

# Post-socialist civil law in historical perspective<sup>1</sup>

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The objective of this paper is to trace questions of Russian property law from the pre-revolutionary legal system, to the revolutionary and “mature” socialist legal systems, through to the property law of our own post-Soviet era. We are undertaking this study in order to (1) ascertain the state of civil law and its developmental trajectory in Russia prior to the Revolution, (2) define what we mean by the “Soviet legal model” and the “Soviet property model” within it, and (3) place the post-Soviet civil law model in a longer term continuum. The answers to these questions will assist further study of the reform of civil law in all former Socialist states in transition.

## *Introduction to pre-revolutionary Russian civil law*

The *Svod Zakonov Grazhdanskikh*<sup>2</sup> set out a liberal civilian concept of *ownership* in which the owner of the land also owned all things attached to the land and everything in the soil and, most distinctively, defined as a lawful power to possess, use and dispose of the property,

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<sup>1</sup> This paper was presented at the 10<sup>th</sup> Biennial Conference of the Australasian Association for Communist and Post-Communist Studies (AACaPS) in Canberra, 3-4 February 2011. It has been peer reviewed via a double referee process and appears on the Conference Proceedings Website by the permission of the authors who retain copyright.

<sup>2</sup> Found in Part 1, Volume 10 of the *Svod Zakonov Rossiiskoi Imperii*. Referred to in this paper as “the *Svod*”. On the development of the *Svod* see further Raff and Taitlin, “Socialist Civil Law in Comparative Perspective – Looking Back to the Twentieth Century” paper presented at the VIIIth World Congress of the International Council for Central and East European Studies, Stockholm 31 July 2010 (forthcoming in *Review of Central and East European Law*) and T Borisova, “Russian National Legal Tradition: *Svod versus Ulozhenie* in Nineteenth-century Russia” *Review of Central and East European Law* 33 (2008) 295-341.

exclusively and independently from others, incorporating also the Russian historical concept of ownership, a right of possession, eternally and hereditarily.

The *Svod* also recognised possession as a separate right, such as the ‘right of life possession’ that the owner could grant to his or her spouse in anticipation of death. There were also rights of public and private participation in the property of another, analogous to public and private servitudes, including customary forest and hunting rights.<sup>3</sup> Aside from servitudes, the *Svod* did not recognise other perpetual rights.

The *Svod* provided protection for factual possession, as well as protection of ownership. It also provided partial protection to one who gained possession in good faith from one without appropriate title. The good faith possessor retained income from the property in question for the period of possession.

The 1905 Draft of the Civil Code defined the right of ownership as a right of exclusive dominion insofar as not limited by law or the rights of others. Ownership was also defined through the rights of possession, use and disposal

The concept of servitude received further development in the 1905 Draft. The general restrictions on ownership were distinguished from private land servitudes, and the customary forest and hunting servitudes were re-defined as personal servitudes<sup>4</sup> rather than land servitudes.<sup>5</sup> The concept of separate possession found in the *Svod* became ‘use-possession’ in the Draft, moving closer to the Roman law usufruct. A more controversial innovation in the Draft was the attempt to codify the two specifically ‘peasant’ property concepts, (i) ‘obrok’ possession, which was a perpetual hereditary form of possession which was not included in the *Svod*, and (ii) peasant communal ownership, which was a legal product of the 1861 peasant emancipation law.

The Draft also provided for the civil law protection of factual possession through a distinct law suit, in addition to the protection of ownership. The protection of owners was partly counterbalanced by the protection of one who acquired possession in good faith. For example, the 1905 Draft provided for compensation to one who acquired possession in good

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<sup>3</sup> “Rights of public participation” included rights of unhindered passage on highways and waterways or the right to use the banks of waterways, as well as restrictions on owners not to prevent public enjoyment of such rights. Rights of private participation embraced neighbourhood rights: aside from private rights of passage, the rights of private participations also included restrictions on owners in the interests of neighbours, such as obligations not to spill waste or water, analogous to private nuisance in common law.

<sup>4</sup> For the benefit of a particular person.

<sup>5</sup> For the benefit of another area of land, regardless of who owns it from time to time.

faith through purchase at a public action. The three year time limit on the owner's suit to recover property implied that after this period the good faith possessor could enjoy the property undisturbed.

The pre-revolutionary Russian civil law also recognised 'adverse possession' of land, conceived as undisturbed possession for 10 years.

Interestingly, the thrust of the pre-revolutionary provisions of the property law with respect to the possessor in good faith, finders and rights to treasure did survive the Soviet period and re-appeared in the post-Soviet civil law.

#### *Post-revolutionary civil law*

After the period of revolutionary legal nihilism of 1918-1920, some resemblance of conventional civil law returned with the 1922 Civil Code, with one crucial exception – all land fell into exclusive state ownership. The Code abolished the conventional civil law distinction between movable and immovable property, introducing the separate ownership of buildings.

Interestingly, the Civil Code treated cooperatives as being on par with private persons, aside from the privilege of cooperative enterprises not being subjected to limits on the numbers of employees.

The rights of the owner, just as in the 1905 Draft, were defined through the rights of possession, use and disposal. Although, the 1922 Civil Code reinstated the concept of ownership, protection of it did not return to forms of protection of possession. Just as in the 1905 Draft, the owner could reclaim his or her property from one holding possession in good faith only in the case of *loss* or *theft* of the property. Another notable change was the exemption of state enterprises from these limitations on the recovery of property.

Generally, the 1922 Code retained the essence of the pre-revolutionary provisions with respect to finding but adapted them to the changed conditions, so not the finder but the state obtained ownership of the found property if the owner did not appear. Similarly, the private acquisition of ownership of abandoned property, recognised in the *Svod* and the 1905 Draft, had no place in the Soviet law, which declared all such property to belong to the state.

The 1922 Civil Code set out a list of state-owned property withdrawn from private ownership, as well as a list of property allowed to be held in private ownership, following of

introduction of the New Economic Policy in 1921. The latter list contained forms of immovable property other than land, such as buildings, which were not withdrawn from private ownership. Thus, as noted, the 1922 Civil Code implicitly recognised the separation of ownership in land and in other immovables: in contravention of the basic civil law principle that the owner of land also owns buildings and fixtures attached to the land. Still, the abolition of this principle was not explicitly announced, and with respect to new buildings, the Code seemed to recognise only temporary building rights (from 20 to 50 years). The building rights and the pledge were the only two lesser proprietary rights recognised in the 1922 Civil Code. Leases were also recognised but in European civil law a lease is not recognised as a proprietary right. Building rights were abolished in 1948 and replaced by private ownership of the privately built residential houses.

The 1922 Land Code provided for *use rights* to be granted in respect of state owned land. As it emerged, these had effectively perpetual duration. It was also explicitly provided that all building and other fixtures on the land belonged to the holder of the land use right. The Code also allowed for different types of land communities, such as *khutor*, *otrub* or strip farming, as well as production collectives, partnerships, *artel* and “joint cultivation”). The Code had no provisions for servitudes.

The Soviet Constitution of 1936 codified a new concept – socialist ownership, comprising state and collective ownership. In comparison, the 1922 Code just listed the property withdrawn from private ownership, without distinguishing socialist from non-socialist ownership. Now, formerly private property was redefined as personal property serving to satisfy only the domestic and cultural needs of the citizen, and personal property was not to be used to obtain ‘non-labour’ income.

Following further tumult in the theory of socialist property, ideas of socialist civil law emerged in the course of preparing the 1936 Constitution and gained favour, leading to the 1961 Fundamentals of the Civil Law of the USSR and the 1964 Civil Code of the RSFSR. It codified not only “socialist” and “personal” ownership but also a specific proprietary right of the state owned enterprises – *the right of operative management*. It provided the state enterprise as a legal person with ownership-like rights of possession, use and disposal, but within the limits of the law and planned targets.

As with the 1922 Code and the 1905 Draft, it continued to define the rights of the owner as the rights of possession, use and disposal.

Land, including forests and the sub-surface, was in the “exclusive ownership” of the state, so it could not be the object even of operative management, thus barring even the limited rights of disposal otherwise enjoyed by state agencies and enterprises.

In the 1964 Code, the owner could reclaim the property from a good faith possessor, not just in cases of loss and theft, as had been the case in the 1905 Draft and the 1922 Code, but also if the property was taken from possession against the owner’s will. Besides, the 1964 Code provided protection only to such possessor in good faith who acquired the property for valuable consideration. These innovations, which effectively lessened protection of possessor in good faith, re-appeared in the post-Soviet Civil Code of 1994.

The right of an owner to reclaim a thing from a good faith possessor was, in the 1964 Code, subject to exemptions not only in favour of state enterprises, as in the 1922 Civil Code, but also in favour of kolkhozes, cooperatives and public organisations. The provisions of the 1964 Code, just as in the 1922 Code, allowing for protection of ownership, did not contain separate provision for protection of factual possession.

Another particularity of the 1964 Code was to codify the residential lease as a *de facto* proprietary right, which was presumed to be automatically renewed. Thus, tenants in state owned apartment blocks received quasi-ownership rights. Unsurprisingly, the only uncontroversial privatization measure of the 1990s was the automatic privatisation of the former state owned flats – the flat-holders simply became the *de jure* owners, having previously been the owners in all but name.

In contrast to the 1922 Code, the 1964 Code classified the pledge as part of the law of obligations and the provisions appear to have recognised the need for financial securities to operate in transactions between state agencies and enterprises.

Reflecting the reality of collectivisation in the 1930s, in contrast to the 1922 Land Code, the 1970 Land Code contained no provision for land use rights of peasant households in land used for crop production, aside from land of their homesteads and some common pastures. The 1970 Code also introduced a system for classification of land in accordance with the land use designation.

### *Post-Soviet civil law*

The 1922 Code already employed the concept of state ownership, but also contained definitions of the objects of property. Consistently with the Stalinist 1936 Constitution, the 1964 Civil Code substituted for the concept of property the concept ownership and, then, defined ownership tautologically by reference to the identity of the owner, which was either the state, a cooperative or a natural person. To remedy this unsatisfactory solution, ownership was then defined through itemisation of the respective property. The 1994 Civil Code followed this pattern, distinguishing not state, municipal and personal ownership, but state, municipal and private ownership. However, the 1994 Code also moved back to the liberal concept of ownership<sup>6</sup> found in pre-revolutionary law, including the *Svod*, and the civil law of most modern democratic states. The concept of ownership in the 1994 Code is limited by law and the rights of other people, as well as environmental considerations. An interesting innovation with respect to the right of ownership is the introduction of trust relationships, however the trust is conceived as a contractual relationship rather than a proprietary interest.

Under § 209 the owner has the rights of possession, use and disposal of the property. The owner may at discretion perform any acts which are not contrary to law and which do not infringe some other lawful interests, including –

- alienation of the property in favour of other persons,
- assignment of the rights of possession, use and disposal, without alienating the right of ownership itself,
- pledge of the property as security, and
- encumbrance or disposition of it by other means.

The owner is not entitled to possess, use and dispose of the land and other natural resources if the action would damage the surrounding environment or the rights and legitimate interests of other persons. The owner may transfer the property to a trustee in trust, who must manage the property in the interests of the owner or another specified person. Ownership can be private, state or municipal. The rights of all owners are protected equally: § 212. The owner

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<sup>6</sup> A modern liberal concept of ownership defines it through a bundle of rights or powers that the owner may pursue with respect to the object; generally to enjoy, to enter transactions with it, including transfer of it, and to exclude others from it. Conversely, one who holds such powers for an unlimited time is entitled to be called owner. See for example § 903 of the German Civil Code. This approach gained the greatest significance in the French revolution and ultimately derives from Roman law.

of land may dispose of it so far as the land in question is not withdrawn from civil transactions: § 260. The land owner is still constrained by the publicly 'designated use' of the land, so land designated as agricultural land, or otherwise, may not be used for other purposes unless determined by law: § 260(2).

The 1994 Code provides the owner, and those who possess property in the name of the owner,<sup>7</sup> with rights to the protection of ownership in terms similar to those in the 1964 Code. The true owner has the right to demand return of the property from the unlawful possession of another: § 301. If property is acquired for value without awareness that the person from whom it is acquired has no right to alienate it, then the true owner has the right to demand return of the property only when the property was lost by the true owner or a person to whom the property was transferred in possession, or the property was stolen or left their possession by some other means against their will: § 302(1). However, if the property was acquired free of charge from one who had no right to alienate it, the owner may demand its return in all cases: § 302(1).

The 1994 Code, for the first time in the Russian civil law, *explicitly* recognises acquisition of ownership in property that has no certain owner: § 218.3. Thus, possessory rights received the status of a proprietary interest. The interesting feature of the 1994 Code is the wide definition of 'a thing in the possession of nobody' (§ 225), which is wider than the concept of an 'abandoned thing': § 226. It is also, understandably, distinguished from a lost thing. The acquisition of a lost thing by a finder is regulated by §§ 227-8. Although § 225.3 provides that property in nobody's possession can become municipal property after a year, in which period it remains listed on the land title register on the representation of the municipal body, this provision does not exclude the acquisition of immovable property by adverse (long) possession: § 234. The acquisition of property by adverse possession, which existed in the pre-revolutionary civil law, is restored by § 234, which sets a 15 year period with respect to immovables and five years for movable property, after which the person in possession acquires ownership of the property. Even before ownership is acquired, a person in possession of property as his or her own has a right to defend possession of it against third parties who are not the true owners of the property and who do not have lawful rights of possession.

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<sup>7</sup> § 305.

Thus, with respect to acquisition of property by taking it into possession, the 1994 Code effectively reinstated the pre-revolutionary position, with modifications appropriate to a property law regime in which state ownership is the exception. The 1994 Code also re-introduced the protection of possessory rights, such as the right of a person in adverse possession to defend possession against third parties: § 234.

The restoration of adverse possession is an important step forward in comparison with the Soviet-era codes, even in spite of the fact that the provision for acquisition of immovable property without a certain owner by the municipal body represents a substantial limitation on the right of acquisition of ownership by long possession. According to the commentaries of the Supreme Arbitration Court of the Russian Federation, new principles concerning adverse possession with respect to former state property commenced from 1 July 1990, which is the date of the law *On Ownership in the USSR*, which abolished § 90 of the 1964 Civil Code. The 1964 provision exempted the state from the time limitation period for commencement of suits to recover its property.

#### Proprietary rights other than ownership

##### *Servitudes, Inherited Life Possession and Perpetual Use*

The 1994 Civil Code restored the civil law concept of a lesser proprietary interest in land, including the servitude –

§ 216. 1. Beside the right of *ownership*, the proprietary interests in land are the *right of inherited life possession* (§ 265); the *right of perpetual use* (§ 268), *servitudes* (§§ 274 and 277),<sup>8</sup> the *right of economic maintenance* (§ 294) and the *right of operative management* (§

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<sup>8</sup> § 274. 1. The owner of immovable property may request the owner of a neighbouring allotment and, in the case of necessity the owners of other allotments to allow him limited use of the neighbouring allotment (*servitude*). A *servitude* can be established for the purpose of driving or passing through, pipelines and electrical and communication lines ...; uses which cannot be undertaken without establishing the servitude. 2. A *servitude* does not deprive the owner of the rights of possession, use and disposal of the allotment. 3. The servitude is established by agreement between the person requesting the servitude and the owner of the neighbouring allotment and must be registered. ... If agreement cannot be reached, the *servitude dispute may be resolved by the court*. 4. ... A *servitude* may also be established by request of a person who holds an allotment by right of *inherited life possession* or *perpetual use* ... 5. The owner of the allotment encumbered by a *servitude* has a right, unless otherwise provided by law, to require from the proprietor of the *servitude* established in their interests payment for use of the allotment.

§ 275. 1. A *servitude* is retained when a land allotment is transferred. 2. A *servitude* cannot be assigned to a person who does not own the dominant allotment ...



296). 2. Proprietary interests may be held by persons who are not the owners of the property. 3. Transfer of ownership is not a basis for termination of other proprietary interests in the property. 4. The proprietary rights of non-owners are protected from infringement (§ 305).

The 1994 Civil Code, thus, reintroduced land servitudes as separate proprietary rights. However, it did not reintroduce personal servitudes, such as the usufruct. The specific feature of the post-Soviet civil law is that these recognised proprietary rights are perpetual rights.

The post-Soviet law has not revived the pre-revolutionary distinction between land servitudes and personal servitudes. In the 1994 Code, servitudes may only be created to the benefit of neighbouring land and the servitude persists despite change in title to the land, thus signifying land servitude in pre-revolutionary terminology. But the concept of a personal servitude over land, such as a *usufruct*, has not reappeared in the post-Soviet civil law. This concept could be particularly useful to define the rights of members of the family of the owner, such as a surviving spouse, to inhabit the dwelling.

General limitations on the right of ownership are also omitted from the 1994 Code. These were codified in the 1905 Draft, replacing the rights of public participation of the *Svod*. However, the 2001 Land Code does describe a concept of *public servitude*, which is analogous to the pre-revolutionary right of public participation.

#### *Inherited life possession and perpetual use*

As a result of the Soviet separation of ownership in land and buildings, the owners of buildings will often hold perpetual land use rights over the land, rather than ownership of it.

The 1994 Civil Code now provides –

§ 265. A right of *inherited life possession* over a land allotment in state or municipal ownership is acquired in the manner prescribed by land legislation.

§ 266. 1. A citizen holding a right of *inherited life possession* has the rights of possession and use ... 2. A person in possession of a land allotment has the right to erect buildings and create

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§ 276. ... 2. In the case of an allotment that cannot be used in accordance with its designated purpose because it is *encumbered by a servitude*, the owner of the servient allotment may demand termination of the servitude.

§ 277. Buildings, structures and other immovable property can be the subject of a *servitude* (§§274-276) ...

other immovable property, retaining ownership of it, unless otherwise provided by rules of land use established by law.

§ 267. A right of *inherited life possession* may not be disposed of except by testamentary gift.

§ 268. A right of *perpetual use* is given over a land allotment in state or municipal ownership to a municipal institution, public enterprise, state agency or local self-government body on the basis of a decision of a state or municipal agency with the authority to grant use of land allotments.

§269.2. A person who has been granted a land allotment in *perpetual use* has the right, unless otherwise prescribed by law, to make independent use of the land for designated purposes ... including the erection of buildings ... and other immovable property. A building erected by the person for that person's own use is owned by that person.

The rights of servitude, inherited life possession and of perpetual use signal return to recognition of lesser proprietary interests in land.

In the context of modern post-Soviet Russian life, the effect of the provisions establishing the two forms of perpetual land use right set out above combine to introduce a new form of “divided ownership” of land and buildings. As noted above, this was unlikely to occur in the Soviet era with respect to a substantial urban building, such as an apartment building, because both the land and the building were owned by the state. Today, the land could be granted as in perpetual use to a governmental authority under § 268 above, while parts of the building, such as apartments, have been privatised to private owners.

Although reintroduction of the rights of servitude, inherited life possession and perpetual use signals return to recognition of lesser proprietary interests in land, the recognition of perpetual land use rights, which, in contrast to servitudes, effectively entitle possession of the land, is in a marked contrast to the pre-revolutionary civil law and the general position in other modern western legal systems.

On a more theoretical level, the perpetual land rights result from *possession* being distinguished from *ownership*. In contractual relationships, such as a lease of land for a term of years,<sup>9</sup> in the pre-revolutionary civil law as well as in Soviet and post-Soviet civil law, the leaseholder possessed in the name of the owner or had a ‘derived’ possession.

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<sup>9</sup> As classified in European civil law generally.

In the post-classical Roman law, the holder of a perpetual lease possessed the property in his own name. Unsurprisingly, the perpetual land lease was a model used to develop the feudal notion of divided ownership. Under perpetual land use rights, the owner of the land in perpetual use loses the most crucial ownership right – the right of disposition.<sup>10</sup>

During the Soviet times, the existence of perpetual land rights was the inevitable result of separation of ownership in land and buildings. The post-Soviet civil law has made tentative steps towards consolidation of ownership of land and buildings: neither the owner of the land nor the owner of the building may alienate their interest without the other. However, no scheme has been devised for the transfer of the existing right of perpetual use into ownership of the land.

*The right of economic maintenance and the right of operative management*

The 1994 Civil Code now provides –

§ 294. State or municipal unitary enterprises<sup>11</sup> that hold property by the *right of economic maintenance* [*khozyaistvennogo vedenia*] may possess, use and dispose of the property within the limits set by the Code.

§ 295. The owner of property in *economic maintenance* may decide in accordance with law questions about formation of the enterprise, defining its objects and purposes, reorganisation and liquidation, appointment of the enterprise head, control of the use of the property in accordance with its designation and requirements for the maintenance of the property. The owner has a right to receive a part of the profit derived from the use of the property. 2. The enterprise may not sell, mortgage or lease the property which it holds by *right of economic maintenance* or invest in the founding capital of an economic association, or dispose of the property in any other way without the consent of the owner.

§ 296. 1. A public enterprise or institution that holds property by the *right of operative management* may possess, use and dispose of the property within the limits prescribed by law and in accordance with the objectives of the enterprise, the tasks set by the owner of the property and the designation of the property.

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<sup>10</sup> The state has thus privatised the property to an individual subject to this limitation, rather than the owner freely alienating a perpetual land use right for a valuable price and then being subject to the limitation which he or she has freely created. This has some analogy to feudalism, not the freedom to create lesser proprietary rights in one's own property in favour of others if one wishes.

<sup>11</sup> Which are not corporations.

§ 297. A public enterprise may alienate or otherwise dispose of the property that it holds by *right of operative management* only with the consent of the owner. ...

The *right of economic maintenance* and the *right of operative management* derive from Soviet law. The right of *operative management* appeared in the 1964 Civil Code as a way to provide state enterprises with some proprietary rights over their operational assets and productive materials without transferring complete ownership to them, which would have contradicted the dogma of unitary state ownership. The 1994 Code has effectively codified two related species of the Soviet-era right of operative management – (i) the right of operative management and (ii) the right of economic maintenance. However, the right of operative management is a more narrowly defined right than the right of economic maintenance. The Soviet-era right of operative management was developed by Venediktov to provide quasi-proprietary rights for state enterprises, which were recognised as legal persons within the Soviet law framework of *unitary* state ownership. Prior to the acceptance of this approach, Venediktov had unsuccessfully pressed for understanding of the state enterprises' proprietary rights as analogous to those of a trustee.

The main difference between the right of operative management and that of economic maintenance is that the latter more closely resembles ownership, carrying with it greater rights of possession use and disposal. There always will be a problem in defining formal rights over property held by the state and its agencies. The position of the owner of the enterprise in operative management or economic maintenance is not completely clear, for example, with respect to protection of rights of ownership and when legal actions in *vindication* of proprietary rights are available.

Why, in the circumstances when the dogma of unitary state ownership was left in the past, has a relic of this epoch been codified into modern Russian civil law? The original right of operative management was also linked to the Soviet separation of state ownership of land and ownership of immovable property, such as buildings, attached to the land. As a result, perpetual rights of economic maintenance and operative management with respect to buildings now, in the new post-Soviet context, need to be accompanied by corresponding perpetual land use rights. Otherwise, re-invigoration of the legal existence of this Soviet-era concept in the 1994 Civil Code serves to prolong the legal separation of ownership of land from ownership of other immovable property, such as buildings, attached to it.

### *Land Use Rights*

Although they were introduced by the post-Soviet Russian 1994 Civil Code, expanded treatment of the two perpetual land use rights is to be found in the 2001 Land Code. Even more than the 1994 Civil Code, the 2001 Land Code has limited the rights of land owners by means of a list of 'permitted uses': § 40.

The 2001 Land Code provides –

§ 20. 1. State and municipal institutions, state (unitary) enterprises, centres of historical legacy of (former) presidents of the Russian Federation, as well as state agencies and local government authorities hold land in permanent (perpetual) use. 2. Citizens cannot hold land in permanent (perpetual) use. 3. A right of permanent (perpetual) use acquired by a citizen or other legal person before the current Code is maintained. 4. Citizens or legal persons who possess a land allotment by right of permanent (perpetual) use cannot dispose of the allotment.

§ 21. 1. A citizen who prior to the present Code acquired a right of life inherited possession over an allotment of state or municipal property retains the right. Following this Code, no citizen can acquire a right of life inherited possession over an allotment. 2. Disposal of an allotment held by right of life inherited possession is not permitted, other than transfer of the right of life inherited possession by inheritance, which is subject to state registration on the basis of proof of the right of inheritance.

The Land Code also contains provisions aimed at overcoming separation of the ownership of land and buildings: § 35.3-4. Thus, § 35.4 does not allow for alienation of a land allotment without the buildings if the land and buildings have just one owner. No time limit has been set for the conversion of rights of perpetual use into ownership.

At the same time, the concept of ownership of land in the Land Code is not only limited by express rights (§ 40) but also by express 'responsibilities' (§ 42), in contrast to pre-revolutionary civil law but also analogous to earlier rights of participation and similar general obligations.<sup>12</sup>

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<sup>12</sup> On earlier rights of participation, see above, note 3. According to § 40 of the Land Code, the land owner can use mineral and water resources; erect buildings in accordance with the designated use of the land and the regulations in place; do drainage works in accordance with the regulations, as well as to pursue other rights stipulated by the legislation. According to § 42, land owners (as well as land users - non-owners) must use the land in accordance with its designated use, keep the land boundaries and signs in order, protect forest and other resources and adhere to fire-safety regulations, commence the land use within the

The duplication of the provisions of the Civil Code that one finds in the Land Code raises the question of the necessity to have a separate Land Code. In Soviet times a separate land code might have been necessitated by the dogma of exclusive state ownership of land, which effectively excluded land from civil law transactions. In comparison, in the post-Soviet civil law, the land and the buildings are subject of civil law transactions, so why should land be the subject of a separate code? One explanation might be that the land use designations and other forms of regulation are more in the nature of public law than the provisions of the Civil Code.

### Conclusion

In the Soviet period, the position of the civil law was taken on a roller coaster ride from systematic abolition in the period of War Communism, to regained tolerance under the NEP, to irrelevance under collectivisation and central planning and returning to favour in the late 1930s and some stability in the 1960s. The result was, just in property law, a legacy of several monumental anomalies.

Crucially, land was placed under state ownership and withdrawn from civil law transaction. As a result, the ownership of land became separated from the ownership of buildings. In marked contrast to the Russian pre-revolutionary civil law, the Soviet civil law developed several perpetual rights: not only the perpetual land rights granted over rural and urban land but also novel proprietary rights such as the right of operative management held by the state enterprises. The Soviet civil law, conditioned by the exclusive state ownership of land as well as unitary state ownership in relation to all state assets paradoxically created a new reality of pervasive 'divided ownership'.

In Russia the post-Soviet civil law made tentative steps toward overcoming the separation of ownership of land and of other immovable property. Perpetual land rights, particularly, with respect to urban land, were the civil law reality of most socialist countries. Most of these countries, for example, united Germany and Poland, provided for conversion of such rights into analogous western property concepts, including ownership. In Russia, the published objective to submerge all such rights into ownership of the land has probably been addressed less systematically: for example, no time schedule has been set for the eventual abolition of these anomalous rights.

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specified time frame, pay land tax punctually, abstain from polluting or adversely affecting the fertility of the land and must abide by other requirements of legislation.

The 1994 Civil Code re-introduced a *liberal* concept of ownership in the modern European sense. The Land Code takes up the public law roles of land use designation and regulation through the specification of responsibilities and controls that are found generally in 21<sup>st</sup> century European legal systems, however, perhaps with a particular enthusiasm and style remnant of the Soviet approach.

The return of the concept of land servitudes is a welcome development in the post-Soviet civil law. However, neighbourhood servitudes have not returned. They were limitations on title to land that regulated reciprocal neighbourhood relations, for example, issues arising in the common use of a stream, such as waste or water leakage, and were recognised in Russian law as long ago as the Code Alexei Mikhailovich of 1649. Personal servitudes, such as the life usufruct of a surviving spouse, are also absent from the post-Soviet civil law.

In the Soviet civil law a residential lease conferred on the leaseholder rights that were effectively proprietary in nature; certainly as conceived in Common Law systems. Unsurprisingly, the only uncontroversial privatisation measure was to convert these leasehold rights held by the inhabitants of state-owned apartments to full ownership rights. This success, in sharp contrast to the privatisation of state enterprises, underlined the importance of the notion of possession and its connection to the concept of ownership in the civil law traditions, even if it was dormant during the Soviet era.

Under the Soviet law, the emergence of indeterminate rights of a proprietary nature, such as the right of operative management, was inevitable; however, this is not a compelling reason for their existence to continue into the post-Soviet civil law. In the Soviet civil law there was ambiguity as to the 'possessor' of state owned property, such as state enterprises. Was the possessor the formal owner, or the state? Or was the enterprise holding possession doing so as a legal person in its own right? What sort of legal person was a state enterprise? In Soviet law legal personality was detached from ownership, so state enterprises which were not *de jure* owners of their assets, although, they were legal persons which held the ill-defined rights of operative management. This ambiguity about *de facto* and *de jure* proprietary rights in the Soviet legal model made fair processes for privatisation of state and public assets almost impossible. As to *de facto* proprietary rights, privatisation probably did uncover the real owners – the Soviet managerial elite!

Sadly, the notion of possession remains neglected in the post-Soviet civil law. The protection of factual possession, which was a feature of pre-revolutionary civil law, is nowhere to be

found. What protection there is of a possessor in good faith in the post-Soviet civil law is to be found in provisions replicated from the Soviet law; confined to protection of one who acquires possession for valuable consideration. On the bright side, some implicit recognition of factual possession is found in 1994 Civil Code provisions on adverse possession and property without an owner.

The protection of factual possession is particularly important in situations where corruption and unreliable court systems are likely factors, where law suits for reclaiming ownership are likely to be won by the more powerful party with the better connections. In the early history of possessory protection in the Russian civil law, a party would automatically be restored to possession by the police, without any law suit, owing merely to the fact that a forceful eviction had taken place.

In sum, post-Soviet Russia has yet not fully returned to a conventional modern western system of civil law in many respects concerned with property. Still, the greatest problems appear to be not so much defects in the Civil Code, as the absence or dysfunctional status of the institutional civil law framework, such as independent court systems and systems of legal aid.

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