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OF SOVIET CIVIL CODIFICATION
AS A CHAPTER IN EUROPEAN
LEGAL HISTORY**

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Many European and even some Russian academics consider Russian legal history to be a series of ruptures. There is some truth to this, and yet the law in east of Eastern Europe is not devoid of continuities which link it with European legal trajectories. This paper examines the pattern of the codification of civil law as one of those links.

Russian experience with drafting civil codes goes back to the ‘age of codifications’ and culminates with the ‘normal’ draft Civil Code of the Russian Empire of 1882–1913. After the Bolshevik revolution of 1917, Soviet civil legislation claimed to break away from all continuity with the bourgeois legacy, domestic and foreign. However, even the codification of ‘real socialism’ in the early 1960s reveals notable similarities with the ‘bourgeois’ legal experience. The theoretical concept of the Civil Code of 1964 overlapped with the modern notion of the code during the ‘age of codification’. This similarity was backed up by the positivistic legal scholarship that conceptualized Soviet law as a hierarchical and gapless system of binding norms.

This part of the Soviet legal legacy still marks the Russian Civil Code of 1994-2006. Hence, the formalistic pattern of codification remains one of the Soviet relics in contemporary Russian legal style and allows a comparison with other civil law jurisdictions in Europe.

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1. Introduction

Codifications are widely believed to be the hallmark of the civil law legal family. Their impact reaches far beyond the systematic collection of legal provisions and notably affect lawmaking, the interpretation and application of law, and legal education. In so doing, codification secures the current legal style of civil law as opposed to common law.¹ However, this seemingly clear narrative becomes more problematic from a historical perspective which reaches into pre- and post-modernity as the concept of the code and codification evolved and continues to evolve over time and space.

European legal scholarship offers at least two approaches to codes and codification. A broader, *functional* understanding associates the code with an increase in legal certainty by reducing the multiplicity of legal sources. It allows a definition of the code as a set of legal norms arranged in a single body. Hence codification can be understood as the collecting and shaping of these norms in a single body.² A narrower, *formal* understanding equates the code with a particular form of European legislation in the modern period. Thus, the code becomes inextricably linked with the rise of the modern (nation-)state which progressively monopolized lawmaking. The code has also become the symbol of political and legal unity or a tool to decrease legal particularism and pluralism, to reassure cultural homogeneity, to serve as the vehicle of legal emancipation from Roman law, and to rationalize government by law.³

Split between these two approaches to understanding the code, legal historians extend or shrink the range of statutory acts in European history which could illustrate the process of codification. Is it correct to call Hammurabi's stele or Justinian's *Corpus Juris Civilis* a 'code'?⁴ Were the Prussian ALR, Austrian ABGB, and French *Code civil* the only true first codes in (European) history or was it just that the postwar understanding of 'the Code' was not yet fully in place in 19th century Europe?⁵ What attributes of a 'true' code are indispensable?⁶ Is the modern concept of the code to outlast modernity itself by transforming itself into a code of principles or will it fall prey to the de-codification of private law in the post-war period?⁷ The choice of the approach begs these and many other questions which often do not have commonly acceptable answers.

For this paper, it is important to stress that the discourse on the codification or the systematization of legal provisions makes sense for European legal history beyond its Romano-

¹ See for example: Kischel U., *Comparative law*, Oxford: Oxford University Press, 2019, p. 385 f.

² Cabrillac R., *Les codifications*, Paris: PUF, 2002 (cited after Russian edition, Moscow: Statut, 2007. p. 108-109).

³ Zimmermann R., Codification: The Civilian Experience Reconsidered on the Eve of a Common European Sales Law, in: *European Review of Contract Law*, 8(4) (2012), p. 367-399. doi:10.1515/ercl-2012-1000.

⁴ Ankum H., Was the Corpus Juris a codification? in: *Extravagantes. Scritti spars sul diritto romano*, Naples, 2001/2008, p. 399-412; Vanderlinden J., *Le concept de code en Europe occidentale du XIIIe au XIXe siècle: Essai de définition*, Bruxelles: Université libre de Bruxelles, 1967. On the alternative ways of organizing legal information in Roman law see: The Oxford handbook of Roman law and society, C. Ando et al. (eds.), Oxford: Oxford University Press, 2016.

⁵ Pihlajamäki H., Why private law not codified in Sweden and Finland, in: Moréteau O. et al. (eds.) *Comparative legal history*, Cheltenham: Elgar, 2019, p. 480.

⁶ For example, J. Vanderlinden enumerates the following attributes: 1) perfection, 2) coherence, 3) promulgation and circulation within the jurisdiction, 4) usability, 5) structured content, 6) clarity of language, 7) absence of contradiction, 8) actual application and enforcement, 9) completeness. See: Op. cit., p 163-190. H. Ankum wrote about 11 attributes many of which *Corpus iuris civilis* lacked.

⁷ An Italian academic N. Irti was perhaps the first to use 'decodification' to describe the multiplicity of laws outside the codes that started to lose their central position in the European legal systems. See: Giaro T., Dekodyfikacja. Uwagi historyczno-teoretyczne, in: *Dekodyfikacja prawa prywatnego: szkice do portretu*, Warszawa: Fundacja "Utriusque Iuris", 2017, p. 13 f.

Germanic ‘core’ jurisdictions further to the east. In the academic literature Eastern Europe is often presented as a patchwork of ruptures, especially in the domain of civil law. First came the (semi-) feudal regulations of the pre-modern *Sobornoye Ulozheniye* (Council Code) of 1649 with its later irregular amendments. This was followed by the titanic efforts of a small bureaucratic team under Mikhail Speransky to collect and re-arrange the law *à la russe* in *Svod Zakonov* (Digest of Laws) of 1833 in the absence of a professional legal community. Next comes the rupture of Alexander II’s Great Reforms to modernize Russian law through its ‘scientification’ and the construction of private law and the BGB-like draft Civil Code of the Russian Empire of the late 19th century. Then, again, the anti-bourgeois Bolshevik revolution of 1917, which led to the brand-new civil law of ‘real socialism’ diligently reflected in the Principles of Civil Legislation of the USSR of 1961 and the Civil Code of Soviet Russia of 1964. Finally, the collapse of the USSR in 1991 led to the wholesale replacement of Soviet civil law with the ‘normal’ westernized codification of 1994–2006.

Against this backdrop, it should not be surprising that Russian civil law scholars prefer not to dive deeply into the waters of the ‘tradition(s)’ of Russian and Soviet codifications. The historiography of Russian civil law codification does not break the narrative of ruptures as it remains overwhelmingly national, fragmentary, and scarce. The history of private law in Russia is often believed to be limited to the mid-1860s through October 1917.⁸ All this markedly contrasts with the well-researched national histories of civil law codifications in Western Europe. Although many academics tend to agree that the true European history of codification has still not been written.⁹

The scarcity of the literature on the topic is partially due to the lack of available sources. Unlike historians of the great Western codifications, their counterparts of the Soviet period are deprived of most materials which could disclose the evolving intention of the lawmaker from the initial draft and its motives, its subsequent assessment, and the final draft presented to parliament.¹⁰

The initial period of the drafting of the first Soviet civil code of 1922 is fairly well known because Vladimir Lenin paid close attention to it – as attested in his writings readily available now in his ‘*Complete Works*’. Other archival materials are scarce and what there is were published in Tatyana Novitskaya’s book.¹¹ In the mid-20th century, various ministerial committees engaged in drafting several codified acts of civil law but the best part of the preparatory materials perished due to various unhappy circumstances, including trivial oversight and several moves of the relevant committees around Moscow.¹² The same bad luck happened with the last Soviet

⁸ Pre-revolutionary legislation is mostly presented by the pre-1917 publications often re-printed after 1991. Soviet codification still waits for its researchers. The domain of civil law has been studied by the authors cited in this paper below. The current codification has not yet become part of ‘history’ for legal historians.

⁹ Obviously, the national phenomenon of modern codification generated nation-focused dedicated historiography that either downplayed, simplified foreign influences, or ignored it altogether. For Spanish, Belgian, and Romanian experience see: Masferrer A., Codification as nationalisation or denationalisation of law: the Spanish case in comparative perspective, in: *Comparative Legal History*, 4(2) (2016), p. 100–130 (with further references to D. Heirbaut and M. Gutan).

¹⁰ Throughout the history of Russian civil law, only the draft Civil Code of the Russian Empire (1882–1913) is well documented with *travaux préparatoires* published several times from 1899 to 1910 (and republished by Wolters Kluwer in 2007).

¹¹ Novitskaya T., *The Civil Code of the Russian Soviet Federal Socialist Republic of 1922: drafting history, general description, text, appendices*, 2nd ed, Moscow: Zertsalo, 2002, p. 111–178 (in Russian) (on the scarcity of the archives see author’s remark on p. 40).

¹² The remaining materials have been collected and digitalized by Aleksander Muranov, *Drafts of the Civil Code of the USSR and other draft materials of the Soviet period* (in Russian) https://zakon.ru/blog/2017/10/24/proekty_gk_ssr_i_nekotorye_inye_civilisticheskie_proekty_sovetskih_vremen#comment_416027 (last accessed on 24.02.2002).

codification of civil law of 1991 and even the current Civil Code. In the words of one of the drafters:

*‘...as the civil law scholars [working in the drafting committee – D.P.] were short of time, they thought least of all about preserving the working materials or to date them. Moreover, many of them subscribed to [Boris] Pasternak’s opinion that ‘one should not create archives or look twice at every manuscript’ with their documents as doing so was mauvais ton...’*¹³

Legal historians can therefore only venture into more or less probable conjectures based on the published and amended versions of the legislative acts, or the memoirs of some drafters.¹⁴

Last but not least, the historiography lacks the conceptual framework to investigate the continuity in the face of the declared ruptures. In this paper, I propose to rely on the *pattern* of codification to link the Soviet codification of civil law with the pre-, post-, and non-Soviet experience. I take this heuristic tool from comparative law, where connections between the pattern of codification and those of lawmaking, its interpretation and application are well-established.¹⁵ It will allow me to show that the codification of ‘real socialism’ builds on the modern concept of the code and the approach to codification.

The limits of this paper do not allow me to analyze the Russian experience of codification beyond a brief overview (Section 2). Then I present the Soviet concept of the code and investigate its alleged originality (Section 3) against the backdrop of the formalistic approach to codification and the legal system. Finally, I outline the relevance of the Soviet experience with codification for the current Civil Code of the Russian Federation (Section 4).

2. Russian experience with the codification of civil law: an overview

Many Western European scholars deplored the ‘age of codifications’ as the end of the European unity built on the Roman-canonical *ius commune*.¹⁶ Their Eastern European counterparts do not share these regrets as the modernization of law through its codification and the Pandectist ‘scientification’ marked an age of much more intense interaction between Eastern and Western Europe. In that sense, the 19th century destroyed one unity but paved the way for another, though at the expense of extinguishing the local legal traditions of Eastern Europe.¹⁷

The new kind of unity rested on the methodology of juridical interpretation and the form of lawmaking rather than a common set of values and beliefs (as used to be the case of *ius commune*). As a result, unity was lost in substance but was gained in flexibility. Russian history offers a good example. The form and technique of modern codification began to influence Russian law earlier than the values of free-market private law. This influence survived the rupture of the Soviet period and even outlived the USSR.

Russia’s experience with the codification of civil law may be presented as follows:

I. Late Imperial Legislation:

¹³ Makovsky A., The list of files becoming chronicles, in: *Vestnik grazhdanskogo prava*, 19(6) (2019), p. 177-206.

¹⁴ Makovsky A., *On codification of civil law (1922-2006)*, Moscow: Statut, 2010.

¹⁵ For references see Kischel U., *ibidem*; Valcke, Comparing legal styles, in: *International Journal of Law in Context*, 15 (2019), p. 274–296 doi:10.1017/S1744552319000284

¹⁶ Coing H. *Europäisches Privatrecht*, vol. 2 (das 19. Jahrhundert), München: Beck, 1989, p. 10 f.

¹⁷ Giaro T., Legal tradition of Eastern Europe: an epitaph, in: *Civilian studies, Yearbook of civil law*, vol. 2, Moscow: Statut, 2006, p. 127-147 (in Russian; translated from Italian by D.Tuzov).

- 1) the draft Civil Code of the Russian Empire of 1811 (modelled by Speransky after the French *Code civil* and rejected as too alien and premature)¹⁸;
- 2) the 10th volume of *Svod Zakonov* of the Russian Empire of 1833 (systematized by the very same Speransky with more cautious borrowings from major Western legislations);
- 3) the draft Civil Code of the Russian Empire (1882–1913: a sibling of the German BGB and a major result of comparative legislation);

II. Soviet Legislation:

- 4) the Civil Code of 1922 (the first civil code of Soviet Russia that paved the way for the civil codes of Soviet Armenia, Azerbaijan, Georgia, Belarus, Ukraine in 1923-1927);
- 5) the draft Civil Code of the USSR (1938-1952);
- 6) the Principles of Civil Legislation of the USSR of 1961 and the Civil Code of 1964 (the second civil code of Soviet Russia, together with 15 codes for the sister-republics of the Union);
- 7) the Principles of Civil Legislation of the USSR of 1991 (promulgated on May 31, 1991 but it became the interim civil code of post-Soviet Russia only on August 3, 1992);

III. Post-Soviet Legislation:

- 8) the Civil Code of the Russian Federation of 1994-2006 (the first part enacted on January 1, 1995, the final fourth part enacted on January 1, 2008).¹⁹

Unlike the one-party political regime or the state-controlled economy, the Soviet pattern of codification took shape not by mid-1930s but a decade after World War II. The first Soviet codification of civil law was nothing more than a promptly made concise compilation to provide a legal framework for the interaction of small and medium size entrepreneurs among themselves and with the dominating state entities (but not between the latter) in the years of the new economic policy (NEP, 1921–1929). It was meant to be an ‘interim’ code to incentivize private production in the devastated country and to create positive publicity abroad.²⁰

The code of 1922 did not reflect either new socialist civil relationships (because these did not yet exist) or a particular Soviet pattern of codification. Rather, it tacitly reproduced the pattern of the draft Civil Code of the Russian Empire of 1882–1913 in terms of its abridged structure (the general part, followed by sections on property rights, obligations, inheritance; leaving family law for a special code), content (436 articles being selected and paraphrased norms of 2640 (!) articles of the pre-revolutionary draft), and the concept of the code (a coherent collection of general rules of an area of law). This was of no surprise, given the tight schedule and the pre-revolutionary education of the drafters (Krasnokutsky, Goikhbarg, Bernstein et al.).

The code of 1922 provided the model for the codes in Soviet Armenia, Azerbaijan, Georgia, Belarus, Ukraine in 1923-1927. However, proper Soviet civil law took shape in the aftermath of industrialization and collectivization. Although the Constitution of 1936 provided for an All-Union Civil Code and the drafting committee was active 1946–1952, it was never completed and civil legislation in Soviet Russia and the USSR generally experienced massive decodification in

¹⁸ Ruzhitskaya I., Draft codification of Alexander I as part of his political reforms, in: *Proceedings of the Faculty of History of the St. Petersburg State University*, 3 (2013), p. 130-139 (in Russian).

¹⁹ There is a debate as to the way to break down the codification in Russia. Even the authors cooperating in the same research center for civil law, do not always agree on this point. See: Medvedev D. (ed.), *Codification of Russian private law*, Moscow: Statut, 2019 (in Russian). P. Krashennnikov breaks it down to seven periods, A. Makovsky writes about five and a half stages.

²⁰ Makovsky A., Three codifications of the domestic civil law, in: Idem, *On codification of civil law, op. cit.*, p. 17-18.

the 1930s and 1940s. This was due to other priorities in the years of industrialization, the great purges, World War II, post-war devastation, as well as the lack of the theory and technique for the systematization of the legislation.

True Soviet codification of civil law became possible when the USSR restored its economy and its lawyers faced the need to sort out the chaos of post-war legislation. The Principles of Civil Legislation of the USSR of 1961 and the Civil Code of 1964 finally arranged the civil legislation of ‘real socialism’ since the 1920s.²¹ The Soviet authors praised this codification as an innovative document stipulating major rules for property relations within the socialist mode of production (not on the fringes thereof, as in the Civil Code of 1922).

The term ‘mode of production’ belonged to the economics which rested on state-owned means of production (land and capital) and full control over production through central planning, but it had clear legal implications: civil law was there to regulate the production and selling of raw materials, converting materials into other products, selling such products to state enterprises, shops, and consumers, although the main content of the contracts was dictated by the production plan. All that amounted to a ‘conscious imitation of a free market’ in order to incentivize production beyond straightforward commands.²² This civil law encompassed primarily the legal relationships between state entities, also the economic activities of individual citizens (personal ownership over consumer products, intellectual property, succession). Family law and labor law were regulated by particular codes. However, one has to look closer at the theoretical framework of the new codification of Soviet civil law to understand and to appreciate its originality.

3. The Soviet pattern of codification

The theoretical framework for the true Soviet codification was rooted in the rigid legalistic positivism proclaimed at the ‘1st All-Union Conference of the Legal Professionals and Scholars on the Issues of the Scholarship of State and Law’ in July 1938. In the 1930s, the relevant narrow normative definition of law (as a system of the rules of conduct created and sanctioned by the state in the interests of the ruling class) was soon coined by the prominent Soviet jurist and Procurator General of the USSR Andrey Vyshinsky to strengthen the governance with the principle of ‘revolutionary legalism’.²³

The imposition of the ‘only correct line’ led to at least three rounds of debates on the system of Soviet law, as attested in the columns of the legal journal ‘*The Soviet State and Law*’. During the first round of this debate, shortly after World War II, legal scholars interiorized the only correct concept elaborated by Vyshinsky:

‘Law is a body of rules of human conduct that comprise [legal norms] stipulated by the state authorities representing the ruling class and customary rules

²¹ Ibidem, p. 13.

²² See: Feldbrugge F., The codification process of Russian civil law, in: Julia Arnscheidt et al. (eds.), *Lawmaking for Development: Explorations into the Theory and Practice of International Legislative Projects*, Amsterdam: Leiden University Press, 2008, p. 231-232.

²³ Vyshinsky A., Revolutionary legalism and the tasks of Soviet advocates, in: *Verbatim report at the meeting of Moscow collegium of advocates, 21 December 1933*, Moscow, 1933. The politicians of the 1930s reasoned that the state and law were indispensable as the class struggle was expected to exacerbate on the way to communism.

*approved and enforced by the same authorities in order to protect and promote social relationships that the ruling class approves and benefits from.*²⁴

It also formed the criteria for arranging and systematizing the growing number of legal acts. Yet, the fundamental criteria for differentiating the branches of law remained unclear leaving no blueprint for organizing the more disordered legislation of late Stalinist period.

This gap was to be filled in during the second round of the debate in the second half of the 1950s and early 1960s. The participants established a correlation between branches of the law and branches of the legislation. In the words of the leading protagonist, professor Nikolai Aleksandrov:

*'any branch of law can be summarized in a single code[...] which does not have to absorb all the norms of this branch [...]. The codification of positive law should be based on the correct, scientifically justified system of the law.'*²⁵

By the time of the second Soviet codification, the leading academics agreed on its theoretical underpinnings:

- positive law equals legislation;
- law must be understood as a system of the state-made norms;
- this system is to be broken down into branches, sub-branches, institutes, and particular norms;
- this subdivision must be 'objective', i.e. it must reflect the actual relationships in society.

The third round of the debate in the 1970s finished the construction of the Soviet theory of codification building on the recently re-codified legislation. It offered few new insights other than differentiating the notions 'legal system' and 'system of law' on the basis of the popular system theory and system analysis in philosophy and hard sciences.

The leading voice of the period, Professor Sergey Alekseev, in a highly influential monograph *'The structure of the Soviet law'* (1975), insisted on grouping the branches of law with regard to 'actual relationships' in the USSR. He minutely described the hierarchy ('pyramid') of the branches (leading, procedural, special, and synthetic) and speculated on the 'horizontal' correlation between the branches of substantial and procedural law. For codification it was important to acknowledge that the system of legislation was to 'mirror' the system of law. No doubt, Alekseev thought the same way about his first field of studies, i.e. civil law.²⁶

Similar voices echoed in the Soviet literature. As Roman Livshits put it, the branch of law provides the blueprint for the branch of legislation. The leading branches of legislation are the exact match of the branches of law. On the contrary, the synthetic branches of legislation may combine legal provisions from different branches of law.

The mirror-principle carried the day and determined the meaning of 'objectively' justified law and legislation. Those who proposed to reverse the relation between law and legislation – i.e. to acknowledge that the system of law is derived from legislation and, consequently, to limit the

²⁴ Vyshinsky A. *Issues of the theory of state and law*, Moscow, 1949, p. 366. The academic master-mind of this round of the debate was Mikhail Arzhanov (1902-1960), associate of the Academy of Sciences of the USSR. See: Arzhanov M. On the principles of constructing the system of Soviet socialist law, in: *The Soviet State and Law*, 3 (1939), p. 27 f.

²⁵ Aleksandrov N., Discussion on the issues of the system of Soviet law and socialist legality, in: *The Soviet State and Law*, 11 (1958), p. 127; cited after: Azmi D., Historical foundations of studies in system of the law in Russia, in: Rad'ko T. (ed.), *System of law*, Moscow: Prospekt, 2019, p. 45 (in Russian).

²⁶ Sergey Alekseev contributed to the second round of the debate with regard to civil law. See: Alexejew S., *Das Zivilrecht in der Periode des umfassenden Aufbaus des Kommunismus*, Berlin: Staatsverlag der DDR, 1964.

study of the system of (Soviet) law to positive legislation – remained a minority. As did those who supported the functional approach to the system of law – i.e. focusing on the social needs that it is supposed to address.²⁷

The outcome of the academic debates was the formalistic and allegedly original theory of the systematization of legal norms imposed from the early 1960s until the end of the Soviet regime. Codification was put into the framework of other forms to maintain and promote the ‘objective’ system of law.

a) The most primitive and loose form, called ‘*inventory*’ (*uczet*), implied nothing more than the register of new laws in three or four ways. It played a crucial role in locating and eliminating outdated legal acts which lost their validity *de facto* without being abolished *de iure*.

b) ‘*Incorporation*’ referred to putting particular acts in a collection without modification. This form culminated in the official incorporation – the *Systematic (Full) Collection of the Legislation of the USSR* in the 1960–1970s, complemented by an abridged *Collection of the Laws of the USSR* in 11 vols. and the *Collection of the Laws of Soviet Russia* (1986–1988) in 8 vols.

c) ‘*Consolidation*’ of the legislation meant creating a synthetic single statute on a particular topic, so that previous individual laws lost their validity, but their norms were included into the single statute unchanged. This form covered many ‘codes’ of the synthetic branches of Soviet law as they lacked a high level of coherence.

d) ‘*Codification*’ was envisaged as the supreme systematization of the law which pulled together various laws and forged them into one coherent new statutory instrument called the ‘code’. The result of codification was to have the following features:

- an act of the state legislation was the most perfect form of coherent lawmaking;
- cover a branch of positive law;
- be marked by coherency of the content;
- formally and symbolically label a ‘code’;
- serve as a tool to transform social relations (though the claim is not backed up by proper regulatory impact assessment).²⁸

This concept was coherently applied to the second codification of Soviet civil law. Its systematic and systematizing design manifested itself in the general part of civil law distributed between the Principles of Civil Legislation of the USSR of 1961 and the Civil Code of 1964. This two-tier system was due not to the federal structure of the USSR, since its constitution of 1936 provided for an all-union civil code, but rather to the politically motivated concessions of the central government in favor of the union republics in 1957 in the course of restoring Lenin’s democratic principles of government.

Against this theoretical framework of codification, the Soviet pattern of codification does not look that original vis-à-vis modern codification. The novelty refers largely to its content, not to its form. Speaking in a lofty style, the Principles of Civil Legislation of the USSR of 1961 and the Civil Code of 1964 were the first legal statutes in the USSR to reflect the civil order of ‘real socialism’. In pragmatic terms, this codification provided a detailed legal framework for the restricted usage of pecuniary relationships ‘during the construction of communism’ (to quote the

²⁷ See: Yampolskaya C., Sukiaynen L., The system of Soviet law and the perspectives of its development, reports on the round table of the journal ‘The Soviet State and Law’, in: *The Soviet State and Law*, 6(1982), p. 94–98.

²⁸ See: Pigolkin A. Features of the codification of the Soviet legislation, in: Mitskevich A. (ed.), *Lawmaking in the USSR*, Moscow: Juridicheskaya literature, 1974, p. 229–272.

enacting clause of the Principles of 1961) in the state-controlled economy which was already in place by the mid-1930s.

This civil-law framework was not applicable to the capital goods covered by other codified branches of Soviet legislation (land and subsoil, water, forest, housing code etc.). The civil-law ‘sandbox’ treated in greater detail the relationships between individuals, between individuals and state entities, and, to lesser extent, the relationships between state entities run in accordance with multiple by-laws. This was the original Soviet civil law without private law and with a simplified legal toolbox – no company law, few real rights or intellectual property, a limited number of contracts to accommodate consumer needs and plan-based relationships between state entities (mostly factories and collective farms), and succession law excluding capital goods. Family law and labor law were singled out as particular branches of Soviet law.

However, formally, the resulting concept of the civil code of ‘real socialism’ was the perfect match for its modern equivalent. The drafters of the Soviet codes repeated the words of legal theoreticians. The code was to become the linchpin of the branch of law with its particular ‘objective’ subject matter and method. It accumulated the principles and general rules (singled out in the Principles of 1961 or marked as the general part in the Civil Code of 1964) which provided the guidelines for the legislation of the whole branch.²⁹

This combination of Socialist content with Pandectist form was the outcome of the positivistic and ideological perception of the law since the mid-1930s combined with dogmatic legal studies. Alternative approaches had been suppressed, including the main challenger of pure dogmatism – sociological jurisprudence. The pre-revolutionary beginnings in this field died out together with Sergey Muromtsev, Maksim Kovalevski, Yury Gamvarov, and Lev Petrazhitsky, while their sympathizers had to leave the country (such as Grigory Gurvich) or go to internal exile. In the 1920s a few Soviet lawyers (Stuczka, Pashukanis, Babunm, Magerovski, Rasumovski, Stalygeovich et al.) worked on a Marxist sociological approach to the law which was suppressed by the mid-1930s.

In the absence of sociological jurisprudence, it was not clear how Soviet civil law would be practically applied and take into account the actual needs of society. Dogmatic legal scholarship postulated the primacy of legal theory over practice, often implied *petitio principii*, and bred disinterest in the law.³⁰ An illustration of such an attitude is the debate in the 1960-70s on the fault-based liability of public entities for not fulfilling contracts. According to the leading civil law scholar Olympiad Ioffe, the state *arbitrazh* committees, while settling disputes between such entities, refused to acknowledge fault as the basis for holding an entity liable for failure to deliver on a contract. Under the Soviet planned economy, the purpose to award damages was two-fold: 1) to restore the assets of the entities as if there had been no failure to deliver, and 2) to incentivize the entities to deliver. There was no need to take fault into account, as the state *arbitrazh* committees discovered. Yet, Ioffe claimed fault to be part of the dogmatic scheme of the civil code. Hence, it was for these committees to change their practice, not *vice versa*.³¹ The legislative model trumped the actual needs of public entities.

²⁹ Fleishits E., Makovsky A. The Civil Code of the Russian Soviet Federal Socialist Republic of 1964, in: Makovsky A., *On codification of civil law*, op. cit. p. 192–193 (reprinted from *The Soviet State and Law*, 8 (1964), p.14-23).

³⁰ For the asocial attitude of legal dogmatism see: Fogelson Yu., Russian civil law in terms of sociological jurisprudence, in: *Zakon*, (4) 2019, p. 166-168. For *petitio principii* in the debates on legal system see: Azmi D., op. cit., p. 41.

³¹ Ioffe O., Development of civil law scholarship in the USSR (part 1), in: Idem, *Selected Papers on Civil Law*, Moscow: Statut, 2000, p. 165 (first published as a brochure by Leningrad State University in 1975).

The Soviet pattern of codification existed unchanged until the late 1980s when the USSR fast-forwarded from the ‘acceleration of (socialist) socio-economic development’ to a ‘regulated market economy’ under Mikhail Gorbachev. To accommodate this rapid transition, lawmakers passed multiple new laws that notably de-codified civil law and necessitated the last Soviet re-codification – the Principles of the Civil Law of the USSR of 1991 which should have become law on January 1, 1992. The demise of the USSR and its legal system on December 26, 1991 did not automatically imply a change of the pattern of the codification.

4. The legacy of Soviet codification after 1991

Following the ‘retrospective’ revolutions of 1989, the nations of Central Europe rushed from ‘real socialism’ back to ‘normal’, ‘civilized’ Europe. The ensuing legal reforms led to the wholesale borrowing of Western institutions which, however, did not mean an easy transition nor the elimination of multiple socialist relics.³²

Eastern Europe enthusiastically joined the race westwards in 1991. This move marked another rupture in the Russian legal trajectory. Yet, thirty years after the change, the Russian legal system is often identified as post-Soviet due to the relevance of that period. The pattern of the civil code offers an appropriate illustration of this incomplete transition from Soviet to Western.

The first civil law codification envisaging a market economy was the Principles of Civil Legislation of the USSR of 1991 enacted as the law of the Russian Federation on August 3, 1992 ‘until a new civil code is adopted’ (fully repealed on January 1, 2008). This short statute of 170 articles covered general provisions, property and other real rights, obligations, copyright, intellectual property, international private law. Despite its quality, the Principles was too concise to match the scale of the social transformation and the race to draft a new civil code began.

One of the drafters testifies that the enterprise was carried out from March 1992 through the mid-1994 by a group of about 12 ‘unemployed civil law scholars’ who initially drafted the Principles of 1991 and started to prepare a new code without any official mandate, competing with two or three other committees in 1993. Unlike all previous civil codes, this one was prepared with direct international borrowings and with the assistance of foreign experts – Dutch, German, and American.³³

The first part of the Civil Code (with a general part, real rights, and major provisions on obligations) was adopted by the Russian parliament on October 21, 1994, the second (1995, a special part of the law of obligations), the third (2001, inheritance law and international private law), and the fourth (2006: intellectual property) parts completed the code in due course. As the final, fourth part of the civil code became law on January 1, 2008, all the provisions and the codified acts of the Soviet civil law were fully repealed.

³² Giaro T., Some Prejudices about the Legal Tradition of Eastern Europe, in: Sitek B. et al. (eds.), *Comparative Law in Eastern and Central Europe*, Newcastle: Cambridge Scholars Publishing, 2013, p. 45 f. For further critique of this stereotype see: Law and critique in central Europe: questioning the past, resisting the present, Oxford: Counterpress, 2016, as well as <http://ceenels.org> (last accessed on 24.02.2020).

³³ A. Makovsky expressed his deep gratitude to several Dutch experts: professors F. Feldbrugge and B. Simons, and, most notably, judge W. Sniijders, funded by the Dutch ministry of justice. See: Makovsky A., Friendly and Wise Assistance from the Dutch, in: *CILC Focus Newsletter*, 23 (2008). In his recent unpublished presentation at the Private Law Research Centre under the President of the Russian Federation on 24 December 2019, he also specifically mentioned German (Bergman and German Foundation of Legal Cooperation), and American experts (Sumners and White, commentators of the UCC).

Does all that mean another rupture in Russian legal history in its codification? Again, a clear answer is not simple. As to the substance, the Civil Code of 1994-2006 disassociates itself from the Soviet one, starting with the principles summed up in Art. 1:

- formal equality of the participants of civil-law relations;
- the non-mandatory (voluntary) nature of acquiring and disposing of civil rights;
- guaranteed private property;
- good faith and no abuse of civil rights;

Each of the above has multiple implications in the particular provisions of all subsequent parts of the Code, which claims to be the economic constitution of a society which rushed towards a free-market economy and liberal democracy, and the Code aimed at constructing the rule of law as a bulwark against the return of an authoritarian regime. What is more, due to the ideological transformation, the Soviet legacy has been ignored or downplayed in the civil law discourse while pre-1917 works became ‘classical’ and were republished in the 1990s.

However, the Civil Code of 1994-2006 was not spared from more than one Socialist ‘relic’.³⁴ The formalistic pattern of the code was one of them. Its symbolic value cannot be contested. The concept of the civil code as the linchpin of branch legislation and by-laws is still widely supported by lawmakers and scholars (both drafters and commentators). The Code offers a coherent set of general legal norms covering the whole area of civil law, which is most visible in its general part (with the same subsections as the Soviet codes but enlarged to over 208 articles compared with 91 articles in the 1964 Code and 51 articles in the 1922 Code). In the opinion of the drafters, the quality of the Code should be measured in updated and new general provisions which generalize the casuistry of multiple cases.³⁵

Formal similarities should be understood against the backdrop of the personal continuity of the drafters (all of them became professionals during the late Soviet period), the theoreticians, and the dogmatic pattern of legal scholarship. The leading theoreticians envisage the law as a coherent system of state-made provisions, hierarchically subdivided into the branches built around the codes. They see ‘no good reason to replace the adopted (Soviet) approach to legal branches today...’³⁶, although some voices call for an updated theory of codification and contemplate new forms of codification (electronic, limited to principles, private professional etc.).

5. Concluding remarks

The Russian experience with the codification of civil law reaches back to the second (Pandectist) wave of great codifications in Europe and opens new chapters during its Soviet and post-Soviet periods (including the recent re-codification of 2008–2012). As this paper shows, the Soviet codification claimed to be the most original. The Principles of Civil Legislation of the

³⁴ To name but a few: several forms of state entities in the free-market economy, land ownership regulated by the Land Code, separate regimes for plots of land and the constructions thereupon; limited number of real rights, implied nominalism of contracts and their particular kinds, like supply agreement, the agreement to supply agricultural goods etc.

³⁵ Makovsky A., *Three codifications*, op. cit., p. 14.

³⁶ Rad’ko T., Theoretical issues of studies in the system of Russian law, in: *Vestnik Adaemii ekinomicheskoy bezopasnosti*, 4 (2015), p.15 (in Russian). The post-Soviet bibliography on codification features mostly authors who published their principle works before 1991 and stick to their previous claims. See: Pigolkin A. (ed.), *Systematization of the legislation in the Russian Federation*, St. Petersburg: Juridicheskij Center Press, 2003, p. 142-153; Tikhomirov Yu., Theory of a Code, in: *Codification of the legislation: theory, practice, technique, Proceedings of the International conference in Nizhny Novgorod 25-26 September 2008*, Nizhny Novgorod: Akademia MVD, 2009, p. 36-42; Rakhmanina T., *Codification of the legislation*, Moscow: Jurist, 2005; Sivitsky V. (ed.), *Systematization of the legislation as a means of its development*, Moscow: HSE Press, 2010 (collected papers of the faculty of law, Higher School of Economics; despite the outlook into the 21st century, the editor fully acknowledged the relevance of Albert Pigolgin’s book cited above in this footnote).

USSR of 1961 and the Civil Code of 1964 synthesized the civil law of 'real socialism' which had no parallels in Western Europe in terms of its content.

This was civil law without private law, applicable mostly to the relationships between individuals, between individuals and state entities, and, to lesser extent, the relationships between state entities. It offered a simplified legal toolbox (as compared to the pre-revolutionary draft Civil Code and coeval Western codes) as it did not cover the capital goods covered by other codified branches of Soviet legislation (land and subsoil, water, forest, housing code etc.).

Yet, even this truly Soviet codification does not break the continuity with the age of great codifications. The Civil Code of 1964 built on the formalistic vision of the code as the linchpin of the branch of the law with its particular subject matter and method. This vision overlapped with the modern notion of a code and rested on the positivistic perception of Soviet law in the professional legal community. Dogmatic legal scholarship in the USSR valued theory over practice, lacked the tools for socio-legal studies, and saw its mission as fostering civil law through melding particular rules into generalized principles.

This formalistic pattern of codification must be studied and understood from the Russian and European perspective for several reasons. It was deeply rooted in the positivistic scholarship and legislation of the age of great codifications. It was exported to other countries of 'real socialism' together with an authoritarian and positivistic approach to law, dogmatic legal scholarship, and bureaucratic judiciary. It remains one of many socialist relics in Eastern Europe that 'still rule us from their graves', not unlike the forms of action in English common law that remained part of its legal style long after the Judicature Acts of 1873 and 1875.

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