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# Legal Sources and Interpretation in Russian Civil Law

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*Russian civil law shares the continental law tradition. Continental law is characterized as a normative legal system, basically emerged in the antique world due to the emergence of alphabetic writing and dialogic communication, that functions through the jurisprudence, where legal sources and interpretation are applied. The French la dictature de la loi and the German Begriffsjurisprudenz still form the conceptual basis of the Russian civil law. The dominance of the legal positivist approach, and consequently, the overemphasized role of the statutory law and dogmatic interpretation of the legal material are, in general, specific for Russian law, whereas the efforts towards the internalization and globalization of law in Russia are still more declarative than real. Nevertheless, the pragmatic approach, enforced in the judicial practice, and the recognition of this and custom as legal sources as well as the equity consideration in the legislation, have been introduced by the recent novelties to the Civil Code. But these changes seem to form a challenge for the Russian legal system and particularly for the doctrine, the position of which has become even weaker than before. And as foreign languages are generally ignored in the country, the Russian legal discourse seems to have remained domestic, strongly bounded to the traditional legal positivism.*

**Keywords:** *Legal positivism; Statutory law; Dogmatic Interpretation Doctrine; Equity consideration*

## Introduction

### *Comparative Realistic Approach*

Methodologically this paper is based on the application of the comparative realistic approach that corresponds to my foreign law expertise—Russian law for foreigners and foreign law for Russians.The realistic approach and—in the studies concerning foreign law—comparative realistic approach is that I share; it is characteristic for lawyers of Nordic countries. My boundedness to the realistic thought particularly means that I am critical to different kinds of metaphysical legal thought including theological law, natural law, liberal law, and socialist law.[2] For me, they represent an ideological (legal reality value) part of legal discourse, often being simply rhetoric. The ideas stay outside of the creation of the legal reality, which occurs through establishing, changing or abolishing the legal relations. The foreign legal reality is national culture bound, wherefore a study of

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[2]My attitude is particularly critical towards the universal legal metaphysics with its attempts to find the final truth about the law.

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foreign law, particularly Russian law, though its similarities to western law, requires an internal approach[3]—that is, if not sympathy, at least empathy to the subject—in order to be productive[4]. Therefore, in presenting Russian law, important are not only legal norms but also the Russian legal thought and rules on the interpretation of law and also of contracts.

*Origin of Russian Modern Law*

Russian civil law shares the continental law tradition. Continental law is characterized as a normative legal system[5] concerning the a priori fixed social behavioural rules that are applicable to concrete cases of social collision through the dogmatic, originally exegetic[6], interpretation[7]. Continental law has emerged in the antique world due to the emergence of alphabetic writing and institutionalization of dialogic (dialectic) communication[8]. Modern development of Russia started through the Greek alphabet[9], modified into Cyrillic to correspond to the phonetics of Slavic languages, including Russian; letters of the (Russian) Cyrillic alphabet rather exactly correspond to the sounds of the Russian spoken language, and it has offered possibilities of the exact fixation of legal text. Due to the influence of Byzanthine culture, including Orthodoxy[10] and Roman law, Russia has joined the European civilization.

As a normative legal system, Russian law functions through jurisprudence, where legal sources and interpretation are applied. The French *la dictature de la*

[3]Usually it requires the internalization (through description) of the positive (normative) legal material, texts of laws (or precedents) of the legal system at issue.

[4]Law deals generally with the phenomena that are subject of the social and behavioural sciences requiring an intentional comprehension where at least empathy is important. Furthermore, in respect of comparative legal studies, attention ought to be paid to the teleological dimension of legal phenomena.

[5]Originally normativistic was the Jewish law that, in addition to the Pentateuch, basically existed in the oral form before its written fixation in the *Mishnah*, the earliest compendium of Jewish law.

[6]In general, the exegetic approach stands for the interpretation grounded on the material a priori existing as religious dogmas and canons, political doctrines, authority's teachings or legal normative texts.

[7]The modern normative legal system must correspond generally to the the principle (trilogy) of juridicity, containing the requirements on legality, legitimacy and ethicality that concern particularly legal decision-making. *See* de Oliveira Costa (2017) at 116, 118–19.

[8]For more on the subject *see* Frolov (2004) at 140 and Yunis (2003) at 2, 4, 8 and 78.

[9]The origin of the difference in Western thinking comes from the rise of literacy, namely completely abstract phonetic, alphabet-based writing system in Greece in ancient times; it processed in acquiring the mental habits of individualism, abstract thinking and internalization – all characteristics of the Western mind. *See* Ong (2002) at 27, 86; and Havelock (1976).

[10] However, Orthodox Christianity was adopted in Russia at the time when the period of its dogmatic pursuits in Byzantine had ended. Therefore, the Russian religious consciousness has understood the Christian doctrine as being complete and not subject to analysis. Thus, openness to the problematisation of fundamental religious questions had not rooted in Russia. Non-critical attitude to the a priori knowledge has also been (and still is) characteristic for the Russian traditional societal, particularly social scientific, thought that has been oriented towards the exploration and elaboration of the (in the first instance universal) truth composing the system of linearly accumulated knowledge. For more on this subject *see*, for instance, Zenkovsky (1989) at 3; Mamzin (2008) at 136; Kourany (1998) at 254–257 and Chestnov (2004) at 16–19.

*loi*—that represents the ideas of the exegetical school[11] and the German *Begriffsjurisprudenz*—that is the product of the pandectistic legal science[12]—still form the conceptual basis of Russian civil law. Thus, the legislative norms stand for the content of the law, whereas the legal-dogmatic conclusions must correspond with the legislative norms for securing the coherency[13] and consistency[14] of the legal system[15] in Russia. Moreover, the idea of 'the only one proper solution' still dominates the Russian legal thought. It also promotes legal stability and predictability that are to be regarded as benefits of the Russian legal system. The situation has not radically changed even in respect of the business law in Russia, which has been under strong influence of common law during the last decades.

Russian law has, though its similarities with continental law are obvious, specific features. For instance, traditionally in Russian culture, law is associated with *pravda* (often meaning positive law codification) that is also identified with right and justice implying equity and even truth (*veritas*). The absence of strict differentiation of these concepts, adopted in the Russian Orthodoxy, is still characteristic for Russian legal culture in general.

## Basis of Russian Civil Law

### *Legal Sources and System of Civil Legislation*[16]

The primary legal source of Russian law is a written law or statutory law. The majority of the civil law norms are contained in the Civil Code[17]. In recent years, the Civil Code has been subject to changes, the purpose of which was to show that Russia intends to participate in the internationalization and globalization of law.

[11]According to the exegetical school that prevailed in France throughout the XIX century, the only true law is deemed to be positive law, namely, the codified text of the law, and this is to be applied directly without making any recourse to natural reason or equity; otherwise, judges have no power to make any general rules. See Chiassoni (2016) at 1631-1666.

[12]Pandectistic legal science, and particularly the doctrine of conceptual jurisprudence (*Begriffsjurisprudenz*), that emerged in the German historical school, represents the dogmatic jurisprudence to the utmost. Originally, the concept of *Begriffsjurisprudenz* is based on the notions (1) that the given law contains no gaps, (2) that the given law can be traced back to a logically organized system of concepts ("pyramid of concepts"), (3) that new law can be logically deduced from superordinate legal concepts, which themselves are found inductively ("method of inversion"). *See* Haferkamp (2011) and also Chiassoni (2016) at 1631-1666.

[13]It means that legal rules are logical in content and reflect the value basis of the legal order.

[14]It means that legal norms are not logically, formally, dogmatically contradictory between each other.

[15]Niemi (2000) at 104.

[16]For more on the subject *see* Orlov (2011) at 8–15.

[17]The Civil Code is the product of a transition era in Russian law. It drew upon the pre-revolutionary Russian civil law tradition and upon models of continental Europe and gives occasional evidence of influence of the common law system. The Civil Code also retains many elements of the Soviet civil law. It is particularly important for the common law lawyer to comprehend that the Civil Code is not merely a compilation of particular rules. It rests upon principles and definitions developed in the legal doctrine, wherefore the Code constitutes a system of interrelated norms.

Some of the amendments to the Civil Code are important and taken into account in this presentation.

In addition to the Civil Code, civil law norms are contained in other civil laws. In certain cases, international law is also applied, particularly to entrepreneurship relations. Civil (business) law rules can be included into other normative acts, which in Russian law are called normative acts subordinated to laws (substatutory acts). Customs are recognized as legal sources, while the use of standard contract conditions and analogy application are also known in Russian civil law[18]. However, judicial practice is not regarded (at least traditionally) as a proper legal source, although the decrees of supreme judicial bodies are recognized as having precedent value in Russia. On the other hand, by its decisions the Constitution Court changes and even rescinds normative acts which are in contradiction with the Constitution. Therefore, such decisions could be seen as having legislative effect. In Russia, civil law regulation is also realised on nonnormative level, for instance, by single law-application acts and usage, course of dealing and course of performance.

Legal theory (doctrine) has been and is still excluded from legal sources in Russian law. Legal doctrine mainly belongs to the theoretical jurisprudence, and, in respect of practical jurisprudence, it still mainly plays a commentary role[19] taking into account that the Russian Civil Code contains almost all necessary legal rules as such, including doctrinal norms. This means that legal doctrine is at least partly comprehended in the legal norms (of the Civil Code).

The term `legislation` is used in Russian law in both the large and narrow senses. In the narrow sense, legislation means only statutory laws (statutes), whereas, in the large sense, it also includes other legal acts. In the narrow sense, the Russian civil legislation contains the Civil Code and federal laws issued in accordance with it. But in the large sense, it comprises, in addition to the Civil Code and federal laws issued in accordance with it, also of other normative acts containing civil law norms. These include other law and normative acts subordinated to the law (substatutory acts), such as ukases (edicts) of the President and decrees of the Government, called other legal acts, and normative acts which ministries and other executive authorities issue. The names of the legal acts are used rather consistently in the Civil Code and other law. In case the civil-law rule refers to a law, it means the Civil Code and other laws. The reference to the law and other legal acts directs to the application of the law as well as the ukase and decree. Sometimes also normative acts are mentioned in the civil-law rules, which mean any legal act issued by any state body.

The Constitution of the Russian Federation is used to be included into civil-law sources. By it, the property rights of citizens are protected. It also protects everyone's right for a free use of his abilities and property for enterprise and other activities not prohibited by law on condition that it is not aimed at monopolization

[18]In a large sense, civil law sources include also contractual terms, for, in accordance with the Civil Code (Art. 8.1), a contract or another transaction gives rise to the rights and duties of its parties.

[19]Regularly published commentaries of the Civil Code are important tools for practicing lawyers in Russia.

and unfair competition. Additionally, the Constitution determines what forms the civil legislation and the hierarchy of its norms.

The normative acts, containing civil-law norms, must be published in Russia. According to the Constitution, federal laws are adopted by the State Duma, and so they are regarded as approved from the moment the State Duma has adopted the decision.

The hierarchy of civil legislative acts is determined directly by the Civil Code (Art. 3). Following the provisions of the Constitution, the federal statutory law takes absolute priority. Federal law may be used to regulate any issue, unless otherwise indicated in the Constitution. According to the Civil Code, civil legislation falls under the Constitution within the jurisdiction of the Russian Federation, and it consists of the Civil Code and other federal laws adopted in accordance with it. In respect of all other laws, the Civil Code requires in principle that the norms they include must be consistent with it. This means that, in order to impose a new rule, the corresponding amendment is to be made in the Civil Code. Furthermore, many norms of the Civil Code contain references only to law, and consequently prohibitions to enact or apply a normative act subordinated to the law.

Other normative acts still form a significant part of the Russian civil legislation. However, although the legal acts of the President, Government, ministries, and other executive authorities of Russia are regarded as civil-law sources, they do not belong to the proper civil legislation.

In respect of the ukases of the President, it is provided under the Civil Code that civil-law relation may be regulated by them, but only on condition that such ukases are not contradictory with the Civil Code and other laws. An ukase of the President may contain guidelines or rules on the application of the civil law norms, the purpose of which is to govern relations unregulated by law.

The legal grounds for the power of the Government to issue decrees containing civil law norms can be, according to the Civil Code, only Civil Code and other laws as well as the ukases of the President, and it restricted only to the implementation of these. The Civil Code and other laws contain sometimes direct provisions on the enactment of decrees of the Government. In certain cases the Civil Code refers directly to the possibility to issue a law or other legal act, and it also means that the decree of the Government may be applied to the legal relation in question.

In respect of the legal acts of the federal executive bodies or substatutory acts, the Civil Code provides that these bodies may issue acts containing civil law norms, in the cases and within the limits provided by the Civil Code, other laws and legal acts (ukases and decrees). Thus, the issuance of any administrative normative act must be grounded by the provision of the law or other legal acts.

The priority of the statutory law over the normative acts subordinated to the law is directly enforced in the Civil Code. According to it, in the event of a conflict between an ukase of the President or a decree of the Government and the Civil Code or other law, the provisions of the Civil Code or respective law must be applied. Thus, the ukases and decrees clearly differ by their legal force from the laws and, consequently, in the event a court finds a contradiction between an ukase

or decree and the Civil Code or other law, it is not only its right but also obligation to leave the contradictory normative acts subordinated to the law inapplicable. As to the administrative acts contrary to law, it may be left inapplicable or recognized as invalid by the court.

The rules on horizontal hierarchy of legal norms are purported to clarify which one of the norms placed at the same level in the vertical hierarchy must be applied first, and they have usually concerned the question of priority of different laws in Russian law. Traditionally these rules have covered two standards: 1) *lex posterior derogat priori* or the latter rule must prevail over the previous one and 2) *lex specialis derogat legi generali* or the special rule must prevail over the general rule. The enactment of the Civil Code has additionally presented to the horizontal hierarchy the third dimension, in which the question is of the relationship between the Civil Code and other federal laws.

The standard giving priority to the latter rule is general. Ordinarily, a new law comes into force in Russia in ten days after the date of its publication, and other new legal acts in seven days after the date of their publication or on the same date. In some cases, a new law or other legal act may contain a provision that it comes into force on a certain day.

The principle of giving priority to the latter rule is also clearly present in the rules of the Civil Code on the scope of application of civil law norms in time (Art. 4).

The standard prioritization of a special rule is not directly provided in the Civil Code as a general rule, but it is definitely recognized as a general principle in Russian Civil law. As a matter of fact, the Civil Code is constructed by using division of its norms into general and special ones. So, the General part of the Civil Code, divided itself into general rules regulating obligations and contracts, is placed into the first part of the Civil Code, whereas norms regulating different types of obligations or contracts form the most part of the second part of the Civil Code. The structure of the second part also represents the division into general and special rules. For instance, the norms regulating (purchase and) sale, lease and work contain, besides the general rules, also the specific rules on the modifications of these types, such as supply (of goods), hire and construction work, which are regarded in Russian law as even single types of contract.

The enactment of the Civil Code has brought along, as stated above, the third dimension to the horizontal hierarchy of legal norms. It comes down to the fact that the Civil Code includes the provision, according to which the civil law norms contained in other laws must be consistent with the Civil Code (Art. 3.2). According to the Civil Code (Art. 3.2.1), the rules that comprise the norms deviating from the Civil Code may not be included in amendments of other (than the Civil Code) laws or laws that concern an independent subject of regulation.

Civil law rules, which form norm-based regulation, are in general applied voluntarily. Parties to civil law relations comply with them in the first instance. However, the application of legal norms also belongs to the tasks of authorities, and judicial bodies are to apply legal norms particularly in case the parties are, for instance, in dispute. The answer to the question of how obligatory is the

application of the norm is to be found in clarifying its applicative nature. The main part of the Russian civil law norms form imperative and dispositive norms.

The concepts of imperative and dispositive norms are well-established in Russian law, and they are used in the Civil Code. According to the rules enforcing the principle of freedom of contract, in the events when a term of contract is provided by a norm which is to be applied as long as the parties have not reached an agreement to the contrary (a dispositive norm), the parties may by their agreement exclude its application or establish a term different from that provided in it, and in the absence of such an agreement the term of the contract is to be determined by the dispositive norm (Art. 421.4). In turn, the rules on imperative norms are included in the norm of the Civil Code concerning relation between contract and law, according to which a contract must comply with rules obligatory for the parties established by a law and other legal acts (imperative norms), which are in effect at the time of its conclusion. The dispositiveness of a legal norm is determined in Russian law in a traditional way, which means that the norm itself expresses the application of it, unless otherwise provided by a contract. Such a provision could also cover a number of rules. Therefore, it is clear that in Russian law imperativeness rather than dispositiveness still continues to be presumed.

Civil law regulation is performed in Russia also by facultative norms. These mean norms, the application of which requires that parties have agreed on their application, and such an agreement must be expressed in a positive way. Furthermore, also reference norms are known in Russian civil law. By using them generally in contract regulation, the rules regulating certain legal relation (contract) is to be applied to the other, usually similar ones.

Universally recognised principles and norms of international law as well as the international treaties of the Russian Federation are, according to the Russian Constitution an integral part of its legal system. Furthermore, the Constitution provides that, if an international treaty of the Russian Federation establishes rules which differ from those provided by law, then the rules of the international treaty are to be applied. These rules are repeated in the general part of the Civil Code (Art. 7). Thus, the Russian law is subordinated to the general rule that if Russia joins some international treaty, the provisions of it must prevail in Russian law over its civil law norms applicable to the case. However, international treaties contradictory to the Constitution are not be applicable.

*General Principles of Civil Law*

The general principles of Russian civil law, which form its bases, are fixed in the Civil Code. These are understood as civil law bases or its principal general rules. They are included directly in the law and are, therefore, normative by nature. Thus, the law requires the general principles to be followed in any legal practice activities. In general, the regulation of civil law in Russia is based on the private law premise which requires a legal system whereby a private person has the right to dispose independently, according to his will, of the legally relevant conditions regarding his behaviour. The other starting point of Russian civil law is the rule enforced in the Civil Code according to which goods, services and financial assets

shall move freely throughout the whole territory of the Russian Federation. The aim of this rule is to strengthen the unity of the Russian economic region and reflects the orientation toward the market economy enshrined in the Civil Code.

The general (basic) principles of Russian civil law, as presented in the literature on Russian civil law[20] and grounded in the respective rules of the Civil Code (Art. 1) are:

- civil law equality,
- impermissibility of arbitrary interference in private affairs,
- inviolability of ownership,
- freedom of contract,
- dispositiveness,
- unhindered exercise of civil rights,
- prohibition of abuse of rights and fairness requirements,
- prohibition to benefit from unlawful or unfair behaviour, as well as
- restoration of violated rights and judicial protection of civil rights.

In respect of the application of general principles, exceptions to them are known and are provided by the law.

In Russian law, the principle of civil law equality is considered the criterion constituting civil law relations in accordance with which the status of the parties of the civil law relations is determined. This states that no subject of Russian civil law, including physical and juristic persons, as well as state and municipal bodies, has priority over any other: the parties in the civil law relation are equal. Thus, a party to a contract, including a public law subject, has no coercive power in respect of another party. On the contrary, their relations are regulated by the same civil law norms. This, however, does not concern issues in which the public law subjects exercise their powers as public authorities (Art. 2.3).

According to the Civil Code, the civil legislation rules shall also be applied to relations in whom foreign physical and juristic persons as well as stateless persons participate: under the Constitution (Art. 62), the national regime is extended to foreign persons, not including the exemptions that are provided by the (federal) law or by international agreement (Art. 2.1).

Legal equality does not, however, purport that subjective civil rights are equal, and the Civil Code includes exceptions to it. The most important exception concerns entrepreneurs who are subject to more than ordinary strict requirements. Moreover, as to the relations between entrepreneurs and consumers, the legal status of a consumer is protected, among others, by the rules of the Civil Code on public contracting (Art. 426). Especially noteworthy exceptions are (state and municipal) Treasury enterprises, the legal capacity of which may be restricted very strictly. Other restrictions known in Russian law include the creditor order in bankruptcy. Restrictions are imposed also in respect to foreign entrepreneurs.

The impermissibility of arbitrary interference in private affairs is directly enforced in the Civil Code (Art. 1.1) and it reflects the private law nature of the

[20] *See*, for instance, Stepanov (2016a) at 25–27; and Stepanov (2016b) at 9–10.

civil law. In the first instance, it is addressed to public power. According to this principle, the ability to interfere in private affairs, including the economic activities of civil law subjects, is restricted to cases provided by the law. To secure their obedience to the prohibition, the Civil Code contains the rule according to which a court may, in hearing of the dispute, declare an unlawful act of a state or municipal body invalid or leave it unapplied (Art. 12 and 13).

The principle of inviolability of ownership concerns both private and public property, and purports that the owner may use his property in his interests. No one can be deprived, according to the Constitution (Art. 35.3) of his property otherwise than by a court decision and on legal grounds. And, according to the Civil Code (Art. 12), the owner has the right, in the event his ownership disturbed or restrained, to demand that the activities which violated his rights or created a threat of their violation to be ceased.

The principle of freedom of contract is characteristic of the exchange relations between independent economic entities and is particularly essential for the regulation of contract law. The principle is directly enforced in the Civil Code rules concerning the basic principles of the civil law legislation and in those regulating contracts. According to it, the subjects of civil law have free power to conclude a contract or choose the contracting party and determine the conditions of the contract (Art. 421). A general exception to the principle of freedom of contract are the rules on compulsory (public) contracting, by virtue of which contract relations are regulated (Art. 426); the Civil Code also provides the possibilities of exemption for the purpose of price control, but this requires the enactment of a law (Art. 424.1).

The principle of dispositiveness, or independence and free will in acquisition, exercise and protection of civil law rights, is closely related to the principle of freedom of contract, and in Russian law is taken to mean above all that the subject of civil law relations is free to form his own will (independently from another subject). According to the Civil Code (Art. 1.2 and 9.1), the subjects of civil law relations acquire and exercise their rights of their own will and in their own interests (and at their own discretion). Thus, no one can be obliged by the law to use his rights. Also, a contract which restricts the use of civil rights is invalid and the refusal of a physical or juristic person to exercise his rights shall not entail the termination of these rights, unless otherwise provided by the law (Art. 9.2).

The principle of dispositiveness is reflected in that the main parts of the civil law norms are dispositive. Their application is dependent on the will of the parties. The application of a dispositive legal norm may be excluded or it may be deviated by them.

On the other hand, the principle of dispositiveness also includes restrictions. The general restrictions are firstly the imperative (compulsory) norms of the law—for instance, the norms by which the legal status of the civil law subjects, including the legal (act) capacity, and the content of real rights are to be defined. The basics of the legal order and morality also limit the principle of dispositiveness in Russian law. The Civil Code provides directly, based on the Constitution (Art. 55.3), that civil law rights may be limited by the (federal) law to the extent to which it is necessary to protect the constitutional order and public

morality, defend the rights and legal interests of citizens and other persons, as well as human life and health, and to ensure the national defence and security (Art. 1.2). Additionally, the Civil Code (Art. 10) directly obliges civil law subjects to act reasonably and fairly and prohibits the abuse of civil rights. The Civil Code also includes cases where the state is empowered to intervene into contract relations.

The principle of unhindered exercise of civil rights reflects the market economy orientation of Russian civil law and the territorial unity of Russia. It is grounded on the Russian constitutional norms (Art. 8) in which the unity of the Russian (federation) economic region and the free circulation of goods, services and financial assets, as well as the promotion of competition and freedom to practise economic activities are guaranteed. Moreover, in accordance with the Civil Code (Art. 1.3), goods, services and financial assets are to move freely throughout the whole territory of the Russian Federation. In turn, the right to practise enterprise activities is enforced in the Civil Code rule regulating such activities by physical persons. Furthermore, in the Civil Code rules on the legal capacity of the juristic person, it is provided in respect of commercial organisations that they should enjoy the civil rights indispensable for the performance of any kinds of activity not prohibited by the law (Art. 49.1). On the other hand, the same norm provides that some kinds of activity listed in the law could require a special permit (license). In order to protect public interests, other restrictions can also be imposed by law; such restrictions are included, for instance, in the Competition law. As to the restrictions in respect of the free circulation of goods, services and financial assets, they may be imposed, according to the Civil Code (Art. 1.3), only by the federal law if this is necessary to ensure safety, the defence of human life and health, or the protection of nature and cultural values.

The prohibition of abuse of rights and fairness requirements can be regarded as a general exception to the basic principles of Russian civil law. In accordance with it, the unrestricted freedom of civil law subjects to exercise civil rights is precluded. The rights granted under Russian law are subject to restrictions in respect of their content and mode of exercise of them, and their violations are sanctioned. As a general rule, it is regarded in Russian civil law that in exercising rights the other's rights and legal interests shall not be violated. The Civil Code expressly provides that in establishing, exercising and protecting civil rights and in performing civil obligations, the participants of civil law relations must act in good faith *(bona fide)* and that nobody is entitled to use his benefit from illegal or unfair behaviour (Art. 1). The Civil Code contains the general presumption of fairness of the participants of civil law relations and of reasonability of their actions (Art. 10.5).

Prohibition of abuse of rights is also expressed directly in the rule of the Civil Code on limits of exercise of civil law rights (Art. 10), according to which the exercise of civil rights exclusively with the intention to cause harm to another person nor the circumvention of the law with unlawful purposes are not allowed, nor is any other exercise of civil rights deliberately in bad faith allowed; furthermore, the exercise of civil rights for the purpose of restricting competition and the abuse of a dominant position in the market is not allowed.

Restrictions and prohibitions to use rights are also imposed by other civil law norms. For instance, in the rules on the content of the right of ownership, it is provided that the owner shall have the right at his own discretion to perform with respect to the property in his ownership any actions, not contradicting the law and the other legal acts, and not violating the rights and the law-protected interests of the other persons (Art. 209.2). In turn, the owner of land and of other natural resources may dispose, under the Civil Code (Art. 209.3), his rights freely, unless this causes harm to the environment or violates the rights and the legal interests of the other persons. The obligation law norms of the Civil Code also contain restrictions and prohibitions to use rights. The most important of these are the rules on public contracting and competition. Furthermore, the rules on invalidity of certain transactions found in the Civil Code (Art. 169 and 179) can be regarded as reflecting the prohibition of abuse of rights. This applies to transactions that are purposefully contrary to the bases of the legal order or morality; those made under the influence of fraud, duress, threat or an agreement made in bad faith, or those made as the result of the coincidence of grave circumstances.

The obligation law norms of the Civil Code also contain the rules where the fairness requirements are concretized. They are applicable to the establishment and fulfilment of an obligation and after the termination of it (Art. 307), to the acquisition of right of pledge and pledged assets (Art. 352), and to the pre-contractual relations (Art. $434^1$), as well as to the change and rescission of a contract (Art. 450 and $450^1$). Moreover, the principle of fairness concerns transactions (Art. 166) and securities (Art. $147^1$).

As a legal consequence of the abuse of rights, the court may, taking into consideration the nature and consequences of the committed abuse, refuse the person protection of the right he possesses, partly or in full, or apply other legal measures (Art. 10.2). In the event the abuse of a right is revealed in the circumvention of the law with unlawful purposes, such measures are to be subsidiary (Art. 10.3). Moreover, the Civil Code provides that personal damage due to the abuse of rights ought to be compensated (Art. 10.4).

Judicial protection of civil rights and restoration of violated rights as a legal principle refers in Russian law to the possibilities for subjects of civil law relations to defend their rights and legal interests in court procedure, including demands to revoke the meeting's decision. Civil law subjects may also use self-defence and other lawful protection means. In general, the purpose of the protection means established in the civil law is to restore violated rights, but the Civil Code also contains the rules on the means of security for the performance of obligations (Art. 329–381) which are particularly important in contract law.

## Main Concepts of Law[21]

The post-Soviet classical legal theory is at present represented by V. Lazarev, M. Marchenko, and L. Morozova, among others. In principle, Russian law

[21]For more on the subject *see* Butler (2009) at 38–85; and Davydova (2017) at 260–275. *See* also http://www.grandars.ru/college/pravovedenie/teorii-prava.html

recognizes only textually formalized legal reality established by the state; law is the entity of legal norms, the implementation of which is secured by the coercive power of the state. On the other side, natural law ideas have been reflected in Russian law. The ideas of the libertaran theories of law built upon classical liberal and individualist doctrines have also spread into Russia.

Among the scholars, who are concerned with the post-classical problematic in Russian legal doctrine, are I. Chestnov and A. Polyakov. Some young Russian scholars are acquainted with the new approaches in legal theory, including phenomenological hermeneutics. They are also familiar with the complexity, discreteness, and openness of legal phenomena and pluralistic legal understanding.

As to the realistic theories, they have been regarded as alien in Russian legal doctrine. The realistic approach has been even alleged of being insufficient in respect of the scientific (obviously scientist) productivity.[22]

The basic idea of Russian (post-Soviet) law is that it (law, legal reality, legal substance exists as (a) a legal consciousness, idea, concept of law (b) legal norms, and (c) social relations. In correspondence with it, the main Russian theories of law are grouped. The legal consciousness, idea, concept of law is represented by such theories as the natural law theory and the psychological theory of law. In turn, the legal norms are the subject of the positivistic and normativistic theories, whereas the social relations (as the source of legal norms and their realization) are subjected to theories of sociology of law. Almost all these concepts pretend to be dominant, even exclusive.[23]

*Positivist (normativist) Theory*

Russian (including Soviet) legal doctrine has always recognized more or less directly the positivist and normativist theories of law, according to which the only legitimate sources of law are the written rules, regulations, and principles that have been expressly enacted, adopted, or recognized by the state.

In the legal positivist theory, law is generally defined as the entity of (only) the (written) norms that have been enacted by the state and supported, if necessary, by its coercive power. It is a closed, logical system in which correct decisions can be deduced from predetermined legal rules without reference to social and moral considerations. According to positivist teachings, legal norms are specific by nature, for they contain prescriptions that belong to the sphere of "ought", where they are subject to the application of deontic logic. They may not be subjects of normal scientific descriptions.

[22]On the contrary, philosophical realism—that has tried to avoid the strict opposition between 'materialism' and 'idealism', and that is based on the idea that reality, containing physical world and artefacts (including law), is originally independent from consciousness—was very popular with Russian natural scientists, including D. Mendeleev and I. Pavlov. *See*, for instance, Korobkova (2016).

[23]The concept of integrative jurisprudence is known as modified in Russia. Integrative jurisprudence is understood in Russia as a theory that combines legal norms (normativism), legal relations (sociology), and legal consciousness (natural law). In the western legal literature, integrative jurisprudence is presented as a legal philosophy that combines the three classical schools: legal positivism, natural-law theory, and the historical school. *See* Berman (1988) at 779.

In turn, in the theory of legal normativism that is the successor to the legal positivist theory, law is regarded as a hierarchical system of the normative acts, where each norm of the legal system is validated by being posited in accordance with a higher-level norm of the system.

According to the Marxist theory of law that dominated in Soviet Union and is still influential in Russia, law represents the will of the ruling class; it is a system (or procedure) of social relations corresponding to the interests of the ruling class and protected by the organized power thereof. Soviet law was otherwise strongly influenced by the positivistic approach that has been supported, as stated above, by the possibilities of the exact fixation offered by the Russian language. The position of the state is still strong in Russia, although its direct participation in enterprise activity is formally minimal. It is still expected that the task of the state is still to set the legal norms and that citizens should obey them strictly.[24]

*Natural Law Approach*

Natural law theories, the acquaintance of which has grown at present in Russia, are often contrasted with the theories of legal positivism. Natural law approach requires that all laws must be informed by, or made to comport with, universal principles of morality, or religion, and justice, such that a law that is not fair and just may not rightly be called 'law'. Natural law approach underlining the supremacy of the imaginary ideals of perfect law over the existing positive law could be characterized as a metaphysics or a secularized version of theology, which is open to all kinds of ideocracy, including enlightened monarchy, Polizeistaat, Nazism, communist state, revolutionary legal consciousness, and globalization. The reincarnation of the traditional natural law thought in present Russia, which the interest to the ideas of the libertarian theories of law has shown, could be interpreted as an ideological support for the return to the 'brilliant' past of the development of Russian law with the Hegelian ideas at the top or for the attempts to build the new free market economy society. Russian law still has a tendency for the use of revolutionary consciousness.

*Psychological Theory of Law*

Psychological theory of law is well known in Russia. It is also, like the natural law theory, metaphysical by nature and is based on the distinction between officially existing positive law and "true" intuitive law implemented in the legal consciousness that is the product of the psychology. Consciousness of legal rules motivates peoples' behaviour that they act in accordance with them.

*Sociological Concept of Law*

Sociological concept of law, the position of which is rather strong in Russian legal doctrine, postulates that law stands for the aggregate of social relations, of people's behaviour in the sphere of law.

[24]*See* Orlov (2010) at 5.

## Interpretation Rules

Rules on interpretation of civil law norms are missing from the Russian civil legislation. These questions are of general nature and explored in Russia in the general legal science or the law and state theory. As to the interpretation of contract, the situation is different, and the rules on interpretation of contract are contained in the Civil Code.

### *Interpretation of Civil Law Norms*[25]

The Russian legal science is familiar with the generally traditionally known linguistic[26], logic[27], systematic[28], historical and political[29], and teleological[30] interpretation. Special legal interpretation, which focuses on analysis of the special terms, as well as legal techniques and modes of expression of will of the legislator, is also distinguished in Russia.

Authentic interpretation based on the literal meaning of the text is the main rule in Russian law. Only in the case of actual content being different from the text of the norm, the application of extensive or restrictive interpretation is allowed. In these cases, for instance, logic or systematic are taken place.

The official interpretation of the legal norms is the most important one. It is implemented in the form of an official document and obligatory to administration of justice bodies. It may be passed as a normative or *in casu* explanation. The official interpretation is an authentic, if it is given by the same body which has issued the legal act, or a legal, if the interpretator is the body empowered to it. Legal interpretation acts may be given in Russia by the Government, ministries and by other executive bodies.

The official interpretation of legal norms gets its form also in judicial interpretation. The question is of the interpretive explanations of the Russian supreme judicial bodies. In certain cases these judicial bodies—to be precise, their plenums—give interpretive instructions concerning the legislation in force based on the generalized practice, which are obligatory for the lower courts and the aim of which is to secure adequate observance of the law. Owing to the fact that the legal interpretation of the supreme judicial bodies is obligatory, in reality they create new legal norms, which have a retroactive effect. Particularly important in Russian law are the normative explanations of the Constitutional Court concerning constitutional issues. According to the Russian Constitution, the Constitutional Court must interpret the Constitution of the Russian Federation on request of the supreme state bodies (including the President of the Russian Federation, the Federation Council, State Duma, and the Government as well as legislative bodies of the subjects of the Russian Federation). In giving its normative explanations

[25]For more on the subject *see* Orlov (2011) at 15–18.
[26]by using the grammar rules.
[27]by using the logic grammar rules.
[28]by identifying the place of the norm in the respective legal act.
[29]by clarifying the historical and political background to the issuance of the respective norm.
[30]by clarifying the aims of the legislator set out in the norm.

concerning constitutional issues the Constitutional Court is empowered, as stated above, to deviate from the text-bound interpretation of the legal norms.

The *in casu* interpretation which a court gives in its decision of a concrete case is legally obligatory only for that case. Court decisions are not precedents binding on other courts in Russia, although the decisions of the supreme judicial bodies may in fact serve as a kind of a model for application of the norms, particularly in the case of explanatory instructions.

The unofficial interpretation, which comprehends legally non-obligatory explanations and comments, plays a relatively minor role in Russian law. Their significance is dependent first and foremost on who has given them, as well as on the correctness and credibility of the interpretation itself. The unofficial interpretation figures as doctrinal, special expertise and ordinary interpretation. The doctrinal interpretation occurs through legal research and expert opinions, the subject matter of which is practical jurisprudence, and they are important in the legislative work as well in the administration of justice. Significant are also uninitiated opinions on legal issues which the ordinary interpretation represents, particularly, of the lay members of the court who participate in proceedings of certain cases in Russia.

Discretionary norms have become known in Russian law after the enactment of the Civil Code, in which international practice was taken into account. The ratification of the Vienna Convention (on International Sale of Goods 1980) especially necessitated the application of discretionary norms and consequently use the *in casu* discretion in courts. This has not, however, been confined only to the regulation of international contracts, but has become general also in the regulation of internal civil law relations.

Among the discretionary norms known in the Civil Code is one containing the requirements of fairness, reasonableness and equity. They are purported to be used generally in the analogy application as a frame for decisions based on the general principles and substantive content of the civil legislation. The obligation law norms of the Civil Code contain a number of references to the considerations of reasonableness and equity—for instance, to reasonable time, price and expenses, sensible management of affairs, disproportional penalty. Also references to 'the usual' are used widely in the Civil Code, an example of which is the usual price. The other expressions largely used in the Civil Code, referring to discretion include the 'necessary', 'essential', and 'obvious'.

The Russian legislator is not used to disclosing the content of the discretionary standards imposed by him with some exceptions. One of them is the concept of good faith (*bona fide),* which is a general rule of the Civil Code and defined directly in the rules on vindication. In accordance with it, the acquirer in good faith (*bona fide* acquirer) is a person, who did not know and could not have known that the assignor did not have the right to alienate the property. This concept may also be used also in other cases when the legislator refers to good faith or fairness[31]. Another example of the legislator's attempt to define the

[31]The obligation of a party to act in a good faith in course of exercising its rights to unilateral alteration and/or repudiation of a contract is now directly specified in the Civil Code. In case a party goes beyond the bounds of a good faith, a court, state commercial court and arbitration may refuse

discretionary standard imposed by him is the concept of the essential breach of contract included in the rules on change and rescission of a contract. A violation (breach) of a contract is to be, under it, considered essential (fundamental), if it entails for another party such damage that he is deprived to a significant degree of that which he had the right to expect in concluding the contract. This concept may also be used in other cases when the law refers to essential breach (violation) of contract. However, in cases where the legislator has left the used discretionary standard undefined, the discretionary power of the judicial authority is enlarged. However, it does not mean that it is unnecessary to ensure the uniformity of interpretation of the discretionary rules, and this is the task in which the role of doctrinal interpretation is considered important in Russia. Moreover, in cases where the legislator has clearly expressed his will, the interpretation corresponding to this requires following the golden rule, according to which the words and expressions contained in the law are to be used in general (ordinary) sense.

The use of discretionary norms is often connected with the question of burden of proof or the question of who must prove whether the actions under dispute correspond or not with the discretionary standard. Usually a court follows the division of the burden of proof required by the contradictory procedure. In certain cases, however, the rules of the Civil Code concerning the burden of proof is to be applied. Thus, for instance, in the rules of the Civil Code (Art. 10) on the limits of exercise of civil law rights, the behaviour corresponding to the requirements of fairness and good faith is presumed, and it means that the other party must prove the unreasonableness and unfairness of the actions of the other party.

It seems clear that the significance of the judicial practice grows and the possibilities to adopt decisions by using *in casu* discretion are enlarged otherwise, as stated above, in Russian law. Significant in this respect is the rule of the Joint Stock Company Law on the rights of shareholders to appeal the decision of the general meeting of the company. It provides that the appealed decision may remain in force, if the vote of the shareholder who appealed would not affect the voting results, the violations are not essential and the decision has not incurred losses to the appellant. Such a rule can be regarded as referring to the consequential approach which belongs to the argumentation theory, and, consequently, shows that the dogmatic (interpretation) approach is giving way to more free legal thinking in the interpretation of civil law in Russia.

### *Interpretation of Contract*[32]

The rules on interpretation of contract are included in the Civil Code (Art. 431) as the rules guiding the consideration of a court. Their starting point or the basic stage of interpretation is the literal meaning of the words and expressions contained in the contract or strictly dogmatic interpretation. Only in the case where the literal meaning of a condition of a contract is not clear is this be established by comparison with other conditions and the sense of the contract as a whole. Where

to protect rights and interests of such dishonest party in full or in part, or to assume other protective measures. The dishonest party may also be bound to compensate damages of counterparty.

[32]For more on the subject *see* Orlov (2011) at 204.

the content of a contract may not be determined in accordance with the above rules, in accordance with the supplementary rule the real common will of the parties must be clarified, taking into account the purpose of the contract. In such a case all surrounding circumstances are to be taken into account, including negotiations and correspondence preceding the contract, the practice established in the relations of the parties[33], the commercial customs and the subsequent conduct of the parties, which play ancillary role[34]. Additionally, it is regarded in Russian legal doctrine that the rule *contra proferentum* must be applied in the interpretation of a contract containing ambiguous terms which must be construed against the person who prepared such a contract.

## Interpretation Rules and Concepts of Law

With respect to the civil law interpretation, the above presentation leads to the conclusion that only the positivist(-normativist) theory and (subsidiarily) natural law theory are relevant. The reason to the dominance of positivistic or dogmatic interpretation dominance is the fact that the content of directly applicable law is nearly totally textualized. Particularly, Russian civil law is codified to such an extent that the norms of Russian civil code contain actual legal principles. Thus, objective interpretation is the main rule in Russian law. In principle, only the Constitutional Court is empowered to deviate from the text-bound interpretation of the legal norms. Also, according to the rules on interpretation of contract, the starting point of interpretation is the literal meaning of the words and expressions contained in the contract.

As to the impact of natural law to the legal interpretation, it is important to understand that natural law notions are not legal rules. Their only purpose is to ensure the value orientation of law and to be implemented as principles or standards for legal considerations. Ordinarily, they represent equity considerations, the positive role of which is (or ought to be) to promote pragmatic legal solution. In Russian law, references to the natural law considerations are in fact subject to the competence of the high judicial bodies, the Constitutional Court and Supreme Court. However, even the discretionary power of the Constitutional Court is subject to constitutionality requirements.

The dominance of the legal positivist approach, and consequently, the overemphasized role of the statutory law and dogmatic interpretation of the legal material are, in general, specific for Russian law, whereas the efforts towards the internalization and globalization of law in Russia are still more declarative than real. Nevertheless, the pragmatic approach, enforced in the judicial practice, and the recognition of this and custom as legal sources as well as the equity consideration in the legislation, have been introduced by the recent novelties to the Civil Code.

[33]Thus, in the Russian civil law, the established (habitual) practice is legally significant concerning interpretation of contract.
[34]Thus, the real will of the parties is placed at the third stage of interpretation.

These changes, however, seem to form a challenge for the Russian legal system and particularly for the doctrine, the position of which has become even weaker than before. And as foreign languages are generally ignored in the country, the Russian legal discourse seems to have remained domestic, strongly bounded to the traditional legal positivism.

## Endnotes

In the end of this presentation, I pay particular attention to the interplay between the positivist and sociologic approaches as it implied in the Russian legal doctrine. The sociology of law approach seems not to be generally distinguished from the jurisprudence (law in proper sense). It obviously means the (deontic) prescriptions (of the positive law) are dealt together with the normal scientific descriptions that are characteristic for sociology. Furthermore, it seems, taking into account that many Russian legal scholars are still occupied with seeking the truth, that the only factor linking the normative prescriptions of law and their real implementation is the illusion that the whole legal world is subjected to the truth (verity). This must be a real methodological problem from the point of view of the realistic approach that I prefer. Particularly disputable I see the application of scientism to the legal science. I regard scientism as a kind of a theoretical conquest of reality, which is not totally applicable to the legal science dealing with the (at least) relative unpredictability of its subjects. However, finding truth (verity)[35] concerning unpredictable phenomena is, by definition, an impossible mission. Besides, it is also impossible to scientifically verify legal issues, due to the artefactual nature of law.

Thus, diversity of legal phenomena and, consequently, methodological pluralism in legal studies are to be recognized as characteristic of modern legal thought. However, more important than that is to secure the reproduction of the legal system that is aimed at effective solving, and also preventing social and political collisions in accordance with the juridicity principle. It requires the adequate legislation and its implementation (according to the legality principle), as well as the upholding of the system of the legal decision making that corresponds to the ethical and moral standards prevalent in society (according to the ethicality principle) and are otherwise legitimate or acceptable by society (according to the legitimacy principle).

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[35]In particular, following the idea of ’the only one proper solution’.

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