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The Impact of the Austrian Civil Code (ABGB) of 1811 on the Concept of Ownership in Russia

I. Introduction

The question of foreign influence on the civil law of Imperial Russia is controversial[1]). There has been discussion on the extent of such impact, and, correspondently on the question to which extent the Russian civilian tradition can be called an original one which was predominantly determined on its own. But those Russian authors that recognize the presence of elements from abroad in the Russian civil law are usually speaking mostly about the impact of the French Civil Code and of the German Pandectism.

However, the founder of the Collection of Laws *(Svod Zakonov)* of the Russian Empire, Speransky, acknowledged that he had taken into consideration not only the Code of Napoleon, but also the *Prussian Allgemeines Landrecht* (ALR) and the *Allgemeines bürgerliches Gesetzbuch für die gesammten Deutschen Erbländer der Oesterreichischen Monarchie* (ABGB) of the Austrian Empire[2]). We know today, that he had learned the German language in order to be closer acquaintained with German codifications and the German legal literature[3]).

Russian science revealed quite some evident parallels of the Russian Imperial Collection of Laws of 1832 and the Civil Code of Austria of 1811 in a couple of subjects[4]). But in this article the focus is on the impact of Austrian law on the Russian pre-revolutionary civil law, with respect to the right of ownership.

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[1]) See for example: *Baratz H.,* O Chuzhezemnom proiskhodenii bolshinstva russkikh grazhdanskikh zakonov [About the Foreign Origin of the Majority of the Russian Civil Statutes], in: Zhurnal grazhdanskogo i ugolovnogo prava [The Journal of Civil and Criminal Law], 1884, Book 8, 1–34; Book 10, 109–146; 1885, Book 5, 81–112; Book 6, 67–81; *Vinaver M.,* K voprosu ob istochnikakh X Toma Svoda Zakonov [About the Problem of the Sources of the Collection's of Laws X Volume], in: Zhurnal Ministerstva Iusticii [The Journal of the Ministry of Justice] Issue 8, 1895, 1–15; *Rudokvas A.,* The Alien, Acquisitive Prescription in the Judicial Practice of Imperial Russia in the XIXth Century, in: Fögen F. Th. (Hrsg), Rechtsgeschichte, Zeitschrift des Max-Planck-Instituts für europäische Rechtsgeschichte, Issue 8, 2006, 59 ff.

[2]) *Baratz* op cit, 1885, Book 5, 81.

[3]) *Baratz* op cit, 85, Note 1.

[4]) *Baratz* op cit, 1884, Book 8, 9–10, 25, 33; Book 10, 115, 118, 123–127 et cetera.

II. The Concept of "Divided Ownership"

II.1 German Legal Doctrine

It is well-known, that the theory of undivisible existence of the unitary right of ownership besides other real rights, which derive from the right of ownership and depend on it, is not the only possibility of understanding of how the same property can belong to different persons. In the European legal history the Germanic concept of the so called "divided ownership – *(„geteiltes Eigentum")* – successfully competed with it[5]). The "divided ownership" concept was finally elaborated as a theory by the German legal scholarship of the 19. century, which was based upon the doctrinal reconstruction of the Ancient and Early Medieval Germanic law. This concept follows the substance of the right. This means that if a property is a potential source for various kinds of usage, it can belong to a person based on the right of ownership only to such aspects, as related to one or more concrete usages, and at the same time other persons can have other partial rights of ownership at the same thing. For instance: one person has an usufructuary right to the land, another has a right to take water from the well, situated at the same land, a third one has the right of disposal *inter vivos* or *mortis causa.* In the framework of the "divided ownership" concept all the rights listed above are only pieces of the whole right of ownership, and therefore are rights of ownership, each independent from the other pieces. As to the respective law of substance, every form of the "divided ownership" has its own legal regime, which depends on the type of the right, which a person has, and on the difference in the usages of the same property. It is obvious that the construction of the "divided ownership" fits only to those legal systems, where the strict opposition of the right of ownership to limited real rights does not exist. Therefore it is not compatible with the abstract and unitary concept of an absolute right of ownership, created by the German Pandectism on the basis of generalization of the Roman law, with which the Germanic legal scholarship in the 19. century competed.

In the Late Medieval law the idea of "divided ownership" arose in the doctrinal construction of the right of ownership, divided into "direct ownership" *(dominium directum)* and the so called "analogous ownership" (*dominium utile* or *usufructus*). These actual conditions and views – which were natural products of the medieval system of land-holding, and were especially closely related to the fact that that system was bound together by the principles of feudal law, – were first conceived as elements of a legal theory by the Glossators in Italy. In their theory they used the concepts and terms of the Roman law, without showing, how they adapted them. But since their doctrine nevertheless was harmonized with the actual conditions of the time, it quickly became very influential despite its inconsistency with its origin and was preserved until modern times[6]).

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[5]) See for example: *Solidoro-Maruotti L.,* "Absolutnaya sobstvennost" i "otnositelnaya sobstvennost" v evropeyskoy pravovoy istorii ["Absolute Ownership" and "Relative Ownership" in the European Legal History], in: Drevneye pravo – IUS ANTIQUUM, Issue 2 (14), 2004, 46–47.

[6]) *Huebner R.,* A History of Germanic Private Law, Engl transl by Philbrick F.S., New York, 1968, 234.

Because the emphyteuta and the superficiary exercised a physical dominion that nearly approached ownership, the Roman law provided them not really with the proprietary action itself, the "rei vindicatio directa", but with a corresponding "utilis rei petitio". This led to the conclusion that the "actio directa" was based on a "ius directum" and the "actio utilis" on a "ius utile". The owner, therefore, had a "dominium directum", and the emphyteuta and the superficiary a "dominium utile". Thus, two "dominia" were recognised, although of different strength, over the same object. Very soon these conceptions were transferred to feudal relations: to the feudal lord was ascribed the "dominium directum", to the vassal the "dominium utile" in the fief. This terminology seemed having been even more natural because the word "dominium" was already used in association with the German words "Fug" (privilege) and "Recht" (right, law) in order to characterize that position of lordship which, under feudal law, was occupied not merely by supreme lords but also by their vassals, as mesne lords ("Aftervasallen"), over their liegemen. The lower tenures were next interpreted in the same way, and finally, in all cases where ownership and real rights of usufruct existed in one piece of land, men came to speak of "dominium directum" and "utile", or of "over" (superior) and "under" (subordinate) ownership[7]).

II.2. Ancient and Medieval Germanic Law

The idea of the divided ownership is a direct descendant of that concept, which is entitled *Gewere* in the Ancient and Early Medieval Germanic law. As an Italian professor of Roman law, Laura Solidoro-Maruotti has noticed: "The form of use, denominated by the term *Gewere,* represented possessory situations of different types and of different intensity, and that, according to the Ancient Germanic tradition of the collective belonging of property, turned to the situation, when a few *Gewere* could pretend to have the same property. There could be so many types of *Gewere's,* as usages the property could produce. Consequently, the same piece of land could be at the same time in *Gewere* of a few different persons, but on essentially different titles. The system of the 'divided ownership', comparable with the *Gewere,* has really nothing common with the co-ownership (condominium), which is an absolutely different concept"[8]).

III. The Concept of "Divided Ownership" in the ABGB

The concept of the "divided ownership" *(geteiltes Eigentum)* was reflected in the German codifications of the Law of Reason. "The Prussian ‚*Landrecht*' and the Austrian Code undertook to give it new life by ascribing to the 'over'-owner the so-called ‚*Proprietät*', the right to the substance of a thing, and to the 'under'-owner at the same time a co-ownership in that ‚*Proprietät*' and an exclusive ownership in the usufruct"[9]).

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[7]) *Huebner R.* op cit, 234.
[8]) *Solidoro-Maruotti* op cit.
[9]) *Huebner R.* op cit, 234.

§ 357 of the ABGB says: *"If the same person has the right to the essence of the thing and the right to its usages, the right of ownership is complete and undivided (ungetheilt). But in case one person has only the right to the essence of the thing, but there is an another one, that, having the right to the essence of the same thing, has in addition an exclusive right to its usages, the right of ownership is divided and incomplete with regard to both of them. The first one is entitled the 'over'-owner (Obereigenthümer), and the latter – the 'under'-owner (Nutzungseigenthümer)"*. It is worth noting that there is the division in the right of ownership between the right to essence and the right to the usages, and therefore the same property can be considered as the object of the two separate immediate rights. At the same time both title holders are recognized to be owners. The definition of § 357 of the ABGB was rather subtle, because it supposed that the "under"-owner could be only the person, who has at the same time the partial right to the essence of the thing and the right of usufruct, and that while having only the usufruct one could not be the "under"-owner[10]).

The succeeding paragraphs in the ABGB revealed the details of the divided ownership's concept. § 358 stated that all the other modes of limitation of the right of ownership, deriving from the statutory law or from the owner's dispositions, could not lead to diminuition of this right's denotation. The subsequent § 359 enumerated the concrete cases of the incompleteness of the right of ownership. It demonstrated that: *"The segregation of the right to the essence of the thing from the right to its usages is to be produced by the owner's dispositions or by the statutory provisions. Depending on the different relations, existing between the 'over'-owner and the 'under'-owner, the property is entitled feudal, hereditary leasehold tenure or emphyteusis, when the right of its ownership is divided. Provisions regarding the feuds are in the particular feudal laws. The chapter about the lease contracts speaks also about the hereditary leasehold tenure or emphyteusis"*.

IV. The Concept of "Divided Ownership" in the Civil Law of the Russian Empire

One could find evident signs of such approach also in Volume X of the Collection of Laws of the Russian Empire. There the legislator used in relation to the right of ownership such terms as the complete ownership and the incomplete ownership.

Article 264 of the Collection of Laws (according to the first edition of 1832[11])) determined the essence of the **complete** ownership: *"The right of ownership is complete, when possession, usufruct and disposal are poured together with consolidation of the property in one person or in one estate of persons without any another's participation"*. This article is included in Chapter I of Book II of Volume X of the Collection of Laws of the Russian Empire of 1832. This Chapter is entitled *"About the right of ownership"*.

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[10]) *Nippel F.X.,* Comento sul Codice Civile Generale Austriaco con Ispeciale Riguardo alla Pratica, Vol III, 1839, 175–176; *Amati A.,* Manuale sul Codice Civile Generale Austriaco, Milano, 1842, 152.

[11]) The Collection's of Laws numbering of articles changed in its subsequent editions, therefore this article got the number 423 in these new publications.

The **incomplete** ownership was understood as every immediate right of another person to the property of the owner, whose right of ownership was also incomplete as long as such other person had rights to his property. Article 271 of the Collection of Laws (according to the edition of 1832) read as follows: "*The right of ownership is incomplete, when it is limited in usufruct, possession or disposal by other extraneous and also incomplete rights to the same property, which are: 1) the rights to share in another's property's usufruct and operating benefits 2) the rights on another's grounds. The right of ownership can also be incomplete: 3) when the right of possession and usufruct is segregated from it and 4) when the right of disposal is segregated from it*". This article opens a special Chapter II of Book I of Volume X of the Collection of Laws of the Russian Empire of 1832. This Chapter is entitled "*About the incomplete right of ownership*".

According to the edition of 1832, the Collection of Laws was re-edited as whole with corrections and amendments in 1842 and in 1857, and thereafter its few separate volumes were also re-published as a complete set. The separate official re-edition of Volume X, dealing with civil law, took place in 1887 and in 1900. In the new editions the article about the incomplete ownership had changed its number, was broadened and finally read as follows: *Art 432 "The right of ownership is incomplete, when it is limited in usufruct, possession or disposal by other extraneous and also incomplete rights to the same property, which are: 1) the rights to share in another's property's usufruct and operating benefits; 2) the rights on another's grounds. On the basis of the respective provisions the right of ownership is enjoyed with limitations by the: 3) possessors of the hereditary estates in fee-tail; 4) possessors of the estates temporarily in fee-tail; and 5) possessors of the estates granted as entailed property in the Western provinces. In conclusion, the right of ownership can also be incomplete: 6) when the right of possession and usufruct is segregated from it and 7) when the right of disposal is segregated from it*".

Taking possession, usufruct and disposal as three main parts of the complete right of ownership, the Russian legislator had to determine the legal construction of the situation, when they are segregated from each other and one has to deal with them individually.

Therefore the Collection of Laws contained special provisions and legal definitions related to this subject. Sector III of Chapter II of Book I of Volume X of the Collection of Laws of the Russian Empire of 1832 was entitled "*About the right of possession and usufruct, segregated from the right of ownership*".

Article 302 of the Collection of Laws (according to the edition of 1832)[12]) determined possession, consolidated in one person with the right of ownership, as "*the essential part of the same right*", and stated, that "*when it was substantiated (a) by charters or (b) other legal titles, it bears the name of patrimonial possession, and perpetual and hereditary possession*".

But according to article 303 of the Collection of Laws (according to the edition of 1832)[13]): "*when a private possessor, who has retained the right of ownership under this title, will segregate possession of the latter and transfer or end it under a contract, or in grant or under another legal act, (a) the segregated possession contains a*

[12]) Number 513 in the subsequent official editions.
[13]) Number 514 in the subsequent official editions.

particular right, whose scope, life-long existence or temporariness are determined by the same legal act they have been established by".

The same construction was applied by the Russian legislator for characterizing the correlation between state ownership and municipal holdings in article 304 of the Collection of Laws (according to the edition of 1832)[14]): "*Similarly when state property in land or grounds is assigned to burghs or settlements in allotment, the state preserves the right of ownership to this land, and only right of possession belongs to them".*

In article 306 of the Collection of Laws (according to the edition of 1832)[15]) the legislator granted to the "segregated possession" an equal legal protection to that of the right of ownership.

While having determined the consequences of segregation of possession from the right of ownership, the authors of the Collection of Laws should have done the same with the rights of usufruct and disposal.

It was really done in the articles 318 and 319 of the Collection of Laws (according to the edition of 1832)[16]) with regard to the right of usufruct. The legislator defined, that: "*Art 318: The usufruct of movables represents a special right, when its possessor, while holding his right of ownership, hands over the usufruct under a contract or any other legal act. The scope of the right is determined by the same legal act which it established. Art 319: The usufruct is complete, when all the fruits of the property and its income belong to the holder; it is incomplete, when some of them are not given to him*".

Finally, Sector IV of Chapter II of Book I of Volume X of the Collection of Laws of the Russian Empire of 1832 was entitled "*About the right of disposal, segregated from the right of ownership*".

Its articles 328 – 329[17]) defined that: "*Art 328: The right of disposal, in its aggregate with the right of ownership, consists in a position to alienate property within the limits defined by statute, and to hand it over for usufruct under the provisions of a lease, or of a free use, or of other contracts. Art 329: The right of disposal can be segregated from the right of ownership only by giving by the possessor the power of attorney to another person (a), or by law, when it will be prohibited to conclude purchase and mortgage deeds for the property or it will be sequestered in its administration, or its guardian will be appointed*".

The Russian legislator had called by the title "the rights of private shares in another's property's usufruct and operating benefits" (Art 272 of the Collection of Laws according to the edition of 1832)[18]) those rights of other persons to the immobile property of the owner, that were not connected to assigning them the exclusive powers of possession or usufruct or disposal of this property, but only granted them limited powers of exploiting it partly for specific purposes. Taking into consideration that the existence of such rights could not deprive the owner of the possibility to use his things and to benefit from them, they were considered only as

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[14]) Number 515 in the subsequent official editions.
[15]) Cancelled in the subsequent official editions.
[16]) Number 535 and 536 in the subsequent official editions.
[17]) Number 541 – 542 in the subsequent official editions.
[18]) Number 433 in the subsequent official editions.

limitations of the right of ownership, and in the dominant doctrine they were later identified with servitudes[19]).

In the framework of the "divided ownership" concept all the real rights are only functionally segregated types of the right of ownership, and each of them has its own means of its creation and cessation, exists independently of the others, and has its absolute protection. It is worth noting that whereas according to the ABGB the "under"-owner could be only the person, who had at the same time the right to the essence of the thing and the right of its usufruct, the Russian Collection of Laws by its logics did not exclude the situation, that one could be the "under"-owner, having only the usufruct.

Therefore, in such conceptual view every holder of the immediate right of possession or usufruct to a thing could be considered as owner, but only within certain limits. In full harmony with this view the Russian pre-revolutionary legal literature and jurisprudence referred as "the rights of incomplete ownership" to the different types of the rights of possession and usufruct to the property of another person, which in the Pandectic doctrine would be considered as various kinds of limited real rights – *jura in re aliena*[20]).

Thus, in the "System of the Russian Civil Law" of Konstantin Annenkov, which was very popular among the practitioners of Imperial Russia and in its essence represented a summary of the court practice, its author openly declared: "The rights to the usufruct of another's property, defined by this article as the rights of incomplete ownership, while being real rights, should be referred to as possession of property, and not as the property to be sued[21]). Another author referred to the incomplete ownership of the so called "right of the permanent chinch", which existed in the Western provinces of the Russian Empire and its essence could be compared to the emphyteusis of Roman law[22]).

V. Opinions in Russian Legal Doctrine and Jurisprudence

In the framework of the "divided ownership" concept the endowing of another person with a limited real right by the owner is conceived as a transformation

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[19]) *Gulyaev A. M.,* Pravo uchastija chastnogo v praktike Grazhdanskogo Kassatsionnogo Departamenta Pravitelstvuyushchego Senata [The Rights of Private Shares in the Governing Senate's Department of Cassation's Jurisprudence], in: Voprosy Prava [The Problems of Law], Book X, 1912, 8.

[20]) Such approach is strikingly corresponding to the logical scheme used by an Italian observer for the description of the ABGB's construction of the system of the real rights. He wrote that the ownership is a type, and from its substance are taking their origin all the real rights, such as dominium directum, dominium utile, servitudes, mortgage, and as many other real rights as for how many usages one could benefit from the thing. – *Carcano G.,* Il Codice Civile Austriaco ed i Suoi Caratteri, Studi per la Compilazione del Codice Patrio, Milano, 1860, 61.

[21]) *Annenkov K.,* Systema Russkogo Grazhdanskogo Prava [System of the Russian Civil Law], Vol I, Saint Petersburg, 1894, 375–376.

[22]) *Zachinskiy N.,* Pravo Chincha [The Law of Chinch], in: Sudebnoe Obozrenie [Judicial Review], 1904, Nr 15, 320.

of the one "complete" right of ownership into two "incomplete" rights of the same legal nature. The impact of the Pandect doctrine, which was permanently increasing in Russia owing to the universities[23]), had gradually compelled for correction of these already traditional views on the subject. But while also trying to break away from the above conceptual frame, due to the impact of the German Pandect doctrine, the Russian jurisprudence was unintentionally maintaining elements based on the earlier paradigm.

So, Dmitrij Mejer, one of the most prominent Russian lawyers, who became the founder of the Modern civil law doctrine in the Russian Empire of the 19. century, in his Manuel of Civil Law, which had been published by his pupils on the basis of the texts of his lectures, insisted, that: "The more we must reject the recognition of the incomplete ownership of the person, who has the right of possession and usufruct of the thing, occurring sometimes, the more the division of the right of ownership in the latest Roman law to a *dominium directum* and *utile,* corresponding to our division of the right of ownership to a complete and an incomplete one (in the sense just mentioned), is rejected by the Modern jurisprudence"[24]). But just before this statement the patriarchy of the civil law scholarship in Russia had noticed: "the right of possession and usufruct can be called incomplete ownership unless and only in the sense, that they form segments of the right of ownership; but, irrespective of that, they do not embrace its whole extent, but are incomplete"[25]). At the same time he thought it is possible to say that "a jus in re aliena is a segregation of a segment from the right of ownership" and characterized possession, usufruct and disposal as components of the right of ownership, which the owner could segregate from his right and transfer to another person[26]). One can notice the curious fact, that Mejer's manner of thinking about the subject, inspired by the peculiarities of the Russian legislation, was strikingly similar to that of the latest patriarchy of the Germanic legal scholarship Otto von Gierke, for whom the

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[23]) See: *Rudokvas A./Kartsov A.,* Der Rechtsunterricht und die juristische Ausbildung im kaiserlichen Russland, in: Pokrovac Z. (Hrsg), Die Juristenausbildung in Osteuropa bis zum Ersten Weltkrieg, 2007, 273–316.

[24]) *Mejer D.,* Russkoe Grazhdanskoe Pravo [Russian Civil Law] (7 ed by Vizin A. I., corrected and amended by Holmsten A. X.), Saint Petersburg, 1897, 281; foreign observers of the Russian law and legislation also thought that the concept of *dominium directum* and *dominium utile* was reflected in the Russian Imperial Statutes –*Todaro Della Galia A.,* Istituzioni di Diritto Civile Russo, Torino, Roma, 1894, 56–57; *Lehr E.,* Éléments de Droit Civil Russe, Paris, 1877, 282–284, and that the ownership in the Russian law could be divided to the rights of possession, usufruct and disposal belonging to different persons – Spyridion *Zézas G.,* Études Historiques sur la Législation Russe Ancienne et Moderne, Paris, 1862, 244. On the other hand, the authors of the Russian Collection's of Laws X volume's (dedicated to the civil law) translations into French and German interpreted the term "incomplete ownership" simply as a "limited ownership" instead of "divided ownership" or its literal translation, probably trying to fall into a pattern of the French civil law and German Pandectic doctrine discourse correspondently, and thus unwillingly misleading the readers. – Code Civil de L'Empire de Russie, trad par Victor Foucher, Rennes, 1841, 90; Codex des Civilrechts (Russisches Civilgesetzbuch), Aus d Russ u mit Einl vers von Hermann O. Klibanski, Gottheimer, 1902, 69.

[25]) *Mejer* op cit, 280.

[26]) *Mejer* op cit, 265.

limited real rights were nothing more than "the splinters of ownership, which had become independent"[27]).

The author of the later Manual of the Russian civil law already confined himself only to a brief description of the construction of the complete and incomplete ownership as it existed in the Collection of Laws, and then laconically pointed out that the Draft Civil Code for the Russian Empire would not use this terminology[28]). He was meaning probably this part of the actual Russian statutory law, when he noticed in the preface to his manual: "although there is no doubt that *scire leges non hoc est verba earum tenere,* there is also no doubt that it is impossible to study the good law without taking into consideration the text of the statutes"[29]).

On the other hand, in some decisions of the highest instance – The Civil Department of Cassation of the Governing Senate of the Russian Empire – only one idea is repeated as a refrain: "The right of possession and usufruct, without the right of disposal, is not yet the right of ownership, because the right of disposal, as an indispensible requisite of the right of ownership, is inseparably linked with it, but the owner can **segregate** in favor of somebody else the right of possession or the right of usufruct, or the right of disposal of his property, on a definite scale, while keeping hold of the right of ownership" (Cass 70/917; Cass 69/1334; Cass 79/582).

The verb "to segregate" plays a key role in this sentence, because it reflects that mode of thinking about the correlation of the right of ownership with those rights deduced from it, which was proper for the Russian Imperial courts. They thought and described this correlation as something similar to the segregation of an orange segment from the fruit, and supposed, thus, a partial forfeiture of his rights by the owner who had endowed a third person to a limited real right to his thing. Such manner of thinking is typical for the concept of the "divided ownership" which supposes the property rights to be the segregated, but equivalent segments compose a whole bearing the name of the complete ownership.

On the contrary, the classical Pandect doctrine considers the endowment mentioned above as a creation of a quantitatively new right, existing in parallel with the right of ownership as its supplement, but having an overlapping dimension with it[30]). Thus, in the framework of the Pandect legal thinking the correlation of the right of ownership with the limited real right is understood as a collision between them, which should be settled in favor of the limited real right. As a consequence of this rule, the owner never loses any of his powers until the total lapse of the right of ownership as such, but as long as the last one is burdened by a limited real right of a third person, he is not authorized to the exercise of his powers, in so far as their exercise could block the exercise of the limited real right. Only in such scheme the well-known metaphor of the "elasticity" of the right of ownership *(ius recadentiae)* gains its logical base. While keeping untouched all powers representing

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[27]) „Die anderen dinglichen Rechte sind . . . verselbständigte Eigentumssplitter" – *Gierke O. von,* Deutsches Privatrecht, Bd 2, Sachenrecht, Leipzig, 1905, (§ 120), 359.

[28]) *Gulyaev A. M.,* Russkoe Grazhdanskoe Pravo [Russian Civil Law], Saint Petersburg, 1912, 132–133.

[29]) *Gulyaev,* Russkoe Grazhdanskoe Pravo, III.

[30]) *Regelsberger F.,* Pandekten, Leipzig, 1893, Bd I, 443, 444.; *Windsheid B.,* Lehrbuch des Pandektenrechts[6], Bd I. (§ 167), Frankfurt am Main, 1887, 563, Anm 7.

the content of the right of ownership, it could be in fact overruled by the force of another's right to the same thing, but will regain its complete force automatically at the moment of the lapse of this burden.

VI. The ABGB as Source of Inspiration for Speranskiy and the Russian Law

Surely, one could doubt whether the "divided ownership" concept in Russia was borrowed from the Austrian Civil Code. Another source could have been the Prussian Civil Code (ALR), which Speranskiy also got acquainted with while drafting the Collection of Laws, and which in its paragraphs (ALR Tit VIII. §§ 16–20; Tit XVIII. §§ 1–819)[31]) reflected also this concept. But the comparative analysis of these paragraphs of the Collection of Laws of the Russian Empire with the corresponding articles of the ABGB is convincing because of the proximity of the latter's wording to the formulation and allocation of the relative normative material peculiar to the Austrian codification.

It is even less likely, that this construction was a fruit of an independent development of the Russian civil law doctrine of that epoch. Such doctrine did not yet exist in Russia at the time of the composition of the Collection of Laws[32]). One has to pay attention in this context that the majority of the other articles of the Collection of Laws of the Russian Empire as a rule was followed by references to their historical sources in the previous Russian legislation. On the contrary, article 271 (according to the edition of 1832), which was dedicated to the definition of the "incomplete ownership", instead of a clear indication of its historical roots referred the reader generally to all references in the next four sections of the same Chapter of the Book.

Therefore, we have to conclude, that it was the ABGB which had become the source of inspiration for Speranskiy when drafting the articles of the Collection of Laws on the complete and incomplete ownership. This goes even more for the subsequent amendment of the article about the incomplete ownership.

The subsequent fate of the "divided ownership" concept differed much in Austria and in Russia. In Austrian legal experience the "pandectization" of the civilian doctrine, which took place in the second half of the 19. century due to the efforts of Josef Unger and his followers, have in fact deprived the provisions of the Austrian Civil Code relating to the "divided ownership" of any practical relevance. Thus, for instance, in the authoritative commentary to the Austrian Civil Code written by Ludwig Ritter von Kirchstetter, it had been especially noticed that such division of the right of ownership should be neglected because in all the cases of acknowledgment of the very existence of the "analogous ownership" *(dominium*

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[31]) Allgemeines Landrecht für die Preußischen Staaten von 1794 (Textausgabe, mit einer Einführung von Hattenhauer H. und einer Bibliographie von Bernet G.), Frankfurt am Main, Berlin, 1970, 98, 256–284.

[32]) See about that for example: *Rudokvas A./Kartsov A.,* The Development of Civil Law Doctrine in Imperial Russia Under the Aspect of Legal Transplants (1800–1917). in: Pokrovac Z. (Hrsg), Rechtskulturen des modernen Osteuropa, Traditionen und Transfers, Bd 4, Rechtswissenschaft in Osteuropa, Frankfurt am Main, 2008, 291–334.

utile), those were the limited real rights to the other's things *(iura in re aliena)* that were at stake[33]).

On the contrary, in Imperial Russia the conceptual framework of the "complete ownership" and the "incomplete ownership" survived more or less successfully until the fall of the Empire in 1917. It was probably due to the correspondence of such understanding of ownership to the legal mind of the people. As illustration for this statement we can propose two examples.

The first one mentioned Mejer in his Manual in order to explain, why the Russian legislator in Art 329 of the Collection of Laws had decided that the right of disposal can be segregated from the right of ownership by giving the power of attorney to another person. Mejer was sure that the law was wrong, but it was due to the fact, that under the legal conditions of serfage only hereditary nobles and members of the gentry could acquire ownership of the estates inhabited by serfs. The rich representatives of the third estate also often wanted to make profits from such estates. Therefore, in order to overcome the prohibition by law, such persons agreed with the noble estate' owners that for a compensation equal to the market price of the estate the owner would grant to this person the general power of attorney with regard to the free possession, usufruct and disposal of the estate. He obtained from the owner also guarantees against loss in case of withdrawal of the power of attorney by the owner[34]). The whole construction seems to be a Russian surrogate device of the trust of the English law.

The second example of the image of the right of ownership in the legal consciousness of the Russian peasantry of that time provides the observation of civil litigations connected to the application of the acquisitive prescription, published in 1888 in the newspaper *Delovoy Korrespondent* [Business Reporter] – the organ of Trans-Ural's Chamber of Commerce and Industry, which existed in the city of *Ekaterinburg*[35]). Its author, hidden under the pseudonym *S. N.,* began with the following introduction: "Up today in many places of Siberia people living on the land do not attribute to it such a value, which it has in the internal provinces and particularly in the West: they knew nothing neither about the leasehold, nor about the price of land, nor about the land taxes (despite of the fact that they pay rent to the public owner), nor about the mortgage, and often they even do not know, to whom the land belongs, while mixing the legal right of possession with actual use. Ask any inhabitant of such places, for what price one can buy land from them, how much

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[33]) *Kirchstetter L. Ritter von,* Commentar zum österreichischen allgemeinen bürgerlichen Gesetzbuch mit Berücksichtigung des gemeinen deutschen Privatrechts[4], Leipzig, Wien, 1882, 198.

[34]) *Mejer* op cit, 263–264.

[35]) "S. N." (sic! – Pseudonym), Tara, O processakh tatar-sobstvennikov po drevnim formalnim aktam i krestyan-vladeltsev v Tarskom okruge Tobolskoy gubernii [Tara, (About the litigations of Tartars-owners by ancient formal acts and of the peasants-possessors in the Tarskiy region of the Tobolsk province)], in: Delovoy Korrespondent 24, 1888; Six years later just the same text was published already in the capital of the Russian Empire: *Krivenko S.,* Kak utrachivayutsya u nas nekotorie prava [How we lose some of our rights], in: Zhurnal Sankt-Peterburgskogo Juridicheskogo obshchestva [Journal of Saint Petersburg Juridical Society], 10, 1894, 88–93.

does cost for example a *dessiatina*[36]) of land, and You will receive no answer in the majority of cases. He will say to You, how much costs the sand on the bank of a fishy river (that is a place to fish with nets), what is the price of a lake, or what is the price of hay defined in carts and haystacks, but he will not say how much costs a land. Even near cities, there people are mowing annually but they do not say that they have taken in lease a few *dessiatina*'s of a meadow or of a field for mowing, but they say: 'I have bought a green fodder for me, it will be in a number of ricks', or 'I have bought a mow of 20 carts'. It is the same concerning timber: they will say, what is the price of a tree, what is the price of a measure of wood, but they do not know, what is the price of a dessiatina of forest. The authority repulses this primitive view of the land by measuring the land expanse and by drawing boundaries here, there and everywhere."

After the situation had changed with the catastrophe of the Russian Empire and the Soviet legislation did not operate with such categories as "complete ownership" and "incomplete ownership", one could think that they were already gone.

But until now the Russian legislator and the dominant doctrine are often inclined to speak, that on acquisition of a limited real right to the thing by a third person the owner of the same thing **transfers** to another person the correspondent powers[37]), which he himself hence forfeits. Such discourse obviously reflects in a latent form the logics of the "divided ownership" concept, despite of the fact that the actual Russian doctrine refrains from referring to those having the limited real rights by the owner's title, and from the usage of the terms "complete ownership" and "incomplete ownership", which are lacking in the contemporary legislation of Russia. So, the phantom-limb pains of the "divided ownership" concept are continuing to be present within the mentality of the Russian civil law discourse.

[36]) *Dessiatina* – a land measure in pre-Revolutionary Russia, approximately 2¾ acres (ca 1, 11 ha).

[37]) See a well-reasoned critic of such approach for example in: *Krasheninnikov E.*, Soderzhanie subektivnogo grazhdanskogo prava [The content of the subjective civil right], in: Ocherki Torgovogo Prava. Sbornik statey pod redaktsiey Eugeniya Krasheninnikova [Studies of Commercial law, The Collection of articles edited by Eugenij Krasheninnikov], Issue 13, Jaroslavl, 2006, 16–25.