Commercial [*Arbitrazhnyi*] Court—using the right granted to them in the Russian Constitution, "to give explanations on questions of judicial practice" (Articles 126 and 127 of the Constitution), issued on July 1, 1996, a detailed joint decision on the application of the First Part of the Code.[3] It is not merely specialists in Civil Law that are writing about the Code; references to Code articles are everywhere in the business-oriented press.

Like every major, truly important statute, the Civil Code occasions both praise and criticism. The phrase "economic constitution" regularly has been applied to it. The President of Russia has vetoed a number of Federal statutes because of their inconsistency with the Code. Very positive evaluations of the Code have been made by a number of eminent Russian statesmen and both Russian and foreign scholars. But the Code has also encountered rather harsh criticism from those who spent many years arguing that socialism needs not civil law but a special "economic law"—some sort of cocktail of public and private law. Private notaries are angered by the fact that in the final text of the Code (in distinction from the draft) most transactions with immovables do not require obligatory authentication by a notary. Sometimes proposals come up in the Duma for amendments to the Code. At the basis of the these proposals is the lobbying of special interests or echoes of election campaigns.[4] But if the Code

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3 Decision of the Full Bench of the Supreme Court of the Russian Federation and the Full Bench of the High Commercial [*Arbitrazhnyi*] Court of the Russian Federation of July 1, 1996, No. 6/8, "On Certain Questions Connected With the Application of the First Part of the Civil Code of the Russian Federation," published in the *Bulletin of the Supreme Court of the Russian Federation [Biulleten' Verkhovnogo Suda Rossiiskoi Federatsii]*, 1996, No. 9, pp. 1-10, and in the *Herald of the High Commercial Court of the Russian Federation [Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii]*, 1996, No. 9 (46), pp. 5-20.

4 Amendments have been made to Articles 64, 185, and 855 of the Code. The amendment to Paragraph 1 of Article 64, adopted not long before scheduled elections of deputies to the State Duma, had the purpose of making citizen-depositors of "shaky" banks creditors of the first priority. The expertise of the authors of the amendment was such that they turned all citizen-creditors of a bank undergoing liquidation into creditors of the first priority. Similar criticisms may be made with respect to the amendments to Articles 185 and 855 of the Civil Code.

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Private Law Research Center
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The Civil Code Of The Russian Federation

Parts 1 and 2

**With a Preface by A.L. Makovsky
and an Introduction by A.L. Makovsky and S.A. Khokhlov**

Edited and Translated by Peter B. Maggs with A.N. Zhiltsov

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PREFACE TO THE ENGLISH TRANSLATION OF THE CIVIL CODE

by A. L. Makovsky

The new Russian Civil Code is presented here to the reader in a superb translation by Professor Peter Maggs. The Code itself needs, and indeed deserves, some explanation.

The first part of the Code (Divisions I-III) was adopted by the lower house of the Russian Parliament—the State Duma—on October 21, 1994; was signed by the President of Russia on November 30, 1994, and went into effect on January 1, 1995.[1] The Second Part of the Code (Division 4) was passed by the State Duma on December 22, 1995, signed by the President on January 26, 1996, and put into effect on March 1, 1996.[2]

The new Civil Code has fully come to life. It is applied everywhere and, in particular, it is constantly being applied by the courts. Russia's highest judicial bodies—the Supreme Court and the High

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1 The text of the first part of the Code and of the simultaneously enacted Federal Statute on putting the Code into effect was officially published in the *Collection of Legislation of the Russian Federation [Sobranie zakonodatel'stva Rossiiskoi Federatsii]*, 1994, No. 32, items 3301 and 3302. Chapter 4 of the Code ("Legal Persons") took effect from the day of first official publication of the Code in the *Russian Gazette [Rossiiskaia gazeta]*, i.e., from December 8, 1994, while the implementation of Chapter 17 of the Code ("Right of Ownership and Other Rights in Things to Land") was postponed by the State Duma until the effective date of a new Russian Land Code. A Land Code was passed by the Duma, but was rejected by the upper house—the Federation Council.

2 The text of the Second Part of the Code and of the simultaneously enacted Federal Statue on putting it into effect were officially published in *Collection of Legislation of the Russian Federation [Sobranie zakonodatel'stva Rossiiskoi Federatsii]*, 1996, No. 5, items 410 and 411.

accompanied by constant consultation with jurists of other countries, with Robert S. Summers and James J. White (USA), Walter Snijders, L. Timmerman, Ferdinand J.M. Feldbrugge, Arthur S. Hartkamp, and William B. Simons (the Netherlands), W. Roland and Peter Schlechtriem (Germany), Joachim M. Bonell and Gabriele Crespi-Reghizzi (Italy), and many others. Very many of the suggestions and comments were adopted. Nevertheless, as a whole, the Code "is based on the Russian legal tradition, which was always characterized by an independent approach to the solution of its civil law problems, developed taking account of the achievements of foreign research in private law."[6]

6 S.A. Khokhlov, "The Conceptual Basis of the Second Part of the Civil Code," *in The Civil Code of the Russian Federation. Second Part, Text, Commentary, Alphabetical Subject Index*, (Moscow, 1996), p. 229, (Private Law Research Center).

causes difficulties for some, this is also evidence of its vitality and effectiveness.

From the start of real work on the Code in the spring of 1992, until the adoption of the Second Part of the Code in December 1995 over four years passed. This is an extraordinary event in modern history, when a code of such importance and size (the first two parts of the Code contain 1109 articles, most of which are rather lengthy) was created in such a short time. It is doubtful, however, if necessity should be considered a virtue.

The economic revolution in Russia, which in historical terms took place in one moment, instantly transformed most previous legislation into an historical monument. Simultaneously with statutes on reforms (On Ownership, On Entrepreneurship, etc.), individual "market" statutes on specific matters (On Pledge, On Insurance, etc.) started to be passed. At the same time the "cleanup" of the prior legislation entirely ceased: the old laws were neither repealed nor amended. As the result, by the early 1990s, a "layer cake" was formed at the bottom of which still were many legislative acts of the former USSR, above them, the old legislation of the Russian Soviet Federated Socialist Republic ("RSFSR") including the 1964 RSFSR Civil Code, and then the Fundamental Principles of Civil Legislation of the USSR and the Republics of 1991,[5] and finally the "new" (i.e., enacted after June 12, 1990—the date of Russian declaration of sovereignty) legislation of Russia.

This legislative chaos contrasted sharply with the goals of the economic reforms, for a market economy especially requires stable and clear laws. In a country with civil law belonging to the legal family of Continental Europe, with its civil law basically systematized in the middle of the nineteenth century and twice codified in the twentieth century (1922 and 1964), there was hardly any other

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5 This statute was adopted on May 31, 1991 in the USSR (*Gazette of the Supreme Soviet of the USSR [Vedomosti Verhkhovnogo Soveta SSSR]*, 1991, No. 26, item 733), but never went into effect as a USSR statute. It was put into effect in 1992 on the territory of Russia (*Gazette of the Congress of People's Deputies of the Russian Federation and the Supreme Soviet of the Russian Federation [Vedomosti S"ezda narodnykh deputatov Rossiiskoi Federatsii I Verkhovnogo Soveta Rossiiskoi Federatsii]*, 1992, No. 30, item 1800).

way to impose order than to create a new civil code and a new system of civil statutes based on it.

The new Civil Code neither repeats nor copies the civil and commercial codes and statutes of other countries. It has its own "personality," with its own virtues and vices. But the basic features of this "personality" are noticeable not so much in comparing the Code with foreign codes as in contrasting it with prior Soviet legislation.

The new language of civil law in Russia can be seen particularly in the norms of the Code envisioning the free acquisition and exercise of civil-law rights (Articles 1 and 9), freedom of every owner to exercise its powers (Paragraph 2 of Article 209), the possibility of private ownership of any kind of property with the exception of that excluded from commerce (Article 213), freedom of contract (Article 421), and in a number of rules striving to precisely describe the possible limitations on these freedoms (Paragraph 2 of Article 1, Paragraph 2 of Article 235, Paragraph 2 of Article 422, and others), to establish *numerus clausus* of such limitations. It is namely these "basic norms" deriving from the 1993 Russian Constitution and the many concrete rules developing them that are the main legal foundation of the new Russian society. Some of them appear to be declaratory, but they are necessary to break clearly with the prior regime of almost total concentration of all productive property in the hands of the state and the obligatory conformity of all important contracts in the economy to the planning commands of state agencies.

A feature of the new Code that is important and also clearly visible to the Russian jurist is the introduction into civil commerce of such objects as land, enterprises, apartments, commercial paper, and securities as well as the corresponding regulation of this commerce in the Code (Articles 129, 132, 209, etc.; Chapters 7, 17, 18, §§ 7-8 of Chapter 30, §§ 4-5 of Chapter 34, and Chapter 35). These objects were either entirely excluded from free civil commerce and given by the state only for use (land, apartments in state buildings), or were distributed mainly within the state sector of the economy on the basis of administrative orders (enterprises, structures, etc.), or were used only in the area of foreign trade and state loans (commercial paper and securities).

The problem of dualism of private law was decided in the new Civil Code in accordance with the long-standing theory and legisla-

tive tradition of Russian civil law and the tendency of development of civil law in a number of other countries (Switzerland, Italy, the Netherlands). The Code in principle contains rules identical both for entrepreneurs and for other participants in civil commerce. It suffices to say that of twenty-six contracts regulated in Division IV of the Code (with their numerous variants), only one (franchising) can be called entrepreneurial in the full sense of the word (See Article 1027) and only one (gift) may not be concluded between commercial organizations (Article 575), although, of course, many of these twenty-six types of contracts (supply, construction work, carriage of freight, etc.) are meant primarily for relations among entrepreneurs. The Code does contain a number of special rules for those who engage in entrepreneurial activity. These rules are primarily connected with the professional nature of this activity (See Article 310, Paragraph 4 of Article 358, Paragraph 3 of Article 401, Articles 469, 481, 721, 891, etc.). With the adoption of the new Civil Code, the idea of creating along with it of a Russian Commercial (or Entrepreneurial) Code became irrelevant.

Being a Federal statute of a country whose Constitution puts civil legislation in the exclusive competence of the Federation (Paragraph "o" of Article 71), the Civil Code substantially strengthens the role of statute law in regulating the relations that are the subject of the Code. In the first place the volume of the adopted parts of the Code is twice as large as the whole 1964 Civil Code. In the second place, the Code specifically states that other civil law statutes, and also norms of civil law contained in other statutes must correspond to the Code (Paragraph 2 of Article 3). In the third place, in a very large number of cases, when the Civil Code allows the establishment of exceptions to its rules, it allows this to be done only by a statute, not by edicts of the President nor by decrees of the Government. Finally, in the fourth place, the Code, for the first time in the history of our law, tries to predetermine (so to speak to "build in outline") the whole system of civil legislation.

The Code gives the court a more independent, more active role in the application of its norms, going far beyond the limits of the mere following of the letter of the law.

The Code directly provides two very important means of deciding disputes in civil cases when the respective relationship is not

regulated by law, agreement of the parties, or the customs of trade: *analogy of statute*, i.e. the application by the court of legislation regulating similar relations (Paragraph 1 of Article 6) and *analogy of law*, i.e. the decision of the dispute proceeding "from the general principles and sense of civil legislation" if it is impossible to use analogy of statute (Paragraph 2 of Article 6). In many situations, the application of the rules of the Code depends upon the extent to which one rule or another established in the Code corresponds to the "nature" of the concrete relations, despite the fact that by the letter of the law, there is no doubt about the subordination of such relations to this rule (see, for instance, Paragraph 2 of Article 467, Paragraph 2 of Article 479, Paragraph 3 of Article 480, Paragraph 1 of Article 481, Paragraph 1 of Article 482, etc.) The Code provides a significantly greater freedom in deciding disputes for judicial discretion also by the way that in many norms it uses concepts and criteria whose content may be defined only by a court considering all the circumstances of a concrete case. These are such concepts as "substantial breach of contract," "reasonable time," "disproportion of the penalty to the damages," "necessary expenses," and many others.

In conclusion a few words should be said about those who prepared the draft of the Code and about the one who has made this English translation of the Code.

Over fifty Russian jurists took part in the creation of the First and Second Parts of the Civil Code. But the basic burden of this work, in particular on the First Part of the Code, was borne by a small group of civil law specialists united under the aegis of the Private Law Research Center Attached to the Office of the President of the Russian Federation, at the initiative of Corresponding Member of the Russian Academy of Sciences S.S. Alekseev. This group included one of the most experienced "law drafters," former Deputy Minister of Justice of the USSR, *G.D. Golubov*, some of the best known civil law specialists of our country, *Professors M.I. Braginsky, V.A. Dozortsev, A.S. Komarov, M.G. Rozenberg, and E.A. Sukhanov*, Doctor of Legal Sciences *V.V. Vitriansky*, Deputy President of the High Commercial [*Arbitriazhnyi*] Court of Russia, *Dr. P.V. Krasheninnikov*, Deputy Chairman of the Antimonopoly Committee of Russia, *Dr. V.P. Zvekov*, Staff Counsel of the Government of Russia, and the talented young jurists *G.E. Avilov* and *Dr. O.M. Kozyr*. All work on the

draft proceeded in constant and very cordial cooperation with *Professor V.F. Yakovlev*, President of the High Commercial [*Arbitrazhnyi*] Court.

Particular mention should be made of two of my friends and colleagues, whom we have lost. At the end of 1996, an exquisite specialist in civil law and an extraordinary person, *Dr. S.A. Khokhlov*, Executive Director of the Private Law Research Center, Rector of the Russian Postgraduate School of Private Law, passed away. He was the "soul" of our Research Center and the most dynamic participant in the creation of the Code. Another very experienced professional was *Professor Iu.Kh. Kalmykov*, not long ago the Chairman of the Committee on Legislation of the Supreme Soviet of the USSR, Minister of Justice of Russia, a man who retired from this post when the war in Chechnya began in 1994. He was one of the initiators of the development of a new Civil Code and continued work on it until the last day of his life in January 1997. The loss of these people is irreplaceable.

The group working on the draft of the Code successfully combined not only three generations of Russian civil law specialists, but three schools of civil law (Moscow, Petersburg, and Yekaterinburg). As Professor Bernard Black of Columbia University noted in a letter to the author of these lines, "I do not know in Russia any other group of drafters of legislation who would work on such a high professional level." It remains only to add that this work was based, in the main, on the enthusiasm of its participants.

The person who undertook the heavy task of translation of the first two parts of the Russian Civil Code into English, *Professor Peter B. Maggs* of the University of Illinois, was long known worldwide as one of the greatest specialists on Soviet law. For reasons that hardly need explanation, his numerous books and articles were much less known in Russia until the end of the Cold War. The lack of mutual interaction in the past has been compensated in recent years by the close cooperation with Professor Maggs of almost all the well-known specialists in civil law of Russia and the other countries of the Commonwealth of Independent States. The development of civil legislation in these countries is to a large extent obligated for its results to his benevolent and highly professional assistance.

It should be said that the entire preparation of the draft Code was

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— Peter B. Maggs