

## From Soviet State Enterprises to Russian Unitary Enterprises

*In Russian law, the State enterprise is probably one of the most noteworthy examples of the continuity of legal development, showing just how much Soviet concepts still influence modern Russian law.*

*It is well known that the means of production could not belong to private persons under Soviet law (apart from some minor exceptions). Consequently, State enterprises built the foundation of the Soviet economy. However, the enterprises needed a legal foundation for their entrepreneurial activity. Not being the owners of the assets, they had an operative management over them. This legal construction, surprisingly, survived the collapse of the Soviet Union and the liberalization of the property regime. In the course of perestroika reform, the right of operative management was redesigned; additionally, a further right, one establishing a full economic jurisdiction, was created. These relicts of Soviet legal thinking later kept their position as a part of the modern Russian law of property. In the Civil Code of the Russian Federation, the right of operative management and the right of economic jurisdiction are explicitly stated as rights in rem (Art. 216 CC). Mostly importantly, they allow the State to create the so-called unitary enterprises and institutions which conduct economic activity but do not own their assets. These assets remain State property; however, the unitary enterprises can possess and use the assets on the grounds of the right of operative management or the right of economic jurisdiction.*

*The paper addresses the continuity in legal developments in regard of the mentioned rights and their impact on the notion of property in modern Russia.*

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### ***Operative management in Soviet law***

The rights of economic jurisdiction and of operative management, which provide for the possibility of creating state unitary enterprises under modern Russian

law, are deeply rooted in Soviet legal thinking. The legal institution of operative management, developed by *Venediktov*,<sup>1</sup> who was awarded a Stalin-Prize for this innovation, reflected in a first way the tension between ideological parameters and

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<sup>1</sup> Regarding *Venediktov*'s relevance for the development of Russian legal thinking: *Ivanov*, in: *Venediktov*, *Izbrannye Trudy*, Volume I, p. 7 seq.;

*ibid.*, *Zakon* 2013, No. 4, p. 77 ff.; *Benevolenskaya*, *Review of Central and East European Law* 2013, p. 173 seq.

the needs of the economy. The notion of scientific communism was premised on State ownership of the means of production, yet the economy demanded that enterprises be provided with a legal capacity allowing them to operate the assets they were entrusted.

The first attempts to solve this contradiction in Soviet legal thinking lay close to the ideas of trust and divided ownership.<sup>2</sup> However, these ideas were accused of being non-socialistic and detrimental.<sup>3</sup>

The underlying idea of operative management as suggested by *Venediktov* rejected any division of ownership between the State and the enterprises. He assumed, instead, that the State as the sole owner of the assets is responsible for general planning, control and guidance. The enterprises were enabled to conduct the management of the assets according to the State plan and their tasks.<sup>4</sup>

Operative management was codified after *Venediktov's* death in Art. 21 Fundamental Principles of Civil Legislation of 1961 and later in Art. 94 Civil Code of RSFSR of 1964. It was specified that the State is the exclusive owner of State property. The organisations to which the

assets were transferred had an operative management over these assets, which included the right to possession, use and disposition, this being restricted by law, based on the aims of their activity and the planning tasks. On that point academic literature already considered operative management not as a bare competence but as a right of State enterprises.<sup>5</sup>

### *Impact of the perestroika reforms on further developments*

#### **Perestroika reforms as a means of improving the existing system**

The next milestone in the legal development of State enterprises was reached during the perestroika reforms. They were prompted by the awareness that the Soviet system lacked efficiency compared with the western economies.<sup>6</sup> So the primary goal at least in this first stage of reforms was to improve the system without challenging the ideological foundations of Soviet law.<sup>7</sup> Therefore, the academic discussion preferred models which could allow some reforms towards a market but at the same time could be considered socialistic. As an example of such attempts, a paper published 1986 by *Rubanov* can be

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<sup>2</sup> *Venediktov*, *Izbrannye trudy* I, p. 221 seq. (342 ff.); *Jacobs*, *Eigentumsbegriff*, p. 223 seq. with further references.

<sup>3</sup> *Vyšinskij*, *Sovetskoe gosudarstvo* 1937, Nos. 3–4, p. 29 (38 seq.).

<sup>4</sup> *Venediktov*, *Gosudarstvennaja socialističeskaja sobstvennost'* (1948), partly reprinted as: *Venediktov*, *Izbrannye trudy po graždanskomu pravu*, Volume 2, Moscow 2004.

<sup>5</sup> *Bratus'/Sadikov*, *Kommentarij k GK RSFSR*, Art. 94, p. 121.

<sup>6</sup> *Ahrens*, *Systemwandel*, p. 33; *Blasi/Kroumova/Kruse*, *Kremlin Kapitalism*, p. 28; *Knüpfner*, *ROW* 1991, p. 167; *Lavigne*, *The Economics of Transition*, p. 91 seq. *Sárközy*, *Privatisierungsrecht*, p. 47 seq.

<sup>7</sup> On the academic discussion of that time, see for example: *Fat'janov*, *Choz. i Pravo* 1990, No. 1, p. 5 (6); *Mozolin*, *SovGiP* 1989, No. 10, p. 73 (75); *Mozolin*, *SovGiP* 1992, No 1, p. 3 (14); *Filatov*, *SovGiP* 1989, No. 9, p. 120.

considered.<sup>8</sup> He suggested a model where operative management would exist as an ownership spin off.

The particularly significant aim of the perestroika reforms was increasing the economic autonomy of State enterprises on the grounds of traditional legal doctrine.<sup>9</sup> In some sense it was an attempt to create some sort of market relations without a real market. Enterprises should gain some autonomy without becoming autonomous actors. Legislators hesitated, for example, to transform state enterprises into public companies which could have remained under State control. Instead, the right of operative management was redesigned and complemented by a right of full economic jurisdiction as established by the Law “On property in the USSR” of 1990.<sup>10</sup> In this way the assets of enterprises remained State property. This decision was in line with the Soviet notion of ownership, which established State property as a superior form of ownership and was therefore an idea adhered to in the course of perestroika reforms.

### **The right of full economic jurisdiction**

The right of full economic jurisdiction granted enterprises extensive powers in respect of their assets, although the means of production remained State property. Enterprises gained the traditional

triad of powers: the rights of possession, use and disposition. In Russian law the triad traditionally describes characteristics of ownership, but it was also used to describe the rights of the holder of operative management in Soviet times as well. The distinction between ownership and the right of operative management or between ownership and the right of full economic jurisdiction can be stated only by comparing their restrictions. However, the restrictions on the powers of the holder of the right of full economic jurisdiction were significantly reduced as compared with operative management in the Soviet era. Pursuant to Art. 24 of the Law “On enterprises in the USSR”,<sup>11</sup> an enterprise was entitled to undertake any actions in regards of the attributed assets, provided that no existing legislation foresaw otherwise. Correspondingly, the control powers granted to the State as the owner of the assets of the enterprises were reduced. Pursuant to Art. 30 of the Law “On enterprises in the USSR”, State authorities were not allowed to interference in the economic activity of enterprises.

Due to reforms, the distinction between the right of full economic jurisdiction and the right of ownership became less apparent, which was criticised as confusing and detrimental, especially by

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<sup>8</sup> *Rubanov*, in: Mozolin (Ed.), *Razvitie sovetskogo graždanskogo prava na sovremennom étape*, p. 84 seq.

<sup>9</sup> *Bratus'*, *SovGiP* 1986, No. 3, p. 19 seq. (25); *Fat'janov*, *Choz. i Pravo* 1990, No 1, p. 5 (6); *Mozolin*, *SovGiP* 1989, No 10, p. 73 (75); *Mozolin*, *SovGiP* 1992 No 1, p. 3 (14).

<sup>10</sup> *Zakon SSSR “O sobstvennosti v SSSR”* of 6.3.1990, *VSND i VS SSSR* 1990, No. 11, Pos. 164

<sup>11</sup> *Zakon SSSR “O predpriyatijach v SSSR”*, of 4.6.1990, No. 1529-I, *VSND i VS SSSR* 1990, No. 25, Pos. 461

*Suchanov*.<sup>12</sup> He claimed that this legal construction allowed the directors of enterprises to misuse their powers to enrich themselves.

However, it would be incorrect to see the ownership of the state as a *nudum ius*. The reforms created instead a conflicting attribution of the assets and an unclear and confusing situation regarding the rights of State enterprises. The rights to dispose over assets and revenues were limited at least by the legislation on privatisation. The case law shows that, for example, a transfer of buildings which belonged to a State enterprise to a private company could be declared void by a court on the grounds of its violating the proper privatisation procedure.<sup>13</sup>

### **The path of further legal development**

The perestroika reforms were a milestone in the development of Russian law. Doubtless, it was a very significant step towards a market economy. The admission of private-property-based structures built a foundation for the further transition of the society.<sup>14</sup> However, at the same time some old dogma and institutions, especially those regarding the notion of ownership, were preserved and later adopted in modern Russian law.

It seems like post-socialist legislators did not reflect adequately on the

fact, that the perestroika reforms were not aimed at achieving a fundamental change. The further legal development of Russian civil law instead followed the given path, especially in the retention of different forms of ownership and, consequently, in retaining the right of operative management and the right of economic jurisdiction.

In this way, the perestroika reforms established a link between Soviet legal doctrine and the architecture of modern Russian private law, providing for continuity in the legal development of Russian private law.

### ***State ownership of the assets of unitary state enterprises***

### **Forms of ownership**

Pursuant to Art. 8 para 2 of the Russian Constitution, “Private, State, municipal and other forms of ownership shall be recognized and protected in the Russian Federation”. The Russian Civil Code repeats this provision in Art. 212 para 1. Art. 212 para 3 allows for regulations that, depending on the person of the owner (or more specifically the form of ownership), differentiate aspects such as the acquisition and termination of the right of ownership and the powers of the owner.

On the other hand, the Russian Civil Code states in Art. 124 that the Russian

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<sup>12</sup> *Suchanov*, *Lekcii o prave sobstvennosti*, Moskow 1991, p. 184, *Suchanov*, *Graždanskoe pravo*, Volume 2, Moskow 2005, p. 162.

<sup>13</sup> *Pis'mo Vysšego Arbitražnogo Suda RF ot 31 ijulja 1992, N S-13/OP-171* “O razrešenii sporov, svjazannyh s primeneniem zakonodatel'stva o sobstvennosti”.

<sup>14</sup> *Topornin*, *WiRO* 1992, p. 241 (242): “Schon die Tatsache, dass Privateigentum zugelassen wurde und sich nach und nach verfestigt, kommt einem revolutionären Umsturz der Grundfesten der alten Gesellschaftsordnung gleich”.

Federation, its subjects and municipal formations shall act in relations regulated by civil legislation on equal principles with other participants in these relations.

In this way the Russian Civil Code contains a sort of contradiction in that it builds a separate form of state ownership and at the same time declares the state to be a participant in legal relations equal to private participants. Consequently, the differentiation of various forms of ownership – and its associated impact – has been a controversial topic in academic literature. Especially western scholars see it as a relic of the Soviet era and as being “needless and detrimental”.<sup>15</sup> Others see the forms of ownership as merely being an attempt to increase the significance of private ownership in the course of perestroika reforms<sup>16</sup> or as being a peculiarity of Russian legislation without any practical consequences.<sup>17</sup> It would go beyond the scope of this paper to discuss this question. However, it can be stated that the differentiation of the forms of ownership entails at least some conceptual decisions. One such example is the existence of unitary enterprises (Art. 113 seq. CC) and unitary non-commercial organisations or institutions (Art. 123 seq. CC), neither of which have ownership of their assets but hold them by right of economic jurisdiction or operative management. The underlying concept is similar to one of state enterprises in the Soviet era, for the assets of modern unitary

enterprises and institutions are subject to State or municipal ownership. However, this concept is now supposed to operate under conditions of the market economy. Especially unitary enterprises, which are commercial organisations, are created to participate in economic relations. This is a challenge that modern Russian law on unitary enterprises has to respond to.

### **Unitary enterprises and the notion of property in Russian law**

As stated above, unitary enterprises hold a right of economic jurisdiction or operative management over their assets. As both rights have much in common the paper will address only the right of economic jurisdiction so as to point out some problems which arise in connection with the economic activity of unitary enterprises.

First of all, it has to be considered that the powers of the holder of the right of economic jurisdiction are restricted by rights and to some extent by interests of the owner, i.e. the state.

Pursuant to Art. 295 para 1, the owner decides on the creation of the enterprise, the purpose of its activity, its liquidation, its reorganisation, and on appointment of the director of the enterprise. Beyond these predictable powers, the owner effectuates “control over use according to the designation and preservation of property belonging to the enterprise.”<sup>18</sup>

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<sup>15</sup> *Knieper*, WiRO 2008, S. 193 (196); *ibid.*, WiRO 2016, p. 129 (131).

<sup>16</sup> *Knieper/Chanturia/Schramm*, *Das Privatrecht im Kaukasus und in Zentralasien*, Berlin 2010, p. 261.

<sup>17</sup> *Suchanov*, *Graždanskoe pravo Rossii – častnoe pravo*, Moscow 2008, pp. 275-278.

<sup>18</sup> Translation by *Butler*, *Civil Code of the Russian Federation*, London 2016.

Hence, the power of a unitary enterprises to dispose of assets is restricted. For example, under Art. 295 para 2 CC, an enterprise does not have a right to sell immovable property, to lease it out, to pledge it or to dispose of this property by other means without the consent of the owner. Although in regards to other assets the Civil Code states that enterprises dispose of such assets in principle autonomously, the Law “On Unitary Enterprises”<sup>19</sup> contains further restrictions. Especially Art. 18 para 4 enumerates additional transactions which require consent of the owner. Moreover, this list can be expanded by the statutes of the company.<sup>20</sup> As well, under Art. 18 para. 3 a unitary enterprise may not dispose of assets if this transaction would prevent it from pursuing the goals prescribed in its statutes. Such transaction is void regardless of the consent of the owner.

These provisions clearly illustrate that unitary enterprises are subject to a special regime, a fact which increases legal uncertainty for their business partners.

It is obvious that actions of the State often require a special regime, at least where the State acts in a capacity of public responsibility, and this is made possible by creating unitary enterprises. Examples of such unitary enterprises are the Post of Russia<sup>21</sup> and Mosfilm,<sup>22</sup> neither of which is supposed to take part in the market economy as a competitive entity.

However, Russian law does not consider whether the State actually acts in a public responsibility capacity, declaring instead that all assets belonging to the State are subject to a specific form of ownership, namely State ownership. Insofar, this has implications for the notion of ownership in Russian law, as private property is not considered a basic property concept which can be subject to special rules in specified cases but rather a one of the possible forms of ownership. This makes the notion of ownership in Russian law significantly different from the concept known in European civil law.

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<sup>19</sup> Federal’nyj zakon o gosudarstvennyh i municipal’nyh unitarnych predprijatijach of 14 November 2002, No 161-FZ.

<sup>20</sup> An example of such a statutory rule can be seen in a decision of the Federal Economic Court of the

Volgo-Wjatskij District of 23 July 2008, No A43-28270/2007-12-735.

<sup>21</sup> <http://www.russianpost.ru>.

<sup>22</sup> <http://www.mosfilm.ru>.

***Leseempfehlungen***

*Butler*, Civil Code of the Russian Federation, London 2016

*Knieper*, Gesetzliche Regelung der staatlichen und kommunalen Unitarbetriebe in der Russischen Föderation, WiRO 2003, S. 161–166

*Malfliet*, On Property Rights in the Russian Federation, in: Ginsburgs, George/Barry, Donald/Simons, William (Hrsg.), The Revival of Private Law in Central and Eastern Europe. Essays in Honour of F.J.M. Feldbrugge, The Hague u.a. 1996, S. 281–321

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