁴⁴ Part 2 (also Division 4), C.C.R.F.

⁴⁵ Arts. 454-1063 C.C.R.F.

⁴⁶ Arts. 1064-1109 C.C.R.F.

unless one would want to equate Russia with the Soviet Union and a centrally planned communist economy.

All legislators of special contract law face the methodological difficulty of fixing an appropriate level of abstraction. On the one hand, legal and social history has imposed a certain differentiation; the distribution of risks and interests between parties of contracts of sale, rent, services, credit, suretyship, etc., is too diverse to be lumped together into one. On the other hand, it would be a vain and superfluous exercise to differentiate according to special services and goods which are to be exchanged. There are as many acts of sale as there are objects and potential sellers and buyers on the market, and there are as many contracts of work as there are services being rendered. Cars and energy, pencils and enterprises, agricultural products and goods with or without packaging can be sold; dentists, garagists, contractors, scientists, designers, and hair-dressers offer services. All these goods and services are specific, yet are made identical and comparable by the fact that on the market they are expressed in terms of monetary (*i.e.*, abstract) value.

Generally applicable laws have to address the identity and abstraction of goods and services whereas the multitude of individual contracts address the multitude of nuances. Laws and contracts have different functions but they complement each other, and aim on different levels for the solution of the same problems: the equilibrium of interests and the distribution of risks of the contracting parties. Laws cannot but standardize rights and obligations of parties, the quantity, quality and the forms of goods, possible places and times of performance, and the consequences of sub-standard products or non-performance of services, etc. Contracts have to define the specific commodities to be delivered, the specific place and time or period of delivery, etc. This is why civil codes present more or less obligatory models of contracts and still grant autonomy to parties to negotiate and conclude contracts freely.

It is certainly part of legal policy and the art of legal drafting to find appropriate and fair methods and standards of differentiation for different types of commodities—as well as for different types of parties—especially when commercial contracts are integrated into the C.C.R.F. From this perspective, professionals are normally under more stringent rules and obligations than non-professionals, consumers are increasingly protected by cogent law, and minors may be excluded from certain businesses. However, special treatment and protection of women—which existed at times in most European codes—today would be rightly considered anti-constitutional and beyond acceptable policy choices. Similarly, and by tradition, European civil codes do not reserve special treatment for the State or other public bodies. These actors are not hindered from being partners in contractual relations; they are submitted to the same rules of civil law as any other party. Special provisions for public procurement do not contradict this statement, since they are administrative procedures established to protect competitors and precede the contract.

As to contracting parties, the C.C.R.F. differentiates partly on these lines, albeit with the notable exception of certain contracts to which the State is a party. The State contracts in writing for the supply of goods⁴⁷ and for the performance of work,⁴⁸ limits the freedom to negotiate terms and conditions in contracts for the supplier and the performer,⁴⁹ and confers a role to courts which seems inspired by the old state arbitration system. No substantial reason is given or is imaginable to legitimize the privilege. The sheer fact that the State is the State no longer seems sufficient and is now open to constitutional examination. It is also highly questionable whether the State's contracts stand the tests of equality and the unhindered entrepreneurial activity of suppliers. These are highly esteemed constitutional principles. Laws contradicting them will probably be invalidated.

The second sphere of legal differentiation concerns types of goods or services to be exchanged against money. Most of the law in this area has developed in long-term economic practice and has eventually been codified. Apparently, the strongest need has been felt in the vast field of contracts for work and services where diverse activities such as transport, storage, insurance, banking, commission, agency, etc., have been singled out in civil and commercial codes for special regulation. The European codification of the travel agency contract is one of the latest examples.

Although the diversity of services seems to make the need for differentiation evident, a note of caution is appropriate. A law is not a textbook. Differentiations which content themselves to define objects, goods, and services make no sense and violate the indispensable principle of abstraction without which codes and statutes would become endless, unpenetrable, and unoperational texts. Each new legal differentiation should be subject to a cost-benefit analysis. Only if rights and obligations, performance criteria, and liabilities are so specific that they cannot find a proper place under a more abstract type of contract should the legislator act. Today, it seems that the legislator often acts to please the general public with symbolic gestures in the wake of a specific problem. The law on travel agency contracts is a case in point. It responds to the phenomenon of mass tourism and conveys a message of legislative activism and reassurance to travelers, but does not add much substance to the general contract of services. The principles which it does add are of a general character and are not restricted to the particularities of the travel contract. It would have been more in line with modernizing relatively old codes to have them introduced without the restriction to a highly specific service. It seems that the European legislator has not fully respected the necessity to formulate general and abstract laws.

The C.C.R.F. struggles with identical problems of finding the appropriate level of abstraction. The difficulties are accentuated by the tradition of the centrally planned economy and its legislation, which insisted much more than Anglo-Saxon law—and

⁴⁷ Arts. 525-34 C.C.R.F.

⁴⁸ Arts. 763-68 C.C.R.F.

⁴⁹ Art. 426 C.C.R.F.

still more than continental law—on specific performance.⁵⁰ Economic contracts were, to a large extent, instruments for the execution of plans, functioning much more through explicit directives of what had to be done and through moral persuasion than through monetary incentives and entrepreneurial or individual liability. Goods and services had to be rendered in kind. Monetary compensation would not have helped much since there was no market for alternative supply. Economic interrelations and rationality were more based on concrete duties than on abstract monetary value. Detailed descriptions and definitions of goods to be delivered and services to be rendered were appropriate means to define performance.

In the "General Part of the Law of Obligations,"⁵¹ the C.C.R.F. reflects the fundamentally changed economic circumstances and pushes the absolute priority of specific performance back in favor of monetary compensation. Article 393 C.C.R.F. establishes the principle and article 396(2) C.C.R.F. stipulates explicitly that monetary compensation frees the debtor from performance of the obligation in kind—a tremendous evolution from Soviet law. The section on "Individual Types of Obligations"⁵² is not always as coherently modern. The C.C.R.F. refers to the traditional and well-probed set of contract types, but in addition describes in epic detail and repetition who has to do what, where, when, and why.

1. The Contracts of Purchase and Sale

The C.C.R.F. does not content itself to transform reciprocal obligations and the rights of buyers and sellers into the generally accepted formulation by which the seller is obligated to transfer the ownership of goods to the buyer⁵³ and the buyer is obligated to accept the goods and pay for them.⁵⁴ It devotes at least one article each to specify certain characteristics of the goods, such as quantity,⁵⁵ quality,⁵⁶ and conformity with assortment criteria—*i.e.*, models and colors,⁵⁷ completeness,⁵⁸ and packaging.⁵⁹ The C.C.R.F. then describes, in each case, the consequences for the failure of performance, which have for the most part already been dealt with in the "General Part of the Law of Obligations," and which renders the repetition superfluous. The repetition is, however, not identically formulated and it is not difficult to imagine how well-trained lawyers—who make a living out of obstructing the swift settlement of disputes—will enter into endless disputes over the applicability of certain norms for certain goods, even if in the end the decision of a case will not depend on it. It will not always be

⁵⁰ H. Kroll, "Breach of Contract in the Soviet Economy" (1982) 16 J. Leg. Stud. 119 at 140.

⁵¹ Division 3, C.C.R.F.

⁵² Division 4, C.C.R.F.

⁵³ Arts. 454, 456 C.C.R.F.

⁵⁴ Arts. 454, 484ff. C.C.R.F.

⁵⁵ Art. 465 C.C.R.F.

⁵⁶ Art. 469 C.C.R.F.

⁵⁷ Art. 467 C.C.R.F.

⁵⁸ Art. 478 C.C.R.F.

⁵⁹ Art. 481 C.C.R.F.

easy to draw clear lines between quality and conformity with assortment, or between quantity and completeness. They are, in fact, of only minor importance (and will be settled by relying on the interpretation of concrete contracts) in a system which is not completely dominated by specific performance—but where unspecific breaches of performance lead to monetary compensation.

After these specifications in the general provisions on purchase and sale, the chapter is further subdivided. Seven paragraphs and more than seventy articles state repeatedly that a contract of sale between an enterprise and a consumer,⁶⁰ or between two enterprises,⁶¹ the State and an enterprise,⁶² or with respect to agricultural products,⁶³ energy,⁶⁴ immovables,⁶⁵ or enterprises,⁶⁶ obligates the seller to transfer the goods to the buyer and for the buyer to accept and pay for the goods received. They also repeat provisions on the time, place, and period of delivery and the consequences of sub-standard or non-performance, which vary slightly between replacement, repair, return of goods, reduction of the purchase price, rescission, and compensation for damages.⁶⁷ The motive behind the slight variations from one contractual situation to another is far from obvious.

In addition, the set of norms is highly complex and difficult to apply. The amount of theoretical doctoral dissertations, lengthy battles in court, and efforts to reduce the complexities in (model) contracts are easily foreseeable. The norms are highly repetitive and rarely innovative; sometimes the legislators even seem to be lost in their own complexities. The following are some examples:

- In addition to the repetitions on transfer, acceptance, and payment, it seems unnecessary to repeat that a contract between an enterprise and a consumer is a public contract,⁶⁸ to stress conditionality,⁶⁹ pre-contractual problems,⁷⁰ storage,⁷¹ packaging,⁷² calculation of damages,⁷³ etc., since these problems have generally been taken care of, in more abstract provisions, in the overarching “General Part of the Law of Obligations.”

⁶⁰ Arts. 492-505 C.C.R.F.

⁶¹ Arts. 506-24 C.C.R.F.

⁶² Arts. 525-34 C.C.R.F.

⁶³ Arts. 535-38 C.C.R.F.

⁶⁴ Arts. 539-48 C.C.R.F.

⁶⁵ Arts. 549-58 C.C.R.F.

⁶⁶ Arts. 559-66 C.C.R.F.

⁶⁷ Arts. 503ff., 511, 518ff., 538, 542, 547, 557, 565 C.C.R.F.

⁶⁸ Art. 494 C.C.R.F.

⁶⁹ Art. 499 C.C.R.F.

⁷⁰ Art. 507 C.C.R.F.

⁷¹ Art. 514 C.C.R.F.

⁷² Art. 517 C.C.R.F.

⁷³ Art. 524 C.C.R.F.

- By integrating norms into one or the other paragraph, they are not applicable to other specific contracts. Yet it is difficult to understand why a duty of information or the right to inspection or the contract of hire-purchase should be restricted to retail sales, while the calculation of damages on rescission—as proposed in article 524 C.C.R.F., which perfectly restates general principles—should be restricted to inter-enterprise sales.
- It will remain the secret of the drafters why they have formulated general consequences for the transfer of goods of improper quality in article 475 C.C.R.F., which is repeated for the enterprise-consumer contract, albeit with little differences in wording whose rationality does not disclose itself. Conversely, they choose in the context of inter-enterprise contracts⁷⁴ the technique of reference. Article 475 C.C.R.F. leads to essentially identical results for both types of contracts. The impression, however, is that there is a fundamental difference between the two, where in reality there is none or at least none of importance.
- Contracts of supply, of procurement of agricultural products, and of energy supply have been developed in the course of central planning to ensure the performance of state enterprises. These all boil down to contracts of purchase and sale and the decision to maintain these distinctions leads to much repetition and confusion. Most of the justified special norms—which deal with professionals, consumer protection or long-term business-relations—are not restricted to the sphere of purchase and sale, but to onerous contracts in general. They could be, should be, and partly are integrated into the general provisions of contracting.

It is possible that many of the repetitions and inconsistencies will be sorted out by practical application, interpretation, and, again, *desuetudo*. As to some key provisions of state contracts in writing, they might eventually be challenged in the Constitutional Court. Amendments to the text are improbable. Care should be taken, however, to avoid using this as a model for other civil codes which are still in preparation. It might even be useful to rethink the norms in application to the amendment of the Model Civil Code for C.I.S. countries which may more easily be used as a playground for reforms.

2. The Contract of Work

In addition to the provisions on purchase and sale, those pertaining to contracts of different works and services merit critical discussion. Again, the primary type of contract is subdivided in terms of parties—*i.e.*, consumers⁷⁵ and the State⁷⁶—or in terms of

⁷⁴ Art. 518 C.C.R.F.

⁷⁵ Arts. 730-39 C.C.R.F.

⁷⁶ Art. 768 C.C.R.F.

specific activities—*i.e.*, construction⁷⁷ and design/exploration.⁷⁸ Scientific research and experimental design are singled out into a chapter of their own,⁷⁹ perhaps guided by the scientifically unacceptable argument that the discovery of the impossibility of achieving hypothesised results⁸⁰ be equivalent to non-performance of scientific work. A separate chapter is devoted to services,⁸¹ which attempts to enumerate specific examples such as communication, medical, veterinary, auditing, consulting, information, instruction and tourist services.⁸² Fortunately for dentists and lawyers, the list is not meant to be exhaustive, which in turn unfortunately renders it legally superfluous except for text-book purposes. Article 779 C.C.R.F. goes on to explicitly exclude contracts of work from services, only to state in article 783 C.C.R.F. that the provisions on the contract of work are applicable with the exception of special norms to the contract of services. These do not, however, deviate in substance from those norms applicable to the contract of work—a complicated and confusing technique of legislation indeed.

When comparing the set of provisions on the different sub-categories and types, it becomes evident again that—except for descriptive concreteness with regard to performance obligations—the division leads mostly to repetitions and in some cases to a limitation of scope, which is hardly justifiable. The following are some examples:

- There is simply no reason to restrict the possibility of insurance,⁸³ the necessity of technical documentation and its obligatory character,⁸⁴ the right to associate an expert to inspections,⁸⁵ the obligation to respect environmental laws,⁸⁶ and the obligatory character of state regulated prices⁸⁷ to consumer work. Whether or not these effects are intentional, they do result automatically from the C.C.R.F.'s organization.
- With respect to the basic obligations of contracting parties, the C.C.R.F. repeatedly states that the contractor has to perform a specific task, work, or service relying on a mixture of technical definitions and non-exhaustive enumerations.⁸⁸ With the exceptions mentioned above, the general provisions of articles 702 to 729 C.C.R.F. contain a well thought-out catalogue of rights and duties of parties, striking an appropriate balance between interests and risks.

⁷⁷ Art. 740 C.C.R.F.

⁷⁸ Arts. 758-62 C.C.R.F.

⁷⁹ C. 38 (arts. 769-78) of the C.C.R.F.

⁸⁰ Art. 775 C.C.R.F.

⁸¹ C. 39 (arts. 779-83) of the C.C.R.F.

⁸² Art. 779 C.C.R.F.

⁸³ Art. 742 C.C.R.F.

⁸⁴ Art. 743 C.C.R.F.

⁸⁵ Art. 749 C.C.R.F.

⁸⁶ Art. 751 C.C.R.F.

⁸⁷ Art. 735 C.C.R.F.

⁸⁸ Arts. 702, 730-33, 740-45, 758-60, 769-73, 779 C.C.R.F.

- With respect to the supply of material and equipment by one party—as well as pricing, inspection, rescission, acceptance, information, and confidentiality—the special provisions of the C.C.R.F. add only very marginal points. They are sometimes reasonable and could be added to an article of the general provisions—such as the extension of liability periods for construction work⁸⁹—while on other occasions they are not easily understandable. Why, for instance, does the law on consumer work refer to the contract of purchase and sale in case of improper performance⁹⁰ and not to the more appropriate norms of the work contract, even though this is the general intention of the chapter?⁹¹ Overall it seems that the special provisions are sometimes not up to the standard of the general ones, and at times seem to have been added solely for the sake of describing obligations of specific performance.

The contract of purchase and sale and the contracts of work and services demonstrate that the base of contractual rights and obligations—just as for all other special types of contracts—is firm and stable. It fixes a distribution of risks and an equilibrium of interests which reflects the universal experience of centuries of monetary exchanges. At the same time, it is still partly inspired by the necessities of a centrally planned economy and its one-sided quest for the specific performance of concrete obligations by sub-entities of a monopolized economy. The uniformity and abstraction of monetary value, for which holders of decentralized property and independent participants on the market finally strive, are not always thoroughly taken into account. This leaves important indications of constant transition in a code that is supposed to be stable. It would have been appropriate—and certainly not disrespectful toward Russian legal culture—to push abstraction and generality further, or to maintain the level of abstraction which is already in place on many topics. The search for certainty, however, may lead to a complex system of interrelation and references rendering understanding and implementation difficult. The ex-Soviet judge might recognize a familiar rule, but it has lost its context and now has to be seen as part of the new totality of law. The quest for transparency and simplicity of laws is as old as efforts of codification. Unfortunately, laws cannot be simpler than the social relations they are meant to regulate—especially if they are based on the rule of law.

Conclusion

The critical analysis of some salient features of the new C.C.R.F. leads to the conclusion that quality might be improved by a more thorough systematization and by a more rigorous liquidation of central planning devices. This is true both for the unitary enterprise and for special types of contracts which have been discussed here. Nevertheless, there is some hesitancy to recommend amendments to the C.C.R.F., although

⁸⁹ Art. 756 C.C.R.F.

⁹⁰ Art. 739 C.C.R.F.

⁹¹ Art. 702(2) C.C.R.F.

there is no hesitancy to recommend an overhaul of the C.I.S. Model Civil Code which is more an intellectual exercise than law, and has no immediate practical impact on social and economic life. This hesitation stems from the conviction that legislation, especially in periods of transition, needs to be stable and not subjected to constant change. There is a definite trade-off between stability of law and its quality. Russia—and for that matter all newly independent states—experiment far too much with new laws which are unfortunately quite often influenced by international organizations. The process sometimes looks like an offspring of Soviet “legal nihilism”. For this reason, it might be advisable to keep any acceptable and constructive criticism on record and let it infiltrate legal practice by drafting statutes and contracts, as well as in preparing and deciding cases in interpretation. The emphasis must shift from legal drafting to implementation. This will help to overcome the inconsistencies and shortcomings of transition in a civil code which, for the most part, is a fine example of craftsmanship and stability.

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