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# THE DOCTRINE OF DUALISM OF PRIVATE LAW IN THE CONTEXT OF RECENT CODIFICATIONS OF CIVIL LAW: UKRAINIAN PERSPECTIVES

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## I. INTRODUCTION

Codifications have been taking place in European and other countries throughout the history of civil law development. A new wave of civil law revision has occurred recently in Europe and Canada. The dissolution of the Soviet Union has provided a new impulse for launching a review of the civil law and for the adoption of Civil Codes.

The decisions made by former countries of the Soviet Union – newly independent states (“NIS”) - to build free market economies require appropriate legal structures. New civil codes have been successfully

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adopted in many of the NIS. Work on the new Civil Code in Ukraine based on free-market principles is still in progress. This process has been slowed by theoretical discussions regarding the coexistence of a civil code and an economic code as two codifications of civil law. Codification in Ukraine has provoked scholarly debates on the essence of private law; both on the methods and techniques of codification and the place of private law in a democratic society. These debates center around what has been referred to as the "dualism of private law," referring to the possible co-existence of an economic code with a civil code.

The possibility of a separate economic code threatens the establishment of a legal system with a free-market orientation in this former Soviet Republic, and presents the danger of returning the country to a planned economy. In the view of this writer, scholars' proposals favoring an "enterprise," "trade," "commercial," or "economic" code are an invitation to Ukraine to move back to the medieval ages or, at the very least, to return to the legal mentality of the nineteenth century. There are several ways out of the codification crisis in Ukraine. One is a separation of the spheres of regulation by the economic code which should cover relations where the state is involved, and the civil code. Another is to make an economic code supplementary to a civil code.

It might be asked whether it is necessary to examine the difficulties surrounding the codification process in an East European country such as Ukraine when leading scholars in Europe are currently working on the European Civil Code.<sup>1</sup> Nonetheless, it is important to devote attention to this subject. An analysis of codification efforts in Ukraine affords an excellent opportunity to take another look at scholarly debates on the so-called dualism of private law in the context of modern codifications in other countries that have a practical impact on codification in Ukraine. Examining the scholarly debates on codification problems in Ukraine can also help to rethink the role of private law and its codification in the New World.

This article gives an overview of some of the problems in the sphere of revision of private law<sup>2</sup> in Ukraine to assure the transformation of its economy from planned principles to a free market economy. The article

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1. See ARTHUR HARTKAMP, ET AL., *TOWARDS A EUROPEAN CIVIL CODE*, Kluwer Law International (1998).

2. There is no difference in the scholarly literature between "civil law" and "private law," and the two are usually treated as convertible terms.

discusses the main scholarly debates on the codification of private law in Ukraine. These debates present arguments for different means of codification in Ukraine. The article also undertakes a limited comparison of codifications in other countries. The author proffers suggestions as to how to overcome the codification crisis in Ukraine, and to facilitate legal reforms to make Ukraine a part of the civilized world.

## II. TRANSITION OF THE LEGAL SYSTEM OF UKRAINE FROM THE SOVIET TO A DEMOCRATIC FORM

### A. BACKGROUND OF THE LEGAL SYSTEM IN UKRAINE

#### 1. A Civil Law Country

A country's legal system is a mixture of many elements stemming from different periods of the country's history.<sup>3</sup> A legal system is built up over centuries, and is in many respects remarkably impervious to social upheavals.<sup>4</sup>

Historically, Ukraine is regarded as a civil law country. The modern Ukrainian legal system was formed within the Russian Empire (Ukraine<sup>5</sup> was part of pre-revolutionary Russia) in the nineteenth century and was greatly influenced by German legal traditions. The German legal system was based mainly on fundamentals of Roman law. Thus, like most of

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3. William E. Butler, *Justice in Russia: Soviet Law and Russian History*, 42 EMORY L.J. 433, at 434.

4. *Id.*

5. Ukraine is the largest country in Europe. It is about the size of France or Texas, and is situated in Eastern Europe with the geographic center of Europe located in its territory. Ukraine's history reflects the encounters between the rich and varied civilizations that developed in Europe, the Middle East and Asia. In the ninth century, Kiev was the major political and cultural center in Eastern Europe. Since that time until the sixteenth century, Ukraine was known as "Kiev's Rus" (from which Russia is a derivative). In 1654, Ukraine asked the czar of Moscow for protection from Poland and the Treaty of Pereyaslav that recognized the suzerainty of Moscow was signed that year. The agreement was interpreted by Moscow as an invitation to take over Kiev, and the Ukrainian state was eventually absorbed into the Russian empire. After the Russian Revolution in 1917, Ukraine declared its independence from Russia on January 28, 1918 but shortly thereafter the Red Army was victorious over Kiev. In 1922 Ukraine became one of the founders of the Union of Soviet Socialist Republics. After the collapse of the Soviet Union and declaration of independence by Ukraine in 1991, transformation of the post-Soviet legal system was launched in Ukraine. Today Ukraine is also a place in which it is easy to witness post-Communist transformation in Eastern Europe. Ukrainian political life reflects the struggle between trends of the former Soviet Union and the European community. More information about Ukraine can be found on the Internet: <<http://www.ukraine.org>>.

continental Europe, Russia and Ukraine adopted Roman civil law traditions.<sup>6</sup>

## 2. Soviet Legal Traditions and Ukraine

The legal system of the Soviet Union was based on civil, or continental, law traditions.<sup>7</sup> After the 1917 revolution and the emergence of the Union of Soviet Socialist Republics ("U.S.S.R."), the main effect of legal reform was an imposition of socialist ideological principles on the existing legal system and legal traditions.<sup>8</sup> Fundamental changes were made in the sphere of civil law – everything connected with private property was removed from the Civil Code of 1922.

Legal norms<sup>9</sup> that formed the Soviet system were highly codified<sup>10</sup> and the codes remained the predominant source of law.<sup>11</sup> As in other civil law countries, the codes were treated as comprehensive, integrated systems<sup>12</sup> containing rules applicable to all relations in a certain sphere of regulation, such as civil, criminal, procedural, and labor.

Another essential feature of the system of civil law in the Soviet Union was its rigid structure<sup>13</sup> – all legal norms were grouped by character into institutes, branches and sub-branches.<sup>14</sup> The formal feature of the branch<sup>15</sup> was the existence of a codified law as a separate structure.

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6. Christopher Lehmann, *Bail Reform in Ukraine: Transplanting Western Legal Concepts to Post-Soviet Legal Systems*, 13 HARV. HUM. RTS. J. 191, at 195.

7. O.N. SADIKOV ET AL., SOVIET CIVIL LAW 4 (1988).

8. Pamela Jordan, *Russian Courts: Enforcing the Rules of Law?* at 209 (a draft of this article was disseminated at New York University School of Law in early 2001).

9. This term covers any legal rules in the form of laws, decrees, ordinances, orders, etc.

10. Jordan, *supra* note 8.

11. *Id.*

12. *Id.*

13. *Id.*

14. Such division was one of the major features of the Soviet theory of stateship and law. The basic criteria for division of legal norms into branches in the Soviet doctrine were: subject of regulation; method of regulation; and distinctive characteristics of persons as participants to specific relations. See V.G. ERMOLAEV & O.V. SIVAKOV, MEZHDUNARODNOE CHASTNOE PRAVO 5 (1998). Civil law scholar B.B. Cherepakhin argued in the earlier part of the twentieth century that each of these criteria had independent value; however, in aggregate they became conclusive factors for division of legal norms into branches. See B.B. CHEREPAKHIN, K VOPROSU O PUBLICHNOE I CHASTNOE PRAVE 1-26 (1925).

15. Among the most common branches were civil, criminal, family, labor, and land law. The structural laws of these branches are the correspondent codes: Civil, Criminal, Family, Labor, and Land Codes.

Shortly after the dissolution of the Soviet Union, fifteen new states began to create their own legal systems<sup>16</sup>, with private law dominant in all spheres of citizens' life as a basis for market transformation.

Since declaring its independence from the former Soviet Union in 1991, Ukraine has implemented numerous legal and political reforms.<sup>17</sup> The stated goal of all these changes is to provide assurance of meaningful changes in the country's economy.

### 3. The Legal System of Ukraine

The concept of the civil law in the Soviet and modern Ukrainian doctrine is based on a broad understanding of the "system" category<sup>18</sup> and a legal understanding of the essence of the civil law in general.

Ukraine is a unified country<sup>19</sup> and this determines the structure of the legal system. The system of legal regulation consisting of legal norms in various forms<sup>20</sup> and issued by different state agencies is strictly organized.<sup>21</sup> All legal norms are set forth in a defined sequence with varying degrees of legal efficacy.<sup>22</sup>

16. Lane H. Blumenfeld, *Russia's New Civil Code: The Legal Foundation for Russia's Emerging Market Economy*, 30 INT'L LAW. 477 (Fall, 1996)

17. Anna M. Kvizmik, *Recent Development: Rule of Law and Legal Reform in Ukraine: A Review of the New Procuracy Law*, 34 HARV. INT. L.J. 611.

18. O. Pidopryhora, *Kontseptualni Zasady Proektu Novogo Tsyvylnogo Kodeksu Ukraïny*, 3 UKRAINIAN LAW 61 (1997).

19. Crimea is an autonomous republic in the territorial structure of Ukraine.

20. There are laws, decrees of Verhovna Rada (the parliament), decrees of the Cabinet of Ministers, ordinances of the President, orders of Ministers and other central state bodies, etc.

21. The basic law in Ukraine as in other countries is the Constitution. It was adopted in Ukraine after the collapse of the Soviet Union in 1996. The Constitution guarantees the fundamental freedoms of citizens, including the freedom of assembly and private initiative. It recognized private property for the first time in the recent history of Ukraine. The Constitution became a law of direct implementation, which means that anyone may use it for the vindication of his or her constitutional rights in the courts. As in other continental law countries, the main source of law in Ukraine lies in codes in certain spheres of regulation, for instance, the Civil Code, Civil Procedure Code, Criminal Code, Criminal Procedure Code, Labor Code, Family Code, and Land Code. The next level of legal norms are the laws – such as the Laws of Ukraine on Entrepreneurship, Companies, and Securities & Exchanges. Verhovna Rada of Ukraine has the power to issue decrees mainly as to how to effectuate the laws. The President of Ukraine can issue ordinances in spheres not regulated by laws. The ministers and other central state bodies make orders and rules in specific industries, such as securities and taxation, that are normally binding within those industries. The explanations of the Supreme Court and the highest Economic Court regarding implementation of legal norms implementation are essentially court briefs, not binding norms.

22. Legal efficacy means that certain forms of legal rules take preference over others. See *supra* note 21. There is a draft of the law in the parliament of Ukraine that suggests a formal order of different kinds of legal norms. This draft structures legal norms in order to identify their priority.

Civil legislation<sup>23</sup> as a part of the system of legal norms is a collection of rules to regulate private relations in all spheres, including private entrepreneurship. The Civil Code is a core law for the entire sphere of civil legislation.

## B. CURRENT REFORM OF THE CIVIL LAW IN UKRAINE

### 1. The Need for Civil Law Reform

Since the beginning of legal reform in 1991, the legal community in Ukraine has recognized the adoption of a new civil code as vital. When fundamental changes occur in the economy with a move toward a market orientation, such a transformation must be undergirded by adequate free-market oriented laws. Adoption of the new Civil Code based on market principles created uncertainties and destabilized lawmaking. Aside from the basic law in the private sphere, which is the Civil Code, many new laws were enacted to establish fundamentals for the new legal system.<sup>24</sup>

Early legislative work in Ukraine was chaotic. Since Ukraine declared its independence, hundreds of new laws<sup>25</sup> have been enacted, many of which are in conflict with others. These laws passed in Verhovna Rada (the parliament of Ukraine) without any legislative program for the transitional period.<sup>26</sup> This law-making process led to disorder in the legal system and created contradictions between provisions of various laws, for instance, between the “first generation” laws dedicated to creating market economy, and the still-existing Soviet laws based on planned economy principles.<sup>27</sup>

Aside from the parliament, which according to the Constitution of Ukraine has the power to enact laws, other state bodies have delegated powers to establish rules in other legal forms, such as decrees, ordinances, orders, resolutions, instructions, information letters, and explanations.<sup>28</sup> Since 1991, thousands of such rules have been adopted.

23. The term “legislation” is to be understood as a collection of all kinds of legal norms that forms the legal system of the country.

24. Among those laws are the laws of Ukraine on property; companies; securities & exchange, and bankruptcy.

25. According to some unofficial sources, approximately 3,000 laws were enacted and almost 1,500 legal drafts are still awaiting adoption in Verhovna Rada of Ukraine.

26. Wolfgang Freiherr von Marschall, *Creating the Necessary Instruments for a Market Economy in the Post-communist Countries of Eastern Europe: Policies and Problems*, 39 ST. LOUIS L.J. 951, at 955.

27. *Id.*

28. A. Dovgert et al., *Kodyfikatsiya Pryvatnoho (Tsyvilnoho) Prava Ukrainy*, Ukrainian Center for Legal Studies (2000), at 13.

Using transitional powers of the 1996 Constitution, the President of Ukraine issued more than forty ordinances, some of which violated provisions of other laws. For instance, one of the presidential ordinances abolished the use of an important free-market legal instrument – assignment of debtor/creditor rights, which is stipulated by the Civil Code of Ukraine.

Apparently, the existence of conflicting laws led to the necessity of enacting other laws and rules. To fill the gaps and eliminate conflicts between different legal norms, the highest courts<sup>29</sup> of Ukraine issue explanations to help unify the process of legal application.<sup>30</sup>

The Civil Code adopted in 1963 was designed to serve the planned economy.<sup>31</sup> This former code constrained legal reform in Ukraine. Many amendments have been made to this Code but they have not changed its principal provisions. Socialist terminology is still used in its text.<sup>32</sup> In contrast, the new free-market oriented Civil Code could serve as a basis for further legal reform.

The newly adopted mass of legal rules obviously creates a situation in which it is virtually impossible to apply effectively the laws in Ukraine. This unreasonable law-making activity<sup>33</sup> resulted in difficulties of a practical character for everyone who applies the laws and created

29. The Supreme Court and the Highest Arbitration (now Economic) Courts have the power to issue explanations that are not binding documents but are used by the lower courts as clarification on how to apply legal norms.

30. For example, the Bankruptcy Law of 1992 listed 22 small articles in six pages of text. In order to correct some provisions and fill in the gaps of this law the Highest Arbitration Court adopted several explanations. The latest explanation approved by this Court in 1997 contained more than 60 large articles in more than 30 pages.

31. The Civil Code of 1963, currently in force, was created to serve the administrative-command system in which the life of every citizen was state-dominated, while private relations were ignored. Therefore, this Code in its many parts lacks a broad application and contradicts economic and political realities in modern Ukraine. See A. Dovgert, *Structura ta Kontseptsia Proektu Tsyvilnoho Kodeksu Ukrainy* (last visited in May 2001) at <[http://www.commerciallaw.com.ua/conc\\_01.html](http://www.commerciallaw.com.ua/conc_01.html)>.

32. For instance, the Civil Code states that this law adopted by the Supreme Council of Ukrainian Soviet Socialist Republic regulates relations for the creation of the basis of communism (Article 1). Further, there are definitions of such terms as “soviet” and “socialist” in the text of the Code.

33. Many politicians used to say that so many newly enacted legal rules show how well the parliament of Ukraine and other state bodies work to ensure market reform. But the experts point out that there is no connection between so many enacted laws and the ensured success of market transformation. Moreover, they argue that this creates many difficulties. One opinion is that such a huge number of laws may be an instrument of market reform deceleration. See Zabihailo V., *Rozvytok Prava ta Efektyvnist Ekonomichnykh Reform v Ukraini*, 11 UEPLAC NEWS LETTER (Jan. 2001).



problems that confuse business people, as well as causing difficulties for judges and practitioners.

Certainly, such a situation creates practical difficulties in terms of application of Ukrainian laws and legal rules. Many experts acknowledge that such instability is one of the main barriers to foreign and international investment in the Ukrainian economy.<sup>34</sup>

Many independent experts conclude that there has been an absence of substantial economic reforms<sup>35</sup> demonstrating the necessity of market-based laws.<sup>36</sup> Another problem is the quality of the new laws.

It is important to note that adoption of the new Civil Code is required for admission of Ukraine to the Council of Europe<sup>37</sup> and is considered a necessary step toward harmonization of new Ukrainian legislation with European directives and unified laws.

### III. DUALISM OF PRIVATE LAW IN THE CONTEXT OF CIVIL LAW REFORM IN UKRAINE

Codification in Ukraine has provoked scholarly debates on the essence of private law, the methods and techniques of codification, and the place of private law in a democratic society. Much of the debate centers around what has been referred to as the dualism of private law,<sup>38</sup> that is, the possible co-existence of an economic code and a civil code.

Scholars who support the economic law concept concede that an economic code should provide regulation in the commercial sphere while other relations should be left to a civil code.<sup>39</sup> Civil code scholars are in favor of regulation of the private law sphere by only one codified law, a

34. Sergiy Kulytskiy & Natalia Omelyanchik, *Investment Climate in Ukraine: Myths and Reality*, 35 ECONOMIC REFORMS TODAY 3 (2001). See also News Letter of Euro-Ukraine Consulting, Volume 3 (2000).

35. See, for instance, Aviva Yakren, *Newly Independent States of the Former Soviet Union*, 31 INT'L LAW 547.

36. Ukrainian lawmakers lack experience in drafting laws with a free-market orientation.

37. An interim agreement between the European Union and Ukraine became effective on January 2, 1996.

38. A. Dovgert, *Systema Pryvatnogo Prava ta Struktura Proektu Novoho Tsyvilnoho Kodeksu Ukrainy* (last visited in May 2001) at <[http://www.commerciallaw.com.ua/conc\\_02.html](http://www.commerciallaw.com.ua/conc_02.html)>.

39. Economic law scholars are of the opinion that the Civil Code should regulate "the relations in the sphere of family and household, in other words to set how to bake, marry, and to occupy the earth, to have livelihood, and to be engaged in music and literature." See Mamutov V.K., *Do Pytannya pro Ponyattya Pryvatnoho Prava*, 2 VISNYK OF ACADEMY OF SCIENCE OF UKRAINE 59, 59-69 (1999).

civil code. They reject the establishment of two regulatory systems that in their opinion would create severe difficulties in the application of law and could overwhelm or lead to the collapse of the legal system.

#### A. THE DUALISM OF PRIVATE LAW PHENOMENON

Dualism of private law is recognized as the existence of two independent systems of norms for regulating the private sphere by civil and commercial codes.<sup>40</sup> This phenomenon of a two-fold division of private law has been known since medieval times, when the first commercial laws were adopted in Italian cities.<sup>41</sup> The basic impulse for initiating the adoption of commercial laws was an idea according to which the interests of trade guilds<sup>42</sup> dominated the interests of other parts of society. It resulted in the birth of commercial laws as special laws to regulate trade. Therefore, the purpose of such an independent sphere of regulation was to establish a separate set of rules for supporting trade.

There were two main phases of the development of the dualism of private law doctrine. The first stage is classic dualism,<sup>43</sup> under which commercial laws existed parallel with civil codes.<sup>44</sup> This phase took place in medieval Europe and nineteenth-century Germany.<sup>45</sup>

In France, a parallel existence of two systems of regulation in the private sphere was finalized with the adoption of the Commercial Code in 1808. It should be noted that this code supplemented the Civil (Napoleon) Code.<sup>46</sup>

40. A. Dovgert, *Polemika Tsyvilistiv Ukrainy z Prybichnykamy Kontseptsii "Hospodarskoho Prava"* (last visited in May 2001) at <[http://www.commerciallaw.com.ua/conc\\_03.html](http://www.commerciallaw.com.ua/conc_03.html)>.

41. With the broadening of trade, new laws more appropriate to supporting business were developed in medieval Italian sea cities. Early stages of the development of those laws consisted of collections of various agreements between cities' councils and trade associations. The agreements and other rules were arranged into special sets of norms called Statutes of Cities. See GABRIEL SHERSHENEVICH, *THE COURSE OF LECTURES ON TRADE LAW* 86 (Volume IV), Moscow (1912).

42. Associations of individuals involved in trade.

43. A. Dovgert, *Problemy Kodyfikatsii Tsyvilnoho (Pryvatnoho) Prava v Ukraini*, 1 *UKRAINIAN LAW* 39, 39-51(1998).

44. Some experts explain that such a situation happened at a time in Europe when Roman civil law was much too formalized to satisfy the practical needs of quickly developing trade with the necessity of simple rules for the conclusion of contracts between businessmen.

45. A. Dovgert, *Tsyvilnyi Kodeks Ukrainy Yak Kodyfikatsiya Pryvatnoho Prava*, 3 *UKRAINIAN LAW* 59 (1998).

46. *Id.*

In Germany, the Commercial Code was adopted in 1897,<sup>47</sup> after the enactment of the Civil Code of united Germany (1896) and was not parallel with the Civil Code; rather, it supplemented the Civil Code.<sup>48</sup> Researchers argue that the German Civil Code of 1896 contained the spirit of a commercial code and therefore did not leave room for the existence of a commercial code. This situation reflected the next stage of the dualism of private law doctrine.

The second stage of dualism of private law development is quasi-dualism.<sup>49</sup> Within this period of private law development there were no longer two separate systems of private law. Practically, there was a single private law system, but legal norms were contained in two codified laws: the Civil and Commercial Codes. This situation became common in Europe in the twentieth century.

In the course of time, the artificial character of the co-existence of two parallel codes in the private sphere became obvious. The development of the civil law has resulted in the disappearance of the basis for differentiating between commercial and other contracts. Further development of both the civil and commercial codes inevitably led to conflicts between them, the presence of gaps, and the duplication of regulations. Thus, codifications of the private law in European countries for the reasons stated above occurred within the framework of civil codes.<sup>50</sup>

Lawmakers in European countries at the beginning of the twentieth century did not proceed to develop two-codes systems. Principles used in the commercial law concept became universal and formed the basis of general provisions of civil codes.

In the motherland of dualism of private law, Italy, the idea of a commercial code was rejected with the adoption of the Civil Code in 1966. The same thing happened in Portugal.<sup>51</sup>

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47. Existence of dualism of private law in Germany has been explained by political dissociation. See Dovgert, *supra* note 28.

48. According to the opinion of Russian civil-law scholar Gabriel Shershenevich (1863-1912), the Commercial Code has been preserved in Germany as the first monument to a national reunion of Germans.

49. Dovgert, *supra* note 28, at 30.

50. For instance, in 1907, a Civil Code was adopted in Switzerland and was later complimented by the Law of Obligations (1911), formally considered as the Fifth Book of the Civil Code. See Dovgert, *supra* note 28, at 31.

51. *Id.*

The new Civil Codes of the Netherlands (1992), the province of Quebec (1994), Russia (the first part was enacted in 1994 and the second in 1995) and other NIS reflected in tangible form a tendency in the development of private law that became common in the last century – the rejection of the dualism of private law.<sup>52</sup>

#### B. THE PECULIAR NATURE OF DUALISM OF PRIVATE LAW DURING THE SOVIET ERA

Civil law scholars in Ukraine assail the supporters of the economic law concept on the ground that when arguing for the separation of private law regulation they disparage the role and place of the civil code in the legal system.<sup>53</sup> There was even a time in Soviet history when they rejected the need for a civil code as a source of law.

In the 1920s and 1930s some Soviet scholars<sup>54</sup> created “the single economic law” concept,<sup>55</sup> the essence of which was the idea that under the conditions of the socialist planned economy, all relations in the sphere of the economy on horizontal (relations between equal partners) and vertical (economic control and administering of trade) levels should be regulated by the so-called economic law. In the opinion of those scholars, the norms of the economic law sphere should also regulate other relations in the private sphere traditionally covered by a civil code.<sup>56</sup>

Reviewing the arguments of economic law scholars, it is easy to see that they explored this concept to arbitrate strengthening the government’s role in business regulation and trade administration. Formally, the economic law supporters suggest governing economic (entrepreneurial, trade, commercial, business) relations by a separate set of rules combined

52. Dovgert, *supra* note 38.

53. Dovgert, *supra* note 28, at 92.

54. Among those scholars are P. Stuchka, I. Pashukanis, and L. Ginsburg.

55. The idea of “the single economic law” has been replaced by another concept – “two-sector private law” regulation, which was proposed by P. Stuchka when the New Economic Order (“NEO”) was set. The NEO was a policy set by the Soviet Government shortly after the Civil War in the early 1920s. The main idea of the NEO was to grant temporary permission to own private property and to control freedom of business within the environment of an emerging planned economy. The NEO lasted for several years and, when at the end of the 1920s, the economy of the Soviet Union was transferred to principles of a planned economy, this policy was eliminated. According to the “single economic law” doctrine, regulation of the private sector, inter-sector relations, and the public sector of the economy should be covered by economic law regulations.

56. Dovgert, *supra* note 38.

in a separate code. Thus, the idea of developing another code parallel to the civil and economic codes has emerged.<sup>57</sup>

The “single economic law” doctrine was understood as a transition to an era of non-legal management of the economy. In the 1930s the “single economic law” theoretical school was destroyed and its leading scholars were repressed or victimized. The Communist Party nomenclature had found in the economic law idea an intrusion into the sphere of uncontrolled management by the Communist Party over the economy.<sup>58</sup>

Another revision of the dualism of private law concept occurred before the break-up of the Soviet Union<sup>59</sup> at the end of the 1950s through the early 1960s during the next codification of the civil law in the Soviet Union.<sup>60</sup>

At the time of Khrushchev’s “snow-break,” the concept of the economic law in a renewed variation was revived. However, this time an independent existence of a civil code as a set of norms to regulate private relations was recognized by economic law scholars.<sup>61</sup>

The Civil Codes were adopted in the Soviet Union Republics in 1963 after adoption of the Fundamental Principles of Civil Legislation (the “Fundamentals”).<sup>62</sup> At that time the economic law scholars again failed.

As civil law scholars have found, the economic law concept during the Soviet Era was constant: the plan was to regulate the socialist economy by a separate set of legal norms combined into a codified law – the Economic Code.<sup>63</sup> Several drafts of the Economic Code were worked out between 1970 and 1980, but did not receive support in the legal community of the Soviet Union.

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57. *Id.*

58. *Id.*

59. V.V. Laptev, *Ponyatie I Sistema Sovetskogo Khozyaistvennogo Prava*, 7 SOVETSKOE GOSUDARSTVO I PRAVO 128 (1959).

60. Blumenfeld, *supra* note 16.

61. G. Matveev, *Pro Kontseptsiyu Gospodarskoho Prava*, 1 PRAVOVEDENIE 3 (1961).

62. The Fundamentals were a form of federal legislation in the Soviet Union, which were the basis for the development of the Republics’ Civil Codes. Peter Maggs, *The Process of Codification in Russia: Lessons Learned from the Uniform Commercial Code*, 44 MCGILL L.J. 281 (1999).

63. Dovgert, *supra* note 28, at 32.

During the dying days of the Soviet era in the summer of 1991, the last Fundamentals were adopted in the U.S.S.R. and were scheduled to take effect in 1992.<sup>64</sup> However, this legislation did not proceed as planned.

After the dissolution of the Soviet Union and the acceptance of free market economic ideas, it appeared as though the idea for an economic code had been buried forever. However, that concept has begun to resurface.

### C. DUALISM OF PRIVATE LAW AFTER THE BREAK-UP OF THE SOVIET UNION

At the end of the 1980s, economic law scholars formulated the next “new concept” of economic law.<sup>65</sup> Practically, the old concept was adjusted for the new economic conditions of the transitional period of former Soviet Union countries.

The authors of this “old-new” concept<sup>66</sup> stated that the codified law in the sphere of economic law (the Economic Code) became an Enterprise Code under new conditions. Therefore, the old principles of the economic law concept – centralism and socialist property as the basis for the planned economy - were converted into principles such as freedom of entrepreneurial activity and legal equality of all kinds of property, both private and state. Also, the authors of the economic law concept proposed regulation by the Economic Code of relations between businessmen (horizontal), and between businessmen and state bodies (vertical). In their opinion, both kinds of relations are so closely connected as to create a new reality, referred to as “economic relations.”<sup>67</sup>

If the method of administrative directives (plan orders) of economic character was recognized as the determinative way to enter into a contract, today these directives offer a method of independent decisions by business persons (methods of coordination) as the basis for such regulation.

64. Maggs, *supra* note 62.

65. On the Project of Ukrainian Business (Commercial) Code (last visited in May 2001) at <<http://www.pravis.donbass.com/pages/draft.htm>>.

66. Russian scholars I. Laptev and I. Martemyanov, among others.

67. Analyzing the text of the Economic Code draft, it is difficult to understand what is meant by “economic relations.” As the authors argue in the articles devoted to the economic law concept, under conditions of market economy both vertical (administrative) and horizontal (private) relations create a new phenomenon – economic relations. Unlike the Soviet regime when socialist organizations were recognized as exclusive participants in economic relations, the current system allows businesspersons to be participants in business relations.

Since the collapse of the Soviet Union, the difficult adjustment of old ideas to new conditions has been ignored in the NIS countries. In Russia, Kazakhstan, Uzbekistan, Kyrgyzstan, and Georgia, new Civil Codes as codified laws in the private sphere has been adopted.

In Moscow, the motherland of the economic law concept, the economic law concept has failed following the adoption of the new Civil Code of Russian Federation. Only a group of Ukrainian scholars seized upon the idea of creating an economic code.<sup>68</sup>

#### D. THE ECONOMIC CODE REVIEW

The Economic Code<sup>69</sup> contains 558 articles,<sup>70</sup> which are grouped into eight sections: the basic principles of the public economic order; persons of the public economic order; the property basis for public economic order; economic obligations, responsibility for economic offences; special kinds of economic activity; financial insurance of economic activity; and foreign economic activity. The draft of the Economic Code was completed in 1995.

The aspiration to unite in one law rules regulating not only the activity of natural and business persons but relations between entrepreneurs and the state results first of all in enlarging the sphere of administrative underpinnings of the market economy<sup>71</sup> and changing existing rules in the

68. Dovgert, *supra* note 38.

69. It is important to note that the term "economic code" is not a correct translation of the Ukrainian word "hospodarskyi." Further, none of the following terms reflect the essence of the original word: trade, commercial, business, and entrepreneurial. The authors of the Economic Code were using, in the translation of the title of the code, such constructions as the Economic (Commercial) Code (*See* Valentyn Mamutov & Georgiy Znamenskiy, *A Word About American Assistance to Commercial Law Reform in Ukraine* (last visited in May 2001) at <<http://www.pravis.donbass.com/pages/articles.htm>>) or Business (Commercial) Code (*See, supra* note 65). I assume it was made to persuade foreign donors to support their ideas.

70. The text of the Economic Code can be found on the internet at the address (last visited in May 2001) at <[http://www.pravis.donbass.com/code/code\\_eng.pdf](http://www.pravis.donbass.com/code/code_eng.pdf)>.

71. Supporters of the concept of economic law accuse civil law scholars of ignoring the role of the state in the sphere of economy regulation. Civil law scholars argue that they realize the role of the state, which uses such instruments as the establishment of a taxation system, formulation of credit and finance policy, and use of antimonopoly measures. However, all these measures should be subordinated to the production activity of businesses and private initiative. Civil law scholars also argue that the government in a market environment is no longer a manager and no one should dictate what to produce, how much to produce and to whom to sell. The fact that the regulation of economic activity in the country is mostly through legal norms does not provide a basis for cutting off property relations in the economic sphere from other private relations in the non-business sphere. Through private regulation, entrepreneurs are provided with the freedom to act, as the market requires, and that is the main engine of economic progress. Civil law scholars also agree that there is no sector of private relations which would not connect with the norms of the public law sphere, but today in Ukraine, public law plays a major role.

business arena. The drafters of the Civil Code of Ukraine are afraid that it may become the basis for a new wave of re-privatization.<sup>72</sup>

The Code covers many legal relations, including:<sup>73</sup> financial systems, taxation, antimonopoly measures,<sup>74</sup> unfair competition, collective bargaining agreements, concessions, free economic zones, and intellectual property. This makes this document more of a declaration than a set of rules. It means that its norms will not be applied directly for various reasons.

Apparently, this approach to codification causes fragmentation and incomplete regulation.<sup>75</sup> This situation leads to the necessity of drafting other laws or additional rules to clarify the provisions of the Code. Therefore, the draft of the Economic Code in this form makes it a law that requires frequent amendments.

Finally, the existence of two codified laws that are designed to regulate the private law sphere may create a situation in which a party to a contract who is a natural person buying a piece of furniture would be subject to Civil Code regulation. Yet, if the same individual sells stocks, such a contract would be regulated by the Economic Code. This is a simple example of the absurdity of the “double” regulation of identical relations by two different laws.

The Economic Code draft also includes provisions which the draft of the new Civil Code already contains. However, some of the provisions of the Economic Code are incompatible with the notion of freedom of business as guaranteed in the Constitution of Ukraine.<sup>76</sup>

In 1994, following a request by the authors of the Economic Code, a group of German experts gave a negative opinion of the general concept of an economic code. They advised Ukrainian drafters not to include both private and public legal norms on the same subject in one codified

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72. Dovgert, *supra* note 28, at 57.

73. Field Trips to Separate Codes (last visited in May 2001) at <<http://www.pravis.donbass.com/pages/events.htm>>.

74. It is difficult to believe that ten articles devoted to taxation would solve all the problems in this important sphere of the economy once the Code is adopted. Likewise, twenty articles about antimonopoly measures will hardly create market fundamentals for organizing the economy on the basis of competition. Currently, there are four drafts of taxation codes being discussed in the scholarly community in Ukraine.

75. Dovgert, *supra* note 28, at 33.

76. *Id.*



document.<sup>77</sup> When the civil law in Germany was revised, the concept of co-existence of two codified laws in the traditional civil law sphere was rejected.<sup>78</sup>

All foreign institutions to which the draft of the Economic Code was presented for expert opinions also disapproved the existence of two codified laws for regulation of the same relations.<sup>79</sup> Based on his expertise, Volkert Milh stated that the main provisions of the Economic Code were not consistent with market economy fundamentals.<sup>80</sup>

The situation that exists in Ukraine forced the Council of the Scientific-Consultative Center for Private Law of the NIS to address a special statement to the drafters of the Civil Code of Ukraine. In it, they expressed the theoretical and historical “insolvency” of the economic law concept and noted a serious danger to the process of forming a civic society and establishing a market economy when there is an attempt to create economic, trade, commercial, entrepreneurial or other codes “parallel” to the Civil Code.<sup>81</sup>

According to the opinions of leading Ukrainian civil law scholars, the draft of the Economic Code strengthens state participation in the economic sphere. Further, the main provisions of this draft do not correspond to the Constitution of Ukraine, international treaties of Ukraine, and international trade practice. Also, many Ukrainian scholars argue that there is no need for additional codes to regulate relations in the business sphere.<sup>82</sup> Recent developments in codification in many countries

77. See Dr. Achim Sramm & Marina Pidpalova, *Deyaki Zauvazhennya Schodo Rozmezhuvannya Sfery Zastosuvannya Proektu Hospodarskoho Kodeksu vid Sfery Zastosuvannya Proektu Tsyvilnoho Kodeksu* [Some Remarks in Regard to Delimitation of the Sphere of Regulation of the Economic and Civil Codes], for the Ukrainian Academy of Science (1999); Dr. Rolf Knieper, *Deyaki Zauvazhennya Schodo Rozmezhuvannya Sfery Zastosuvannya Proektu Hospodarskoho Kodeksu vid Sfery Zastosuvannya Proektu Tsyvilnoho Kodeksu* [Some Remarks in Regard to Delimitation of the Sphere of Regulation of the Economic and Civil Codes], for the Ukrainian Academy of Science (1999). These expert opinions were ordered by Ukrainian Academy of Science and fulfilled by foreign experts of Ukrainian-European Policy and Legal Advice Centre (UEPLAC), Kyiv, Ukraine.

78. Dovgert, *supra* note 28, at 107.

79. Peter Gass, et al., *Perspektivy Est: Nekotorye Aspekty Obsuzhdeniya Proekta Grazhdanskogo Kodeksa Ukrainy* (last visited in May 2001) at <<http://www.practix.com/gazeta/2001/01/12.html>>.

80. Volkert Milh, *Pryntsyp Svobody Ukladannya Kontraktiv i Pidpnyemnytska Diyalnist*, 3 UKRAINIAN LAW 82, 82-85 (1997).

81. Dovgert, *supra* note 28, at 34.

82. O. Skakun et al., *Problemy Pidpnyemnytstva v Konteksti Kodyficatsii Tsyvilnoho Zakonodavstva Ukrainy*, 3 UKRAINIAN LAW 72, 72-74 (1997).

with continental legal systems substantiates this idea, and Ukraine can benefit from their experiences.<sup>83</sup>

Significantly, the Economic Code is not a code of private law<sup>84</sup> that would supplement the Civil Code. Rather, if the Economic Code was adopted, it would be a triumph for the European quasi-dualism of private law concept in the twenty-first century.

#### IV. CODIFICATION OF THE PRIVATE LAW IN UKRAINE

The most recent civil law revision in Ukraine brought to light scholarly debates about the place of private law in the legal system. These discussions centered around the division of legal norms into public and private areas of law.<sup>85</sup>

##### A. PRIVATE LAW DEVELOPMENTS

Russian civil-law scholar S. Alekseev<sup>86</sup> formulated four basic historical stages of private law development. He found that formulation of private law regulation began in the first and second centuries. Then, activities of glossators and post-glossators in medieval times resulted in the perfection of the private law system and the formulation of its institutions.<sup>87</sup>

Next, there was an adaptation of the basics of private law institutions for the formation of a civic society with market principles. This development was associated with adoption of the Napoleonic Code, the Civil Code of Germany, and the Civil Codes of other European countries.

The final stage of private law development was the result of recent civil law codifications in the second half of the twentieth century. New Civil Codes were adopted in the Netherlands, Quebec, Russian Federation, and other countries.

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83. *Id.*, at 73.

84. Dovgert, *supra* note 28.

85. A. Dovgert, *Novyi Tsyvilnyi Kodeks Ukrainy yak Kodyficatsiya Pryvatnoho Prava*, 3 UKRAINIAN LAW 59, 59-61 (1997).

86. S.S. ALEKSEEV, CHASTNOE PRAVO 40-44 (1999).

87. *Id.*

The revival of private law that is expected to become a basis for the transformation of the Ukrainian economy began after the dissolution of the Soviet Union and the declaration by Ukraine of its independence in 1991. By virtue of historical reasons it was recognized that the return to the system of civilized private law in Ukraine would be slow and laborious.<sup>88</sup>

Since the beginning of the recent codification process in Ukraine, division of legal norms into public and private, as opposed to the Soviet division into branches, sub-branches, and institutions,<sup>89</sup> has prevailed in scholarly literature.<sup>90</sup> The scholarly literature has recognized that legal norms are designed to regulate two layers of social relations – public and private interests which should be separate.

The reason for correcting the main Soviet theoretical approach to the structure of the legal system is that the division into those two spheres of regulation, public and private, is in accordance with the nature of law.<sup>91</sup>

The public law sphere is based on specific principles, among which are: power domination, vertical obedience, and strict subordination of participants to those relations. The public law, using the terminology of the Soviet doctrine, covers such branches as constitutional, administrative, financial, criminal and procedural law. The private law, in turn, covers one sphere – civil legislation with its many institutions.

Private laws have the main objective of regulating relations between individuals as members of a civic society, and its legal norms are

88. The truth of this assertion has been proven by the history of the revision of the civil law of Ukraine when scholarly debates around the concept and text of the Civil Code put brakes on the process of its adoption. The new Civil Code that is based on free-market principles had been in the parliament of Ukraine for more than six years when everyone realized it needed to be adopted to further market transformation.

89. S. Polenina, *Vzaimodeistvie Sistemy Prava i Sistemy Zakonodatelstva v Sovremennoi Rossii*, 9 GOSUDARSTVO I PRAVO 5, 5-13(1999).

90. See, for instance, O. Pushkin, *The Concept of the New Civil Code of Ukraine*, 1 UKRAINIAN LAW 228 (1997). Such division of legal norms has been known since ancient Rome, where public law was associated with public welfare and private law regulated relations between individuals.

91. It is important to note that in the world now there is less attention to the division of legal norms for the private and public spheres. It is true that scholars outside of Ukraine do not pay much attention to such theoretical discussions. Today a legal system in each country consists of different legal norms that are difficult to divide into groups. Under the rule-of-law regime, all legal norms constitute a single legal system.

characterized by decentralization, as opposed to public law, which is based on the centralization principle.<sup>92</sup>

The main underpinnings of the private law sphere are recognized private initiative and private property determination. These are the basic principles at the foundation of the private law sphere, and are formulated in general provisions of any civil code. Among those principles are freedom of contract, inviolability of property, and freedom of private initiative and of associations, including the establishment of business organizations.

#### B. DEVELOPMENTS IN PRIVATE LAW DURING THE SOVIET ERA

Even with the most rigid limitation of private regulation, private life never disappears entirely.<sup>93</sup> It would be mistaken to say there were no private relations during the period of Soviet rule. The entire history of development of the Soviet Union's legal system shows that the progress of civic society corresponds with direct dependence on maturity and the level of evolution of private law underpinnings.

Revolutionary experiments in the natural movement of political, social and economic processes in the U.S.S.R. (including Ukraine) during the period 1917-1991 rendered the sphere of private law unrecognizable. The first Civil Code of the Soviet Russian Federation, adopted in the early 1920s, was constrained to note that with the strengthening of public elements in the economy, norms of strict-imperative character prevailed. Still, the existing Civil Code of Ukraine adopted in 1963 had some controversial provisions.

The division of legal norms in the public and private spheres was not recognized under the Soviet regime. Private law regulation was considerably reduced. For example, the norms designed to regulate relations in business, land, private labor, family, international private law, and many other spheres of law were omitted from the Civil Codes.

The draft of the new Civil Code already has a private-oriented character<sup>94</sup> because it provides for regulations to decentralize the economy and

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92. Pushkin, *supra* note 90.

93. A. Dovgert, *V Novom Veke Ukraina Budet Zhit Po Zakonom Chastnogo Prava* (last visited in May 2001) at <<http://www.practix.com/gazeta/2001/01/10.html>>.

94. Pidopryhora, *supra* note 18.

create a system that could support free entrepreneurial initiative. In this sense, the new Civil Code is a codification of private law.<sup>95</sup>

Recent theoretical discussions in Ukraine elaborated on the division of private and public law regulation. As a result, drafts of the Economic Code received considerable support in Verhovna Rada of Ukraine from many parliament members. The Code has already gone through a second reading.

Supporters of the Economic Code concept use this situation to defend the creation of a duality of regulation in the private law sphere due to differences in the nature and methods of regulation. Undoubtedly, conflicts between different regulation systems will result.

### C. RECENT CODIFICATIONS OF THE CIVIL LAW IN UKRAINE

During the entire history of the development of private law, many aspects of the rules<sup>96</sup> in the private law sphere have retained inconsistencies.

There are two classical systems of codification known in the world, represented by the Napoleonic Code and the Civil Code of Germany.<sup>97</sup> They are the institutional and pandect systems. The first takes Rome's institutions (persons, things and actions) as a basis, and is sometimes referred to as Rome's system. The second system<sup>98</sup> has a general section and four subsections: laws regarding things, obligations, family, and inheritance.<sup>99</sup> The Drafters of Ukrainian Civil Code took the pandect system as a structural basis.<sup>100</sup>

95. O. Pushkin & O. Skakun, *Kontsepsiia Novoho Tsyvilnoho Kodeksu Ukrainy*, 3 UKRAINIAN LAW 63, 63-65 (1997).

96. The purview of the Civil Codes is never a standing value. For instance, in the early part of the twentieth century, the main parts of the Civil Codes were the provisions devoted to private property.

97. A. Dovgert, *Kontsepsiya Kodyfikatsii Pryvatnoho Prava*, 3 UKRAINIAN LAW 18 (1997).

98. The institutional system is featured in the Napoleonic Code that consisted of (1) the law of persons; (2) the law of things; and (3) methods of acquiring rights.

99. It should be noted that there is no codification that is entirely separate from every other system. This statement was made at the beginning of the twentieth century by well-known Russian scholar Gabriel Shershenevich. The new Civil Code of the Netherlands is an example.

100. O. Shilokhvost, *Osnovni Polozhennya Zagalnoi Chastyny Tsyvilnoho Prava u Proekti Tsyvilnoho Kodeksu Ukrainy i Tsyvilnomu Kodeksi Rosii*, 1 UKRAINIAN LAW 89, 89-101 (1998).

As to the methods of revising legal norms while drafting a codification, there are two main techniques presented in scholarly literature.<sup>101</sup> The first type of codification aims at a systematic listing of legal rules.<sup>102</sup> This kind of codification assumes the establishment of new rules of behavior, reflecting new compromises. The second type of codification usually takes the form of rationalization with no serious changes in the content of the rules.<sup>103</sup>

In Ukraine, it was recognized that it was impossible to codify by using only formal-logical systematization without studying the contents and tendencies of development of the entire legal system as objectively existing phenomena, and without studying the private law system as a concept. The doctrine in Ukraine was derived by significant research results not only in such spheres as human rights, separation of powers, the bases of a rule-of-law regime, and the civic society concept, but also in the study of the division of legal norms into public and private law.<sup>104</sup> Certainly, these achievements were reflected in the draft of the new Civil Code.

Revision of the Ukrainian Civil Code of 1963 began in 1992 with the formation of a working group. This group consisted of distinguished Ukrainian civil law scholars.<sup>105</sup> While working on the draft, Ukrainian scholars reviewed recent codifications of private law in Canada (Quebec), the Netherlands, and Italy, and received considerable support from the working group revising German civil law.

Legal expertise was garnered at various legal institutions in Western countries (Germany, the Netherlands, the U.S.A., Italy and Switzerland) at different stages of the drafting. As Western experts noted, the draft reflects the the tendencies of the private-law codifications of many countries. According to the judgment of Western experts, the draft is distinguished by superior legal techniques.<sup>106</sup>

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101. Attila Harmathy, *Codification in a Period of Transition*, 31 U.C. DAVIS L. REV. 783, at 788.

102. *Id.*

103. *Id.*

104. Dovgert, *supra* note 38.

105. The authors of the Civil Code draft are prominent Ukrainian civil law scholars, among whom are Anatolii Dovgert, Opanas Pidopryhora, Oleksandr Pushkin, Dina Bobrova, Nataliia Kuznetsova, Volodymyr Luts, Zoryslava Romovska, Viktor Musiiaka, Mykhailo Sibiliiov, Yaroslavna Shevchenko, and Viktor Kalakura.

106. Dovgert, *supra* note 28, at 105.

In Ukraine, as in other former Soviet Union countries, the Model Code, drafted by scholars and leading lawyers from Russia, Kazakhstan, Ukraine,<sup>107</sup> and other NIS countries, was used as the pattern.<sup>108</sup>

The Civil Code was drafted so that its legal terminology is in conjunction with international treaties and recent developments in theories of international law.

The draft of the new Civil Code was submitted to Verhovna Rada of Ukraine for adoption in 1996. Parliamentary hearings were held in June 1997 and in spring of 2000.<sup>109</sup>

#### D. REVIEW OF THE DRAFT CIVIL CODE OF UKRAINE

Ukraine's draft Civil Code was created according to uniform private-law principles, and covers all civil law related norms, including private-law relations in the sphere of business. Therefore, the Civil Code drafters tried to identify and extract rules of private character from rules that regulate vertical relations in controlling and administering trade, and include them in the draft.

The draft Civil Code of Ukraine consists of 1,621 articles combined into eight books (according to the official draft of the Code submitted to the Parliament of Ukraine in 1996).<sup>110</sup>

The draft Civil Code, as well as those adopted in the countries of NIS (Russian Federation, Belarus, Georgia, Armenia, Kazakhstan,<sup>111</sup>

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107. The Model Civil Code was worked out under the auspices of the Council of the Scientific-Consultative Center for Private Law of the NIS. Some of the drafters of the new Civil Code of Ukraine were active participants in the drafting of the Model Civil Code. See Y. Shevchenko, *Systemnist – Osnovnyi Pryntsyp Kodyfikatsii Tsyvilnoho Prava*, 3 UKRAINIAN LAW 68, 68-69 (1997). There are four other model laws drafted by the Center: Model Laws on Partnerships with Limited Liability, Joint-Stock Companies, Bankruptcy, and Mortgage.

108. The reason for using the Model Code as a pattern is simple: all former Soviet Union countries have similar legal traditions. The Model Code makes use of familiar terminology, concepts, and institutions. See Maggs *supra* note 62.

109. The first three books of the Civil Code of Ukraine were passed in the parliament of Ukraine (the third hearing) on June 26, 2001; the fourth book was passed in September 2001.

110. The author of this note refers to the text of the draft of the Civil Code of Ukraine that was last published in 1999: *Tsyvilnyi Kodeks Ukrainy: The Draft of August 25, 1996 passed the First Reading on June 5, 1997*, 1 UKRAINIAN LAW 32, 32-612 (1999).

111. See Christopher Osakwe, *Propter Honoris Respectum: Anatomy of the 1994 Civil Codes of Russia and Kazakstan: A Biopsy of the Economic Constitutions of Two Post-Soviet Republics*, 73 NOTRE DAME L. REV. 1413.

Kyrgyzstan,<sup>112</sup> Uzbekistan, and Turkmenistan), have a monistic character, covering regulation of property and personal non-property relations in all spheres of activity of persons (natural or legal), including the business sphere.

The draft of Ukrainian Civil Code is based on the pandect system of disposition of legal norms that includes "traditional" parts of codified law in the sphere of civil law, among which are "General Provisions,"<sup>113</sup> "Persons," "Transactions," "Agency," and "Terms and Limitations." The Ukrainian draft of the Civil Code expands the range of relations to be regulated by this law in comparison to the classical pandect system. The draft also includes Intellectual Property, Family Law, and International Private Law.

According to the traditions of the codification of civil law in Ukraine, the draft begins with the "General Provisions" book. The purpose of this section is to establish basic principles that are applied to all parts of the Civil Code. The main feature of the codified laws is a combination of general and specific legal norms.

Among those principles of private law contained in the first book are the following:<sup>114</sup>

- Impermissibility of arbitrary interference in the sphere of the private life of a natural person;
- Impermissibility of deprivation of the right of ownership with the exception of those cases envisaged exclusively by law;
- Freedom of contract;
- Freedom of entrepreneurship;
- Judicial defense of any civil right in the event of its violation.

The most considerable changes were made in the section devoted to legal persons. The novelty of this section is its acceptance and inclusion of the "reality of legal persons" doctrine – a dominant doctrine in the twentieth century, characterized by its acknowledgment of the general legal capacity of legal entities.

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112. The new Civil Code (the first part) of Kyrgyzstan went into effect on June 1, 1996. See Yakren, *supra* note 35.

113. The possibility of allocation of the general part to a certain sphere of regulation was always theoretically considered as one of the parameters of the codified laws.

114. Article 3 of the Draft Civil Code of Ukraine.



One of the most important provisions of the draft is the formulation of a basic principle of market economy – that is, when the state participates in private relations it entails the withdrawal of immunities granted to the state. It is stated directly in the draft that the state takes part in private-law relations through establishing legal persons.

The personal non-property relations of natural persons (the second book) contains a more detailed regulation. In the third book (“The Law of Property”) the authors of the draft removed from the Code forms of collective property that characterized the Soviet doctrine.

The section devoted to intellectual property (the fourth book) has been considerably expanded, and now meets the standards stated in international conventions.

During the work on “The Law of Obligations” (the fifth book), experiences regarding regulation of similar relations in countries such as Germany, the Netherlands, and Russian Federation were considered, as were recommendations of the International Chamber of Commerce. The role of these norms has a special importance for ensuring market conversions in the country.

The most disputed section is the one devoted to family law (the sixth book). There are still theoretical discussions about whether it is necessary to include this section in the text of the Civil Code or to leave it in a separate Family Code. The seventh book is devoted to inheritance law and retains the basic principles of the existing Civil Code.

One of the essential innovations of the new Civil Code is that it reflects the latest codifications in civil law countries – the eighth book is devoted to private international law. It is logical for the Civil Code to conclude with private international law. After providing regulation for all private relations in the previous seven sections, the eighth book suggests the codification of conflict-of-laws rules. Such relations are more fully regulated in the Ukrainian Civil Code, as compared to codifications in other countries. Another advantage of this section is that besides the conflict-of-laws rules, the Civil Code includes international civil procedure that provides a full range of legal regulations in this sphere.<sup>115</sup>

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115. Section 114 of the Draft Civil Code of Ukraine.

#### IV. CONCLUSION

We are witnesses to the establishment of a market base for the economy of Ukraine through codification of a revived private law in order to minimize state influence in private life and business. Adopted in the NIS countries, the new Civil Codes have become the most significant legislative acts in the recent history of these countries, and have provided a legal basis for transition to a democratic society and market transformation.

Some scholars<sup>116</sup> argue that prior to recent changes in former socialist countries, the concept of economic law prevailed and traditional categories of civil law were abolished.<sup>117</sup> This is true for countries that were not part of the Soviet Union.<sup>118</sup> One can safely assert that based on research, the economic law doctrine has never received support in the legal community of the Soviet Union or after its breakup. Some scholars support this doctrine, but their arguments in favor of an additional set of codified laws in the sphere of private law are not convincing.

Unfortunately, theoretical debates about the economic law concept have created political conflict in Verhovna Rada of Ukraine.<sup>119</sup> Economic law supporters use their political influence in the parliament to insist on concurrent adoption of the Economic Code along with the new Civil Code. By promoting the adoption of the Economic Code, some scholars and politicians are trying to revive the planned economy system and establish socialist principles of administering the economy in Ukraine.<sup>120</sup> But the Economic Code will not be the rudiment of the Soviet doctrine of economic law in modern Ukraine. It has its own goals. Civil law scholars state that the current economic situation in Ukraine provides no basis for returning Ukraine's economy to planned principles.

There are several ways out of the "codification crisis" in Ukraine.<sup>121</sup> One is a separation of the spheres of regulation by the Economic Code, which

116. Harmathy, *supra* note 101.

117. *Id.*, at 371.

118. That author based her conclusions on the experience of Czechoslovakia. Recently, economic codes were adopted in Czech Republic and Slovakia.

119. M. Pavlenko, *Pro Scho Zabuly Domovytyz Hospodarnyky*, 3 UKRAINIAN LAW 86, 86-87 (1997).

120. A. Dovgert, *Znatchennya Novoho Tsyvilnoho Kodeksu Dlya Formuvannya Hromadyanskoho Suspilstva, Rozvytku Pidpryemnytstva v Ukraini ta Reformuvannya Ii Pravovoi Systemy* (last visited in May 2001) at <[http://www.commerciallaw.com.ua/conc\\_04.html](http://www.commerciallaw.com.ua/conc_04.html)>.

121. A. Dovgert, *Kak Vyiti Iz Kodifikatsionnogo Krizisa na Ukraine* (last visited in May 2001) at <<http://www.practix.com/gazeta/2000/00-19/0019-07.html>>.

should cover relations where the state is involved, and by the Civil Code. The main point is that these codes should not regulate the same relations.<sup>122</sup> A second alternative is to allow the Economic Code to supplement the Civil Code. This could help to avoid conflicts between two systems of regulation. It should be noted that the drafters of the European Civil Codes do not align their work with any European commercial code.<sup>123</sup>

This article has tried to show that the concept of an economic code suggested by representatives of the economic law theoretical school creates serious obstacles on the road to market transformation. Some Ukrainian scholars compare the adoption of the Economic Code to a new Chernobyl<sup>124</sup>, arguing that adoption of this code may cause the young democracy to collapse. In view of the points raised in this article, the suggestions of scholars in favor of an "enterprise," "trade," "commercial," "economic" or other similar code can be considered an invitation to Ukraine to return to medieval times or the legal mentality of the nineteenth century.

Almost all scholars in Ukraine argue that success in the market transformation of society can be achieved only by using free market principles based on private initiative in the sphere of business, with stable legislation supporting entrepreneurial activity, and with the true equality of all participants in civil relations.<sup>125</sup>

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122. Such spheres might include antitrust regulations, state control of product liability and trade regulation, and state support for small business.

123. Hartkamp, *supra* note 1, at 9.

124. H. Znamenskyi, *Pro Uzhodzhennya Proektiv Tsyvilnoho i Hospodarskoho (Komertsiinoho) Kodeksiv*, 3 UKRAINIAN LAW 212, 212-214 (1997). Supporters of the Economic Code cite the words of George Soros, who warned not to blindly buy into the "market magic." This clearly indicates that Economic Code supporters drafted their Code in opposition to market reform.

125. R. Shyshka, *Tsyvylistychni Prystrasti na Komertsiino-Politychnu Temu*, 3 UKRAINIAN LAW 76, 76-78 (1997).