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The Privatization of Land in Russia:  
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I. INTRODUCTION

One obvious reason that comprehensive and speedy privatization in Russia has encountered serious economic, social, and political problems is that a private enterprise system can hardly prosper within a centrally-planned economy. The Russian economy was pushed into the process of privatization prematurely. It is becoming clear that privatization will not be successful unless other fundamental economic reforms are also undertaken. Several factors contribute to the initial demonopolization<sup>1</sup> and decentralization of the national economy: (1) eliminating government control; (2) abolishing ministers and agencies; (3) instituting a

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1. Some authors believe that successful privatization requires privatized firms to operate in a competitive environment. *See, e.g.*, JOHN VICKERS & GEORGE YARROW, *PRIVATIZATION: AN ECONOMIC ANALYSIS* (1988) (citing privatization efforts in the United Kingdom); *see also* STANLEY FISCHER, *PRIVATIZATION IN EAST EUROPEAN TRANSFORMATION* 3 (May 1991) (Working Paper No. 3703, on file with the National Bureau of Economic Research, Inc.) (stating that “demonopolization should precede privatization”).

banking system before privatization;<sup>2</sup> (4) reforming trade to encourage competition and export; (5) establishing legal incentives for foreign investors;<sup>3</sup> (6) reducing barriers to foreign trade;<sup>4</sup> (7) reforming prices and liberalizing the market; (8) permitting private ownership rights to land; (9) enacting legal reforms to ensure proper disclosure; (10) developing bankruptcy, tax, and antitrust legislation;<sup>5</sup> and (11) enforcing contracts and due process. Rather than implementing these steps, the Russian President and Parliament, both accustomed to administrative remedies, instituted another government plan—the Program of Privatization.<sup>6</sup> In a sense, this Program reflects the entire range of theories about privatization. Accordingly, the Program includes different approaches to the transfer of state property to the private sector.

One of the fundamental obstacles to the development of a market economy in Russia, and other former Soviet republics, is a failure to recognize the concept of private land.<sup>7</sup> Historically, Soviet land law failed to provide incentives for developing land and increasing production of agricultural commodities. A report by the European Bank for Reconstruction and Development found that some twenty-eight percent of all grain and as much as fifty-percent of all potatoes produced in the former Soviet Union were simply lost before reaching consumers.<sup>8</sup> Perhaps these losses can

2. See, e.g., LAWRENCE J. BRAINARD, STRATEGIC FOR ECONOMICAL TRANSFORMATION IN EASTERN EUROPE: THE ROLE OF FINANCIAL REFORM (1990) (on file with the Bankers Trust Company).

3. *Foreign Participation in Russian Privatization Must Deal With Various Obstacles*, 3 RUSSIA AND COMMONWEALTH BUS. L. REP. NO. 21, Mar. 9, 1993, available in LEXIS, World Library, ALLWLD File.

4. EDUARDO BORENSZTEIN & MANMOHAN S. KUMAR, 38 PROPOSALS FOR PRIVATIZATION IN EASTERN EUROPE 319 (1991) (on file with International Monetary Fund).

5. See, e.g., V.K. Mautov, *Pravovoe obespechenie uslovii dlia razvitiia sorevnovaniia v ekonomike* [Legal Guarantees of Conditions for Developing Competition in Economics], 6 SOV. GOS. I PRAVO 56-64 (1992) (discussing the developing Russian anti-monopoly legislation).

6. Generally, annual State Programs of Privatization have to be considered and approved by the Government of the Russian Federation and passed by the Russian Parliament—the Supreme Soviet of the Russian Federation. The Programs establish methods of privatization, including units and enterprises subject to compulsory transformation of ownership rights.

7. Alexander Belozertsev & Jerry W. Markham, *Commodity Exchanges and the Privatization of the Agricultural Sector in the Commonwealth of Independent States: Needed Steps in Creating a Market Economy*, 5 LAW & CONTEMP. PROBS. 119, 144 (1992).

8. *Id.* at n.184 (citing to *Half Soviet Potatoes Never Reach Consumers*, FIN. TIMES, Oct. 16, 1991, at 7).

be explained by "the absence of private property, which means people regard state property and goods as 'belonging to no one.'"<sup>9</sup> Accordingly, the privatization of state agricultural farms and collectives might resolve the problems of production and supply of agricultural goods. Privatization of property, however, may not resolve all existing problems of the Russian agricultural complex. The Soviet civil law model of absolute ownership is inconsistent with the public policy goal of increasing farming efficiency. The "giving away" scheme can deliver the land to the wrong person for the wrong purposes. Privatization gives rise to corruption and money laundering. An economic gap exists between the "new rich" in Russia and the working people of the former Soviet republics. The affluence of the new rich results from the weakness in the law and its administration, rather than hard work and business competition.<sup>10</sup> Rudimentary ecological legislation now in effect does not protect natural resources and land from harmful contamination. Inflation, coupled with government restructuring, encourages corruption.<sup>11</sup> Land can be bought practically dirt-cheap and kept fallow for many years until inflation is curbed because the commercial value of the land is much higher than its agricultural value.<sup>12</sup> Such privatization does not serve the public interest.

This Article offers an historical review of the predominance of state property in Russia. It describes Russia's policies of collectivization, and its early concepts of land privatization. This Article then reviews existing land legislation and land reforms in Russia, and demonstrates the fundamental issues that have been left unresolved by these laws and reforms. Finally, this Article outlines the development of a substantive program to realize privatization and reconstruction of state farming.

Privatization in Russia resembles the children's game of musical chairs. Everybody walks around the chairs and waits until

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9. *Id.*

10. After Russian President Boris Yeltsin signed a decree guaranteeing Russians the right to buy and sell land, Yuri D. Chernichenko, leader of the Farmer's Party, stated: "There are 12 million peasants in Russia, and all of them have become wealthy in just one day." Sonni Efron, *Yeltsin Signs Guarantees of Private Land Ownership*, L.A. TIMES, Oct. 28, 1993, at A1, A16.

11. Fred Kaplan, *Russians Are Able to Trade Land Again*, BOSTON GLOBE, Oct. 28, 1993, (National/Foreign), at 1 (describing the corrupt practices of Russian businesses).

12. This was a popular argument by the collective farm lobby against land privatization. *Id.*

the music stops, indicating that they may sit down. Unfortunately, players outnumber the chairs, and a player left without a chair is out of the game. This game differs from the process of land privatization in Russia only because under the old Soviet system, all the "chairs" were already allotted to members of the Communist Party and the bureaucratic elite. Some citizens had no chance to win in the first place. Under a privatized system of land ownership, when the music stops and everyone is allowed to "sit," not everybody will have a "seat."

This Article will discuss two possible solutions to the problems of land privatization in Russia. First, this Article will suggest that Russia should not privatize everything, and it should not distribute property to everybody. The government must maintain the discretion to choose which land to privatize and who will receive it, thereby limiting the scope of privatization. Second, this Article will argue that the traditional civil law approach to the right of absolute ownership must be reformed, and the state's undivided property interest should be split into estates. The state can transfer title on land to a farmer for the limited purposes of agricultural activity but still reserve the right to regain the ownership to the land in the event of waste. This system allows the state to designate the use of land for specific purposes pursuant to public policy, while also giving the owners a broad system of powers to possess, use, manage and control the land.

## II. STATE PROPERTY AND THE PRIVATIZATION OF LAND IN RUSSIA: HISTORICAL REVIEW

Prior to the October Revolution of 1917 and the First World War, Russia "ranked first among all of the nations of the world in quantity of production and export of wheat, and was second only to the United States in the total production of cereals."<sup>13</sup> Despite this success, the tradition of private farming was not well established in Tsarist Russia. Russian land was not owned by individuals, but by peasant communal farms, known as *mirs*.<sup>14</sup>

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13. SCOTT NEARING & JACK HARDY, *THE ECONOMIC ORGANIZATION OF THE SOVIET UNION* 47 (Jerome Davis ed., 1927).

14. Later, both Karl Marx and Friedrich Engels believed that the institution of the *mir* contained "the germ of socialism," and Josef Stalin starved millions of peasants to implement that collectivist vision in the 1930's. See, e.g., Efron, *supra* note 10, at A16.

State property in Russia is derived from the property of princes, tsars and sovereigns; the difference between the tsar's family property and state property, or fiscal property, was gradually introduced into practice and implemented by law.<sup>15</sup>

For example, the Edict On The Imperial Family of 1797 established a special type of property—the appanage estates (“*udelnii imenija*”).<sup>16</sup> These appanage estates were recognized as the private property of the Imperial Family and other members of the Imperial House, and were separated from the fund of the state, or fiscal property.<sup>17</sup> According to this novation the land, which did not belong to anybody in particular, was considered the property of the Tsar, and fell under the jurisdiction of the state treasury.<sup>18</sup> For instance, as the new lands became the territorial acquisitions of Russia, they became the property of the state, and not of the Imperial Family.

The idea of state ownership of land is not merely a theoretical product of communist ideology and Stalin's collectivization. Pre-revolutionary Russia was primarily agricultural, with an established history of state ownership of land.<sup>19</sup> In 1893, the Tsar's Minister of Finance, Count Vitte, stated in his report to the Tsar on land reforms:

“In our fatherland, because of the specific historical conditions which the Russian state has formatted and developed, a market economy cannot restrict itself within strictly defined boundaries, which are pre-established according to the state's needs in the generally accepted meaning of the word. The Russian people have a deep notion, rooted in their feelings and their minds, that everything, including a concern about the well-being and needs of the people, springs from the power of the Tsar.”<sup>20</sup>

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15. Rafail Nasirov, *Opredelenie gosudarstvennoi sobstvennosti v Rossiiskom dorevoluzionnom zakonodatelstve* [Definition of State Property in Pre-Revolutionary Russian Legislation], in *AKTUALNII PROBLEMI PRAVOVEDENIA NA SOVREMENNOM ETAPE* [ACTUAL PROBLEMS WITH AUTHORITY OF THE LAW AT THE PRESENT STAGE] 12 (Sverdlovsk Law Institute ed., 1992).

16. *Id.*

17. *Id.*

18. *Id.*

19. NEARING & HARDY, *supra* note 13, at 47.

20. L. B. HODSKY, *OSNOVI GOSUDARSTVENNOGO HOZIJASTVA* [FUNDAMENTALS OF THE NATION'S ECONOMY] 43 (Saint Petersburg, 1894).

According to Count Vitte, whose impact on the development of Russian history is arguable,<sup>21</sup> the Russian people did not need private ownership of land because they had faith in the Tsar and his discretion to use the land for the necessities of the state, as well as for the benefit and needs of the people themselves.<sup>22</sup> This was an official state policy of Tsarist Russia.<sup>23</sup> Vitte's ideas about the unique quality of the formation and development of the Russian state were later adopted and expanded by the Slavophiles. Some of the Slavophiles included famous Russian literary figures, critics, and scientists who advanced the unique "slavic way" of developing Russia.<sup>24</sup>

According to the general census of 1905, the state owned thirty-eight percent of all agricultural lands and sixty percent of all forests in the European section of Russia.<sup>25</sup> The majority of state lands, however, were enormous spaces in Eastern and Northern Russia that were apparently not included in the 1905 census.<sup>26</sup> Though it is clear that state ownership of property was dominant in pre-revolutionary Russia, the percentage of Russian land that was under state ownership remains uncertain.

Pre-revolutionary Russia also faced problems with effective management of the huge expanse of state lands. The Russian government, from the beginning of the nineteenth century,

21. *Id.*

22. *Id.*

23. *Id.*

24. The idea of a "unique Slavic way" is far from dying, even in our time. Two prominent Western economists, Jeffrey Sachs of Harvard University and Anders Aslund of the Stockholm School of Economics, served as advisors to the Russian government on its free-market reforms. In January 1994, they resigned in despair over the anti-reform attitude of the new cabinet. Russian Prime-Minister Viktor S. Chernomyrdin responded to the resignations by stating that he did not believe in using foreign advisors. His spokesman, Valentin Sergeev, told reporters that Russia's reform "naturally takes into account world experience in market economics, but its pivot is the reality of the Russian state, its traditions, an understanding of the country's specifics and the mentality of Russians." Carey Goldberg, *Western Advisers Quit to Protest Russia Policy*, L.A. TIMES, Jan. 22, 1994, at A6.

25. Rafail Nasirov, *Opit privatizazii gosudarstvennih zemel v gubernijah evropejskoy rossii v 1906-1917gg* [*The Experience of Privatization of State Lands in the Provinces of European-Russia 1906-1917*], in AKTUALNII VOPROSI SOVERSHENSTVOVANIYA ZAKONODATELSTVA I PRAKTIKA EGO REALIZAZII [ACTUAL QUESTIONS OF PERFECTING LEGISLATION AND THE PRACTICABILITY OF ITS REALIZATION] 79, 80 (Sverdlovsk Law Institute ed., 1992).

26. See, e.g., D. A. TARASUK, POZEMELNAYA SOBSTVENNOST POREFERMENNOI ROSSII [TRANSLATION] 69 (Profizdat Moskva ed., 1981).

endeavored to create appropriate conditions for developing small private farms. The Edict of 1801 initiated the process of privatizing state lands.<sup>27</sup> The Edict gave merchants, the petty bourgeois, and the free peasants the right to purchase state lands.<sup>28</sup> Nonetheless, the slowly forming private ownership relations became an obstacle to the development of bourgeois economic relations.

The Land Reform of 1961 was famous for its legal abolition of landlord property rights. Nonetheless, tens of millions of peasants remained without their own land. The government, pursuing its own fiscal and policy interests, did not want to annihilate the peasants' communes. The government's action explains why owners of the purchased lands were not individual peasants but rather the communes themselves. The peasants could not demand their own share of the land upon leaving the commune. Furthermore, the peasants were allotted their parcels of land only temporarily, and each time in different places. Clearly, such an organization of agriculture did not promote efficient farming. The peasants had no incentive to invest their labor and capital in the land.

Reithern, the Tsar's Minister of Finance,<sup>29</sup> an advocate of private ownership and an opponent of the state-based economy, established a policy allowing minimum state intervention in the economic sphere.<sup>30</sup> During this time, state-built railroads were being transferred to private associations.<sup>31</sup> Privatization also extended to state-owned factories, plants, and fiscal lands.<sup>32</sup>

The First Russian Revolution of 1905 forced the government to take serious steps to extend the availability of private farm lands.<sup>33</sup> The Stolipin Land Reform signaled the transition from government policy to the concept of private farming.<sup>34</sup> It was the most significant attempt to resolve the so-called "land question" in pre-revolutionary Russia.<sup>35</sup>

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27. The peasants received this right only by The Edict of the 3d of March, 1848. Nasirov, *supra* note 25, at 20.

28. *Id.*

29. Mr. Reithern served as Minister of Finance from 1862-1878.

30. Nasirov, *supra* note 15, at 13.

31. *Id.* at 14.

32. *Id.*

33. Nasirov, *supra* note 25, at 80.

34. *Id.*

35. *See, e.g., id.*

The Edict of the 27th of August, 1906, promoted the development of individual agricultural farms in Russia.<sup>36</sup> Interestingly, only arable lands were sold off, while the lands of churches, schools, state factories, plants, and other organizations were excluded from the sale.<sup>37</sup> The state's arable lands were sold to individual farmers, cooperatives, agricultural associations, and peasant communes.<sup>38</sup> The price of the land was determined by the Peasants' Land Bank, according to the average profitability of the particular parcel.<sup>39</sup> The state's arable lands could be bought on credit with only a small down-payment (3.02% of the full price), and the balance could be paid by annual installments during a period ranging between 13 to 55.5 years.<sup>40</sup> Notably, an initial lease of the state land was a prerequisite to purchase.<sup>41</sup> Only after the expiration of the lease could title to the parcel of land be transferred to the peasant.<sup>42</sup> Another condition precedent to the land purchase required the prospective owner to move to the land.<sup>43</sup> Land certificates were prepared and notarized only after these conditions were fulfilled.

The process of privatization was administered by specially created commissions, which included representatives of the Peasants' Land Bank, a local administration, judges, government, agents, and public delegates.<sup>44</sup> The alienation of state lands, however, did not occur on a massive scale. By January 1, 1912, only 9,351 land-purchase transactions were completed, privatizing approximately 156,000 *dessiatinas* of state-owned land (421,200 acres).<sup>45</sup>

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36. Ukaz O prednaznachenii Kazennih zemel k prodazhe dlja Raschereniya Krestiyanskogo Zemlepolzovaniya [Edict on the Earmarking of Public Lands for Sale to Extend Peasant Land Use] art. 1399, 210 Sbornik Ukazov (1906).

37. Nasirov, *supra* note 25, at 81.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 81-82.

42. *Id.* at 82.

43. *Id.*

44. Ukaz ot 4 marta 1906 goda ob uchrezhdenii: a) Komiteta po zemleustroitelnim Delam pri Glavnom Upravlenii Zemleustrojstva i Zemledalija i b) Gubernskie i Uezdnie Zemleustroitel'ny Komissii [Decree of March 4, 1906 of the Organization of a) the Committee on Land Development for Construction and Agriculture Management, and b) Commissions on the Subdivision of Provinces and Townships] art. 307, 48 Sbornik Ukazov (1906).

45. Nasirov, *supra* note 25, at 80.

The October Revolution of 1917 resulted in the abolition of landlord property rights and the nationalization of lands previously belonging to the Imperial Family, the government, and local municipalities. One famous Bolshevik slogan proclaimed, "The land to the peasants," and one of the first of Lenin's decrees, "The Decree On Land," provided that peasants were the true owners of the land in their possession without the necessity of any further payments.<sup>46</sup>

The Russian Civil War, the counter-revolution, and foreign intervention by several industrial countries simultaneously, and on different fronts, dramatically deteriorated the situation in Russia after the October Revolution.<sup>47</sup> During this crucial period, Vladimir Lenin proposed a policy of "war communism," originally conceived as a temporary measure.<sup>48</sup> The Bolsheviks abolished private grain trade and sought grain from the peasants as a loan to the state in order to fight inflation and mass starvation, as well as to provide war supplies and to keep the factories working.<sup>49</sup> Indeed, Lenin considered the food suppliers' problem to be the factor that determined the survival of the country, especially when the poor harvest of 1918 aggravated the situation.<sup>50</sup> Facing sabotage by the prosperous and middle-class peasants who were not willing to give their grain away for non-secured government promises of reimbursement, the Bolsheviks adopted extraordinary measures of forced grain requisitions.<sup>51</sup> These measures were aimed at eliminating speculation in grain and partially resolving the food problem. Nonetheless, the peasants responded to the government's actions by slashing production to levels that met only their own needs and sheltered the grain to sell on the black

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46. See, e.g., RUDOLF SCHLESINGER, *SOVIET LEGAL THEORY* 40 (1951).

47. See, e.g., W. BRUCE LINCOLN, *RED VICTORY: A HISTORY OF THE RUSSIAN CIVIL WAR* (1989).

48. The Bolsheviks instituted the program of "war communism" in an attempt to eliminate private enterprise through the nationalization of land, industry, and banks. Belozertsev & Markham, *supra* note 7, at 124. Trade was brought under strict government control and industry was subject to wholesale nationalization. E. A. REES, *STATE CONTROL IN SOVIET RUSSIA: THE RISE AND FALL OF THE SOVIET WORKERS' AND PEASANTS' INSPECTORATE, 1920-34*, at 15 (1992).

49. Belozertsev & Markham, *supra* note 7, at 124.

50. SILVANA MALLE, *THE ECONOMIC ORGANIZATION OF WAR COMMUNISM, 1918-1921*, at 338-80 (1985).

51. *Id.*

market.<sup>52</sup> During the period of “war communism,” agricultural production fell to a level of approximately three-fourths of the 1912 production level.<sup>53</sup>

After the civil war and foreign intervention, the Bolshevik government faced the problem of rehabilitating the national economy. The system of “war communism” became an obstacle to the development of agricultural production.<sup>54</sup> Furthermore, the widespread dissatisfaction of peasants with the policy of forced grain requisitions aggravated the political situation.<sup>55</sup> The overwhelming majority of Red Army soldiers were peasants who returned to their farms after the wars.<sup>56</sup> The Bolsheviks had no choice but to unite with the peasants to form their broad political base. In March 1992, at the Tenth Congress of the All-Union Communist Party of Bolsheviks, Vladimir Lenin proposed a so-called New Economic Policy (“NEP”).<sup>57</sup> The peasants were given tenancy of the land as long as they kept it cultivated.<sup>58</sup> Instead of forced grain requisitions, the peasants were taxed initially “in-kind”—that is, in grain. All grain produced in excess of the tax could be sold on the free market, creating an incentive for increased production.<sup>59</sup>

The NEP brought civil peace, political stability, and economic recovery.<sup>60</sup> In fact, while the NEP was in effect, the economy recovered and agriculture production was restored to pre-war levels.<sup>61</sup> Unfortunately, one will never know how the course of history might have been changed had the Bolsheviks kept this economic policy as a fundamental principle. The turning point of Russian history was the death of Vladimir Lenin, who, in his final years, became convinced that a market exchange and commodity,

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52. Belozertsev & Markham, *supra* note 7, at 125.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. See, e.g., PETER J. BOETTKE, *THE POLITICAL ECONOMY OF SOVIET SOCIALISM: THE FORMATIVE YEARS, 1918-1928*, at 114 (1990); VLADIMIR DMITRENKO, *ECONOMIC POLICY DURING THE CONSTRUCTION OF SOCIALISM IN THE USSR* 46 (1987).

58. Belozertsev & Markham, *supra* note 7, at 125.

59. *Id.*

60. STEPHEN F. COHEN, *BUKHARIN AND THE BOLSHEVIK REVOLUTION: A POLITICAL BIOGRAPHY, 1888-1938*, at 273 (1971).

61. Belozertsev & Markham, *supra* note 7, at 128.

or money-based relations system was preferable to heavy state domination over the entire economy, at least with regard to mid-size and small enterprises.<sup>62</sup>

Lenin's successor, Joseph Stalin, decided that collectivization was needed to liquidate the *kulaks*, or rich farmers, as a class.<sup>63</sup> Large, private farms reminded Stalin of the capitalist, pre-revolutionary country.<sup>64</sup> Indeed, private ownership of land was necessary to the development of a market, which was an alien concept to communist ideology.<sup>65</sup> In this way, wide-spread general collectivization began.<sup>66</sup> The wealthy and middle-class peasants who resisted collectivization were arrested and exiled to Siberia. Their lands, estates, chattels, and equipment were confiscated. "Private trade . . . became a crime, punished as 'speculation' with a sentence of five to ten years in a labor camp and loss of property."<sup>67</sup> This action was contrary to the NEP's most fundamental principle: the right of the peasants to manage their own farms and sell grain freely.<sup>68</sup> Collectivization resulted in severe famine, terror, and mass murders,<sup>69</sup> as well as the aggravation of agricultural production problems.<sup>70</sup>

The idea of collectivization itself was primarily political. The NEP showed that a socialist economy could successfully survive alongside private farming, free market relations, free trade, and

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62. After Lenin's death, almost all of his last works about new economic changes toward a market economy were concealed from the public. This concealment is explained in part by Stalin's fear of publicity of his ideological disagreements with Lenin. Lenin had demanded that the Central Committee of the Communist Party reconsider Stalin's candidacy for the post of General Secretary.

63. RONALD HINGLEY, *JOSEPH STALIN: MAN AND LEGEND* 204-05 (1974).

64. *Id.*

65. According to Trotsky, one of Lenin's opponents, "the socialist organization of the economy begins with the liquidation of the market." RICHARD PIPES, *THE RUSSIAN REVOLUTION* 698 (1990).

66. Hingley, *supra* note 63, at 205.

67. Belozertsev & Markham, *supra* note 7, at 127.

68. *Id.*

69. *Id.* According to some sources, collectivization caused ten million deaths in the 1930's. These deaths were primarily due to starvation and repressions. See e.g., Fred Kaplan, *supra* note 11 at 1.

70. See, e.g., MICHAEL MIRSKI, *THE MIXED ECONOMY NEP AND ITS LOT* 213-30 (Rosenkilde & Bagger ed., 1984); see also Hingley, *supra* note 63, at 204.

commodity exchanges.<sup>71</sup> No clear economic need to reform agricultural organization existed.

Both objective and subjective causes contributed to inadequate food supplies. First, the entire national economy was depressed as a result of the nine-year period during the First World War, the Russian Civil War and foreign intervention in Russia.<sup>72</sup> The overwhelming majority of peasants left the land to go into military service, and many never returned.<sup>73</sup> The most favorable farm lands for agricultural production in Russia were occupied by enemies and produced no harvests for a long time.<sup>74</sup> Second, agricultural production in Russia largely depends on climatic conditions. Poor harvests in the late 1920's and early 1930's resulted from bad weather. Finally, peasants had no incentives for rational and efficient management. Historically, they were unaccustomed to being private owners and did not yet have "roots" in their land.

The main goal of collectivization was not to increase grain supplies in order to feed urban workers, as has been asserted by some authors.<sup>75</sup> Rather, the socialization of the country and the liquidation of such alien class elements as *kulaks* was the primary goal.<sup>76</sup> Even in periods of poor harvests and insufficient availability of grain for human consumption, the Soviets exported grain to acquire badly needed foreign currency.<sup>77</sup> Certainly, Russia was able to feed itself, and for the most part, it did.

The stated goal of collectivization was to replace the farm with an "agro-industrial complex."<sup>78</sup> Farmers became workers; they were housed in apartment blocks, worked seven-hour shifts, and received monthly salaries—just like factory workers.<sup>79</sup> This

71. According to the image-laden expression of an historian, the NEP "set the wheels going again and the chimneys smoking by the stimulus it gave to private production, small in units but vast in volume, and to private trade." Hans Schmidt, *Housing Problems, in RED ECONOMICS* 225-46 (Gerhard Dobbert ed., 1932).

72. See, e.g., Pipes, *supra* note 65, at 698-99.

73. *Id.*

74. *Id.*

75. See, e.g., Belozertsev & Markham, *supra* note 7, at 144.

76. Hingley, *supra* note 63, at 204-05.

77. M. M. Kosteci, *The Soviet Union in International Grain Markets, in THE SOVIET IMPACT ON COMMODITY MARKETS* 202 (M. M. Kosteci ed., 1984).

78. Elisabeth Rubinfien, *Russia Moves to Dismantle Collective Farming System*, WALL ST. J., Oct. 27, 1993, at A16.

79. *Id.*

system failed miserably. Since the 1970's, the Soviet Union has generally imported about fifteen percent of its annual grain needs.<sup>80</sup>

Significant attempts to improve agricultural production after Stalin's death all failed because they did not change the basis of agricultural production—ownership of the land.<sup>81</sup> “Ever since the collectivization in the early 1930's, agriculture has been an outstanding weakness of the Soviet economy. No other branch appears so riddled with economic absurdities . . . .”<sup>82</sup>

In the 1980's, Soviet economists seriously considered introducing market elements, such as those used during the NEP period, into the national economy. Mikhail Gorbachev advocated a brigade system of workers for collective farms, with payment based on results.<sup>83</sup> Presumably, such incentives would increase productivity.<sup>84</sup> Gorbachev also proposed imposition of a food tax derived from a similar tax used by Vladimir Lenin during the NEP period.<sup>85</sup> Under this proposal, state production quotas were set, and the collectives were allowed to sell the excess.<sup>86</sup> Thus, the income of the collectives became tied to their production without changing their essential social nature.<sup>87</sup> The Communist Party's Central Committee adopted Gorbachev's proposals for land leasing arrangements in the agricultural sector.<sup>88</sup> These restructuring efforts, however, did not disturb a fundamental object of the centralized socialist economy—communal ownership of the means of production, including land. The collective farms still predomi-

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80. *Id.*

81. For example, Nikita Krushchev sought to cultivate the “virgin lands” in Kazakhstan. Several efforts were made to improve the material and technical basis of collective farms. RAYMOND HUTCHINGS, *SOVIET ECONOMIC DEVELOPMENT* 121 (2d ed. 1982); ELLSWORTH RAYMOND, *THE SOVIET STATE* 163 (2d ed. 1978); RONALD J. HILL, *THE SOVIET UNION, POLITICS, ECONOMICS AND SOCIETY FROM LENIN TO GORBACHEV* 26 (1985).

82. ANDERS ASLUND, *GORBACHEV'S STRUGGLE FOR ECONOMIC REFORM* 96 (1989).

83. Belozertsev & Markham, *supra* note 7, at 130.

84. *Id.*

85. *Id.*

86. *Id.*

87. See, e.g., MIKHAEL S. GORBACHEV, *AN INTIMATE BIOGRAPHY* 158 (Donald Morrison ed., 1988).

88. See, e.g., OLIMPIAD S. IOFFE, *GORBACHEV'S ECONOMIC DILEMMA: AN INSIDER'S VIEW* 228-45 (1989).

nated in the country,<sup>89</sup> and agricultural production remained abysmal.<sup>90</sup>

The following conclusions may be drawn from this brief historical review: (1) state ownership of land predominated in Russia, even before the October Revolution of 1917; (2) historically, the practice of private farming was not fully developed in Russia; (3) nationalization of land and state ownership of land are not distinguishing characteristics of the social and economic structure of socialism, but are products of Stalin's model of socialism;<sup>91</sup> and (4) the means of production in the Soviet Union's agricultural-industrial complex, which was based on the collective organization of labor on state-owned lands, proved to be a failure.

### III. LAND LEGISLATION AND LAND REFORMS IN RUSSIA: UNRESOLVED ISSUES

A complete discussion of the problems and perspectives of privatization of land in Russia must include the development of Russian land legislation, since it reflects the evolution of Russian

89. At the end of 1993, less than four percent of Russian farmland was private, and all 184,000 of those family farms were created in the last three years. Efron, *supra* note 10, at A16. Private family farms occupied 16.3 million acres of agricultural land, small household farms had 13.6 million acres, and state or collective farms held 385.3 million acres. Rubinfien, *supra* note 78, at A16. In comparison, the entire land mass of the United States is 2,271,343,360 acres, but only about thirty percent of that—some 662.1 million acres—is owned by the federal government. About one percent of the total land is owned by either foreign countries or foreign nationals; the rest is owned by U.S. citizens. Irene Ertugrul, *Mixture of Hope and Pessimism Seen in New Russian Land Policy*, WE (Russia), Nov. 15-28, 1993, at 3.

90. Food production in the former Soviet Union has been dropping at an annual rate of ten to twelve percent. Francis X. Clines, *10 Soviet Republics Agree to Coordinate Food Supply*, N.Y. TIMES, Sept. 17, 1991, at A5.

91. This conclusion is based on the assumption that the collectivization was merely a product of Stalin's political imagination and was compelled by the government as an administrative measure, rather than an economic necessity. The NEP evidently proved that land, as private property, could successfully coexist with the elements of socialist planning and a restricted state monopoly with regard to certain key activities, such as transportation, communication, banking, military-defense, and large industry. In fact, some Eastern European countries, such as Poland, have never abolished private land ownership. State control over production, if needed, can be accomplished by other methods that are more productive than ownership, such as contract, taxation, splitting of ownership rights or fiduciary relations. For this reason, China and Communist Vietnam are working toward capitalism, which they officially call "a socialist market economy." Indeed, that may be the practical answer for countries unwilling to admit "their wish to abandon the disadvantages of a planned economy for the rewards of individual initiative." Arlen Specter, *Capitalism's March in Asia*, WALL ST. J., Jan. 28, 1994, at A12.

land policy. The concept of land ownership still is developing in Russia, as reflected in the "profusion and proliferation of its land laws."<sup>92</sup> On the other hand, the established traditions in legislation, for better or worse, affect the development of political and economic consciousness. Understanding the major legal issues of Russian land law, or at least its general principles, is helpful in analyzing the current problems of land ownership in Russia.

First, Russian property law originated in the branch of continental law, which is derived from Roman civil law.<sup>93</sup> The major difference between the concepts of ownership in common law and civil law is the absolute character of ownership rights under civil law, as opposed to a "splintered" or "compound-structural" model of ownership under common law.<sup>94</sup> The "possessory estates," "fiduciary ownership," or "trusts," recognized in the Anglo-Saxon legal system, have no direct counterparts in continental or civil law. Indeed, civil law basically deals with the movement of objects of ownership but not with abstract intangible rights, such as "fee simple," "fee tail," or "life estate." Accordingly, the operation of Anglo-American common law has been described as follows:

The development of the fee simple estate is an example of that most striking phenomenon of English law, the reunification of abstractions, a process of thinking that still pervades our law. Instead of thinking of the land itself, the lawyer thinks of an *estate in land*, which is imagined as almost having a real existence apart from the land.<sup>95</sup>

In contrast, Russian lawyers think first about the object of ownership itself—ownership that represents certain absolute rights. The rule is simple: one object of ownership, one right of ownership. The socialist-communist doctrines inevitably left their mark on the development of civil law in Russia after the socialist revolution. Land was basically withdrawn from commodity-money exchange in Russia for several generations. Under the Communist regime, people were not permitted to own land privately; thus, land could not be purchased and sold. Consequently, the Russian

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92. Olga Floroff & Susan W. Tiefenbrun, *Land Ownership In the Russian Federation: Laws and Obstacles*, 37 ST. LOUIS U. L.J. 235 (1993).

93. Janis Rozenfelds, *Latvia: Legislation and Denationalisation of Land*, 67 LAW INST. J. 358-59 (1993).

94. *Id.*

95. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 206 (3d ed. 1993).

concept of land ownership differs significantly from the Western concept.

Some well-known principles of socialist land law include:

1. *Community ownership of land.* The ownership of land was legally vested in "the community." As a practical matter, those with political power controlled the land. Usually the state's position was considered analogous to the monarch in feudal English law.<sup>96</sup> The federal structure of the Soviet Union and Russia itself also complicated the process of allotting lands between the Federation, the Republics, and the regions.

2. *Ambiguous and uncertain title.* The concept "property of the whole people" does not identify the person or entity that owns the property. Economic, social, and legal "de-personification" of property precludes any subject—collective or individual—from being vested with any integral interest and benefits of the owner-proprietor.<sup>97</sup> Such a "diffusion" of the right of ownership and its anonymous character causes confusion. Locating the owners of a specific parcel of land in the ordinary course of business presented a common practical problem. There is no land register analogous to the Torrens Land Title Register in Latvia.<sup>98</sup> Land title cannot be assured. An administrative document, or state land certificate, establishes the grant of the particular parcel of land for a specified use. This document provides some indication of the purpose of the land use, such as agricultural, or building works.<sup>99</sup> The person who is entitled to use the land, however, has no alienable right to its ownership. Prior transfers of "title" or any encumbrances on the land remain uncertain.

3. *Special legal regulation of land ownership.* Russian legislation clearly distinguished between the concept of ownership in rural and urban areas, and the rights of possession and use of land and buildings. First, land and buildings were separately owned.<sup>100</sup> Unoccupied land could not be purchased or sold, but the building itself could be subject to any transaction.<sup>101</sup> Second, land was considered an object for agricultural production.<sup>102</sup>

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96. Rozenfelds, *supra* note 93, at 358.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

Russian law did not recognize the principal that “the possession of land carries with it in general . . . possession of everything which is attached to or under that land.”<sup>103</sup> For example, collective farms did not have legal rights to natural resources and minerals found on their lands. Thus, land ownership in Russia primarily represents ownership of a farm for agricultural purposes. Therefore, two independent branches of legislation existed: property law as a part of civil law, and land law, or agricultural law.

4. *Limited right to use, possess, lease, and dispose of land.* The Land Ownership Fundamentals were enacted shortly after the Perestroika Liberation took effect.<sup>104</sup> The legislation did not mention land ownership, but it did provide the right to possess land, and it explicitly prohibited the “buying, selling, donating and mortgaging or unauthorized exchange of parcels of land.”<sup>105</sup> The Land Reform Law of the Republic of Russia officially abolished the state monopoly on land and developed a system of land ownership.<sup>106</sup> Nonetheless, this law embodies a narrow view of land ownership because it imposes explicit restrictions on the use, transferability, and disposition of land. For example, according to the Land Reform Law, parcels of land may be owned solely for the purpose of farming, gardening, animal husbandry, and other agricultural activities.<sup>107</sup> Thus, the term “ownership,” as defined in the Land Reform Law, is limited to farmland. The State can seize the land if it is being used inefficiently or improperly.<sup>108</sup> Furthermore, state agencies restrict the size of the land that may be owned.<sup>109</sup>

103. *Hannah v. Peel*, 1945 K.B. 509 (1945).

104. Floroff & Tiefenbraun, *supra* note 92, at 237.

105. *Id.*

106. *Id.* at 238-39.

107. Land Reform Law, *supra* note 106, art. 4, para. 1.

108. *Id.* art. 14, para. 1.

109. *Id.* art. 2, para. 4. The plots of land are so small—50 acres on average—that efficient and profitable production has been nearly impossible. See, e.g., Kaplan, *supra* note 70, at 1. For example, The Decision of the Sverdlovsk Region Soviet “On Transformation the Land Under Control of the Soviet of People Deputies, Establishing Maximum Dimensions of Land Plots for People of the Region,” which was adopted on July 26, 1990, established the following sizes for land plots: gardening—0.20 hectare; private subsidiary, small-holding in agricultural area (farm garden attached to a house)—up to 5.0 hectares; individual dwelling—up to 0.10 hectare. *Problemi razvitiya zakonodatelstva o zemle v Rossiiskoi Federazii* [*Problems of Developing Land Legislation in Russian Federation*], 8 SOV. GOS. I PRAVO 3, 9 (1993) (citing the round table of the Journal “Gosudarstvo i Pravo”). In comparison, the average size of a farm in the United

The Land Reform Law also restricts the sale of land by owners or recipients of land grants. The State, as the agent that initially grants land to individuals, is the only entity that can buy land from an owner. Owners may only sell their land back to the local Council of People's Deputies,<sup>110</sup> which acts on behalf of the State, and is obliged to buy back the land if the owner wishes to sell it.<sup>111</sup> To avoid speculation, land granted by the state must be held for ten years before it can be resold.<sup>112</sup> Nevertheless, land presumably may be inherited when the heirs continue to work on the land and use it according to all prior established conditions.<sup>113</sup> Finally, land may not be transferred to, or owned by, foreign citizens.<sup>114</sup>

Significant legislative steps toward de-socialization of agricultural relations in Russia occurred during the post-Gorbachev period.<sup>115</sup> For example, the first and most progressive measures of capitalization in the country included: (1) allowing different forms of farm ownership, including privately owned farms;<sup>116</sup> (2) establishing citizens' rights to lease land, life-long inheritable possession, or ownership;<sup>117</sup> and (3) maintaining a system of registration of land ownership.<sup>118</sup>

Undoubtedly, the purpose of these reforms was to abolish the longstanding monopoly on possession of collective and state farm land and to reorganize the Russian farm system.<sup>119</sup> The same traditional socialist principles, however, predetermined the course of the legislation's development. Therefore, the reforms left numerous issues unresolved and failed to achieve the primary goal of diversification of land ownership.<sup>120</sup> Restrictions on the

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States is 190 hectares. G.B. Chubukov & A.A. Pogrebnoi, *Pravo chastnoi sobstvennosti krestianina-fermera* [The Right of Private Property of a Peasant-Farmer], 7 SOV. GOS. I PRAVO 61, 68 (1993).

110. Land Reform Law, *supra* note 106, art. 9, para. 2.

111. *Id.* art. 9, para. 3.

112. *Id.* art. 11, para. 3.

113. *Id.* art. 9, para. 2.

114. *Id.* art. 4, para. 3.

115. BUSINESS AND COMMERCIAL LAWS OF RUSSIA: TRANSLATIONS WITH EXPERT COMMENTARY 7-6 (Mark C. Swords ed., 1994).

116. *Id.* at 7-4.

117. Floroff & Tiefenbrun, *supra* note 92, at 235.

118. BUSINESS AND COMMERCIAL LAWS OF RUSSIA, *supra* note 115, at 7-4.

119. *Id.*

120. Floroff & Tiefenbrun, *supra* note 92, at 235 (providing a detailed review of the land legislation of Russia).

purchase of land and limitations on the sale of land to anyone other than the state still existed. Methods for transforming land ownership rights were not resolved, and land continued to be subject to particular farming use restrictions. Only heirs who expressed a desire to be farmers could inherit land. If more than one heir existed, the Counsel of People's Deputies determined which claimant deserved the inheritance.<sup>121</sup> Land could escheat to the State in the absence of an heir or member of the farm to continue the farming activity.<sup>122</sup>

The rule against direct restraints on alienation is well established, dating back to feudal times.<sup>123</sup> The rule was historically used by mesne lords to block transfers of their land by tenants without their consent.<sup>124</sup> Nevertheless, the economic inefficiency of such systems is well known. U.S. legal academics note that such restraints make property unmarketable, discourage improvements on land, prevent the owner's creditors from reaching the property, and "tend to perpetuate the concentration of wealth by making it impossible for the owner to sell property and consume the proceeds of sale."<sup>125</sup> The effect of these restraints explains why Russian President Boris Yeltsin's next step in the continuation of market reforms was to allow the buying and selling of land.

The Decree of December 27, 1991 authorized individual owners to resell land to other individuals, not just to the State, in particular situations such as retirement, inheritance, and resettlement of land for farming purposes.<sup>126</sup> Removal of these limitations on the resale of land greatly expanded the concept of ownership by providing a reasonable possibility of resale. Nevertheless, the Decree only governs agricultural lands, it still requires new land owners to pursue specific activities on the land, and it still prohibits the resale of land to legal entities and to

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121. BUSINESS AND COMMERCIAL LAWS OF RUSSIA, *supra* note 115, at 7-7.

122. *Id.*

123. DUKEMINIER & KRIER, *supra* note 95, at 223.

124. *Mesne* means intermediate; a mesne lord, in feudal times, was lord to those who stood below him in the feudal ladder and tenant to those above, the tenant in chief and the King. "A tenant in chief could be a mesne lord, but the King, standing at the top, could not be." *Id.*

125. *Id.*

126. Ukaz Prezidenta Rossijskoj Federatsii o neotlozdnikh merakh po osutchestvleniu zemelnoi reformi v RSFSR [Decree of the President of the Russian Federation on Urgent Measures for Carrying Out Reforms in Russia], translated in 22 ZAK. I EKON. 45 (1992).

citizens for the purpose of engaging in entrepreneurial activity.<sup>127</sup> Until these restrictions are lifted, the market concept of land ownership as a subject of capital and investment will not be achieved.

On March 25, 1992, President Yeltsin issued Decree No. 301,<sup>128</sup> allowing individuals and legal entities to buy and own real estate for entrepreneurial activity.<sup>129</sup> The process of abolishing old socialist restraints on alienation presents an interesting development. The focus of Russian land legislation is changing from subjective restrictions on the alienation of land to particular persons to objective restrictions on the types of land that may be privatized. The Decree specifies which categories of land may not be sold for entrepreneurial activity. These categories include land for public utilization within urban areas, national parks, historical monuments, nature preserves, botanical gardens, recreation areas, lands contaminated by hazardous materials, land under temporary use, *agricultural lands*, and lands with *mineral deposits*.<sup>130</sup> All other types of land may be sold for the purpose of engaging in entrepreneurial activity.

While the Decree expanded the idea of land ownership, it should not be regarded as a guarantee of the right to buy and sell land freely. The Decree primarily aims to resolve the existing conflict between titles of ownership of the enterprise occupying the land, and the titles of ownership of the land beneath the enterprise. The market value of a privatized enterprise did not include the market value of the land on which it was built. Likewise, the value of the land under the enterprise was not included in the statutory capital of the enterprise. Obviously, any situation in which a privatized enterprise did not own the land on which it was erected was unattractive to prospective buyers.

The provisions for buying and selling parcels of land for entrepreneurial activity did not actually constitute a guarantee of free purchase of land in Russia. First, these provisions apply to privatized enterprises, which are mostly labor-managed and have a collective form of ownership.<sup>131</sup> Second, no clear legal mecha-

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127. *Id.*

128. Floroff & Tiefenbrun, *supra* note 92, at 237.

129. *Id.*

130. *Id.*

131. *See, e.g.,* Floroff & Tiefenbrun, *supra* note 92, at 236-37.

nism for the diversification of land ownership exists.<sup>132</sup> The presence and power of the State remain incontrovertible because the State regulates all matters concerning the right to purchase land and all payments relating to the land; it controls the use of the land, and it can seize the land.<sup>133</sup> Because the State sells both the privatizing enterprises as well as the land on which they are built, it controls the process of allotting the land. Third, restrictions on land ownership, which prevent owners from operating efficiently, remain effective. For example, land transferred to private ownership cannot be resold for ten years, and land bought from the State cannot be resold for five years.<sup>134</sup> Fourth, the new Russian laws do not give the owner the power to utilize and dispose of natural resources—such as oil, gas and minerals—that may be discovered under the land. Basically, land is still considered the means of production but not the object of capital investment. Finally, socio-political tension surrounding the land ownership question cannot ensure the stability of current legislation and the irreversibility of the privatization process.<sup>135</sup>

Decree No. 1767 of the President of the Russian Federation on the Regulation of Land Relations and the Development of Agrarian Reform in Russia abolished the last legal restrictions on buying and selling land on October 29, 1993.<sup>136</sup> According to Yuri D. Chernichenko, leader of the Farmers' Party, "without this decree, there could be no real ownership of land."<sup>137</sup> This Decree provides that "citizens and legal entities who are landown-

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132. *Id.*

133. *Id.*

134. KONST. RSFSR [Constitution] art. 12, para. 3; *see also* Ertugrul, *supra* note 89, at 3.

135. According to Gennady A. Zyuganov, "[i]n Russia, land, air and water must belong to all the people and not to concrete individuals." Zyuganov was a leader of the Russian Communist Party, which together with the powerful, conservative Agrarian Party has a strong opposition in the new Russian parliament. Zyuganov stated that individual ownership "is against Russian historic traditions. The very nature of a Russian peasant is against it." Efron, *supra* note 10, at A16. Indeed, public opinion polls have found that one-half to three-quarters of all farmers oppose de-collectivization. *Id.* Yeltsin faces serious resistance; the members of Russia's 26,000 state collective farms make up a powerful lobby, firmly represented by the minister of agriculture. Kaplan, *supra* note 11, at 1.

136. "Decree By the President of the Russian Federation on the Regulation of Land Relations and the Development of Agrarian Reform in Russia," Decree No. 1767 of Oct. 27, 1993, The British Broadcasting Corporation, Summary of World Broadcasts, ITAR-TASS News Agency (World Service), *available in* LEXIS, News Library, Omni file.

137. Efron, *supra* note 10, at A16.

ers have the right to sell, bequeath, gift, mortgage, lease, and exchange land, and also transfer land or part of it as an *investment* in the capital funds of joint-stock companies, associations and cooperatives, including ones that have foreign investments."<sup>138</sup>

The primary and most important provision of the Decree is the designation of land as a commodity and an object of capital investment. By lifting the moratorium on sales, the Decree removes the largest obstacle to private farming by enabling farmers to obtain loans through mortgages. According to the Decree, "[t]he state guarantees the inviolability and protection of private ownership of land, and also the protection of the rights of owners of land when carrying out transactions with land."<sup>139</sup>

The Decree provides an opportunity to use land for non-agricultural purposes. It is now possible to sell land for non-agricultural uses, provided the owner obtains permission from regional authorities.<sup>140</sup> The construction of the decree by local authorities, however, will apparently shape many practical issues. Unfortunately, the Decree is not specific regarding changes in land use and transformation of land for non-agricultural purposes. For example, the Decree permits the refusal to issue a land ownership certificate on the basis of "[a] change in land use,"<sup>141</sup> it also establishes "compensation payments for taking agricultural land out of agricultural use."<sup>142</sup> Members of collective farms can sell their allotments of land to citizens and legal entities for the production of agricultural produce. At the same time, the members of the collective have preference in obtaining allotments, or shares, over other purchasers.<sup>143</sup>

The conditions under which members of collective farms can sell their allotment of land for non-agricultural purposes is uncertain. Many of the terms and clauses of the Decree must still be defined and explained. For example, it is unclear when the State can refuse to issue a certificate of the right to land ownership under "a change in land use" clause. Furthermore, the amount of "compensation payments" for taking agricultural land out of agricultural use, and the agency that determines the amount of

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138. Decree No. 1767, *supra* note 137, art. 2 (emphasis added).

139. *Id.* art. 4.

140. *Id.* art. 5.

141. *Id.* art. 9.

142. *Id.* art. 7.

143. *Id.* art. 5.

such payments is uncertain. Agricultural land is not clearly defined. Additionally, the Decree fails to define the "preferences" given to members of collectives, and how they can be realized.

According to Russian bureaucratic traditions, and the absence of a true separation of powers within the government, central and local authorities construe legal decrees. Obviously, the interpretation may depend largely on the political biases of the interpreter. For instance, comments made by the Minister of Agriculture of Russia, Khlystin, on the implementation of Yeltsin's latest decree, are difficult to derive from the Act itself. According to Khlystin, "If a person received a plot of land but was not using it sensibly, the State retains the right to confiscate the plot or to buy it out compulsorily, even from the owner . . . [t]his land would be transferred to the redistribution fund and could then be given to new owners."<sup>144</sup> One may speculate whether this statement was the official government position or only a personal interpretation by a public figure seeking political support. Khlystin also noted that town dwellers who decide to move permanently to rural areas would have the right to obtain land if they met a number of conditions, such as "having appropriate diplomas in agriculture and having certain agricultural skills."<sup>145</sup> Thus, it is difficult to interpret the ultimate meaning of Russian laws.

Yeltsin's Decree calls for the privatization of Soviet-era collectives and the state-farm system;<sup>146</sup> as the famous Russian economist, Pavel Bunich, stated, "the state collective farms will not die overnight," if indeed they will die at all.<sup>147</sup> Unfortunately, state decrees cannot eliminate the psychological resistance of the Russian people to private ownership of land. One of the main obstacles to land reforms is the individual reluctance to make dramatic changes in society.<sup>148</sup> In December 1991, Yeltsin's Decree required all *kolkhozes*, collective farms, and all *sovkhoses*, state farms, to re-register for the first time by January 1993.<sup>149</sup> They were given the option to retain their present form, to become

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144. *Interview with Agriculture Minister Khlystin on Land Reforms* (Moscow radio broadcast, Oct. 27, 1993), available in LEXIS, World Library, ALLWLD File.

145. *Id.*

146. Decree No. 1767, *supra* note 137, art. 2.

147. Efron, *supra* note 10, at A16.

148. "We don't want any choice!" was the peasants' response to privatization efforts in Nizhny Novgorod. Rubinfien, *supra* note 78, at A16.

149. BUSINESS AND COMMERCIAL LAWS OF RUSSIA, *supra* note 115 at 7-5.

limited liability or joint-stock societies, or to form cooperatives or associations.<sup>150</sup> Ninety percent of the farmers chose to remain in the collective sector.<sup>151</sup> Public opinion polls indicate that one-half to three-quarters of all farmers oppose de-collectivization.<sup>152</sup> In compulsory deliveries and other forms of forced removal of agricultural produce from collectives and state farms for state resources has been abolished. Thus, the collectives can finally compete with the private sector on more favorable terms. This ability to compete creates further doubt that the collectives will liquidate in the near future.

The abolition of collective farms, however, may not be necessary. There may be few economic incentives to privatize. The state may be misguided in its efforts to enforce de-collectivization in the first place, as was the case sixty years ago. Perhaps it is preferable to give farmers the land and the opportunity to decide for themselves how and with whom to work. Regardless, the new Russian law gives peasants these opportunities.

The Decree did not expressly permit foreigners to obtain land for private ownership, but it did not prohibit it either. Most foreign investors are interested in Russian land for non-agricultural purposes, such as commercial or industrial uses. There are at least three legal means by which foreign investors may buy land. First, foreign investors can employ a Russian lawyer who forms a Russian domestic corporation. The corporation could then sell all shares of stock in the corporation to foreign investors. Under this scenario, enterprises with 100 % foreign-owned assets may be founded and operated on the Russian territory.<sup>153</sup> Enterprises involving foreign investment may be created by founding a new business or by investing in or buying an existing business.<sup>154</sup>

Second, foreign investors can buy private real estate such as building which is bought without the underlying land. The original price of a building or enterprise upon privatization does not include the price of the land, and the price of the land underlying the enterprise is not normally included in the statutory capital of

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150. Ertugrul, *supra* note 89, at 3.

151. *Id.*

152. Efron, *supra* note 10, at A16.

153. BUSINESS AND COMMERCIAL LAWS OF RUSSIA, *supra* note 115, at 7-7.

154. *Id.*

an enterprise.<sup>155</sup> Thus, the foreign investor can legally possess and use the land without any practical inconvenience.

Third, foreigners can lease land and property on that land for a long period of time, or lease both with an option to purchase after the expiration of the term.

According to the Decree, landowners receive a certificate of land ownership that is to be registered in a registration (land) book.<sup>156</sup> "The certificate is a document certifying the right to land ownership and serves as the basis in transactions concerning the purchase, sale, mortgaging, and leasing of land, and also for other actions involving the ownership, use, and disposition of land in accordance with existing legislation."<sup>157</sup>

The Decree proclaimed that "plots of land and everything firmly connected to them are regarded as *immovable property*."<sup>158</sup> While it is unclear whether natural resources and minerals are considered immovable property and, therefore, belong to the owner of the plot, two arguments support the interpretation that they do not. First, Article One of the Decree states that "[l]and deals are regulated by civil legislation, taking into consideration land, forest, nature conservation, and other specialized legislation and this present decree."<sup>159</sup> Existing civil legislation, however, treats natural resources and minerals as state property. Second, the Decree itself is a source of agricultural law and is mainly concerned with land relationships in the agricultural sphere. Moreover, it is not clear whether "immovable property" includes a single ownership of both the land and the real estate above it, or only the land. If the former definition is assumed, this provision may be inconsistent with existing Russian legislation on dwellings, which imposes certain restrictions on buying and selling dwelling houses in Russia.

The Decree provides that the sale of land may take place by competitive bidding or auction.<sup>160</sup> As a result, agriculture may fall prey to speculators who buy all the land and keep it fallow, awaiting higher prices for their crops. They may rent it out at

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155. *Id.*

156. Decree No. 1767, *supra* note 137, art. 3.

157. *Id.*

158. *Id.* art. 1.

159. *Id.*

160. *Id.* art. 8.

usurious rates, creating a new class of serfs.<sup>161</sup> With current skyrocketing inflation and catastrophic depreciation of the ruble, land can be bought cheaply by foreigners or individuals who might illegally use the purchase as a means to launder money. Although well-intentioned, the Decree may ultimately exacerbate a major area of corruption.

Finally, the Decree is basically concerned with farm lands and does not regulate the ownership of urban, non-agricultural lands. Urban lands are more attractive to foreign and domestic investors. The current Russian law does not offer a mechanism for distributing urban lands. Furthermore, the Decree is drafted in very general terms and will subsequently require considerable interpretation through acts and resolutions that may wipe out all positive provisions of this ordinance.

#### IV. THE DEVELOPMENT OF A SUBSTANTIVE PROGRAM: PROPOSALS FOR PRIVATIZATION AND RECONSTRUCTION OF STATE FARMING

Each society has its own special reasons for privatization. A particular government's objectives will be primarily determined by several factors: (1) the current socio-political atmosphere in the country, (2) the level of prior socialization of property, (3) the length and scope of the process of privatization, (4) distorted economic factors and feasibility of expenses, (5) the historical development of the economic and legal institutions in the country, (6) the current legal system, and (7) the effects of the options proposed. "The nature of a government's objectives have a determinative effect on the shape of its program. It is only possible to design a program, and assess its success, if its objectives are clearly formulated and expressed."<sup>162</sup>

The underlying objective of privatization in Russia must be to restructure the system of socialist ownership relations and to abolish the State's monopoly on property ownership. The goal of decentralization of the Russian economy can only be achieved by abolishing the State's absolute dominance over the means of production and by establishing a multi-structural and multiform system of ownership relations. The various forms of ownership

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161. Efron, *supra* note 10, at A16.

162. Matthew S. R. Palmer, *Privatization in Ukraine: Economics, Law, and Politics*, 16 YALE J. INT'L L. 453, 492-93 (1991).

reflect the diversity of economic interests. Russia cannot move toward a market-based economy without restructuring its current ownership relations. State ownership of the means of production resulted in significant socio-economic distortions in the spheres of distribution and consumption of material goods.<sup>163</sup> This situation adversely affected the economic and social welfare of the Russian people.

The implicit objective of land privatization is to encourage the development of efficient farming. Efficiency can be achieved through a mechanism for diversifying ownership of agricultural land and abolishing the monopoly of *kolkhozes*. The present system of *kolkhozes* is grossly inefficient. Nevertheless, this does not mean that all *kolkhozes* must be destroyed under the new program of decollectivization. Legislation reform should allocate land to peasants and give them the freedom to manage that land. Depending on the particular situation, some peasants might choose to join their parcels of land and work together in cooperatives, while others might decide to operate independently. This land management freedom would achieve diversified land ownership, encourage development of the agricultural market, and give the peasants incentives to use their land productively.

Thus, privatization is an important element in the reconstruction of state farming and in the transformation of the Russian agricultural complex into a market economy. The ultimate objective of both reconstruction and privatization is to improve the economic and social standard of living of the Russian people. Thus, the privatization program must be tailored to the economic, social, political, legal, and historical conditions of Russia.

The program should reflect the current period of economic and social transformation, and it should be applied only during this period. Future economic changes can substantially modify the legal principles of the program. In other words, this period of transformation requires specific measures that must exist only during this period, and specifically to resolve the problems of that period. A transitional period requires only transitional law. The notion that the system of state-owned property can be changed into a system of privately-owned property by legislation is quite Utopian, at least in the former Soviet Union.

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163. *Id.*

The key word in the definition of privatization is "transformation." Transformation means "the act or an instance of transforming" or "the state of being transformed."<sup>164</sup> Thus, privatization law regulates the temporary period during transformation of state-owned property into privately-owned property, establishes the methods of such transformation, and creates a foundation for further development of the major institutions of property law.

There are several fundamental principles that will help shape a Russian privatization program. Among these principles are Russia's legal traditions, its current socio-economic tension, possible alternatives, and feasible options.<sup>165</sup>

First, different types of state land must be allocated, employing different legal approaches to urban land and agricultural land. The government must establish two different systems of regulation for the distribution of urban land and farm land. The system of privatization of urban land must be more relaxed than the system of allocating farming or agricultural lands. The reason for such differentiation is quite obvious—the country cannot afford to lose all agricultural land at once. Such a loss could happen through purchases of land for speculative purposes. Groups such as Russian *nomenklatura*, and *apparatchiki*—or black-marketeers, mobs, and foreigners—could take advantage of the skyrocketing inflation and the catastrophic weakness of the national currency.<sup>166</sup> The main objective of privatization—to provide conditions for developing efficient farming, while eliminating inequality among members of the community—would not be achieved. Such a turn of events would eventually lead to a new socio-political crisis, which could only be resolved by a new communist, nationalist, or even fascist revolution. It has been argued that the traditional socialist and republican hostility to speculators "is grounded in part on the notion that they introduce a degree of liquidity into economic relations that threatens the political structure of the community."<sup>167</sup>

Thus, farming land in this transformation period must be subjected to some restrictions on use and alienation. Without

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164. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1901 (3d ed. 1992).

165. Palmer, *supra* note 163, at 492.

166. *Id.* at 494.

167. William H. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335, 1343-44 (1991).

these drastic measures, fairness and equity of distribution cannot be achieved. Such restraints are common in nineteenth-century reform models.<sup>168</sup>

On the other hand, urban land is much more important to the market process. The price of urban land is dependent on the market. The freedom to buy and sell urban land will induce broad investments and stimulate the development of urban areas. Furthermore, the land and structures thereon should no longer be separately owned. The ongoing process of privatization of enterprises, buildings, and dwellings demands the legal reformation of basic real estate law. Urban land must be free from restraints on alienation. Investment by foreigners, primarily interested in urban land, can only improve socio-economic conditions, not aggravate them.

Second, for the reasons stated above, the farm lands in the agricultural areas must be distributed primarily for the purpose of farming. The land should only be sold for commercial use if nobody wishes to purchase these lands for agricultural purposes. The government should establish a two-tiered system of bidding for farm land. The farmers and others who wish to work on the land may participate in the first round of auction. These buyers would be favored by preferable terms, government credits, and lower prices. An auction purchase might be determined not only by the price, but also by the proposed program for the development of the land, the participants' skills, and their knowledge and reputation. The state committee, which would evaluate the potential candidates and their business programs, might include government officers, judges, agronomists, ecologists, peoples' deputies, and farmers. The proposed land development program could then be incorporated into the purchasing contract.

Thus, land distributed for agricultural use would have restrictions so that it could be used only for agricultural purposes and not be subjected to speculation for a certain period of time. These restrictions are quite reasonable given the significantly favorable

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168. American economist Thomas Skidmore proposed a system under which property could be held privately by the "fathers" only as a life estate. The property would then revert to the state upon the holder's death, to be redistributed each generation to the "children" in approximately equal allotments. PAUL K. CONKIN, *PROPHETS OF PROPERTY: AMERICA'S FIRST ECONOMISTS* 237-40 (1980). The Homestead Act of 1862 limited the amount of public land that might be acquired to a quarter section per claimant. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 363 (1973).

terms upon which the land was acquired. Without analyzing the theoretical details of real estate rights, the farmers would have an Anglo-American equivalent of a fee simple absolute, and the state would retain a possibility of reverter,<sup>169</sup> or some kind of limited ownership.<sup>170</sup> The transfer restraint gives the state enforcement control over the transfer of the equity interest. The constraint may give the state a right of first refusal may require the state's consent to sale, or may require that the buyer satisfy stipulated conditions.

Restraints on alienation may contribute to the maintenance of a politically desirable distribution of wealth and "preclude transfers that might threaten the social-republican character of the community—notably transfers to absentee owners or 'speculators.'"<sup>171</sup> In fact, some U.S. colonial laws imposed either settlement conditions on property interests in feudal grants of western lands or usage requirements that required the owner to reside on the property and use it productively as a condition to property rights, or both.<sup>172</sup> Such restraints are also prominent in twentieth-century third-world land reform programs.<sup>173</sup>

As the second step in the two-part bidding process, if the land cannot be sold in the first round of the auction, the state auction committee can recommend that the local government, as the current owner of the land, either lease or sell the land for commercial use. Government ordinances, through established zoning or covenants, can also restrict the potential commercial use of the land.

Third, land used by the collective farms must not be sold at auctions, but instead, allocated among the members of the collective farms themselves. Historically, collective farms were organized by joining private farms, including land, cattle, and agricultural implements. Because members are the successors to the former private landowners, it seems inequitable to liquidate *kolkhozes* without fair compensation to their members. Moreover,

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169. DUKEMINIER & KRIER, *supra* note 95, at 266.

170. For a discussion of different forms of limited equity ownerships, see Simon, *supra* note 168, at 27-32.

171. *Id.* at 1341.

172. *Id.* at 1342.

173. See, e.g., SIDNEY KLEIN, THE PATTERN OF LAND TENURE REFORM IN EAST ASIA AFTER WORLD WAR II, 20-21 (1958); SUSAN WALSH SANDERSON, LAND REFORM IN MEXICO 1910-1980, at \_ (1984).

public policy favors the distribution of agricultural lands to people who are planning to farm those lands. Also, the land has far more value to farmers than to anyone else. Therefore, the land of collective farms should be distributed among the members. From a practical standpoint, if the government does not give the collective farmers some privileges with respect to acquiring the right to their land—land that they have possessed for several generations—the government would be unable to liquidate *kolkhozes* without a Stalinist-type “implementation” of state policy by means of force.

All members of collective farms would be entitled to a share of the farm’s land and varying shares of the fixed assets of the farm. The size of the plot and the value of the individual’s share would depend on seniority, the length of time worked on the farm, a coefficient of labor participation, position, and other factors. Each person could decide whether to use his share of the land for private farming or to pool his property with others and work cooperatively. From a legal viewpoint, this collective land should have relaxed requirements and fewer restrictions. The farmers should be able to alienate their lands, but the collective and the state should have the first right of refusal. As a practical matter, this means that the land would not be transferrable on the secondary market until the economic transformation has been completed and the market has been formed.

Fourth, collective farms, as a form of state enterprise, must be reorganized. If farmers want to work collectively, they must organize themselves into a legal form of business association, such as a cooperative, a partnership, or an association. These new organizations should not be liable for the debts of the former *kolkhozes* or subjected to the existing requirements of providing compulsory supplies to the government; they should enter into contracts with the government. These new organizations should be given a new start. The cooperatives must be free to buy their supplies and sell their product without administrative restrictions on quantity or price.

Fifth, the government must provide equal opportunity and equal treatment for all business organizations and private farmers. For example, credit and financial assistance, if any, should be available to everyone on an equal basis. Government subsidies should be abolished. The so-called “[s]tatements of Technical

Service,"<sup>174</sup> which provided collectives with combines and universal technical service for their transportation, must be privatized or liquidated. Basically, the enterprises, as parts of the chain of agricultural production, must be privatized and must reorganize their relations on a contractual basis.

Sixth, denationalization of land in Russia to the former owners should not be allowed. Some former Soviet republics decided to restore land to previous owners or their heirs;<sup>175</sup> the Baltic states did not become part of the former Soviet Union until well after its formation, however. Thus, the liquidation of private property and other changes in landowner rights in these countries occurred in the span of one generation. Certainly, it is much easier for the Latvian Parliament to justify and legitimize denationalization rather than explain to the Russian people why they have to return their property to people whose remote predecessors may have possessed the land three generations before them. This denationalization is inconsistent with current Russian policy.

Seventh, there are many technical obstacles to ascertaining the former owners of land after such a long and bloody period in Russian history. When the Baltic States joined the Soviet Union, the traditions of the people were vastly different from the people of other republics. The Baltic States were forced to adopt socialist civil law, which was quite different from their former civil legislation, particularly with regard to property law.<sup>176</sup> After proclaiming their independence, the Baltic States were able to return to their pre-Soviet civil law, which automatically changed many legal institutions of the Soviet legal system, including state ownership of the means of production, without any significant problems. The denationalization of Russian land to its former owners is not advisable. This situation would create new political tension, social anxiety, and legal chaos, thus jeopardizing the entire process of economic transformation.

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174. See, e.g., Rozenfelds, *supra* note 93, at 358.

175. *Id.*

176. The Soviet Latvian Civil Code was built as a Pandect system-based code. The Code included all of the same principles that applied to the rights of ownership in other Soviet Republics. The Civil Law of pre-Soviet Latvia was based on an institutional system like the French *Code Civil*. The subsequent Soviet Latvian Civil Code of 1964 only included about 600 articles while the earlier Civil Law of 1938 had 2,400 articles. *Id.* at 358.

Finally, natural minerals such as oil, gas, gold, and copper should not be considered private property of the land owner. Such a rule would eliminate land speculation during the period of the land's initial distribution and would prevent unjust enrichment to speculators at the expense of society as a whole. A contrary approach to this problem would provoke a "land-rush" and induce even greater corruption of the people.

#### IV. CONCLUSION

Privatization is an inherently controversial issue that will generate considerable public and political debate. "Resolution of the substantive issues of privatization is necessary, but not sufficient, for embarking on a program."<sup>177</sup> Procedural issues are no less important, but inadequate attention to the process of implementation may destroy the program.<sup>178</sup> This is particularly true in Russia. Current economic changes, political instability, absence of clear legal doctrines and regulations, conflicts of interests facing government officers and state enterprise managers, corruption, and bureaucracy demand implementation of a clear and coherent policy.

The government must control the land allocation process and designate the subsequent use of the land. Nevertheless, privatization should be driven by public initiatives, giving citizens the opportunity to create their options, rather than allowing the government to manipulate the process. The government should play an administrative role in this process. A complete legislative package must be introduced, covering commercial law, banking law, bankruptcy law, securities law, real estate finance law, tax law, administrative law, and labor law. Furthermore, the law regarding ownership of property must be revised before privatization can occur. The Soviet civil law, with its "absolute character" of ownership relations, cannot provide a legal system that will combine the economic interests of different people, entities, and the state. The transition from a command economy to a market-driven economy demands flexible laws that cannot only guarantee an owner sufficient powers to effectively realize his interest in the property, but also give society the legal means to control the

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177. Palmer, *supra* note 163, at 510.

178. See Ed A. Hewett, *Comments and Discussion*, in 1 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 309, 312 (William C. Brainard & George L. Perry eds., 1990).

distribution of this power according to general principles of fairness, equity, and the public interest.