

Legislators, Judges, and Professors

Edited by
JÜRGEN BASEDOW,
HOLGER FLEISCHER and
REINHARD ZIMMERMANN

*Max-Planck-Institut
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*Beiträge zum ausländischen
und internationalen Privatrecht*

114

Mohr Siebeck

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Direktoren:

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Reforming the Russian Civil Code

A Search for Better Law-Making

Andrey M. Shirvindt

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I. Introduction

The Russian Civil Code in force today, the Civil Code of the Russian Federation, was adopted over the course of the years 1994–2006 in four parts that entered into force separately. The Fourth Part took effect on 1 January 2008.

Right away, a large-scale reform of the Code was set in motion. Not later than 18 July 2008, President Medvedev, a former law professor himself, ac-

ceded to a proposal coming from experts of his consultative bodies (the Council on the Codification and Improvement of Civil Legislation, and the Sergej Alekseev Research Centre for Private Law), who were among those responsible for the Civil Code, and assigned to them the preparation of a Concept for the Development of Civil Legislation and, as a second step, the elaboration of draft amendments to the Code.¹

Contrary to the initial plan, the respective amendments were adopted not as a single whole but as a number of separate bills during the following years (2012–2015). By now, the changes have been introduced in virtually all the spheres covered by the original programme, except for property law and the law of financial transactions. It does not seem very likely that any further far-reaching changes will take place as a part of this reform.

This paper does not trace the entire law-making process from the moment the idea of the reform first appeared until the enactment of the amendments. Instead, it picks out the most transparent and rationally structured part of this process, i.e. the preparation of the Concept and the draft amendments that started on 18 July 2008 with Edict No. 1108 and resulted in a bill transmitted to the President on 30 December 2010. The bill never became law in that original version; it has been split into several parts and has undergone an array of changes due to dramatic developments and bitter disputes in the course of the internal legislative process. Nevertheless, a significant portion of the amendments proposed in 2010 has been enacted.

The reform has brought about a huge number of changes in just about every sphere of Russian private law. These changes are one of the central subjects discussed by lawyers nowadays and will certainly remain topical for a long time. Aside from these discussions and partly intertwined with them, heated debates have taken place concerning the way the reform has been carried out.

There is, on the one hand, a vast amount of publications – books, articles and interviews – from the experts charged with the preparation of the Con-

¹ Paras. 1, 3, Edict of the President of the Russian Federation of 18 July 2008 No. 1108 “On the Improvement of the Civil Code of the Russian Federation” (Edict No. 1108), *Sobranie zakonodatel'stva RF* [Collection of the legislation of the Russian Federation], 2008, No. 29 (1st part), item 3482. See, e.g., *Veniamin F. Jakovlev*, *Modernizacija Graždanskogo kodeksa Rossijskoj Federacii – razvitie osnovnyx položenij graždanskogo prava* [Modernization of the Civil Code of the Russian Federation – Development of Fundamental Rules of Civil Law], in: *Kodifikacija rossijskogo častnogo prava 2015* [Codification of Russian Private Law 2015], ed. by Pavel V. Krašennikov (Moscow 2015) 10–21, 12; *Aleksandr L. Makovskij*, *O kodifikacii graždanskogo prava (1922–2006)* [On the Codification of Civil Law (1922–2006)] (Moscow 2010) 58; *Vasilij V. Vitrjanskij*, *Reforma rossijskogo graždanskogo zakonodatel'stva: promežutočnye itogi* [The Reform of Russian Civil Legislation: Interim Results], *Xozjajstvo i pravo* [Economy and Law] 3 Annex (2015) 2–80, 5.

cept as well as the draft amendments that provide insight into the reform process. They shed light on the ideas and values underlying the reform not only as to its substance, but also with regard to its protagonists, goals, procedures, methods and sources.

On the other hand, a bulk of scholarly writings has emerged, ranging from detailed positive criticism to radical and emotional statements questioning the whole project and not always avoiding exaggerations and personal attacks. Here too, not only substantive questions but also methodological ones became part of the discourse.

The present paper attempts to sum up the most prominent issues discussed, making them more pointed and supplementing them with further considerations in one aspect or another.

The history of the reform has not been written yet. The main actors, methods, procedures, sources etc. are not always clear. Not being able to fill this gap, the paper – without any claim of exhaustiveness – touches upon some features of the reform that might be attractive for a comparative discussion and for illustrating some general problems of law-making that have been highlighted during the disputes in Russia irrespective of the part they played in this story.

Four issues are addressed: expert groups, the working method, legislative history (or *travaux préparatoires*) and the role of comparative law. Well-known to the comparative legal discourse, these rubrics do not represent any coherent system and serve only to organize the material.

Given that the focus of the paper is not on what has been done but rather on how it has been done, the problems of law-making are discussed with no regard to their actual impact on the quality of the resulting law and with no examination of whether or not and, if so, to what extent the dangers they entail have materialized.

II. Expert Groups

1. *The Council, the Research Centre and the ad hoc working groups*

The draft amendments were developed by two permanent advisory committees, convened under the auspices of the President of Russia, and seven *ad hoc* working groups formed by them.

The two committees are the Council of the President of the Russian Federation on the Codification and Improvement of Civil Legislation and the presidential Sergej Alekseev Research Centre for Private Law.² They are closely

² On these committees see: *Issledovatel'skij centr častnogo prava pri Prezidente Rossijskoj Federacii (1991–2011)* [The Research Centre for Private Law under the President of the Russian Federation (1991–2011)] (Moscow 2011).

related, both formally and informally, and share several members. Since their foundation in 1990s, their principal tasks have been to make proposals concerning law reform in the sphere of private law and to give expert opinions on draft amendments in this area. Arguably, the main result of their work is the Civil Code of the Russian Federation.

The team at the Research Centre is built mostly of people with an academic background having doctoral degrees or even postdoctoral qualifications, some of them also with teaching experience. Their duties in the Centre consist primarily in expert analysis on draft legislation.

The Council is composed mainly of judges, high-ranking civil servants and professors, as well as several experts from the Research Centre. Whatever their actual positions, most of the members possess a first-rate academic background. They work on a *pro bono* basis. The total number of members has been growing steadily, totalling more than 40 members since 2014.³ The members of the Council are appointed by the President, the procedure not being subject to any transparent rules or criteria.

The seven *ad hoc* working groups were composed of the Council members (seven judges of the Supreme Arbitrazh [Commercial] Court of the Russian Federation being among them) and fellows of the Research Centre; apart from that there were external experts mainly from academia and civil service, with a fairly modest participation of legal practitioners. The total number of members was close to 50. Most of the working groups' members had an academic background.⁴

2. Controversies around composition of the groups

Several controversies provoked by the reform pertain directly to the composition of the expert groups. Additionally, there are controversies relating to substantive problems, which might be a consequence of the groups' composition.

a) Lack of access

The lack of objective criteria and transparency in setting up the groups as well as the lack of access to them has been criticized.⁵ In fact, neither aca-

³ Edict of the President of the Russian Federation of 29 July 2014 No. 539 "On the Approval of the Composition of the Council of the President of the Russian Federation on the Codification and Improvement of Civil Legislation", *Sobranie zakonodatel'stva RF*, 2014, No. 31, item 4402.

⁴ *Aleksandr L. Makovskij*, O Konceptii razvitija graždanskogo zakonodatel'stva Rossijskoj Federacii [On the Concept for the Development of Civil Legislation in the Russian Federation], in: *Konceptija razvitija graždanskogo zakonodatel'stva Rossijskoj Federacii* [Concept for the Development of Civil Legislation of the Russian Federation] (Moscow 2009) 3–15, 9 ff.; *idem*, Centr pritižženija [The Centre of Attraction], in: *The Research Centre for Private Law* (n. 2) 18–39, 36 f.

demia nor practitioners had any access to the groups on any transparent basis. These criticisms would seem to raise one of the fundamental issues regarding the legitimacy of expert groups charged by a law-maker with the drafting of legislation: to what extent should they be representative and whom should they represent?

This lack of access may have been one of the main reasons for the emergence of an alternative working group, which was formed within a big law firm and then operated under the umbrella of the Ministry of Economic Development of the Russian Federation and the Moscow International Financial Center.

Still, without downplaying this aspect regarding the formation of expert groups, one should remember that, after all, they are meant to function as working groups which implies, in particular, that they cannot be allowed to become too large and, perhaps also, that there should not be too much disagreement between their members. It is not unlikely that similar considerations (co-)determined the formation of the groups.⁶

b) Public-spiritedness and public interests

The members of the working groups have often emphasized that only an expert body composed mainly of judges and professors is capable of acting professionally and animated by public spirit, objectively and impartially.⁷ This emphasis was coupled with scathing criticism directed at the competing project launched and supported by an influential law firm and, allegedly, by big businesses and banks.⁸

⁵ *Vadim A. Belov*, Čto izmenilos' v Graždanskom kodekse?² [What Has Changed in the Civil Code?] (Moscow 2015) 8, 218. It has been observed that some competing schools of thought were not involved: *Jurij K. Tolstoj*, O koncepcii razvitiia graždanskogo zakonodatel'stva [On the Concept for the Development of Civil Legislation], *Žurnal rossijskogo prava* [Journal on Russian Law] 1 (2010) 31–38, 31 f., 38.

⁶ Cf. *Aleksandr L. Makovskij*, Kodifikacija graždanskogo prava i razvitie otečestvennogo meždunarodnogo častnogo prava [Codification of the Civil Law and the Development of Russian International Private Law], in: *Krašeninnikov*, Codification (n. 1) 172–202, 189; the working group on international private law established by the Council in the late 1990s functioned “as a creative living body” and therefore was preserved and vested with the new task of preparing the concept and the draft amendments as part of the reform.

⁷ *Aleksandr L. Makovskij*, Ob urokax reformirovanija Graždanskogo kodeksa Rossii [About the Lessons from Reforming the Civil Code of Russia], *Vestnik graždanskogo prava* [Civil Law Review] 5 (2013) 157–172, 167.

⁸ *Veniamin F. Jakovlev*, Interv'ju [An Interview], *Juridičeskij mir* [Legal World] 2 (2012) 4–9, 4 f.; *Makovskij*, Lessons (n. 7) 165, 167; *Evgenij A. Suxanov*, Problemy kodifikacii zakonodatel'stva o juridičeskix licax [Problems of Codifying the Legislation on Legal Persons], in: *Krašeninnikov*, Codification (n. 1) 56–70, 62; *idem*, O častnyx i publičnyx interesax v razvitiu korporativnogo prava [About Private and Public Interests in the Development of Corporate Law], *Žurnal rossijskogo prava* [Journal on Russian Law] 1 (2013) 5–9, 5 ff.; *idem*, O koncepcii razvitiia graždanskogo zakonodatel'stva Rossijskoj

Public-spiritedness and acting in the public interest may and indeed have proven problematic in many ways.

Most certainly, public-spiritedness and impartiality have in fact guided the work of the groups. However, no formal mechanism has been established to ensure it. No code of best practice has been enacted; no rules on impartiality, conflicts of interest, etc. have been set. Here too, the lack of transparent procedure and criteria for forming the groups becomes relevant.

It should also be noted that there are no rules that would prevent either Council members or Research Centre fellows as such from engaging in private consulting, working for a law firm, or undertaking any other kind of practical activities. There are no rules, at least no written ones, concerning impartiality, conflicts of interest and the like in either the Council or in the Research Centre.

It has been suggested that the members of the groups, being predominantly professors and judges who are not capable of taking on board economic arguments, tended to establish in the drafts the traditional concepts from textbooks or take them from the legal traditions respected in academia, that is to say, for instance, from Roman and German law, and codify the existing court practice rather than answer real questions posed by practice.⁹

The members of the groups, it has been argued, have taken advantage of their membership to push their personal opinions, introducing them into the Concept and drafts and, thus, satisfying their professional and academic ambitions rather than pursuing public interests.¹⁰ These criticisms, *inter alia*, raise the difficult question, whether members of expert groups should be bound by majority views, by a *communis opinio doctorum*, or whether they may rely on their own professional opinions.

Additionally, one of the basic problems of outsourcing law-making of any kind has become topical. During the sharp debates between the members of the groups and their critics, pre-eminently those that came up with the alternative project, it was noticeable that not just different technical solutions were at stake, but rather different views on both the direction that the future development of Russian law and society should take¹¹ and even the functions of law in

Federacii [On the Concept for the Development of Civil Legislation in the Russian Federation], *Vestnik graždanskogo prava* [Civil Law Review] 4 (2010) 4–21, 14.

⁹ *Belov*, What Has Changed (n. 5) 8, 218 f. See also n. 28.

¹⁰ *Belov*, What Has Changed (n. 5) 219; *Dmitrij I. Stepanov*, *Novye položenija Graždanskogo kodeksa o juridičeskix licax* [The New Provisions of the Civil Code on Legal Persons], *Zakon* [The Statute] 7 (2014) 31–55, 32.

¹¹ Symptomatically, one of the draftsmen, the head of the working group on the law of obligations *Vasilij V. Vitrijanskij*, has manifested his discontent with the representatives of the alternative working group, “who insisted on introducing into the bill new provisions, which complied with their views on the development of economic life, without regard to the fact that they contradicted the Concept” (*Vitrijanskij*, *Interim Results* (n. 1) 6).

society.¹² These discussions were led under such headings as “just vs. efficient”, “equality and justice vs. investment climate, regulatory competition and international ratings”, “internal legal arguments vs. law and economics”, and the like. Not surprisingly, the working groups consisting mainly of judges and professors stuck to the first halves of these opposing pairs.¹³ Yet, it was not a conflict between the largely descriptive approach of judges and academia, and the social engineering appetite on the part of critics, but rather a confrontation between two competing social engineering projects. The main question is, of course, whether it is legitimate for a legislator to delegate value judgements of this kind to a group of a-political experts functioning outside the democratic process.

c) Emphasis on hard cases?

In some instances the experts may have forgotten that hard cases make bad law and as a consequence may have overestimated particular problems and overgeneralized approaches developed by the courts.¹⁴ A possible source of this kind of shortcoming is that a judge’s professional perspective may be limited or, to put it differently, that his approach may be formed by cases or types of cases he knows; and a supreme court judge may focus primarily on hard cases that constitute the bulk of his work.

¹² This has been observed, for instance, by *Stepanov*, *The New Provisions* (n. 10) 31 f. See also *Evgenij P. Gubin*, *O predstojaščix izmenenijax v časti I Graždanskogo kodeksa Rossijskoj Federacii i pravovoe regulirovanie predprinimatel’skoj dejatel’nosti* [On the Upcoming Amendments to the First Part of the Civil Code of the Russian Federation and the Legal Regulation of Business Activities], *Predprinimatel’skoe pravo* [Business Law] 4 (2012) 2–5, 3 f.

¹³ *Aleksandr L. Makovskij*, “Prežde čem delat’ zakon dlja kogo-to bolee privlekatel’nym, nado ponjat’, dlja kogo on stanet menee privlekatel’nym” (Interv’ju) [“Before you make a law more attractive for somebody, you have to realize for whom it will become less attractive” (An Interview)], *Zakon* [The Statute] 5 (2012) 89–96, 89 f.; *idem*, *Lessons* (n. 7) 158 ff.; *idem*, *Centre of Attraction* (n. 4) 39; *Evgenij A. Suxanov*, *Sravnitel’noe korporativnoe pravo* [Comparative Corporate Law] (Moscow 2014) 18 ff.; *idem*, *Amerikanskije korporacii v rossijskom prave* (o novoj redakcii gl. 4 GK RF) [American Corporations in Russian Law (On the New Version of Ch. 4 of the Civil Code of the Russian Federation)], *Vestnik graždanskogo prava* [Civil Law Review] 5 (2014) 7–23, 7 ff.; *idem*, *Concept* (n. 8) 12 ff.

¹⁴ *Anton D. Rudokvas*, *Priobretatel’naja davnost’ i zaščita dobrosovestnogo priobretatelja v koncepcii razvitija zakonodatel’stva o veščnom prave* [Acquisitive Prescription and Protection of Bona Fide Purchasers in the Concept for the Development of Property Law], *Vestnik Vysšego Arbitražnogo Suda Rossijskoj Federacii* [The Herald of the Supreme Arbitrazh Court of the Russian Federation] 7 (2009) 94–113, 100; *Andrej M. Širvindt*, *Ssylka na ničtožnost’ sdelki kak zloupotreblenie pravom* [Invocation of the Nullity of a Legal Transaction as an Abuse of Right], *Arbitražnaja praktika* [Practice of Arbitrazh (Commercial) Courts] 7 (2015) 24–41.

III. Working Method

1. An outline

The work started in summer 2008, that is after Edict No. 1108 had been issued, with the preparation of the Concept.¹⁵

Each of the seven *ad hoc* working groups developed a detailed Concept for a certain area. These draft Concepts (over 600 pages in total) were published during winter and spring 2009.¹⁶

A public discussion in the form of conferences, scholarly writings and internet forum dialogues followed. Foreign experts were consulted. The feedback was taken into consideration, and the final version of the Concept (about 140 pages) was prepared by the presidium of the Council, which in this case consisted of the heads of the *ad hoc* working groups. On 25 May 2009 the Council examined the final version of the Concept. On 7 October 2009 it was approved by the Council chaired by the President of Russia on this occasion.¹⁷ Subsequently, the Concept was published.¹⁸

¹⁵ For a brief overview see *Makovskij*, Concept (n. 4) 8 ff.; *idem*, Centre of Attraction (n. 4) 36 ff. See also *Veniamin F. Jakovlev*, O kodifikacii graždanskogo zakonodatel'stva sovremennoj Rossii [On the Codification of Civil Legislation in Modern Russia], in: *Osnovnye problemy častnogo prava* [Fundamental Problems of Private Law], ed. by Vasilij V. Vitrjanskij/Evgenij A. Suxanov (Moscow 2010) 380–394, 386 f.; *Suxanov*, Concept (n. 8) 7 f.; *Vitrjanskij*, Interim Results (n. 1) 5 f.

¹⁶ *Koncepcija razvitija zakonodatel'stva o juridičeskix licax (proekt)* [Concept for the Development of Legislation on Legal Persons (Draft)], *Vestnik graždanskogo prava* [Civil Law Review] 2 (2009) 9–73; *Koncepcija razvitija zakonodatel'stva o cennyx bumagax i finansovyx sdelkax (proekt)* [Concept for the Development of Legislation on Negotiable Instruments and Financial Transactions (Draft)], *Vestnik graždanskogo prava* [Civil Law Review] 2 (2009) 75–143; *Koncepcija soveršenstvovanija obščix položenij objazatel'stvennogo prava Rossii* [Concept for the Improvement of the General Provisions of the Russian Law of Obligations], *Xozjajstvo i pravo* [Economy and Law] 3 Annex (2009) 4–64; *Koncepcija soveršenstvovanija obščix položenij Graždanskogo kodeksa Rossijskoj Federacii* [Concept for the Improvement of the General Provisions of the Civil Code of the Russian Federation], *Vestnik Vysšego Arbitražnogo Suda Rossijskoj Federacii* [The Herald of the Supreme Arbitrazh Court of the Russian Federation] 4 (2009) 9–101; *Koncepcija razvitija zakonodatel'stva o veščnom prave* [Concept for the Development of Legislation on Property Law], *Vestnik Vysšego Arbitražnogo Suda Rossijskoj Federacii* [The Herald of the Supreme Arbitrazh Court of the Russian Federation] 4 (2009) 104–185; <<http://privlaw.ru/sovet-po-kodifikacii/conceptions/>>.

¹⁷ Para. 1, Decision of the Council of the President of the Russian Federation on the Codification and Improvement of Civil Legislation of 7 October 2009, in: *Concept for the Development of Civil Legislation in the Russian Federation* (n. 4) 156.

¹⁸ *Koncepcija razvitija graždanskogo zakonodatel'stva Rossijskoj Federacii* [Concept for the Development of Civil Legislation in the Russian Federation] (Moscow 2009) = *Vestnik Vysšego Arbitražnogo Suda Rossijskoj Federacii* [The Herald of the Supreme Arbitrazh Court of the Russian Federation] 11 (2009) 8–99.

Next came the elaboration of the draft amendments within the same seven *ad hoc* working groups. In accordance with the decision of the Council of 8 November 2010, the resulting draft was published on the websites of the Supreme Arbitrazh (Commercial) Court of the Russian Federation (in several parts during the period between 13 November and 6 December 2010)¹⁹ and the Research Centre.²⁰

As stated in the Explanatory Note,²¹ a public discussion in the form of international conferences took place, and Russian and foreign experts were asked to give their opinions on the draft. The feedback was taken into consideration.

On 30 December 2010 the draft bill was presented to the President.

2. Problematic aspects

a) Limited transparency

It is not an easy undertaking to give a critical account of the working method outlined above. This is due to a reason which itself amounts to an important feature of this method, i.e. the limited transparency of the process. The transparency issue was present from the beginning of the project: it was addressed expressly by the draftsmen, who showed a clear ambition to be transparent in publishing both the draft Concepts of the *ad hoc* working groups and reports on how the work had been organized.²² The very idea to prepare, publish and discuss a Concept before the elaboration of draft amendments manifests a commitment to more transparent law-making.²³

This tendency can partly be explained by the fact that Edict No. 1108 insisted on a public discussion of the Concept.²⁴ The search for legitimacy may provide the main part of the explanation. It is also worth mentioning that the emergence of the alternative project induced some members of working groups to come up with a series of quite passionate publications making their

¹⁹ <<http://arbitr.ru/press-centr/news/31202.html>> (13 November 2010), <<http://arbitr.ru/press-centr/news/31505.html>> (25 November 2010), <<http://arbitr.ru/press-centr/news/31726.html>> (6 December 2010).

²⁰ <<http://privlaw.ru/sovet-po-kodifikacii/conceptions/>>.

²¹ See n. 38.

²² See e.g. *Makovskij*, Concept (n. 4) 4, 11 ff.; *idem*, Centre of Attraction (n. 4) 37 f. While criticizing alterations to the original version of the bill, Aleksandr L. Makovskij demonstrates dissatisfaction with the low level of transparency at the late stages of the internal legislative process: *Aleksandr L. Makovskij*, *Sobstvennyj opyt – dorogaja škola* [Learning from One's Own Experience Is an Expensive Way to Learn], in: *Aktual'nye problemy častnogo prava* [Current Problems of Private Law], ed. by Bronislav M. Gongalo/Vladimir S. Em (Moscow 2014) 24–37, 26, 27 f.

²³ This idea, which was fixed in the presidential edict, came originally from the Council (*Makovskij*, *Lessons* (n. 7) 170 f.).

²⁴ Para. 3, subpara. 6, Edict No. 1108.

views, which had not remained without influence on the Concept and the draft amendments, as well as many criticisms that they were faced with more clear and pointed. As a result, a lot can be learned about the preparation of the Concepts and the draft amendments from the publications of those charged with these tasks. These are in fact our main source of information about the reform.

Yet, many aspects of the working method remain unclear. Apart from the criteria of the personal composition of the groups, this assessment is also true for aspects such as the division of labour and the coordination of work within and between the *ad hoc* groups, the way in which problems were formulated, and the evaluation of the feedback.

b) Problem formulation

One of the most obscure and debatable aspects of the working method of the groups was the way in which problems were formulated. Edict No. 1108 specified only general objectives of the reform, so that the draftsmen enjoyed a very high degree of freedom in determining what exactly had to be done.²⁵ According to the Concept this was to be developed after the concrete needs of improving civil legislation had been identified.²⁶ There is, however, no information as to how exactly this preparatory work was done. The draftsmen would hardly have concealed the fact that a study of commercial and (other) social practices, needs and expectations had been undertaken for this purpose. Nor would a comprehensive regulatory impact assessment have been kept secret.²⁷ Furthermore, one should not overestimate the potential input from the public discussion of the Concept in this context in view of the way the discussion was organized (see *infra* III.2.d)). Under these circumstances, case law seems to have been the main source of information about the actual social needs that to some extent could have determined the problem-formulation by the groups. The draftsmen have been criticized for disregarding the needs of practitioners as well as social and legal realities and for being guided, instead, by their personal academic and professional ambitions and preferences, by a purely scholastic way of thinking, and by authorities found in the traditions of academic literature and prestigious foreign models.²⁸

²⁵ *Suxanov*, Concept (n. 8) 6 f.; *Vladimir A. Slyščenkov*, Proekt izmenenij Graždanskogo kodeksa i principy zakonotvorčestva [Draft Amendments to the Civil Code and Principles of Law-making], *Zakonodatel'stvo* [The Legislation] 8 (2011) 9–20, 9 f.

²⁶ Concept for the Development of Civil Legislation (n. 18) 24.

²⁷ *Slyščenkov*, Draft Amendments (n. 25) 13.

²⁸ *Pëtr D. Barenbojm*, Zakonoproekt o reforme Graždanskogo kodeksa ignoriruet interesy rossijskix vkladčikov i mirovoj opyt antikrizisnoj raboty na finansovyx rynkax [The Bill on the Reform of the Civil Code Disregards the Interests of Russian Depositors and Ignores the International Experience of Crisis Management on Financial Markets], *Pravo i èkonomika* [Law and Economy] 11 (2010) 14–19, 14 ff.; *Belov*, What Has Changed (n. 5) 213 ff.; *Oleg M. Ivanov*, Pravo i èkonomika: vmeste ili porozn'? [Law and Economy:

c) Coordination

Establishing different working groups for different subject matters inevitably raises the problem of coordination, both in methods and substance. Even though there is no information on how this problem was dealt with, the silence of the draftsmen may be eloquent, and stylistic differences between different draft Concepts and even between different parts of the Concept in its final version make it plausible that coordination was not a primary concern of the draftsmen.

d) Public discussion

The way the public discussion was made part of the process as well as the way the feedback was “taken into account” represent one of the most problematic aspects of the procedure followed by the draftsmen. It should on the one hand be noted that they were seeking a broad public discussion from the very beginning of the work²⁹ and later kept stressing that such discussion had taken place in different forms and at different stages of the work, i.e. firstly after the draft Concepts had been published and secondly after the publication of the draft amendments, and that it had been “taken into account”.³⁰ There is

Together or Apart?], *Bankovskoe pravo* [Banking Law] 6 (2009) 4–8, 5 ff.; *Artem G. Karapetov*, *Zavisimost' usloviya ot voli storon uslovnoj sdelki v kontekste reformy graždanskogo prava* [Conditions Dependent on the Will of a Party to a Conditional Transaction in the Context of the Reform of Civil Law], *Vestnik Vysšego Arbitražnogo Suda Rossijskoj Federacii* [The Herald of the Supreme Arbitrazh Court of the Russian Federation] 7 (2009) 28–93, 32; *Boris I. Puginskij*, “Graždanskij kodeks napolnen pravovym xlamom iz učebnikov” (Interv’ju) [“The Civil Code is Filled with Rubbish from Textbooks” (An Interview)], *Arbitražnaja praktika* [Practice of Arbitrazh (Commercial) Courts] 6 (2011) 12–15, 13 ff.; *idem*, *O principe dobrosovestnosti v naučnyx publikacijax* [About the Good Faith Principle in Scholarly Writings], *Predprinimatel'skoe pravo* [Business Law] 4 (2011) 5–8, 6; *Anton D. Rudokvas*, *Vladienie i vladel'českaja zaščita v koncepcii razvitiya zakonodatel'stva o veščnom prave* [Possession and Possessory Remedies in the Concept for the Development of Property Law], *Vestnik Vysšego Arbitražnogo Suda Rossijskoj Federacii* [The Herald of the Supreme Arbitrazh Court of the Russian Federation] 5 (2009) 22–53, 27, 29; *Slyščenkov*, *Draft Amendments* (n. 25) 10 ff., 17, 19; *passim*; *Dmitrij I. Stepanov*, *Reforma graždanskogo zakonodate'stva*. Interv’ju nomera [The Reform of Civil Legislation. Interview on the Issue], *Jurist predpriyatija v voprosax i otvetax* [The In-House Lawyer: Questions and Answers] 2 (2011) 11–18, 15, 17; *idem*, *The New Provisions* (n. 10) 32.

²⁹ *Aleksandr L. Makovskij*, “Samye udačnye normy zakona roždajutsja iz sudebnoj praktiki” (Interv’ju) [“The Most Appropriate Statutory Provisions Stem from Case Law” (An Interview)], *Zakon* [The Statute] 8 (2008), 7–11, 10.

³⁰ See e.g. *Jakovlev*, *Codification* (n. 15) 386 f.; *Elena A. Pavlova*, *Kodifikacija zakonodatel'stva ob intellektual'noj sobstvennosti* [Codification of Laws on Intellectual Property], in: *Krašeninnikov*, *Codification* (n. 1) 203–218, 216; *Suxanov*, *Evgenij A. Suxanov*, *Problemy reformirovanija Graždanskogo kodeksa Rossii: Izbrannye trudy 2008–2012 gg.*

no information on whether the discussion that went on after the final version of the Concept was published was taken into account as well.

On the other hand, it cannot remain unnoticed that neither meaningful and profound discussion nor systematic consideration of its results could have possibly been carried out under the given circumstances.³¹ A number of facts have to be kept in mind.

(1) The project aimed at a large-scale reform, bringing at times radical changes in nearly every sphere of Russian private law (significantly revised corporate law, an almost completely new property law, numerous changes to the general rules on legal transactions, prescription, and the law of obligations, etc.).³² Needless to say, a well thought out and critical analysis of such vast material by the professional community would take a considerable amount of time.

(2) At the first stage, the respective proposals were formulated in the quite abstract and vague³³ form of a Concept. Beyond that they were not always sufficiently substantiated.³⁴ In some instances the Concept just pointed out that a particular problem had to be considered.³⁵ Offering a critical assessment of a

[Problems in Reforming the Russian Civil Code: Selected Works of 2008–2012] (Moscow 2013) 3; *idem*, Concept (n. 8) 7; *Vasilij V. Vitvjanskij*, Obščie položeniija o dogovore v uslovijax reformirovanija rossijskogo graždanskogo zakonodatel'stva [General Provisions on Contract in the Context of the Reform of Russian Civil Legislation], in: Krašeninnikov, Codification (n. 1) 71–99, 71. It has also been pointed out that the alternative project was completed without any discussion: *Suxanov*, Problems of Reforming the Russian Civil Code (n. 30) 4; *Vitvjanskij*, Interim Results (n. 1) 19.

³¹ *Karapetov*, Conditions (n. 28) 92 f. Cf. *Aleksej Ja. Kurbatov*, Predlagaemye izmeneniija norm GK RF o bankovskix sčetax i rasčetax: trebuetsja ispravlenie ošibok [The Proposed Amendments to the Rules of the Civil Code of the Russian Federation on Bank Accounts and Settlements: Error Correction Needed], *Bankovskoe pravo* [Banking Law] 5 (2012) 29–34, 29: “Unfortunately no detailed discussion of either the Concept [...] or the draft amendments based on it [...] did happen”.

³² According to *Belov*, What Has Changed (n. 5) 8 f., there is talk of “the new Civil Code”.

³³ See e.g. *Slyščenkov*, Draft Amendments (n. 25) 19; *Daniil O. Tuzov*, Obščie voprosy nedejstvitel'nosti sdelok v proekte koncepcii soveršenstvovanija Graždanskogo kodeksa Rossijskoj Federacii [General Issues regarding the Invalidity of Transactions in the Draft Concept for the Improvement of the Civil Code of the Russian Federation], *Vestnik Vysšego Arbitražnogo Suda Rossijskoj Federacii* [The Herald of the Supreme Arbitrazh Court of the Russian Federation] 6 (2009) 6–42, 9.

³⁴ For criticisms in this regard, see *Belov*, What Has Changed (n. 5) 221; *Karapetov*, Conditions (n. 28) 31, 93; *Oleg I. Krassov*, Recepcija norm zarubežnogo prava – metod razvitija civilističeskoj mysli [Reception of Rules of Foreign Law as the Method for the Development of Civil Law Theory], *Ėkologičeskoe pravo* [Environmental Law] 3 (2013) 34–41, 35; *Rudokvas*, Possession (n. 28) 26, 30, 47; *Slyščenkov*, Draft Amendments (n. 25) 12 f.; 19; *passim*; *Tuzov*, Invalidity (n. 33) 24, 25.

³⁵ Concept for the Development of Civil Legislation (n. 18) 35, 36, 121, 148.

document of this kind is a hard task. Moreover, all the efforts of the critics can well go in vain if their analysis focused on the Concept does not meet the resulting draft amendments based on it, or if in the end the respective ideas of the Concept will not be converted into draft amendments at all.

(3) All this work had to be done within a very short time. The feedback was supposed to come within a couple of months in the first stage (when the Concepts of the *ad hoc* working groups were published) and within at most one month and a half in the second stage (when the draft was published). It is quite obvious that the professional community could hardly be expected to come up with a detailed analysis of the Concepts and the drafts within these time limits, even ignoring the natural restrictions posed by the length of the hard-copy publishing process.³⁶

(4) As has already been mentioned, the procedure for evaluating feedback was not transparent – a fact that might to a certain extent have been detrimental for both the involvement of the professional community and the evaluation process itself. What has been told is that a considerable number of conferences and discussions took place (the latter occurring both in printed book form and with the use of electronic media), that many comments and criticisms were addressed to the draftsmen (over 500), that foreign experts gave their opinions and that all of this was “taken into account”.³⁷ However, it should not be forgotten that the evaluation is said to have taken place within the same short period of time, by no means sufficient for a comprehensive assessment of the feedback.

IV. *Travaux préparatoires*

1. *Available materials*

The question of legislative history or *travaux préparatoires* can be approached from two different perspectives, depending on whether the focus lies on the making or the application of law. In the first case the emphasis will be on the texts produced during the elaboration of a bill, i.e. those texts

³⁶ Cf. e.g. *Aleksandr K. Goličnikov/Gennadij A. Volkov, Zemlja, drugie prirodnye resursy i razvitie zakonodatel'stva o veščnom prave* [Land, Other Natural Resources and the Development of Legislation on Property Law], *Ekologičeskoe pravo* [Environmental Law] 5/6 (2009) 2–4, 2: the editors of this special issue of a law journal dedicated to the discussion of the published final version of the concept observe that unfortunately they can publish the contributions only after the approval of the concept (although they had received them beforehand).

³⁷ See e.g. Explanatory Note (n. 38); *Makovskij*, Concept (n. 4) 11 ff.; *Makovskij*, Centre of Attraction (n. 4) 37 f.; *Suxanov*, Concept (n. 8) 7 f.

which the drafters used as sources of information and perhaps even all the texts and facts which form part of the history of a statute or a rule. The main attention in the second case is paid to those texts and other sources of information on the legislative history which should be – or indeed are – taken into consideration by those who interpret and apply the law, and to this practice of enquiring into legislative history as such. Naturally this paper approaches the topic from the former perspective, with only some remarks being devoted to the standards and practices of statutory interpretation by courts and academia.

Many texts that can be regarded as part and parcel of the law-making process have appeared throughout the period between Edict No. 1108 – which officially initiated the reform and is thereby the first in this series of texts – and the enactment of the respective bills. This bulk of texts includes the seven draft Concepts, the final version of the Concept, the first published version and several later versions of the draft amendments, the Explanatory Note to the bill, dozens of opinions of responsible agencies, and probably much more. A great deal of this material has been published in one form or another.³⁸

This is of course not the only type of sources that can help to understand the new law. The reform process has seen the publication of not only a series of commentaries by the draftsmen analysing the draft Concepts and the final version of the Concept, but also articles and books written by them as well as their interviews, lectures and posts in blogs. As the respective amendments became law, commentaries on them began to emerge.

The Concept and the draft amendments were supposed to³⁹ and in fact did draw inspiration from the existing case law as well as from foreign experiences. Later we will come back to the latter source (see *infra* V.). To get an idea of the role that case law played in the reform, one can simply look at the number of explicit references to court jurisprudence in the Concept.⁴⁰ The final version of the Concept makes more than 15 references in total,⁴¹ in three cases proposing to codify the established practice. The respective numbers in the draft Concept on the general provisions are approximately 35 and 15; in the Concept of the working group on the law of obligations 40 and 5. The real number of instances in which the case law exerted influence will surely be higher. Be that as it may, looking into these models can also be helpful for understanding the relevant new rules.

³⁸ This material is available on the official website of the State Duma of the Russian Federation: <<http://asozd2.duma.gov.ru/main.nsf/%28Spravka%29?OpenAgent&RN=47538-6>>.

³⁹ Para. 1, subparas. б–д, Edict No. 1108.

⁴⁰ See also *Makovskij*, “The Most Appropriate Statutory Provisions” (n. 29) 8 f.

⁴¹ All the numbers mentioned in this paper result from manual counting that was double-checked through computer search. Still, this operation entailed value judgments, so that the figures provided in some cases might slightly deviate from those one would obtain using different criteria.

Besides, opinions expressed by the draftsmen in their scholarly writings long before the reform was put on the agenda are likely to have left their mark on the amended law and, accordingly, consulting this literature can throw light on the motives underlying some of the new rules.

2. *The Concept and its functions*

Two features are characteristic of the *travaux préparatoires* in the context of this reform. The first one is that a Concept of the reform had been developed; the second is that it was published and publicly discussed before the elaboration of the bill started.

The draftsmen proposed to determine in Edict No. 1108⁴² that the reform should begin with the preparation and a discussion of the Concept. This *modus operandi* came as a reaction to the widespread problem of legislative drafting whereby bills are often encountered with no clear idea behind them, and it was meant to become paradigmatic for further large-scale reforms.⁴³ The intention of the draftsmen was thereby to create a guideline for the elaboration of the draft and for its deliberation throughout the legislative process. The latter expectation was disappointed.⁴⁴

It should be stressed that in the eyes of its authors the primary function of the Concept was to guide the drafting and legislative process. Certainly, this cannot preclude judges and academia from consulting the Concept to understand and interpret the law,⁴⁵ but it was not designed for this purpose. One may consider whether concepts of this kind should be drafted with due regard to their possible second function, i.e. to their afterlife and their use in the context of statutory interpretation. The analysis, however, will ultimately depend on the place which legislative history takes in the judicial reasoning process in a given national system.

⁴² Para. 3.

⁴³ *Makovskij*, Lessons (n. 7) 170 f.; *Jakovlev*, Interview (n. 8) 8. See also *Lidija Ju. Mixeeva*, Razvitie rossijskogo semejnogo zakonodatel'stva trebuet konceptual'noj osnovy [The Development of Russian Family Legislation is in Need of a Conceptual Basis], in: *Krašeninnikov*, Codification (n. 1) 311 f., 322. About the time when the reform started, *Aleksandr L. Makovskij*, who played a leading role in the current reform as well as in the codification of 1994–2006, expressed his regrets about poor documentation of the legislative history in the latter case, specifically emphasizing the unfortunate lack of information on motives (*Makovskij*, Codification (n. 1) 12).

⁴⁴ *Makovskij*, Lessons (n. 7) 170–171.

⁴⁵ The draftsmen themselves emphasized the importance of the concept for the interpretation of the amendments, see e.g. *Anton V. Asoskov*, Reforma razdela VI “Meždunarodnoe častnoe pravo” Graždanskogo kodeksa RF [The Reform of Division VI of the Civil Code of the Russian Federation “Private International Law”], *Xozjajstvo i pravo* [Economy and Law] 2 (2014) 3–28, 4.

There is no clear majority view in Russia on whether the *travaux préparatoires* should play a part in the application of the law, and there is not much evidence that this does in fact happen in the courts. Nor have scholarly writings shown much interest in the matter. The reform under consideration might bring about a change, the Concept being too clear an invitation to reassess the role of *travaux préparatoires*, especially given the fact that the reform has introduced many new concepts and rules that can hardly be understood without reconstructing the underlying grounds.

Having said that, one has to admit that for the moment it does not seem to be happening. As of January 2016, a fairly representative legal database⁴⁶ contains about 25 court decisions expressly referring to the Concept. It is in only a couple of cases that the Concept has been used as a means to interpret the law as it stands now or to determine the temporal scope of a particular provision newly introduced into the Code with regard to the motives of the reform as documented in the *travaux préparatoires*.⁴⁷ It is only reasonable to suggest that the new case law that does not pay much attention to the Concepts and other relevant materials will almost inevitably develop in directions deviating from the original plans of the legislature. A thorough reconstruction of the legislative history of every single provision might, even if it is done by academia, come too late.

Curiously enough, soon after its publication the Concept, originally just a by-product of the law-making process, acquired yet one more function, which is – in contrast to those mentioned above – independent from the legislative process and the statutory changes. In several cases courts have invoked the Concept as an authoritative text reflecting Russian law as it was before the reform and as it stands after the amendments, a reliable source that specifies some principles of Russian law and some trends of its development. This use of the Concept can be observed in about 20 decisions, the first one dating back to 9 October 2009,⁴⁸ i.e. only two days after the Concept had been approved by the Council (7 October 2009), two-and-a-half years before the respective bill was to be adopted in its first reading (27 April 2012) and longer still before different parts of it were to become law. The most recent decision originates from September 2015.⁴⁹

⁴⁶ “Konsul’tantPljus”.

⁴⁷ The resolution of the 19th Arbitrazh Appellate Court of 19 February 2015, case No. A14-12993/2014; the resolution of the 3rd Arbitrazh Appellate Court of 11 July 2013, case No. A33-19347/2012 and perhaps the resolution of Resolution of the Arbitrazh Court of the Central District of 18 November 2015 No. Ф10-3908/2015, case No. A83-752/2015. Cf. also the ruling of the Krasnodar Territorial Court of 29 January 2015 No. 4Г-12657/2014.

⁴⁸ The Decision of the Arbitrazh Court of the Kostroma Oblast of 9 October 2009, case No. A31-3239/2009.

V. Comparative Law

1. *Prominent role of comparative inspirations*

The reform has placed a high value on comparative law.

Three out of six general objectives set in Edict No. 1108 were concerned with taking into account foreign laws. These were to harmonize Russian law with EU law, to make use of the experiences of European countries that have modernized their civil codes recently and to preserve legal uniformity within the Commonwealth of Independent States.⁵⁰

As has already been mentioned, foreign experts from Austria, Germany, the Netherlands and presumably also from other countries were consulted at least twice. They were asked to answer some crucial questions that had emerged during the work on the Concept,⁵¹ and at the final stage they were invited to give their opinions on the draft.⁵²

The Concepts repeatedly refer to foreign and international laws, the references varying between those that cite specific articles of the relevant instruments and those that make reference to a certain national or supranational legal system or even to a majority of developed legal systems. The final version of the Concept invokes the authority of foreign and international experiences in more than 40 instances. This is just a fraction of the real number of comparative inspirations, which becomes evident if one looks at the numbers of references in the initial and more detailed versions of the Concept. For example, the draft Concept on general provisions supports its considerations and proposals with approximately 50 explicit comparative references while the corresponding part of the final version, not very different in substance, confines itself to making just four. The respective ratio found in the part on obligations is 40 to 6

Moreover, there are many instances where borrowings or influences were not indicated by an explicit reference but where they can nevertheless be proven or at least hypothesized. A striking example is given by the proposal (which has not ultimately become law) to recognize that in some situations a modified acceptance can constitute an acceptance and should not necessarily be regarded as a counter-offer, as is the case under Russian law (Article 443 of the Civil Code). The wording of the Concept clearly follows Article 19(2) of the United Nations Convention on Contracts for the International Sale of Goods (CISG), yet there is no reference to any source in this context.⁵³ Or, to offer another

⁴⁹ The Resolution of the 17th Arbitrazh Appellate Court of 21 September 2015 No. 17AII-11247/2015-ГК, case No. A60-7466/2015.

⁵⁰ Para. 1, subparagraphs. в–д, Edict No. 1108.

⁵¹ *Makovskij*, Concept (n. 4) 13; *idem*, Centre of Attraction (n. 4) 38.

⁵² Explanatory Note (n. 38).

⁵³ Concept for the Improvement of the General Provisions of the Russian Law of Obligations (n. 16) 55, 59; Concept for the Development of Civil Legislation (n. 18) 123 f.

example: there are no explicit references to the Draft Common Frame of Reference (DCFR) in either the final version of the Concept or in the Concept of the working group on obligations (in the latter case the DCFR may be taken to be covered by different vague formulas referring to “international projects of unification in the field of contract law” and the like), but quite a few references can be found in an introductory commentary on the working group’s Concept that was written by one of the members of that working group.⁵⁴

The main models explicitly referred to include national, supranational and international as well as non-state laws. It is hardly possible to determine precisely to what extent each model influenced the project or any particular part of it. At the same time, to get a first impression one might look at the explicit references in the final version of the Concept and, for instance, in the draft Concepts on the general provisions and on the law of obligations. Apart from pointing in a very general way to, for instance, foreign and international laws or to the experiences of many developed or European legal systems (about 25 references), the final version of the Concept refers more specifically to the German (6), Dutch (2), French (2), Swiss (2) and Ukrainian (1) laws as well as to English and American laws (1) (additionally, in one case the Concept mentions approaches in Austrian and German law differing from the one taken by Russian law and suggests that they should not be followed). Furthermore, there are references to European Union law (11) and to several international instruments: the UNIDROIT Convention on International Factoring (Ottawa, 1988) (1), the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995) (1), and the United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001) (1). Soft law is represented by the UNIDROIT Principles of International Commercial Contracts (PICC) (3) and the ICC Uniform Customs and Practice for Documentary Credits (UCP 600) (1).

Apart from making more or less vague allusions to foreign experiences, legal families or groups of legal systems and the like (about 50), the draft Concept on general provisions makes explicit references to a number of national legal systems – German law (more than 40 times), Dutch law (17), Italian (17), French (14), Swiss (12), Austrian (7), Spanish (6), Estonian (1) and Québécois law (1) – as well as to the Roman law (1), “Anglo-Saxon” law (1) and the “Anglo-American” (1) legal systems. It invokes, furthermore, international experiences generally (5) as well as the CISG (1) and the PICC (1).

In the Concept of the working group on obligations, although mention is made of foreign and developed legal systems (13), German law (3) and Dutch law (2), the leading role is undoubtedly assumed by soft law and international instruments. The “international principles of contract law”, generally meaning

⁵⁴ *Sergej V. Sarbaš*, *Ispolnenie objazatel’stv* [Performance of Obligations], *Xozjajstvo i pravo* [Economy and Law] 3 (2009) 24–49.

the PICC and the like (10 or 11), PICC (14), the Principles of European Contract Law (5), the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (7), the UNIDROIT Convention on International Factoring (3) and the United Nations Convention on the Assignment of Receivables in International Trade (6), are the main sources of this part of the Concept, at least as far as explicit references are concerned. Here again there is only one instance where the Concept refers to “Anglo-American law”.

2. *Controversial aspects of the use of comparative law by drafters*

Several problems concerning the use of comparative law in the legislative process have become apparent during the discussion.

a) *Borrowing as an end in itself*

A tendency has been identified to borrow not in order to meet any practical needs or to answer questions that have arisen. Sometimes, at least, the introduction of “classical” notions, concepts and solutions into Russian law and the approximation of Russian law to some of the “highly-developed legal systems” have become end in themselves.⁵⁵

b) *Borrowing vs. creating*

It has been argued that in many instances the reception of foreign experiences is an easy but ineffective way to solve national (legal) problems. Russian lawyers would be better advised to develop their own approaches that fit the Russian tradition, that are specifically designed to operate within its systematic framework and that meet the actual challenges.⁵⁶

c) *The model to follow: civil law or common law?*

A further issue that has become a hot topic is the choice of the model to be followed. As evidenced by our analysis of two draft Concepts and the final version of the Concept, English and American laws have played a very modest role if any. In three cases out of four where explicit reference to these legal systems was made, it was restricted to the remark that a given solution can be found in both civil and common law. In the fourth case the “Anglo-Saxon legal system” was invoked in the context of land registration as a contrasting model, to stress the particularity of the Germanic legal family, the

⁵⁵ *Belov*, What Has Changed (n. 5) 213 f., 216 f.; *Karapetov*, Conditions (n. 28) 32; *Krassov*, Reception (n. 34) 37, *passim*; *Rudokvas*, Possession (n. 28) 30.

⁵⁶ *Karapetov*, Conditions (n. 28) 32; *Krassov*, Reception (n. 34) 40; *passim*; *Slyščenkov*, Draft Amendments (n. 25) *passim*.

“Russian legal system being traditionally regarded as being part of it”.⁵⁷ The working groups drew inspiration almost exclusively from civil law models, while ideas from the common law were allowed to permeate into the project mainly indirectly, i.e. through civil law systems, international treaties and soft law documents.

The working groups have been criticized for this approach primarily, but not exclusively, in the fields of corporate law and contract law.⁵⁸ The main source of contention was whether a reception of common law in Russia, a civil law country, is possible and desirable. Roughly speaking a considerable segment of academia, adhering to tradition, appears to favour transplants solely from the civil law world, while big businesses and some legal practitioners strive for solutions from the common law.

d) *Quality of the comparative work*

The quality of the comparative work done by the groups was also far from unexceptionable. Four shortcomings seem to be worth emphasizing.

(1) In many cases the working groups concentrated primarily on the black-letter rules, not paying much attention either to the history or the functions of the respective rule at issue, its interdependence with other parts of the system, or to the way it is applied by the courts, let alone to its critical assessment in the national literature.⁵⁹

The draft Concept on the law of obligations explicitly refers to foreign case law as being distinct from a “legal system” only once, and in one case mentions a commentary by the UNCITRAL Secretariat. A look at the commentaries written by the members of the respective working group supports the suggestion that comparative and foreign literature were consulted at best occasionally and only to a fairly modest degree.⁶⁰

⁵⁷ Concept for the Improvement of the General Provisions of the Civil Code of the Russian Federation (n. 16) 15. For a similar attitude among the draftsmen generally, see *Jakovlev*, Interview (n. 8) 5 and in respect of corporate law *Suxanov*, O predmete korporativnogo prava [About the Subject of Corporate Law], in: Gongalo/Em, Current Problems (n. 22) 227–249, 228, 249, *passim*; *idem*, Problems of Codifying the Legislation on Legal Persons (n. 8) 60; *idem*, Sravnitel’noe korporativnoe pravo [Comparative Corporate Law] (Moscow 2014) 5 ff., 18 ff., *passim*; *idem*, American Corporations (n. 13) 7 ff.

⁵⁸ *Gubin*, On the Upcoming Amendments (n. 12), 4; *Krassov*, Reception (n. 34) 35 f.; *Stepanov*, The Reform (n. 28) 15; *Irina S. Šitkina*, Voprosy korporativnogo prava v proekte federal’nogo zakona o vnesenii izmenenij v Graždanskij kodeks RF [Corporate Law Issues in the Draft Federal Law on the Introduction of Amendments into the Civil Code of the Russian Federation], *Xozjajstvo i pravo* [Economy and Law] 6 (2012) 3–31, 4 f. The competing project associated with the reform has succeeded in introducing some new sets of rules inspired by common law concepts, such as indemnity, and representations and warranties (406.1 and 431.2 of the Civil Code).

⁵⁹ Cf. e.g. *Tuzov*, Invalidity (n. 33) 39 f.

The draft Concept on the general provisions explicitly refers to foreign literature, though not specifying authors and works (about 10 times), and in a general way refers to foreign case law (more than 15 times). It is not clear on what kind of research this data is based, but keeping in mind the pace and the scope of the work, comprehensive and in-depth research can hardly have been done. Spot checks show that at least some comparative references take the relevant foreign rules out of their historical and normative context.⁶¹

(2) The second deficiency is that a systematic analysis does not appear to have been performed as to whether the individual foreign concepts to be introduced into Russian law are compatible with the latter or as to how these concepts would interplay with other newly introduced concepts, or the original rules.⁶²

(3) The third controversial aspect of the use of comparative law by the working groups is that in the majority of cases foreign experiences were invoked to support the solutions proposed, providing no overview of the alternative approaches.⁶³ The final version of the Concept never mentions alternative solutions, and the draft Concepts do so very rarely – the draft Concept on general provisions does so in half a dozen cases, the draft Concept on the law of obligations only once. Furthermore, the working groups generally remain silent as to how the recommendations formulated without express reference to a foreign model look in comparative perspective (only one exception can be found in the final version of the Concept). There is no evidence that any objective criteria were applied to decide whether to take foreign experiences into account in a particular case and, if so, what solution should be adopted.⁶⁴

(4) Considering the range of the reform as well as its breath-taking pace, mistakes and inaccuracies in comparative analysis are inevitable, even as far as the mere description of the actual solutions is concerned. Thus, instances

⁶⁰ *Vasilij V. Vitrvjanskij*, Ponjatje objazatel'stva [The Notion of Obligation], *Xozjajstvo i pravo* [Economy and Law] 3 (2009) 19–24; *Sarbaš*, Performance (n. 54); *Aleksandra A. Makovskaja*, Položenija o zaloge [Provisions on Pledges], *Xozjajstvo i pravo* [Economy and Law] 3 (2009) 49–57.

⁶¹ *Andrej M. Širvindt*, Aktual'nye voprosy predstavitel'stva [Current Issues of Agency (Representation)], *Vestnik èkonomičeskogo pravosudija* [The Herald of Economic Justice of the Russian Federation] 12 (2015) 61–144, 126 f.

⁶² See e.g. *Belov*, What Has Changed (n. 5) 219, 220; *Krassov*, Reception (n. 34) 37 ff.; *Rudokvas*, Possession (n. 28) 29; *Jurij K. Tolstoj*, Problemy soveršenstvovanija graždanskogo zakonodatel'stva i puti ix rešenija [Problems in Improving Civil Legislation and the Ways to Solve Them], *Vestnik èkonomičeskogo pravosudija Rossijskoj Federacii* [The Herald of Economic Justice of the Russian Federation] 5 (2015) 44–50, 47 f.

⁶³ See e.g. *Tuzov*, Invalidity (n. 33) 39 f.

⁶⁴ See e.g. *Belov*, What Has Changed (n. 5) 219; *Rudokvas*, Possession (n. 28) 26.

have been identified where references in the Concept to foreign experiences turn out to be false.⁶⁵

VI. Final Remarks

What can be learned from this story? The way the reform has been organized as well as the criticism directed against it attests to a conscious search for better law-making within the professional community of lawyers. Even the very question that opens this paragraph and that is emblematic of the indicated discourse, originates from the discussion about the reform.⁶⁶

Another issue is what better law-making is supposed to mean. In the eyes of those responsible for the reform, it means more transparency, more public discussion, more comparative law and more rational structuring of the preparatory work. It means, furthermore, that judges and professors should have the main say. Yet, both these ideals as such (especially as regards the role of judges and academia and the use of comparative law) and the way they were put into practice have become controversial.

It is still another question whether this experience along with its critical assessment will benefit future law-makers – in Russia or elsewhere.

⁶⁵ *Karapetov*, Conditions (n. 28) 31, 32 ff.; *Širvindt*, Agency (n. 61) 91.

⁶⁶ *Makovskij*, Lessons (n. 7) 157 ff.; *idem*, Learning from One's Own Experience Is an Expensive Way to Learn (n. 22) 24 ff.