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PRIVATE PROPERTY AND RUSSIA'S LEAP OF FAITH

DOUGLAS R. HADDOCK*

American law professors who teach a basic property course to first-year students encounter numerous looks of amazement from their students during class discussion of the American “law of property.”¹ Much of the amazement seems to stem from the realization—or, perhaps more accurately, the attempt to understand—that “property” in our culture does not consist of “things,” or even concrete and absolute rights. Instead, property is a complex set of abstract and nebulous relationships among individuals and their government. These legal relationships *are* property for lawyers.

Popular notions of property are enshrined in constitutional protections that seem to make quite clear our society's emphasis on the individual's preeminence in matters of property. This emphasis on the individual and the sanctity of individual property “rights” in our culture seems to make private property an immutable, God-given right of all people.² It is not surprising, therefore, that Americans have

* B.A., J.D., University of Utah. This essay grew out of the author's association with Larisa Krasavchikova, Docent of Civil Law at the Juridical Institute in Sverdlovsk (now Ekaterinburg), Russia. In 1991, Larisa left her Russian home in Sverdlovsk and journeyed to San Antonio, Texas, to spend six months at St. Mary's University School of Law. She teaches property, as I do, and we had numerous interesting conversations on that subject and, more specifically, on the rapidly developing political and economic events in her homeland. During Larisa's stay on our campus, dissidents in the USSR attempted to overthrow the government of Mikhail Gorbachev, the nation she had left just weeks earlier disintegrated, a new social and political order started to evolve in Russia and other parts of what was the Soviet Union, and the name of her hometown was changed from Sverdlovsk to Ekaterinburg. I shall never forget the uneasy excitement I witnessed during my conversations with Larisa. As we discussed the prospects of a regime of private property in Russia similar to what we know in the United States, Larisa seemed a bit like a young child facing a new adventure with a mixture of anxious anticipation and cautious fear. I suspect that both the anticipation and the fear were justified. This essay is written with fond hopes for the success and happiness of my friend Larisa and the people of Russia and the other republics of the former Soviet Union.

1. It is possible, of course, that the writer is the only property teacher getting these looks of amazement. In any event, it is likely that most first-year property students find many aspects of the American law of property, as taught in American law schools, to be peculiar indeed.

2. In her excellent book, *Rights Talk — The Impoverishment of Political Discourse*, Mary

never been able to accept the “socialist ownership” notions of the Soviet Union and other socialist countries as a viable scheme of property.³ Now that those ideas apparently have also been rejected by the republics that were the Soviet Union, the religion of private property seems even more natural, and many Americans are no doubt muttering “We told you so!” to socialists everywhere.

It is probably irrefutable that the application of socialist ownership principles in the Soviet Union has been less efficient than the American model of private ownership.⁴ I would submit, however, that we may be a bit too hasty in condemning entirely the ideas of socialist ownership and concluding that the fall of the Soviet Union has proved the ultimate “rightness” of private property as we know it. I would prefer to avoid casting the matter in terms of “right” and “wrong.” For the moment, we would do well simply to understand the meaning and consequences of events that occurred in what was the Soviet Union and throughout the Eastern bloc as we prepare to advance into the twenty-first century. Premature value judgments of those events

Ann Glendon effectively questions both the “fact” of absolutism in property rights and the desirability of couching our public and private dialogue so emphatically in terms of rights. MARY ANN GLENDON, *RIGHTS TALK—THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 1-46 (The Free Press 1991).

3. Much closer to home, but somewhat similar to the clash of ideas about property between the United States and the USSR, is the relationship between the United States and the original American people who “discovered” Columbus when he arrived on the American continent. There was, and probably still is, a wide gulf of misunderstanding about matters of property between Native American peoples and the United States of America. Native American societies saw property not so much in terms of “private or individual” and “development and exploitation” but rather in the “less civilized” terms of “community,” “use,” and “stewardship.” With this fundamental difference in the frames of reference of the two cultures, it should be no surprise that the attempt by the United States to assimilate Native Americans into European culture by persuading them of the superiority of notions of private property was not destined to be a success. One wonders whether the apparent failure of the Soviet Union’s experiment in communism, and the inability of the Europeans to “civilize” the Native Americans and change their notions of private property, say more about culture and history than about the rights and wrongs of natural law. Certainly American society, or at least a part of it, has now begun to recognize the significant values in Native American perceptions of land and the fragile earth we inhabit, values not comprehended by the conquerors of the earlier centuries.

4. See Richard C. Schneider, Jr., *Developments in Soviet Property Law*, 13 *FORDHAM INT’L L.J.* 446, 448 (1990) (noting that socialist ownership produced less efficient economy than market economy based on private ownership). In economic theory, “efficiency” of course means somewhat different things to different people. As I use the term here, I mean simply to recognize the apparent failure of the Soviet economic system in terms of maximizing wealth and utility for the large majority of the citizens of the Soviet Union. This failure certainly delivers a major blow to Marxist theory in practice.

will not advance the cause of human happiness and may even jeopardize the prospect of a net gain from the disintegration of the Soviet Union.

My experience with first-year law students suggests that our beliefs about property are very firmly held and are based on tradition and vague understandings of our political and social order. The emphasis here is on "firmly held" beliefs. In spite of many prolonged efforts designed to persuade students that they should redefine "property" in their minds to conform to American legal thought, I believe that many, if not most, cling to a belief that "property" cannot be what their ivory-tower law professors say it is. Perhaps a better way to capture this phenomenon is to say that students tuck their preconceived notions of what property *really* is into a corner of their minds, rather than allow the property professor to substitute his or her ideas for those of the students. They can then call upon and fall back on those earlier notions whenever it is convenient or attractive.

The people of Russia and the other former Soviet republics must be experiencing even more disturbing repercussions than my first-year property students. The reformation of the legal systems in what was the Soviet Union, and the quite drastic redefinition of "property" in that part of the world, is presumably a tremendous shock to the people affected, both collectively and individually. From 1917 until the recent past, the Soviet scheme of socialist ownership, although more complex than most Americans realize, was characterized by an emphasis on state and communal ownership, with much less "private property" than has been common in American society.⁵ There were three classes of owners, namely (1)the Soviet Union, (2)collective farms and other social organizations, and (3)citizens of the Soviet Union.⁶ Despite having three classes of owners, though, "the foundation of the economic system of the USSR [was] socialist ownership of the means of production in the form of state property (belonging to all the people), and collective farm-and-co-operative property."⁷ Now it appears that the people have opted to cast aside the tradition of the

5. See Richard C. Schneider, Jr., *Developments in Soviet Property Law*, 13 *FORDHAM INT'L L.J.* 446, 448 (1990) (noting substantial difference in property concepts between socialist and market economics).

6. *Id.*

7. KONST. SSSR [Constitution (Fundamental Law) of the USSR] art. 10 (1977), *reprinted in* 8 *MODERN LEGAL SYSTEMS ENCYCLOPEDIA* 8.150.152-181 (Kenneth R. Redden & Linda L. Schlueter eds., 1991).

past seventy-five years and, with western democracies, emphasize the individual rather than the community as to matters of wealth, property, and production.

Many changes to the Soviet law on ownership were made on March 6, 1990, by the Supreme Soviet of the Union of Soviet Socialist Republics (USSR). New forms of ownership were created and additional rights and protections fashioned. Later in that same year, the Supreme Soviet of the Russian Soviet Federated Socialist Republic (RSFSR) adopted its own, more liberal, law devoted to ownership. As it turns out, the RSFSR has apparently prevailed in this "war of laws," and the result must be a very confused national understanding of property, at least for the present.

For example, consider a number of related provisions of law concerning individual ownership, all arguably applicable in Russia at some time or another during 1990 and 1991. First of all, prior to January 1, 1991, the Civil Code of the RSFSR provided that an individual or spouses living together could own only one dwelling-house.⁸

8. GK RSFSR [Civil Code of the RSFSR] arts. 105-07 (1964), *reprinted in* THE SOVIET CODES OF LAW 419-20 (William B. Simons, ed., A.K.R. Kiralfy trans., 1980). The Civil Code provides:

Chapter XI. INDIVIDUAL OWNERSHIP

Article 105. Objects of the Right of Individual Ownership

Citizens may individually own property intended to satisfy their material and cultural needs.

Every citizen may own his earned income and savings, a dwelling-house or part of a house, subsidiary domestic equipment, articles of domestic utility and personal use and comfort.

Property individually owned by citizens may not be used as a source of unearned income.

Article 106. Right of Individual Ownership of a Dwelling-house

A citizen may own individually a dwelling-house or part of one.

Spouses living together and their minor children may own only one dwelling-house or part of one, whether it belongs to one of them or is owned by them in common.

The maximum size of a dwelling or part of it belonging to a citizen by right of individual ownership may not exceed 60 square meters of dwelling space.

Article 107. Termination of the Right of Individual Ownership of More than One House

If, on grounds permitted by law, more than one dwelling-house is individually owned by a citizen or spouses living together and their minor children, the owner has the right to elect which of these to keep. Within the course of a year, the other dwelling-house or dwellings must be sold, given away, or otherwise disposed of.

If within one year the owner fails to dispose of the dwelling in some form, the house becomes liable, after a decision of the executive committee of the district or city Soviet of Workers' Deputies, to compulsory sale by the procedure laid down by the Code of Civil Procedure of the RSFSR for the execution of judicial decisions. The former owner re-

If a couple owned more than one house, they were given one year to dispose of it or face a forced sale orchestrated by the government. The owners would receive the money from any sale, but if no purchasers were found, the house would pass into state ownership without any payment.

The same Russian Civil Code provided that a citizen who built a house (or part of one) without permission or a properly approved plan, had no power to dispose of the property by sale, gift, lease, or any other method.⁹ The government could require that the house be demolished at the owner's expense or "be confiscated without compensation and added to the housing resources of the local Soviet of Workers' Deputies."¹⁰

Meanwhile, on March 6, 1990, the Supreme Soviet of the USSR adopted a new "Law on Ownership in the USSR."¹¹ Article 7, captioned "Ownership of Citizens of the USSR," stated:

Dwelling houses, dachas, garden houses, plantings on a land plot, means of transport, cash assets, stocks, and other securities, household articles and articles of personal consumption, means of production for conducting peasant farming and other labor economy, personal subsidi-

ceives the proceeds of the sale after deduction of the cost connected with the compulsory sale.

In cases in which the compulsory sale does not take place for lack of buyers, the house passes into state ownership after a decision of the local Soviet without any payment. . . .

Id.

9. *Id.* art. 109. Article 109 of the Civil Code of the RSFSR provides:

A citizen who builds a house or cottage or part of same without permission or without a properly approved plan, or substantially departing from such plan or with a serious violation of the fundamental building regulations, has no right to dispose of such house or cottage or part of the same, *e.g.* by sale, gift, lease, or otherwise.

Upon a decision of the executive committee of the district or city soviet of workers' deputies, such house or cottage or part of the same must be demolished by the citizen who improperly built it, at his expense, or, upon a decision of a court, may be confiscated without compensation and added to the housing resources of the local Soviet of Workers' Deputies.

If such house or cottage or part of the same is so confiscated without compensation . . . , the court may deprive the citizen and persons living with him of the right to use accommodation in such house or cottage. If, however, such citizens have no other accommodation suitable for permanent residence, the executive committee of the local Soviet of Workers' Deputies to whom the house or cottage is transferred must provide them with alternative accommodation.

Id.

10. *Id.*

11. Vedomosti SSSR [Law on Ownership in the USSR] (Mar. 6, 1990), reprinted in *BASIC DOCUMENTS ON THE SOVIET LEGAL SYSTEM* 269-81 (W.E. Butler ed. & trans., 2d ed. 1991).

ary husbandry, gardening, market gardening, individual and other economic activities, products produced and revenues received, as well as other property of consumption and production designation, may be in the ownership of citizens.

Types of property which may not be in the ownership of citizens may be established by legislative acts of the USSR and the union and autonomous republics. The composition and value of other property acquired by a citizen at the expense of his labor incomes and savings and on other grounds permitted by law shall not be limited.¹²

The revolutionary plot thickens considerably with the "Law on Property in the RSFSR," which was adopted by the Supreme Soviet of Russia on December 24, 1990, to take effect on January 1, 1991. Several fundamental, even radical, changes pertinent to the foregoing discussion illustrate the dramatic nature of the events. Articles 2 and 7 of the new law considerably stabilize individual ownership of property by providing that such property cannot be limited or claimed by the state against the will of its owner.¹³ All exceptions to this rule are

12. *Id.* art 7, §§ 1, 3.

13. *Vedomosti RSFSR* [Law on Property in the RSFSR] (Dec. 24, 1990), reprinted in *THE PARKER SCHOOL OF FOREIGN AND COMPARATIVE LAW, COLUMBIA UNIVERSITY, RUSSIA AND THE REPUBLICS — LEGAL MATERIALS* (John N. Hazard & Vratislav Pechota eds., 1992). Article Two is an interesting statute; consider its first few paragraphs:

Property Rights

(1) Property rights in the RSFSR arise according to the procedure and under the conditions envisioned by legislative acts of the RSFSR. Property rights in the RSFSR are recognized and protected by law.

In the RSFSR the stability of property relations are guaranteed and the conditions for their development and defense are guaranteed.

(2) The owner owns, uses and disposes of property belonging to him according to his own discretion.

The owner may transfer his competence of ownership, use and disposal of property to another party, use his property as security or burden it by other means, may transfer his property to the ownership and management of another party, and also has the right to commit to his property any action that does not conflict with this law.

(3) Property may be private, state, municipal, or the property of a social amalgamation (organization). The state is not permitted to establish any form of limitation or claim to the private, state, municipal property or the property of a social amalgamation (organization).

(4) Objects to which property rights apply may be products of science, literature, art, and other products of creative activity in the sphere of production enterprises, complexes, plots of land, mining operations, buildings, structures, equipment, raw materials and articles, money, securities, and other manufactured, consumer, social and cultural articles, as well as products of intellectual and creative work.

Articles of intellectual property are products of science, literature, art, and other types of creative activity in the sphere of production including discoveries, inventions, rationali-

accompanied by a requirement that the owner be fully compensated.¹⁴

Different forms of ownership—state, municipal, social organizations, and individual—persist under the new law but all forms of ownership are now equal. For the first time since October 1917, truly private ownership can exist in Russia. Also for the first time, it was declared that *land* could be owned by individuals as well as by the state.¹⁵ The impact of such changes can be sensed by recognizing that there are presumably few Russian citizens still living who remember a time when private ownership was the norm and state ownership was not preferred. Consider the furor that would be caused among American citizens if a continuing downturn in the United States economy caused this country to switch to a socialist form of ownership, similar to the law in the Soviet Union prior to recent developments. Such a turn of events is all but unimaginable.¹⁶

The new Russian law on ownership also removes significant limits on individual ownership. The limit on the number of houses individuals can own is easily eliminated by putting the plural in place of the singular—“residential buildings, apartments, vacation houses.”¹⁷ Strict limitations on the size of these houses are also eliminated; the law explicitly provides that “the quantity and value of property acquired by a citizen . . . is not limited.”¹⁸ And for the first time, the previously restricted list of objects of individual ownership now includes “media” and “businesses, property complexes in the sphere of the production of goods, services, trade, other spheres of business activity, buildings, structures, equipment, means of transportation and other means of production.”¹⁹ In other words, the pendulum has shifted dramatically from the state side of the equation to the individ-

zation proposals, industrial models, computer programs, databases, expert systems, know-how, trade secrets, trademarks, company logos and services logos. . . .

Id. art. 2, §§ 1-4.

14. *See id.* art. 7.

15. *See id.* art. 4 (specifically granting citizens right to own land).

16. Some might point to various forms of “socialism” already prevalent in the United States, including social security, medicare, welfare programs, etc. These programs seem to fall considerably short of the kind of “invasions” of “private property” countenanced by the Soviet system prior to 1990.

17. *Vedomosti RSFSR [Law on Property in the RSFSR] (Dec. 24, 1990) art. 10, reprinted in THE PARKER SCHOOL OF FOREIGN AND COMPARATIVE LAW, COLUMBIA UNIVERSITY, RUSSIA AND THE REPUBLICS — LEGAL MATERIALS (John N. Hazard & Vratislav Pechota eds., 1992).*

18. *Id.* art. 10, § 1.

19. *Id.* art. 10, § 2.

ual side. Private or individual ownership was previously characterized as "consumption ownership," distinguishing it from ownership of the means of production, which was limited to the state. Thus, the new Russian law has discarded an artificial distinction between individual property and state property. For the first time, there are almost no limits on the composition and value of personal property.²⁰

Finally, the new Russian law on property arguably takes American notions of private property one step further than has American law. The Russian federation assumes an obligation to compensate owners for all losses which result from crimes against property.²¹ Although victim reparation acts have received some attention in the United States, the idea that the state is in a sense responsible for criminal offenses committed by private citizens seems to be a very liberal notion.²²

In summary, the dramatic developments in Russia over the past few years raise interesting questions for those who are interested in the philosophy of private property. It certainly appears that Russia is taking dramatic steps toward private property and some form of a free market economy. This is heralded in many nations as a positive development, destined to contribute to a better world. It is hard to disagree with this assessment. But it seems likely that such a dramatic shift in the philosophy of the relationship between the material wealth of a society and its people will create substantial turmoil and anguish, at least during the transition.

There is reason to believe that both the former Soviet Union and the world will be better places as a result of the changes in Russia and the other republics of the former Soviet Union. Even so, with the many economic, social, and environmental problems the American traditions of private property and free market economics have not been able to resolve, I think it is fair to suggest that our attitudes

20. *Id.* art. 10, § 1. Article 10 includes an exception to private ownership as to "individual kinds of property stipulated by legislative acts which because of state and social security or in accordance with international obligations may not be owned by citizens." *Id.*

21. *Vedomosti RSFSR [Law on Property in the RSFSR]* (Dec. 24, 1990) art. 30, 33, reprinted in *THE PARKER SCHOOL OF FOREIGN AND COMPARATIVE LAW, COLUMBIA UNIVERSITY, RUSSIA AND THE REPUBLICS — LEGAL MATERIALS* (John N. Hazard & Vratislav Pechota eds., 1992). The new law will then allow the government to recover its expenses from the guilty party. *Id.*

22. Spreading the risk in a fashion similar to this is, of course, the idea of many private insurance programs popular in the United States and elsewhere.

about property are by no means a panacea for societal problems, even in the abstract. Economic analysis has much to offer those who would understand and solve the world's problems. These problems, however, are problems of the individual person and individual communities. It should not be surprising that "the market economy, too, can take a toll on society, including the family, by orienting human beings to means—especially money and power—rather than to ends."²³

A fundamental flaw in many American's notions about private property and free markets is the myth of equality, a myth that often works its way into economic theory, at least as an assumption. In a world that starts with unequal individuals with unequal resources, there are numerous victims of the free market, victims of a Darwinistic survival of the fittest.

In a sense, the American experiment with private property and free markets, and the Soviet experience with communism, are more closely allied than many have assumed.²⁴ American citizens, with their

23. MARY ANN GLENDON, *RIGHTS TALK—THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 119 (The Free Press 1991).

24. In some ways, not a lot has changed in this respect in the past sixty years. In the 1930s a "capitalistic-communistic" dispute arose over a fresco painted by the Mexican artist, Diego Rivera, in Rockefeller Center in New York City. The lofty title of the project, apparently proposed by Rockefeller's representatives, was "Man at the Crossroads Looking with Uncertainty but with Hope and High Vision to the Choosing of a Course Leading to a New and Better Future." Rivera, a communist, included in the painting a picture of Vladimir Ilyitch Lenin. Unsuccessful in persuading Rivera to alter his work, Nelson A. Rockefeller, through a management company, halted work on the project on May 9, 1933 and paid Rivera in full. The mural was covered up and in February of 1934 was destroyed, although a reproduction of the work can be seen in the Palace of Fine Arts in Mexico City. Notwithstanding the collapse of the Soviet Union and the "evils" of Lenin, the following observation written in 1933 about the Rivera-Rockefeller controversy, seems in some ways as timely in 1993 as it did in 1933:

[I]t may well turn out that Rockefeller and Lenin stand much closer together than people think. Both believe in eliminating waste through the concentration of effort. Both look toward a future in which mankind will benefit by unity of purpose instead of suffering the discord and confusion inevitable in the long past when races, countries, and even neighboring cities stood apart in mutual hostility, and spent incalculable time and strength on activities that were futile if not actually destructive. Rockefeller and Lenin are culminations, perhaps even definitive ones, of man's collective purpose to base his life on more reasonable conditions. Which system is to be in control of these conditions? I am sure I do not know. With diversity of opinion on every hand, I think it extremely probable that we have still got to go through a lot of experimenting, that we must arrive at modifications of both schemes before even the wisest of us can discern the controls for the unimaginable machine of the future world.

dreams of material wealth and equality, have focused on one side of the coin—maximizing wealth and happiness, individually and collectively, with the hope that each individual can realize the dream. Hoping to achieve communal justice and equality, the Soviet communists, on the other hand, have criticized the opposite side of the coin—poverty and exploitation.²⁵ Neither system has yet succeeded. Both societies have exploited people and resources in negative ways. Both have been unsuccessful in eradicating poverty and suffering. Unrelenting scarcity persists, as do excruciating pain and suffering.

Applied to Russia, with its significantly different history and background, it takes a giant leap of faith to suppose that our concepts of private property and free markets can successfully address Russian problems. Even so, those presently in control appear to be prepared to take that leap. The real danger for Russia, the United States, and other nations, is not the existence of scarcity, pain, or suffering. These are all probably inescapable parts of the human condition. Rather, the problems continue to be whether we feel and share those crises facing the world community and how we treat one another as individuals and individual communities.

In her book, *Rights Talk*,²⁶ Mary Ann Glendon persuasively illustrates how the obsession of United States citizens with “individualism” and “individual rights” has impoverished our political and social discourse. Our society seems more polarized and more fractionated than ever before. In an ever-increasing number of arenas, including the discussion of private property, there seems to be a very thin line between “rights talk” and “hate speech.” For example, consider the “taxpayer revolts” of recent years in this country. These reactions to the cost of living in modern society presumably have varying degrees of merit, but some of them certainly seem to involve unhealthy doses

Walter Pach, *Rockefeller, Rivera, and Art*, HARPER'S MONTHLY MAGAZINE, Sept. 1933, at 476.

25. Some may object to my suggestion that private property on the one hand, and poverty and exploitation on the other, are simply two sides of the same coin. I find the suggestion difficult to refute, primarily because of the earlier stated premise that people are not equal, in terms of either ability or opportunity. This is not to say that people are not equal in terms of fundamental worth or intrinsic human qualities. In my view, history and reason suggest that private property and free markets, unless tempered by social considerations, really do tend to exacerbate the problem of economic inequality.

26. MARY ANN GLENDON, *RIGHTS TALK—THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (The Free Press 1991).

of selfish individualism. One wonders whether Morris R. Cohen would write today what he wrote 65 years ago:

In actual society no one ever thinks it unjust that a wealthy old bachelor should have part of his presumably just earnings taken away in the form of a tax for the benefit of other people's children, or that one immune to certain diseases, should be taxed to support hospitals, etc. We do not think there is any injustice involved in such cases because social interdependence is so intimate that no man can justly say: "This wealth is entirely and absolutely mine as the result of my own unaided effort."²⁷

Perhaps both Russians and Americans have focused on a false choice in terms of property. The solution, if there is one, does not reside in either the notion that the state should protect an individual's property rights or the belief that the individual should be subservient to the state or cared for by the state. American protection of private property provides important incentives for individual citizens. Socialist and communist theories address legitimate concerns of those who do not thrive in a society driven by an economic survival-of-the fittest philosophy. The answers, good or bad, are in the attitudes and beliefs of the individuals with regard to their place and role in the communities of which they are part, and the world which none of us can avoid much longer. Until individual American citizens, Russian citizens, and other citizens of the world learn how to balance their attitudes about wealth and scarcity with a proper respect for the interests of all and the needs of their local and world communities, it will make little difference what example Russia chooses to follow. Change in Russia is good; change in us all is essential.

27. Morris R. Cohen, *Property and Sovereignty*, 13 *CORNELL L.Q.* 8, 16 (1927).