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RUSSIAN LAW JOURNAL (RLJ)

An independent, professional peer-reviewed academic legal journal.

Aims and Scope

The Russian Law Journal is designed to encourage research especially in Russian law and legal systems of the countries of Eurasia. It covers recent legal developments in this region, but also those on an international and comparative level.

The RLJ is not sponsored or affiliated with any university, it is an independent All-Russian interuniversity platform, initiated privately without any support from government authorities.

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Notes for Contributors

The RLJ encourages comparative research by those who are interested in Russian law, but also seeks to encourage interest in all matters relating to international public and private law, civil and criminal law, constitutional law, civil rights, the theory and history of law, and the relationships between law and culture and other disciplines. A special emphasis is placed on interdisciplinary legal research.

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TABLE OF CONTENTS

Special Issue: 100th Anniversary of the Russian 1917 Revolution

Sergey Belov (St. Petersburg, Russia)
Guest Editor’s Note on the 100th Anniversary of the Russian 1917 Revolution and Law ......................................................... 4

Articles:

Innokenty Karandashov (St. Petersburg, Russia)
Ksenia Shestakova (St. Petersburg, Russia)
The Principle of Equality of States in the Wake of the Russian Revolution ........ 8

Andrea Kluknavská (Bratislava, Slovakia)
Tomáš Gábriš (Bratislava, Slovakia)
Criminal Law Between the Capitalist and Socialist Paradigm? .................... 43

Ekaterina Mishina (Ann Arbor, USA)
Soviet Family Law: Women and Child Care (from 1917 to the 1940s) .......... 69

Piotr Szymaniec (Walbrzych, Poland)
The Influence of Soviet Law on the Legal Regulations of Property in Poland (1944–1990) ........................................................................... 93

Tatiana Borisova (St. Petersburg, Russia)
The Institutional Resilience of Russian Law Through 1905–1917 Revolutions .............................................................................. 108

Paul Fisher (London, United Kingdom)
The Soviet Union’s Approach to Arbitration and Its Enduring Influence upon Arbitration in the Former Soviet Space ................................. 129

Vlada Lukyanova (Moscow, Russia)
Product Standardisation in the USSR: Legal Issues ................................. 151

Maria Zakharova (Moscow, Russia)
Vladimir Przhilenskiy (Moscow, Russia)
Two Portraits on the Background of the Revolution: Pitirim Sorokin and Mikhail Reisner ......................................................... 193
The role of “legal” formalities played a major role in the Revolution. Legal documents formalized every political decision of the revolutionary government (such as the first decrees adopted right after the Revolution – decree on peace and decree on land). In this way, the Russian Revolution pretended to be made through legal instruments, addressing the critic to the substantial wrongness of these legal acts, keeping the formal legality fulfilled. The new social order was established through the legal declarations and constituting legal acts.

The substance of Soviet legality and practice radically evolved during the Soviet period (1917–1991). The law, established after the Revolution in 1917 was far from the law dismantling by perestroika and the new constitutions of Soviet states in 1990s, but its main principles and specific features remained the same from 1917 onward.
The specifics of this legal system, established in the Soviet states, is still left as a matter for deep research. The studies of Soviet law in the contemporary scholarship both in Russia and abroad was dramatically politicized, and only a few decades after collapse of the system we can start moving to an impartial analysis of its main ideas, its development and influence throughout the world, to understand the specific nature of Soviet law. Russian scholars that drastically criticized “bourgeois” law of Western democracies in 1960–1980, lost interest in Soviet law in 1990s, treating it as discarded and forgotten, belonging to the history only. Western jurists also hastened to argue that the Soviet law is dead. Today both realize that the Soviet law could not disappear without a trace and moreover its specificity can be a material for the future development of law in the world.

It is obvious today that, the Soviet law reflected the specificity of the Soviet social system as whole. The law reflected the economic and political realities of the Soviet society, and if western scholars treated these realities as incompatible with the ideas of democracy, they found consequentially the Soviet law to be unjust and far from ideals and principles of law in the Western culture. Some scholars even denied that Soviet law was law, focusing mainly on the actual gap between the law in books and the law in the life in the Soviet states. This approach objectively prevented the analysis of the institutions of the Soviet law, rejected or survived in the contemporary post-Soviet law.

Many institutions of the Soviet law share a great deal in common with Western law on the formal level, especially in the private law. The classification of Soviet law as a legal family of socialist law was based on the role of law in the society and the specifics of the political system, rather than the substance of regulation (e.g., such institutions as contract or torts). The legal institutions functioned within very different context and were sometimes interpreted in very specific way, but still can be a matter for comparative analysis, taking out the prejudices and political perceptions of Soviet law.

The difference in the formal and substantial dimensions of law were an area for deep misunderstanding between Soviet and foreign jurists. Soviet lawyers judged law on the formal side, believing that critics of the Soviet legal culture came from political motives. Western scholars found that the Soviet law did not provide effective protection of legal interests of people and did not reflect those principles, which are associated with the “nature” of law. All these issues raise a principal question: Did the Russian Revolution of 1917 make a specific legal system? Or did the Revolution organize the legal system with only minor variations of the legal institutions (e.g. property or political elections)?

A very important dimension of the analysis of the Soviet law today (also grasped by the contributors to this issue) is its influence on the legal development in post-Soviet republics (including Russia) as well as in other jurisdictions. The Soviet paradigm of the social organization was exported to many countries around the world together with Soviet concept of law. As a result, the traces of the Soviet law are found today in different social and legal contexts, in different legal traditions.
and circumstances. These traces sometimes are contributions to the general ideas of law, sometimes are the variations of the legal institutions, specifically developed due to the Soviet ideas.

Today we can make the analysis of the Soviet law in both synchronic and diachronic perspectives, focusing on the phenomenon of the Soviet law in the historical and the development of law in the world. The special issue of the *Russian Law Journal*, presented herewith, is a contribution to this important purpose. The contributors to this issue aim investigate the Soviet concept of law, developed after the Revolution of 1917. These investigations focus both on the general overview of the pre-revolutionary imperial and the Soviet legal tradition (as Tatiana Borisova, Maria Zakharova and Vladimir Przhilenskiy) and its development in particular legal fields (papers by Ekaterina Mishina, Innokenty Karandashov and Ksenia Shestakova, Andrea Kluknavská and Tomáš Gábriš) and institutions (Piotr Szymaniec, Paul Fisher and Vlada Lukyanova). Most of the contributors are from Russia, making analysis of the Soviet law “from inside,” while three articles present the view “from outside.” This balance allows to compare the methodology and the principal approaches to the analysis of the Soviet law in different traditions.

Tatiana Borisova in her article “The Institutional Resilience of Russian Law Through 1905–1917 Revolutions” tries to trace the interaction of the Russian legal tradition with ideas of the Soviet law, focusing on the opposition between the Rule of law and diktatura zakona (dictatorship of the law). Examining the activity of three key social actors of the legal system (the sovereign, the intermediaries and the people) through the Russian revolutions of 1905 and 1917, Tatiana comes to the conclusion, that “in spite of traditional interpretation of the October revolution as a breakdown of the imperial state and its law, the revolutionary changes should be considered as a culmination of prerevolutionary legal trajectories.” As a result, the Soviet approach to the law from its formal and technical side is proved to be not only the result of the Soviet ideology, but a continuity of the prerevolutionary imperial legal tradition as well.

Maria Zakharova and Vladimir Przhilenskiy in their paper “Two Portraits on the Background of the Revolution: Pitirim Sorokin and Mikhail Reisner” show the diversity of the social perception of the October Revolution and its reflection in law by the Russian society. This perception is extremely significant as it shows two radically different approaches. Pitirim Sorokin, a professor of the law faculty at St. Petersburg University, actively counteracted the Revolution thinking that Soviet ideology encroached on the basic principles and ideas of law. Mikhail Reisner, another professor of St. Petersburg University, started to develop “Marxist-Leninist” theory of law, believing that the new social order gives birth to a new kind of law.

One of the first fields of law, regulated in radical new manner, was the field of family and childhood law, which Ekaterina Mishina addresses in her article “Soviet Family Law: Women and Child Care (from 1917 to the 1940s).” The author argues that right after the Revolution the new government liberalized the legal rules for marriages and divorces, cancelled the ban for abortion, abolished the discrimination of children born out of
wedlock, but later, in 1930s, many of these measures became matters for revision. For instance, abortion became illegal again in 1936. The legal policy of the Soviet state in first years after the Revolution fundamentally changed in the consequent years.

Another field of law, reflected the policy of the Soviet state, was the international law, the changing Soviet paradigm of which is the matter of the article by Ksenia Shestakova and Innokenty Karandashov “The Principle of Equality of States in the Wake of the Russian Revolution.” They demonstrate that the conceptual approach formed by Bolsheviks before the Revolution of 1917 strongly favored the equality of states (being one of the key principle in international law), while later both the political practice and the doctrine of international law of the Soviet state departed from this original position.

Paul Fisher from the UK, in his article “The Soviet Union's Approach to Arbitration and Its Enduring Influence upon Arbitration in the Former Soviet Space” investigates the history of arbitration in Russia. He starts from the pre-revolutionary use of arbitration in the Bolsheviks party and ends with the vestiges of the Soviet arbitration in today legal and judicial system of Russia. Analyzing the practice of enforcement of the commercial arbitration awards (including foreign international arbitrations), Paul concludes that the Soviet legal practice definitely appears in the practice of the post-Soviet countries of commercial dispute resolution.

Vlada Lukyanova in the article “Product Standardisation in the USSR: Legal Issues” focuses on the institution of standardization, generally dismantled in Russia in 2000s and replaced with a new system of “technical regulations.” Vlada argues that the Soviet paradigm of product standards having binding force has to be kept in today Russia within the evolution from deregulation, applied in the state policy and legal regulation in 1990s, to the “optimization paradigm.” The latter supposes involvement of the state in the regulation of economic activity more intensively, and the Soviet notion of standardization is a good instrument for this.

The Polish contributor to the Special issue Piotr Szymaniec focuses his attention in the paper “The Influence of Soviet Law on the Legal Regulations of Property in Poland (1944–1990)” on export of law from the Soviet states to the states of Eastern Europe under the communist regime. The legal concept of property – the central institution for legal regulation of economy – became the main subject for this research. Piotr argued that the Soviet ideas of property regulation were imposed in the Polish legal system through the Polish Constitution of 1952 and the Civil Code of 1964 and the vestiges of this regulation is still current for Poland.

Two authors from Slovakia, Andrea Kluknavská and Tomáš Gábris, in the paper “Criminal Law Between the Capitalist and Socialist Paradigm?” presented the conceptual analysis of the criminal law in these two approaches. Making their analysis, the authors conclude that although the ideas and principles of the Soviet and western criminal law were quite different, they did not form so big difference to qualify them as separate paradigms, though the legacy of communism in Slovakia and other countries of Eastern and Central Europe appears quite obviously.
International law can be viewed as a project of exclusion and inclusion of events and ideas into its narrative. Some shake the pillars of international law, while others, influence its progressive development. Widespread wars and revolutions and events and ideas behind them occupy special place in this project: they expose irregularity in the system and at the same time may threaten its existence. The immediate and long-term effects of such events on international law can only be seen with a passage of time.

The 1917 Russian Revolution marking its 100^{th} anniversary this year is an illustrative example to this statement. Though it did not end to be the event in international law when the soviet law as predicted by some Soviet scholars replaced bourgeoisie law, it significantly contributed to disseminate ideas that laid foundation of the general international law. Though in post-revolutionary context Soviet Russia advanced different radical approach to universal social and economic justice and criticized the pre-existing international law, international law remained resistant to extremes and capable of encompassing constructive ideas.

The most spectacular example of this approach is Soviet attitude towards equality of states – one of the main international law axioms and utopias and at the same time a cornerstone of Marxism-Leninism theory – and Russia’s early attempts to give it more precise legal meaning.

This article briefly describes the bumpy way that this principle undertook before the Russian Revolution, to depict the background against which Soviet Russia started to advance its understanding of equality, in some sense, picking up and developing the ideas of the 1789 French Revolution. It further considers the meaning, that the early
Soviet doctrine attached to equality and concrete legal mechanisms through which the Soviet approach was translated into international law, specifically focusing on the works of Vladimir Lenin. The article then studies the actual early Soviet international law practice, through the lens of predominant Soviet theoretical approaches. Two conclusions are made: Marxism-Leninism had limited impact on the Soviet early practice of international law (1) and inconsistent application of principle of equality in the post-revolutionary context should not lead to its complete disregard (2).

To the contrary, it is here argued that the Revolution has been influential in the democratization of international law by developing the following legal dimensions of the equality principle. First, it restated equality in the terms of status, meaning equality in acquisition and exercise of rights (1). Second, it helped to eliminate “dual standards,” which meant the cases where a state could treat one state as dependent and the other – as independent (2). Third, it projected the concept of states’ equal rights to nations and peoples (3). Finally, in the early Soviet Russia practice, the idea that states have equal rights stopped to be confined to any group of states, as compared to international law at that time. To the contrary, it implied equality between all states, even in relations between socialist and capitalist states, thus helping in long-term perspective to abandon “civilization test” (4).

Keywords: 1917 Russian Revolution; principle of equality; capitulations; secret treaties; theory of international law; history of international law; Soviet international law.


**Table of Contents**

**Introduction**
1. International Law before the Russian Revolution: Civilization Test, Equality and the Great Powers
2. Marxism-Leninism on Equality and International Relations in the Early 20th Century
5. The Principle of Equality in the Soviet Treaty Practice
Conclusion
Introduction

Three types of phenomena, according to Antonio Cassese, introduced critical changes in both the organization and the functional rules of the international community: widespread wars; drastic changes in the social composition of the international community; and revolutions within States.¹

The 1917 Russian Revolution marking its 100th anniversary this year rightfully takes its place among these events. It stood up “towards a radical contestation of numerous traditional norms of the international community” that later significantly influenced the content of numerous fundamental international rules.² On one hand, Soviet Russia, based on its understanding of social and economic justice, tried to develop its own Soviet law – opposing it to priory existed “Tsarist” law – and Soviet international law – criticizing prior existed international law as a creation of European “bourgeois” states. On the other hand, it could not and did not completely oppose itself to the prior existed law, unwilling to become a pariah. Thus, as Vidya Kumar describes it, Soviet Russia in a revolutionary and post-revolutionary context tried to translate “the goals of widespread social and economic change through law,” and implement and fulfill “the comprehensive or radical, social, economic and political goals of the revolution, whether this be through the use or the dis-application of law.”³

In assessing the development of international law in the wake of the Russian Revolution, and using the Soviet attempt to re-read the principle of equality of states as an example – the authors argue that to say that after the Revolution Russia has excluded itself from international law for almost a century⁴ would be a great oversimplification and against the structure of international law itself. To the contrary, even though the USSR proved to be a costly experiment that failed to introduce radical communist ideas both in the country itself and into the international community of states, it promoted through the mechanisms inherent to international law several important conceptions that significantly influenced the evolution of international law, including concrete legal dimensions of the principle of equality of states.

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² Id. at 98.


We have chosen to focus on the principle of equality to illustrate the long lasting legal effects of the Russian Revolution. On one hand, equality is one of the cornerstones ideas of Marxism-Leninism and the ultimate goal of its world revolution. On the other, it is one of the great utopias of international law, as well as one of its great deceptions. It promises to abolish all unjustified privileges based on power, religion, wealth, or historical accident, to transcend the blatant injustices of the international system. Although the principle has always implied universal justice, its normative content is very vague and practice of application drastically contrasts to its original progressive aspirations. At the same time, this practice always aimed at broadening the formal content of the principle, fleshing it out with the legal rules. Thus, the early Soviet understanding of the principle of equality and its attempt to translate it through the legal means into international law is illustrative for the debate on inclusion in or exclusion from the international law of a revolutionary state.

This article aims to critically assess the case of the Russian Revolution, its effects on the principle of equality and include it into the traditional narrative of international law. Although the principle of sovereign equality is well studied in international law, Soviet scholars as a rule did not perform its systemic analysis. They generally overlooked the extent to which Marxism-Leninism – the official ideology of Soviet Russia – has influenced the Soviet understanding of equality in international law or failed to critically assess coherence of the Soviet foreign policy with its reading of equality (may be out of fear or because of a personal choice). Further, current international legal scholarship mostly focuses on theoretical approaches and pays little regard to Soviet Russia’s early practice of international law. The authors study


7 As an example, see Lauri Mälksoo, *Russian Approaches to International Law* (Oxford: Oxford University Press, 2015). The early works, however, looked at the link between theory and practice, but were not focusing at specifically the principle of equality. See, for instance, Jan F. Triska & Robert M. Slusser, *The Theory, Law and Policy of Soviet Treaties* (Stanford, California: Stanford University Press, 1962) (more than half a century old, it remains one of the major works in the field). One of the contemporary authors, John Quigley considers the Soviet understanding of the principle of equality, but his focus is on the
the early Soviet foreign policy documents (treaties, diplomatic notes and other instruments) starting from the outbreak of the Russian Revolution in 21 October (7 November\(^8\)) 1917 and ending on 31 December 1926. We also refer to the foreign policy documents outside of this timeframe to demonstrate, first, the continuity between the early and later readings of the principle of equality by Soviet Russia (1) and, second, the ways and means by which Soviet Russia translated the principle of equality into its early and later treaties (2).

This timeframe was chosen for the following reason: Vladimir Lenin became the first head of Soviet Russia, and his understanding of the principle of equality strongly influenced the Soviet foreign policy, being translated into official position of the state. He ruled the country till his death on 21 January 1924.\(^9\) However, Marxism-Leninism became the official ideology of Soviet Russia for decades, and the understanding articulated by Lenin can still be traced in the treaties and foreign policy documents concluded by Soviet Russia after his death. This is especially true for the soviet instruments dated before 1926: other states’ refusal to recognize it (followed by several recognitions only in 1924 and 1925\(^10\)), prompted Soviet Russia to reiterate the idea of equality in its foreign policy documents, consciously or unconsciously defining and unpacking its legal meaning when demanding equal treatment for itself. In this sense, the chosen timeframe allows us to see a concentrated Marxist-Leninist idea of equality and the ways Soviet Russia translated it into international law.

This article is divided in six parts. In the first part, the authors briefly describe the origin and the evolution of the principle of equality of states and outline the historical background against which Soviet Russia attempted to re-read the principle (1). The second part analyses the Soviet reading of economic and social justice linked to the idea of equality (2). The third part traces how Lenin shaped the existing legal mechanisms around his understanding of equality and advanced the new legal dimensions of the concept of equality in international law (3). The fourth part deals with the early Soviet diplomatic practice, illustrative for the formation of the new reading of the equality principle in the international law (4). The fifth part focuses on the treaty practice – a tool inherent to the international law – and one of the most important for Soviet Russia – for advancing it goals and ideas, including the

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\(^9\) Hereinafter, the second date in brackets is according to the Gregorian calendar.

principle of equality (5). The last part shows the discrepancies between the high aspirations of Soviet Russia and its contradictory practice in treating states as equal (6). The authors conclude that the inconsistent Soviet attitude towards equality does not signify its complete failure to re-read the principle: Soviet Russia has laid the foundations for further democratization of international law expanding the scope of application of international law beyond great, fully sovereign and civilized countries and helped to abandon such practices as consular jurisdictions, capitulations, secret and unequal treaties.

1. International Law before the Russian Revolution: Civilization Test, Equality and the Great Powers

The concept of equality has already acquired some of its features in international politics and international law when the Bolsheviks took over Russia in the wake of 1917 October Revolution. It mostly shaped the relations of great and civilized counties in a non-homogeneous international community of states that also included “uncivilized,” “not fully sovereign,” “dependent,” “smaller” and or “less powerful” ones. At that time, the principle was mostly reduced to the formal parity of certain predominately European states and followed from the recognition of their supreme authority over respective territories – in other words sovereignty. The concrete legal content of the equality principle however was defined on case-by-case basis by a handful of privileged states.

The bumpy road towards realization high aspiration of states’ equality in international law, shaken by several widespread wars and revolutions, traditionally starts from 1648 Westphalian Peace. Although some trace the doctrinal origin of the principle to the Spanish theologian and lawyer Francisco de Vitoria. According to James Brown Scott, Vitoria in his seminal work “De Indis” justified the

equality of states, applicable not only to the states of Christendom and of Europe, but also to the barbarian principalities of the Western World of Columbus.12


The majority of scholars (lately criticized for creating “Westphalian myth” as not every sovereign was party to the deal\(^{13}\)) believe that the foundations for the contemporary legal order based on the principle of sovereign equality were only laid out by the 1648 Westphalian Peace concluded in two treaties – the treaties of Munster and of Osnabruck, ending the Thirty Years War.\(^{14}\) It introduced the twofold understanding of equality principle, although not perfectly expressed.\(^{15}\) First, the supreme authority of states over their territories stopped to be challenged by the Holy Roman Empire, implying their independence, absence of other supreme authority and as a result their equality. Secondly, the interventions into religious matters that could lead to abridgment of sovereign prerogative came to the end, implying states equality notwithstanding their religious beliefs. Still, the sovereign equality was limited to the European Christian states, as L. Oppenheim points:

> there is no doubt that the Law of Nations is a product of Christian civilization. It originally arose between the States of Christendom only, and for hundreds of years was confined to these States.\(^{16}\)

Thus, only belonging to the group of “fully-sovereign” and “civilized states” generally gave states the right to participate in the formation of international law. The divisibility of sovereignty, distinction between civilizations and focus on power led to its only limited application in practice.

Apart from rare exceptions, world of sovereign states was composed from European, Christian and monarchic countries, formed because of heredity or wars of conquest.\(^{17}\) The state was regarded to be a property of a monarch, who could use it accordingly. This was translated into international relations that were reduced to the relations between the reigning houses. The 1789 French Revolution challenged the existed privileges of aristocracy. It proclaimed that people are born free and equal.\(^{18}\) These new ideas of the Enlightenment and natural law provided a new justification for the principle of sovereign equality, famously supped up by Vattel in 1774 as

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\(^{13}\) See, for instance, Randall Lesaffer, *Peace Treaties from Lodi to Westphalia* in *Peace Treaties and International Law in European History: From the Late Middle Ages to World War One* 9 (R. Lesaffer (ed.), New York: Cambridge University Press, 2008).


\(^{17}\) Cassese 2008, at 72.

\(^{18}\) *Id.*
a dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom. By a necessary consequence of that equality, whatever is lawful for one nation, is equally lawful for any other; and whatever is unjustifiable in the one, is equally so in the other.\textsuperscript{19}

Thus, equality was once again restated and gained new justification: all interstate relations must be equal and sovereign and no state should be superior to the other. It implied states’ independence, obligations to respect territorial integrity and not to interfere into domestic affairs. Though the French Revolution shook the traditional foundations of the legal order, it did not completely abandon the “civilization standard” but substituted it with the idea of respect for “human rights” and asserted “better” equality for fully sovereign states. And since the use of force was not completely outlawed back then, the principle of equality, according to Simpson, was further undermined during the 1818 Vienna Congress that reorganized Europe after the Napoleonic Wars and factually legitimized hegemony.\textsuperscript{20}

By the outbreak of the Russian Revolution, the use of the principle of equality to a large extent still depended on the Great Powers’ (Russia including\textsuperscript{21}) discretion to count the state willing to be treated on equal footing among “civilized” ones. The division into “civilized” and “uncivilized” nations remained inherent to the international law of the 19\textsuperscript{th} and the beginning of the 20\textsuperscript{th} centuries,\textsuperscript{22} limiting its scope of application only to relations between the “civilized” states and leaving “uncivilized” out.\textsuperscript{23} When they were not being conquered by their “civilized” neighbors, “uncivilized” states were routinely forced to sign treaties on terms favoring civilized states. Those included, for instance, consular jurisdiction and capitulations. The local systems of justice were viewed by European states as unacceptable, and no European citizen could have ever been submitted to them. As a result, countries regarded “uncivilized” were forced for to sign treaties of capitulation, which granted the “civilized” powers


\textsuperscript{21} Oppenheim 1905, at 193.


\textsuperscript{23} Högger 2015, at 135–141.
“extra-territorial jurisdiction over the activities of their own citizens in these non-European states.” This limitation on the sovereignty was regarded as a massive humiliation by that state, which sought to terminate all capitulations at the earliest opportunity.

According to Anthony Anghie,
capitulations were a part of the unequal treaty regime imposed on these states and generally comprised one part of a treaty which usually granted rights to trade and rights to establish residences, for example.

To sum up, as Arnulf Lorca puts it:

Western and non-Western states signed treaties establishing formal international legal relations that occasionally sanctioned formal equality, but mostly instituted unequal treatment.

At that time, smaller and weaker states were insisting on their equality with the Great Powers. One of the prominent examples of such “equality” struggle of smaller

24 Anghie 2004, at 85.
25 Id.
26 Id. He further cites Alexandrowicz (Charles H. Alexandrowicz, An Introduction to the History of the Law of Nations in the East Indies 97 (Oxford: Clarendon Press, 1967)), who argues that “originally, capitulations were voluntarily undertaken by Asian states who were sympathetic to the problems faced by traders in a foreign culture, and who sought to facilitate trade by means of the capitulation which, in the early stage of the colonial encounter, took place on equal terms. Capitulations at that stage did not signify inequality or inferiority; that occurred by the nineteenth century” (Id. at 86). Further on unequal treaties see Arnulf B. Lorca, Mestizo International Law 46–47 (Cambridge: Cambridge University Press, 2014). V. Andersen wrote that “[t]he essence and the feature of an unequal treaty is that its provisions are characterized by obvious limitation of sovereignty of one of the contracting parties” (Андерсен В. Неравноправные договора царской России с Китаем в XIX веке, 9 Борьба классов 102 (1936) [V. Andersen, Unequal Treaties of Tsarist Russia with China in the 19th Century, 9 Class Struggle 102 (1936)])]. А.Н. Талаляев and В.Г. Бояршинов wrote that such treaties to a greater or lesser extent violated states’ sovereignty (Талалаев А.Н., Бояршинов В.Г. Неравноправные договоры как форма удержания в колониальной зависимости новых государств Азии и Африки [A.N. Talalaev, V.G. Boyarshinov, Unequal Treaties as a Mode of Prolonging the Colonial Dependence of the New States of Asia and Africa] in Советский ежегодник международного права, 1961 [Soviet Yearbook of International Law, 1961] 168 (Г.И. Тункин (ed.), Moscow: Nauka, 1962).
27 Lorca 2014, at 47.
28 Грабарь В.Э. Начало равенства государств в современном международном праве [Vladimir E. Grabar, The Principle of Equality of States in Modern International Law] in Известия Министерства иностранных дел. Кн. I [Bulletin of the Ministry of Foreign Affairs. Book One] 195, 198 (St. Petersburg: Tип.В.Ф. Кишбаума, 1912). He considered that at the beginning of the 20th century he named 8 states as the Great Powers: states members of the Quadruple Alliance (Prussia, Russia, Austria, England) and France that in time joined the Alliance. Italy entered the Great Powers’ circle in the second half
states can be found at the Second Hague Conference of 1907. When the Great Powers tabled a proposal on their larger representation in a new permanent international court, the smaller states opposed this by demanding equal representation of all states. As a result, negotiations stalled, and no permanent court was established.\footnote{For details see Lorca 2014, at 158–168, 179–180.}

The Great Powers used to pick and choose, which state would be added to the “civilized nations” list and not every state was able to upgrade it status. Two examples of Japan and China vividly illustrate this point. Japan was accepted into the family of nations in 1905 following the Japanese defeat of Russia.\footnote{Anghie 2004, at 137; Lorca 2014, at 112–114.} Whereas it was attending the Paris Peace Conference of 1919–1920 in the status of the only Asian Great Power, its proposal to insert an article or at least a paragraph into Preamble on equality of all human races into the Covenant of the League of Nations was rejected outright by the Western Powers.\footnote{Kinji Akashi, Japan-Europe in The Oxford Handbook of the History of International Law 724, 739 (B. Fassbender & A. Peters (eds.), Oxford: Oxford University Press, 2012). Though the author doubts that Japan’s intention to introduce this principle was genuine citing instances where Japan was in turn discriminating other Asian states during the examined period.} Another signature of the Treaty of Versailles, China, remained bound by unequal treaties till 1940s. According to the Chinese international jurist and “leading expert on treaties”\footnote{Xue Hanqin, Chinese Contemporary Perspectives on International Law: History, Culture and International Law 51 (Leiden: Martinus Nijhoff, 2012).} Wang Tieya,

\[\text{[the era of 100 years of Western intrusion and domination of unequal treaties – started with signing of the 1842 Treaty on Nanjing under the threat from the British fleet – has only ended] with the conclusion of new treaties with the United States and the United Kingdom in 1943 that abolished in principle the extraterritorial system in China, and founding the [People’s Republic of China] in 1949 when all unequal treaties were abrogated in reality as well as in name.}\footnote{Wang Tieya, International Law in China: Historical and Contemporary Perspectives 238 (Leiden: Martinus Nijhoff, 1990) (references omitted); Chi-Hua Tang, China-Europe in The Oxford Handbook of the History of International Law 701, 706 (B. Fassbender & A. Peters (eds.), Oxford: Oxford University Press, 2012). Though Shin Kawashima in the other chapter of same book argues that the Qin Dynasty when concluding 1842 Nanjing Treaty was not thinking about it as unequal: it was only labelled as such by future generation (see Shin Kawashima, China in The Oxford Handbook of the History of International Law 451 (B. Fassbender & A. Peters (eds.), Oxford: Oxford University Press, 2012)). Lorca 2014, at 88.}]

of the 19th century and the U.S. – in the end of that century, Japan took its place among the Great Powers (see Id. at 197–198). Joshi Srivastava was of the same opinion concerning the list of the Great Powers at the outbreak of World War I (see Joshi Srivastava, International Relations 103 (9th ed., Meerut: GOEL, 2005)). However, that circle of the Great Powers was not remained unchanged: after World War I “Austria, and Russia and Germany temporarily were removed from the list of Great Powers” (Id.).

\footnote{For details see Lorca 2014, at 158–168, 179–180.}
According to Dickinson, writing in the end of 1910s, the principle of equality, was used in resolving interstate disputes, was mentioned in international instruments and was advocated by state officials at the international conferences.34 Though it rather tended to work in relations between the Great Powers themselves, it tended not to – in their relations with “civilized” but smaller states where the interests of the Great Powers prevailed. In 1912, Grabar concluded that practically no political matter was solved at that time without direct or indirect participation of the Great Powers, who completely ruled world politics. History has shown that the factual inequality in the relations between the Great Powers and the smaller states persisted. The First World War, being the ultimate manifestation of inequality, has not changed a thing. Inequality has further culminated, when France, Italy, United Kingdom and Germany concluded 1938 Munich Agreement that allowed German annexation of the Sudetenland in Western Czechoslovakia and became the prologue to World War II.35 A sharp brief characteristic to the principle of equality in the beginning of the 20th century – when Soviet Russia has emerged – was given by McNair: if equality before the law was then “a normal fact of international jurisprudence” equality in the sense of equal capacity to exercise rights was far enough from reality.36

2. Marxism-Leninism on Equality and International Relations in the Early 20th Century

The Russian Revolution to certain extend picked up and developed the ideas advanced by the French Revolution, but came from different premises as it differently construed social and economic justice, on which it based its understanding of equality. The Soviet understanding of principle of states’ equal rights was heavily inspired by Lenin’s views, who headed the Russian Revolution and whose ideas substantially influenced the Soviet policy during the early years of Soviet Russia.

The understanding of states’ equal rights by Soviet Russia was indeed closely linked with the notion of “equality.”

By political equality, – Lenin wrote, – Social-Democrats mean equal rights, and by economic equality… they mean the abolition of classes… Political equality is a demand for equal political rights for all citizens of a country who

have reached, a certain age and who do not suffer from either ordinary or liberal-professorial feeble-mindedness.\textsuperscript{37}

He also noted that

as for establishing human equality in the sense of equality of strength and abilities (physical and mental), socialists do not even think of such things.\textsuperscript{38}

For Lenin, the concept of equality was more important than its corollary – capacity to exercise equal rights. First, Lenin repeatedly wrote that equality means abolition of classes\textsuperscript{39} and that according to Marxism-Leninism the absence of classes should become a distinctive feature of the society organized on a communist basis – being the ultimate goal of the communist revolution.\textsuperscript{40} Thus, the concept of equality was a cornerstone of the Marxist-Leninist doctrine of class struggle.

Secondly, Lenin considered the concept of “equal rights” as a tool to deceive the oppressed classes. He wrote:

Abstract or formal approach to the question of equality as such including national equality pertains to the very nature of bourgeois democracy. In the guise of equality of human personalities… the bourgeois democracy declares formal or legal equality of a proprietor and a proletarian, an exploiter and an exploited thereby greatly deceiving the oppressed classes.\textsuperscript{41}

Lenin wrote that bourgeois society


\textsuperscript{38} Id.


\textsuperscript{41} Lenin 1981, at 162.
disguises factual, economic unfreedom and inequality for workers, for all working people and people exploited by the capital by means of formal recognition of freedom and equality… 42

For him, the formal equality, or equality of rights, was a deception if there was no economic equality that he defined as equality in the position in social production. 43

Addressing the problem of inequality in the US, Lenin wrote:

Some owns land, factories, capitals and lives at the expense of unpaid labor of workers… Others… do not have any means of production and live off selling their labor… 44

In Lenin’s view, economic equality was a goal that could only be achieved in a communist society. He understood the economic equality as abolition of classes 45 that, according to Marxism-Leninism, would be pertinent to a communist society. Lenin wrote:

The abolition of classes – means placing all citizens on an equal footing with regard to the means of production belonging to society as a whole. It means giving all citizens equal opportunities of working on the publicly-owned means of production, on the publicly-owned land, at the publicly-owned factories, and so forth. 46

In his paper “The State and the Revolution,” when describing the development of society from the lowest phase of a communist society (i.e. socialism) to the highest, Lenin wrote:

As soon as equality is achieved for all members of society in relation to ownership of the means of production, that is, equality of labor and wages, humanity will inevitably be confronted with the question of advancing further from formal equality to actual equality, i.e. to the operation of the rule from each according to his ability, to each according to his needs. 47

44 Id. (citations omitted).
45 Id. at 362.
46 Id. at 363.
47 Lenin, The State and Revolution, at 99.
It follows that, for Lenin, formal equality was only the starting point on the way to a better state of society based on “actual” equality as opposed to formal one. However, Lenin’s “actual” equality closely resembles economic equality: the formula – “each according to his ability, to each according to his needs” – is per se a concise description of economic relations in a communist society.

However, Soviet Russia could hardly mean Lenin’s concept of economic equality when wording its legal position in terms of equality in international relations. Soon after the Revolution, it has found itself in a difficult political situation: unrecognized by other states\(^48\) subject to foreign intervention by former Entente allies and suck into the mire of the civil war.\(^49\) Getting international recognition and winning the civil war, restoring diplomatic relations with “bourgeois" states was of paramount importance to Soviet Russia. Thus, the ultimate goal of the abolition of classes that implied the economic equality was not, as a rule, explicitly advanced in foreign policy-related official speeches or records, however, was widely practiced through “encouraging revolutions”.\(^50\) Besides, advancing even the idea of economic equality in international negotiations would have been the least successful tool for pursuing another priority need: Soviet Russia demanded equal treatment from “bourgeois” and especially European states who have frequently negotiated matters affecting Soviet interests in Russia's absence.\(^51\) Soviet delegations were also treated unequally as compared with delegations of other states, which caused repeated protests of Soviet diplomats.\(^52\)

Analysis of the early Soviet diplomatic documents leads to the same conclusion. For instance, G. Chicherin, the RSFSR People’s Commissar for Foreign Affairs at the time, when making a declaration on behalf of the Russian Delegation at the Genoa Conference on 10 April 1922, stressed that:

\(^{48}\) For details see Бобров Р.Л. Шаг, продиктованный историей: международно-правовое признание Советского государства [Roman L. Bobrov, A Step Dictated by the History: International Legal Recognition of the Soviet State] 59–65 (2\textsuperscript{nd} ed., Moscow: Mezhdunarodnye otnosheniya, 1982).

\(^{49}\) For details see Гаспарян А. Россия в огне Гражданской войны: подлинная история самой страшной братоубийственной войны [Armen Gasparian, Russia in the Fire of Civil War: True Story of the Most Terrible Fratricidal War] (Moscow: E, 2016); Поляков Ю.А. Гражданская война в России: возникновение и эскалация, 6 Отечественная история 32 (1992) [yuriy A. Polyakov, Civil War in Russia: The Emergence and Escalation, 6 Russian History 32 (1992)].

\(^{50}\) See Part 6 of this article.


\(^{52}\) See, for instance Documents on the Foreign Policy of the USSR. Vol. 5, at 620–621.
the universal peace should be established, in our opinion, by a world congress based on complete equality of all peoples…

It cannot, however, be deduced either from the text, or from the context that he meant economic equality, or abolition of classes. This term was rather used as a synonym of “states’ equal rights.” This, to our best knowledge, is equally true for the references to equality that Soviet officials included in diplomatic documents and international treaties.

As compared to Lenin’s original idea, the understanding of equality was adjusted to encompass the need to prioritize economic relations with “bourgeois” states over immediate advancing of economic equality. As a result, the meaning of equality in foreign policy documents was a slightly different reading of the old historical concept rather than “abolition of classes.” This difference, however, was novel and progressive for the actual practice of international relations at the beginning of the 20th century. The Soviets advanced the idea of equal enjoyment of rights by states, which was largely inspired by the Lenin’s understanding of how states should treat each other.

3. Lenin on Equality:
New Legal Dimensions of the Old Principle

Lenin contributed to the fleshing out of the principle of equality with the concrete legal rules in a fourfold way. First, he explained his general view of equality in international law in his article “Finland and Russia” published in the Pravda Newspaper No. 46 of 2(15) May 1917. Lenin wrote:

Agreement is possible only between equals. If the agreement is to be a real agreement, and not a verbal screen for subjection, both parties to it must enjoy real equality of status that is to say, both Russia and Finland must have the right to disagree.

It was not the first attempt to define the scope and meaning of “equality of status” by adding an adjective before the word “equality.” For instance, Art. 3 of General Convention of Peace, Amity, Commerce and Navigation between the United States of America and the Federation of the Centre of America signed on 5 December 1825 started with following words:


The two high contracting parties, being likewise desirous of placing the Commerce and Navigation of their respective Countries on the liberal basis of perfect equality and reciprocity...\textsuperscript{55}

Chicherin used “complete equality” in his speech cited above.\textsuperscript{56} Further, as evidenced by the drafters of the Volume II of the Soviet Foreign Policy Documents, Leonid Krasin, the head of the Russian Foreign Trade delegation at the first meeting with the members of the British government on 31 May 1920 stressed the aspiration of the Soviet Government to “establish normal economic ties with the capitalist states, United Kingdom including, on the basis of complete equality.”\textsuperscript{57} On 20 August 1920 at the international conference on the “status of Danube” in Paris, Chicherin pronounced in the Diplomatic Note to France the view of Russian Government that “all nations shall be granted freedom and absolute equality regarding navigation in this river...”\textsuperscript{58}

It seems that these attempts are brought together by the desire to see “equality of status” as not merely an empty phrase, but a meaningful promise that all states should always comply with. Arguably, Lenin expressed a similar idea in his article, writing about Russian-Finnish relations, where he viewed principle of equality not as just a pure abstraction but a tool that should be applied in practice. This derives from the textual interpretation of the term “real equality of status.” Consequently, all the wordings above shall be viewed as full synonyms having the same legal effect: equality cannot be real if it is qualified, not complete or not absolute equality. Such phrases used in soviet diplomatic documents (analyzed in part 4 below) and in treaties concluded by the USSR (studied in part 5 below) are mere paraphrase of Lenin’s “actual equality,” they add nothing new to the Lenin’s principle of equality. Though soviet diplomatic documents generally prefer unqualified terms “equality” or “equal rights” to “absolute,” “complete,” “perfect” or “real” equality, the study of the latter helps to shed the light on the meaning of the former words when Soviet diplomats used them in the context of international law.

Second, in Lenin’s eyes equality was closely linked with solving the problem of “dependent relations,” including those between colonies and their mother states and between states and nations annexed by them.

In the era of capitalist imperialism, – he wrote describing the division of the world between the Great Powers, – ...[n]ot only are the two main


\textsuperscript{56} Supra note 53 and accompanying text.

\textsuperscript{57} Documents on the Foreign Policy of the USSR. Vol. 2, at 762, 695.

\textsuperscript{58} Документы внешней политики СССР. Т. 3 [Documents on the Foreign Policy of the USSR. Vol. 3] 140–141 (G.A. Belov et al. (eds.), Moscow: Gospolitizdat, 1959).
groups of countries, those owning colonies, and the colonies themselves, but also the diverse forms of dependent countries which, politically, are formally independent, but in fact, are enmeshed in the net of financial and diplomatic dependence, typical of this epoch.59

He further reiterated this approach with respect to the Russian-Finnish relations that he viewed as a display if annexionism “both Russia and Finland must have the right to disagree.”60 Lenin’s idea of equality implied that states should treat each other as well as their colonies and other dependent territories as fully independent entities, i.e. without any forms of dependence. Thus, before tackling the issue whether states have equal rights, one should answer the question: do they feel independent when negotiating with the other states?

According to Cassese, the USSR advocated for the principle of substantive equality of states (as opposed to their formal equality) in international relations.61 However, as the above first and second aspects of the Lenin’s equality concept suggest, this is only partially true. In fact, though Soviet Russia advocated for a principle of equality it believed that equality could only be achieved when states treat each other as equals without any coercion.

Third, despite the differences in social systems, Lenin believed that socialist and capitalist states should be recognized as equals. The following two examples demonstrate that. First, the statement made by Chicherin at the 1922 Genoa Conference:

the Russian delegation arrived [at the conference]… willing to enter commercial relations with governments and businesses of other countries based on reciprocity, equality of status and full and complete recognition [of Soviet Russia]62

was addressed to both socialist and capitalist countries, participating in the conference. Thus, he implied that both socialist and capitalist countries we accorded equal status. Second, when during the same year the United Kingdom, France, Italy, Yugoslavia, Bulgaria, Romania, Greece and Egypt attempted to settle the issue of the Black Sea Straits without Russia, it has filed a note of protest, stating that:

60 Lenin, Finland and Russia, at 4–5.
62 Russian Declaration of 10 April 1922, supra note 53, at 148.
the Government of Russia hopes to have its voice heard by everyone willing to achieve the true peace based on states’ equal rights... and full respect for Turkish sovereignty over its territories.⁶³

This message was conveyed to “capitalist” (bourgeois) states. Further, as Lenin accorded equal rights to both capitalist and socialist states, that he conceded as a provisional state of things to the legal equality of two types of property – capitalist and communist.⁶⁴

Fourthly, according to the early Soviet doctrine, the idea of equal rights was not confined to the relations between states and was extended to relations between states and nations willing to choose their form of state existence (their geographical location in or outside Europe notwithstanding). As the Decree on Peace put it:

The government conceives the annexation of seizure of foreign lands to mean every incorporation of a small or weak nation into large or powerful state without the precisely, clearly, and voluntarily expressed consent and wish of that nation, irrespective of the time when such forcible incorporation took place, irrespective also of the degree of development or backwardness of the nation forcibly annexed to the given state, or forcibly retained within its borders, and irrespective, finally, of whether this nation is in Europe or in distant, overseas countries. If any nation whatsoever is forcibly retained within the borders of a given state, if, in spite of its expressed desire – no matter whether expressed in the press, at public meetings, in the decisions of parties, or in protests and uprisings against national oppression – is not accorded the right to decide the forms of its state existence by a free vote, taken after the complete evacuation of the troops of the incorporating or, generally, of the stronger nation and without the least pressure being brought to bear, such incorporation is annexation, i.e., seizure and violence.⁶⁵

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⁶³ Documents on the Foreign Policy of the USSR. Vol. 5, at 595.


This idea was further put forward in 1917, when Ioffe, then the head of the Soviet Delegation, was sent to Brest-Litovsk to negotiate the terms of the peace treaty with Germany. He set forth six main pre-conditions, the third of which required that national groups, which were not politically independent before the war, should be allowed by referendum to decide on their independence.66 According to the last pre-condition, the colonial question was meant to be resolved taking into consideration all the above.67

Had the Soviet Government not adhered to the principle of equality of states and nations opting for self-determination, it would have been impossible for it to demand from other states to grant all nations “forcibly retained within their borders” the right to solve “the question of the forms of their state existence.” Such attitude of a state towards a nation demonstrates its desire to treat the latter as a legally equal partner. This idea has subsequently paved the way to the right of self-determination of people. Given that the nations struggling for independence did not enjoy any rights under the international law of that time, the idea to grant to them and states equal rights was novel and quite progressive. In a wider context, this approach implied, first, universalization of international law broadening the scope of its territorial application and, second, its democratization by erasing the distinction between “civilized” and “non-civilized” nations. However, to put into practice the idea that states enjoy equal rights, Soviet Russia needed to introduce it into international law. As history shows, it has consistently pursued that aim.

4. Great Expectations:
Principle of Equality in the Early Soviet Foreign Policy Documents

The interests of the class struggle urged Soviet Russia to expand its ideas and views on international law among other states. By translating it into the international community of states it either consciously or unconsciously played its role in the
development of international law. As the general rule Soviet state translated its idea of equality on the international by either of the following means: diplomatic or treaty practice.

Soviet ideas infiltrated international law by way of international treaties, advancing soviet ideas, either through the “equality clause” or other provisions based in the soviet idea of equality as discussed in the next part of the article. Here we will focus on the non-treaty based way of expansion of the soviet views. This mechanism did not immediately lead to the creation of the rule, but could be supported by other states and then be translated into international law either as a customary or treaty rule.

This non-treaty based diplomatic way encompasses several legal mechanisms. First, Soviet Russia translated its ideas through the wording of the national laws that had effect in the foreign policy. The Decree on Peace, promoting the principle of equality of states and nations willing to exercise their right to self-determination:68 drafted by Lenin himself, it became the first framework foreign policy instrument of Soviet Russia, which expressed its position on international law.69 Besides, as one of its first laws, the Council of Peoples Commissars of the Russian Socialist Federal Soviet Republic adopted on 4 June 1918 the Decree on Abolition of Diplomatic Representatives’ Ranks, by which according to its name, abolished diplomatic ranks and renamed its representatives into plenipotentiaries. Paragraph 2 of the Decree stressed that

the main idea of international law – communication of states with equal rights

required –

to regard all diplomatic agents of foreign states accredited to the Russian Socialist Federal Soviet Republic as equally authorized irrespective of their ranks.70

68 See supra note 65.
69 Bobrov 1957, at 87.
Second, the notion of equality was frequently used in the diplomatic acts of Soviet Russia. References to equality and equal rights of states, as well as criticism of inequality between states are most often met in the diplomatic documents from October 1917 till December 1926.

Third, concrete political actions helped to promote the spread of the idea of equality, as they gave additional weight to the wording of domestic laws and diplomatic acts that, without concrete political steps, could hardly arouse sympathy from other states.

For example, principle of equal rights was stressed by the newly emerged Soviet Russia when it has published and abolished both secret and unequal treaties concluded by Tsarist Russia. Many of them confirmed inequality of states as they provided for division of territories or delimitation of spheres of influence in third states without their consent.

One of such secret treaties was the Agreement concluded between the united Kingdom and France in 1916, to which Russia has subsequently acceded. It provided for future delimitation of zones of influences and future territorial acquisitions in

71 See, e.g., Нота Народного Комиссариата Иностранных Дел РСФСР Министерству Иностранных Дел Китайской Республики от 10 марта 1921 г. [Note of the People’s Commissariat for Foreign Affairs of RSFSR to the Ministry of Foreign Affairs of Chinese Republic of 10 March, 1921] in Documents on the Foreign Policy of the USSR. Vol. 3, at 584; Телеграмма Президиума Центрального Исполнительного Комитета СССР Центральному Исполнительному Комитету Гоминьдана от 22 марта 1925 г. [The Telegram of the Presidium of Central Executive Committee of the USSR to Central Executive Committee of Kuomintang of 22 March 1925] in Документы внешней политики СССР. Т. 8 [Documents on the Foreign Policy of the USSR. Vol. 8] 187 (I.K. Koblyakov et al. (eds.), Moscow: Gospolitizdat, 1963); Выступление Полномочного Представителя СССР в Китае Л.М. Карахана на банкете в Пекине, данном лидером японской партии Кэнсэйкай Мотидзуки от 24 июля 1925 г. [The Speech of the USSR Plenipotentiary L.M. Karakhan in China at the Banquet in Peking Held by the Leader of Japanese Party “Kenseikai” Mochizuki of 24 July 1925] in Id. at 450, 452.

72 See, e.g., Речь Полномочного Представителя СССР в Китае, Председателя Советской делегации по переговорам с Китае Л.М. Карахана на открытии советско-китайской конференции от 26 августа 1925 г. [The Speech of the USSR Plenipotentiary in China, the Chairman of the Soviet Delegation for Negotiations with China L.M. Karakhan at the Opening of Soviet-Chinese Conference of 26 August 1925] in Documents on the Foreign Policy of the USSR. Vol. 8, at 506. Karakhan spoke about unequal treaties with China calling them shameful.

73 Decree on Peace, supra note 65, at 96.


75 See more about the secret treaties, for instance, in Tuzmukhamedov 1959, at 6–7, 9–12.
Asiatic Turkey as well as creation of an independent Arab state or a confederation of Arab states within Arabia. According to the treaty, Russia was to acquire Erzurum, Trebizond, Van and Bitlis provinces along with some other territories; France was to acquire *inter alia* the Syrian coastal strip and the Vilayet of Adana; the United Kingdom was to obtain control over the Southern part of Mesopotamia including Baghdad along with some other territories. The non-delimited area, including the “Holy Sites,” was to be subject to international administration later established by a trilateral agreement between Russia, France and the United Kingdom. This secret treaty was unilaterally terminated by Soviet Russia. In the Appeal to the Moslems of Russia and the East, the Council of People’s Commissars announced “…the treaty for the partition of Turkey, which was to ‘despoil’ it of Armenia, [to be] null and void.”

As a further example of *unequal* treaties is the 1907 Convention between Russia and the United Kingdom relating to Persia, Afghanistan and Tibet. It provided delimitation of Russian and British territorial interests in Persia concerning political and commercial concessions. Subsequently, Soviet Russia declared this convention terminated.

The fact that references to equality of equal rights of states are reiterated in the Soviet documents all over again, evidences, first, that the principle of equality was important brick in the structure of Soviet international law (1), and, second, that Soviet Russia attached great significance to its spreading into international relations during the early years of its existence (2). In the next section we will examine, how effective these attempts to export Soviet understanding of equality into international law were, by analyzing Soviet treaty practice.

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79 Нота Народного Комиссара Иностранных Дел Посланику Персии от 14(27) января 1918 г. № 137 [Note by People’s Commissar for Foreign Affairs to Persian Envoy No. 137 of 14(27) January 1918] in Documents on the Foreign Policy of the USSR. Vol. 1, at 91.
5. The Principle of Equality in the Soviet Treaty Practice

The treaty practice of the Soviet Russian in the examined period – starting from 21 October (7 November) 1917 and ending on 31 December 1926 as well as some later treaties – proves that Soviet views to certain extent have influenced international treaties.

The Treaty on Friendship and Brotherhood between Russia and Turkey signed on 16 March 1921 illustrates this point: it contains such terms as “the principle of nations’ brotherhood,” “solidarity in fight against imperialism” (in the preamble) and condemns capitulations as incompatible “with free development of every country” (Art. VII). These phrases are certainly of “Soviet” origin.

Soviet Russia used both direct and indirect means to advance the principle of equality idea in international law. It was way more flexible in introducing Marxist-Leninist ideas into the treaties with dependent or smaller states – states that did not enjoy rights inherent to full sovereignty. In such treaties, Soviet Russia, usually without explicitly referring to the principle of equality, abrogated unequal terms forced upon those states by the former Russian Empire. For instance, Art. VII of the 1921 Moscow Treaty between Russia and Turkey condemned and abrogated capitulations. This can be seen in the historical context as an indirect advancement of the Soviet understanding of equality.

Another example is the Agreement on General Principles for Settling Questions between the USSR and the Republic of China of 31 May 1924. Article III of the Agreement provided that

Governments of both Contracting Parties agree to annul all conventions, treaties, agreements, protocols, contracts etc. concluded between the Government of China and Tsarist government at the conference mentioned in previous Article and replace them with new treaties, agreements etc. on the basis of equality, reciprocity, and justice...

At the same time, Art. IV declared “null and void all treaties, agreements, etc. affected sovereign rights or interests of China, concluded between the former Tsarist

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81 Id. at 295–296.
government and any third party or parties,\textsuperscript{83} whereas Art. XII provided for the USSR Government’s renunciation of consular jurisdiction.\textsuperscript{83}

The texts of the treaties concluded by Soviet Russia with independent and fully sovereign states, do not clearly evidence that their drafters draw inspiration from the Soviet approach to the principle of equality. As a rule, these treaties did not explicitly uphold any specific dimensions of the Soviet approach to the principle of equality: state-parties seem to construe such agreements in the context of their own understandings of the principle of equality.\textsuperscript{84}

To the greatest extent, Soviet understanding of the principle of equality had influenced the USSR treaties with the other socialist states. The following treaties serve as good examples of how the treaty text was used for clear and express promotion of the idea: they contain phrases, that confirm adherence to the Soviet understanding of the principle of equality.

For instance, the Charter of the Council for Mutual Economic Assistance of 14 December 1959 stipulated (Art. I(2)) that

\begin{quote}
    economic, scientific and technical cooperation of state members of the Council shall be performed in accordance with the principles of complete equality, respect for sovereignty and national interests, mutual benefit and comradely mutual assistance...\textsuperscript{85}
\end{quote}

\textsuperscript{83} Agreement Concerning General Principles, supra note 82, at 332, 335.

\textsuperscript{84} Since the Soviet treaty practice was abundant, we will give just a few examples: Treaty between Russian Socialist Federative Soviet Republic and Germany of 16 April 1922 (Treaty of Rapallo) (see in Documents on the Foreign Policy of the USSR. Vol. 5, at 223–224); Convention embodying Basic Rules of the Relations between Japan and the Union of Soviet Socialist Republics of 20 January 1925 (with Protocols A and B) (see in Documents on the Foreign Policy of the USSR. Vol. 8, at 70–77). Further, on the Soviet treaty practice see Triska & Slusser 1962. Some provisions of the treaties between Soviet Russia and fully sovereign states on the first reading can be viewed as reflecting some element of the Soviet understanding of equal rights. For instance, according to para. IX of Trade Agreement Between His Britanic Majesty’s Government and the Government of the Russian Socialist Federative Soviet Republic of 16 March 1921 the British Government declared that “it will not initiate any steps with a view to attach or to take possession of... any movable or immovable property which may be acquired by the Russian Soviet Government within the United Kingdom” (see the text of the Agreement in Documents on the Foreign Policy of the USSR. Vol. 3, at 607–614). On the one hand, this treaty could be interpreted as encompassing the Soviet understanding of equality in the sense that it provided for equality between socialist and bourgeois countries: socialist and bourgeois countries were parties to it. On the other hand, though, nothing in the treaty evidences that this provision implying equality was enshrined notwithstanding economic and social differences between the parties. Thus, it can be viewed (and most likely was viewed by the British Government) as a special case of the principle of equality in its traditional meaning. For this reason, we do not consider that the Soviet understanding of equality has left any mark on such provisions.

Article IV of the Agreement Concerning Multilateral Settlements in Transferable Rubles and Organization of the International Bank for Economic Cooperation of 22 October 1963 provided the following:

The activities of the International Bank for Economic Cooperation shall be conducted in conformity with the principles of full equality of rights of member-countries and respect for their sovereignty. The members of the Bank shall enjoy equal rights in the consideration and determination of questions connected with the Bank’s activities.86

Article I of the Agreement Concerning the Establishment of the International Investment Bank of 10 July 1970 stipulates that

the activities of the Bank shall be conducted based on full equality and respect for the sovereignty of all the Bank’s member-countries.87

The influence of the Soviet idea of equality can also be traced in the multilateral treaties of the USSR. The preambles of 1933 London Conventions for the definition of aggression noted that all States have an equal right to independence, security, the defense of their territories, and the free development of their institutions.88 On 6 February 1933, M. Litvinov introduced draft declaration to the General Commission of Disarmament Conference. Its preamble stated that

[the declaration] recognizes the equal right of every state to independence, security and self-defense.89

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86 Ведомости Верховного Совета СССР, 1964, № 7, ст. 83 [Bulletin of the USSR Supreme Council, 1964, No. 7, Art. 83]. It was later amended by protocols of 18 December 1970, 23 November 1977, and 18 December 1990; the cited provision became a part of slightly amended Art. III. The treaty name was also changed. The latest consolidated version of the treaty is available at http://ibec.int/files/Statutes.pdf.

87 Сборник действующих договоров, соглашений и конвенций, заключенных СССР с иностранными государствами. Т. XXVII [Collection of Treaties, Agreements, and Conventions Concluded by the USSR with Foreign States. Vol. XXVII] 201 (Moscow: Mezhdunarodnye otnosheniya, 1974). In the current version of the treaty as of 20 December 1990, Art. I reads as follows: "The activities of the Bank are performed on the basis of equality of its members and respect of sovereignty of the countries" (see agreement with the latest amendment here: https://www.iib.int/files/agreement_on_the_establishment.pdf).


89 Проект Декларации, внесенный тов. М.М. Литвиновым в генеральную комиссию конференции по разоружению 6 февраля 1933 г. [Draft Declaration Introduced by Comrade M.M. Litvinov to the General
Hence, the preambles of the London Conventions were phrased based on the soviet draft. Several components of the Lenin’s understanding of equal rights of states are embodied in it. First, the idea that states should treat each other as fully independent entities. Second, the equality between socialist and capitalist states, because the preamble does not specify the socio-economic structure of the states-parties. At the same time, its scope is limited to dependence, security, the defense of their territories, and the free development of their institutions and does not provide the principle of equal rights as such.

The UN Charter can serve as another example of direct introduction of the Soviet concept of equality. Article 1(2) lists among UN purposes

to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.\(^90\)

This wording came into being \textit{inter alia} as the result of USSR’s suggestion – to add to the draft Charter a provision according to which,

development of friendly relations between states should be based on respect for the principle of equal rights and self-determination of peoples.\(^91\)

The very existence of such interpretation allows to assume that when suggesting the amendment, Soviet diplomats articulated – consciously or not – one of the components of the Soviet concept of equality – the equality in relations between states and nations.

To sum up, first, the fourfold Soviet idea of equality has not been introduced into international law in a single package by Soviet Russia. Instead, its elements have been inserted in various treaties with Soviet Russia. The element introduced in the UN Charter was the idea of equal rights of states and nations, whereas other treaties with the socialist states contain traces of, for instance, such elements as the right of a state to disagree when a question affects its interests.

\(^{90}\) Art. 1, para. 2 of the UN Charter.

Second, the fragmented introduction of different elements into international law resulted in them having different impact on it. Whereas the provision of Art. 1(2) of the UN Charter contributed to strengthening the people’s right to self-determination and to removing “civilization test” from international law, the formula “complete equality” used in the certain treaties was eventually left in oblivion. This has partly happened because most of the treaties between Soviet states were of a regional rather than universal nature and due to the followed collapse of the USSR and the Soviet bloc failed to advance to the universal level. Additionally, if a treaty provides for equal status, any other qualifications of this principle with adjectives “actual” or “complete” are superfluous; rather its effective application depends on the political will and genuine behavior of states.

As a result, though one can hardly find a rule in international law that would have reflected all elements of the Soviet approach to the principle of equality, it is still partly rooted in international law, having contributed to its progressive development.


Soviet Russia emerged at the time when the political interests of the Great Powers prevailed over the equal rights principle. However, was Soviet Russia consistent in promotion and application of the principle of equality or did it regularly retreat from it for the sake of political interests (as the “capitalist” states it has criticized)? The fact that Soviet Russia has published secret and abrogated unequal treaties, started concluded agreements on more equal terms, indicates that it followed its idea of states’ equal rights.

One of the results of putting the idea of “equality of status” into practice was the resolution of so-called “Finland issue.” On 18(31) December 1917 in response to the request by the Finnish Government concerning recognition of independence of the Republic of Finland, the Council of the People’s Commissars adopted the regulation according to which the Council proposed to recognize the Republic of Finland as independent state to the Central Executive Committee of the RSFSR.92 The latter did so on 22 December 1917 (on 4 January 1918).93 Thus, in Soviet Russia’s understanding, it treated Finland in accordance with the principle of equality.

92 The long title of the body is “The All-Russian Central Executive Committee of Councils of Workers’ and Soldiers’ Deputies.”


94 The Abstract of the Minutes of the CEC Meeting (in Russian) is available at http://www.histdoc.net/history/ru/itsen.html.
At the same time, history demonstrates examples to the contrary. Soon after Soviet Russia granted independence to Finland, the Finnish Civil War broke out between Reds and Whites. In this war, the Whites were supported by Germany, whereas the Reds – by Soviet Russia notwithstanding the fact that it has previously recognized Finland as an independent state.\(^{95}\)

There are other examples of Soviet Government support of revolutionary movements during that time. As Lenin wrote to general I. Vacietis on 29 November 1918:

> While our troops progress to the West and to Ukraine, temporary regional Soviet governments are organized to strengthen Soviets in the field… Therefore, we ask to instruct the military command of respective units to support these temporary Soviet governments of Latvia, Estland, Ukraine and Lithuania, but, of course, only the Soviet governments.\(^{96}\)

In the course of the Civil war in Estonia (1918–1920) the Red Army supported Estonian communists in their struggle against Estonian temporary bourgeois government being in turn supported by the USA, the United Kingdom and Finland.\(^{97}\) During the civil war in Latvia (1918–1920) though the United Kingdom, Germany, France and the USA supported Latvian bourgeois government,\(^{98}\) the Soviet Government was established for short periods (November 1917 – February 1918; December 1918 – summer 1919\(^{99}\)) in Latvia with the help of Soviet Russia.\(^{100}\)

However, the Soviet internal understanding of equality could not be reasonably reconciled with the Soviet practice of aiding revolutionary movements abroad. The *prima facie* answer is negative, since the “export” of revolution subjects the importing state to the political interests of the exporting state and thus establishes unequal

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99 *Id.* at 3, 76, 81, 128.

100 *Id.* at 11–12, 75–76.
treatment. In the view of Marxism-Leninism, the answer is however positive: Soviet Government was convinced that by doing so it facilitated the proletarian struggle against bourgeoisie and imperialism that, as a result, would pave the road for a better and more equal social structure – communism. In this context, Soviet understanding of equality receded into the background.

A further example of Soviet retreat from the principle of equality of status can be found in Art. VI of the Treaty of Friendship between Soviet Russia and Persia of 26 February 1921. According to it,

> both High Contracting Parties agree that if a third Party attempts to carry out a policy of usurpation by means of armed intervention in Persia, or if such Power desires to use Persian territory as a base for military operations against Russia if, at the same time, a Foreign Power threatens the frontiers of Russian Soviet Federative Socialist Republic or those of its allied powers, and if the Persian Government is not able to put an end to such threat after having been once called upon to do so by Russian Soviet Government, Russian Soviet Government shall have the right to advance her troops into the Persian territory for the purpose of carrying out the military operations necessary for its self-defense. Russian Soviet Government undertakes to withdraw its troops from Persian territory as soon as the threat has been removed.  

One should recall the context, in which the treaty was signed: that year British troops entered Iran. Therefore, the Soviet Government feared that the United Kingdom could use Persia as a base area against it – and this was the reason for including Art. VI in the Treaty. Interestingly, when the Soviet Government used Art. VI of the Treaty, it was not because of the British threat: in 1941, the Soviet state involved it as a legal basis for advancing Soviet troops into Iran’s territory fearing that Germany would occupy Iran. Iran repudiated Art. VI later in 1979.

The Soviet doctrine argued that

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102 Beryozkin et al. 1980, at 136.


Article VI was not a unilateral guarantee of security to Soviet frontiers, it also aimed at ensuring integrity and security of Iran: Soviet Russia undertook to prevent third parties from carrying out the “usurpation policy” on the Persian territory. Further, Soviet Russia also undertook not to use “annexationist policy” on Persian territory.” In other words, it provided for mutual obligation of Russia and Iran to fight aggressors in the name of security.105

This wording in a way resembles unequal treaties that Soviet Russia has opposed from the moment of its creation: no matter how one construes Art. VI, one thing remains unchanged: this treaty did not grant the same right to Persia with respect to Russia. It is unlikely, that this provision could at all be justified under the Soviet idea of equality as it imposed “limitations on the Persian sovereignty.”106

These examples demonstrate that Soviet Russia has on numerous occasions retreated from its own understanding of the equality principle. Yet another well-known dramatic example of an act contradicting this principle is the Additional Secret Protocol to the Treaty of Non-Aggression between Germany and the Union of Soviet Socialist Republics of 23 August 1939, that has delimited German and Soviet spheres of interests in Poland and Baltic states.

All the above evidences that Soviet Russia easily prioritized the fight against bourgeoisie and, in a wider sense, the promotion of the main Marxist-Leninist ideas over the advancing of the principle of equality. It was ready to act contrary to the equality principle if the expected outcomes could contribute to the struggle against the “bourgeois world.”

However, Soviet Russia was not the only state putting its political interest above the principle of equality. In his address to the Senate of 22 January 1917, Woodrow Wilson, the President of the United States, explained that there was “a deeper thing involved than even equality of rights among organized nations”:107

no peace can last, or ought to last, which does not recognize and accept the principle that governments derive all their just powers from the consent of the governed, and that no right anywhere exists to hand peoples about from sovereignty to sovereignty as if they were property.”108

105 Supra note 102. The drafters of the Volume III of the Soviet Foreign Policy Documents viewed this treaty as equal (see Documents on the Foreign Policy of the USSR. Vol. 3, at 682, note 64).


108 Id. at 536–537.
In W. Wilson’s opinion, equality of status was of secondary importance as compared to such principle as democratic governance. Thus, the intervention for the sake of democratic governance could justify retreat from the principle of equality. The analogy can be drawn between W. Wilson’s views and the United States policy at present. Indeed, as L. Ambrosius noticed that

when President George W Bush defined his response to those terrorist attacks [of 11 September 2001], he embraced Wilson’s legacy, promising to make the world safe for freedom and democracy.¹⁰⁹

After World War I, the other Great Powers generally seem to share Wilsonian view on the proper balancing the right to “democratic governance” against “the principle of equal rights among organized nations.” This is seen from the Joint Note of the Supreme War Council sent to Alexander Kolchak on 26 May 1919, according to which allied and united governments agreed to help “Kolchak’s government and its allies” with ammunition, supplies and food for it “to fortify its position as all-Russian government,” provided Kolchak as the leader of the Whites and his allies comply with the following conditions. First, when they entered Moscow they should have convened a

constituent assembly elected on the basis of freedom, secrecy and democratic principles, as the supreme legislator of Russia, to whom the Russian government must be accountable.

Second, permit free and proper elections of all the free and legally constituted assemblies, such as dumas, zemstvos, etc. in all territories subject to the government of Kolchak and those who is allied with him. The Note was signed by J. Clemenceau, D. Lloyd George, V. Orlando, W. Wilson and C. Saionji – the representatives of the five Great Powers (France, United Kingdom, Italy, USA and Japan).¹¹⁰ Consequently, these countries acknowledged the priority of democratic governance over equality of rights, as the intervention in the Russian affaires not strictly compatible with the equality of states is conditioned on the democratic governance in Russia.

As a result, despite its somewhat naïve initial desire to make the world better and in idealistic pursuit of the principle of equality, Soviet Russia was ready to use the principle instrumentally and sacrifice it in the name of spreading the Marxist-Leninist ideology. In turn, Western powers were prepared to oscillate towards the narrative of democracy, leaving equality of nations aside. That left the principle of


¹¹⁰ See Klyuchnikov & Sabanin 1926, at 248–250.
equality in the wake of the Russian Revolution as nothing more than an old utopian aspiration detached from actual practices.

Conclusion

Soviet Russia has emerged when the principle of equality in international law had a limited scope of application and as a rule lacked effectiveness. The early Soviet idea of equality – as Soviet Russia was delisted form “civilized” states after the Revolution was a response to unequal treatment accorded by “civilized” to “uncivilized” and by Greater states to the weaker and smaller ones. The concept had four main interconnected dimensions. First, equality in terms of rights or status in the acquisition and exercise of rights (1). Second, elimination of “dual standards”: where a state treats one state as a dependent and the other – as an independent (2). Third, extrapolation of equal rights not only to states but also to nations and peoples (3). Fourth, the scope of Lenin’s equal rights concept was not confined to any group of states, as compared to international law at that time. To the contrary, it implied equality between any states, even in relations between socialist and capitalist states (4).

Soviet Russia translated it approaches to international law, including the Soviet understanding of equality its diplomatic practice and international treaties, putting it into practice by inserting “equality clauses.” As a result, the Soviet state contributed to eliminating, among others, such institutes as secret treaties, capitulations and consular jurisdiction. As a long-term effect, Soviet Russia contributed to the transparency and universalization of international law.

At the same time, in pursuit of Marxism-Leninism ideas – building communism through the class struggle, – the Soviet Government paid secondary importance to the principle of equality. The Soviet state used it as yet another instrument of struggle against bourgeoisie or as an instrument for inducing Western states to accord equal treatment to Soviet Russia. Soviet Russia on numerous occasions retreated from its understanding of the idea of equality, advancing its ultimate goal – communist world with no states or law needed (with its citizens living in a states of actual equality). Thus, it would be a great simplification to say that Soviet Russia’s understanding of equality (and view of international law) has always been completely extraneous to the international law. Indeed, there was an ideological conflict between the Soviets and the Western states that could not be resolved and cannot be denied. However, in certain areas Soviet Russia was in a quite traditional way participating in the development of international law.

Notwithstanding the Soviet effort to re-read equality and add new legal dimensions to its content, it has preserved its double structure as “formal rule and substantive aspiration, as torn between reality and utopia.” Despite of “many deviations from

111 Krisch 2003, at 135.
the ideal principle of equality in human history and bows to power in reality,” it has always aimed at preserving the independence of states and thus has played important role in regulating the world of states, being another legal obstacle to war.

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112 Krisch 2003, at 135.


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Socialist legal theorists claimed they introduced a new paradigm of (criminal) law. To verify or falsify this claim, the article is searching for specificities of socialist criminal law. Out of numerous East-European countries, Czechoslovakia was taken as an example here. There, the new regime in 1948 had already simplified the entire criminal justice system. Other major changes, still influencing the legal system in Slovakia (a descendant of Czechoslovakia) nowadays, include the introduction of: lay judges, protective measures as new forms of sanctions, material understanding (dangerousness) of the criminal offense, and the increased role of public prosecution. On the other hand, since the 1960s, the formalistic approach to (criminal) law was adopted in Czechoslovakia, becoming a characteristic feature of criminal law in the whole Eastern Bloc, just like in Western Europe. Therefore, it seems that despite some minor differences between socialist and capitalist criminal law, these do not actually represent contradictory paradigms of criminal law. Should any paradigm shift in its proper (Kuhnian/Foucaultian) meaning be seen in the socialist countries, rather a more general paradigm shift might be proposed: the socialist society could namely be seen as a potential precursor to a post-modern “control society” (replacing the previous “disciplinary society”), due to the omnipresent control by Communist Party structures.

Keywords: capitalist law; socialist law; criminal law; paradigm; Czechoslovakia.

Table of Contents

Introduction
1. Criminal Law in the Territory of Russia before and after 1917
   2.1. Changes in the System of the Judiciary
   2.2. 1950 Recasts – Substantial Changes in the Criminal Justice System
   2.3. Criminal Procedure and the Office of Prosecution in the 1950s
   2.4. Strengthening Legal Guarantees at the End of 1950s
   2.5. Socialist Criminal Law – Optimism in the 1960s
   2.6. Getting Sober in the 1970s
Conclusion – Shifting the Sociological or Legal Paradigm?

Introduction

The term “paradigm” in the sense of dominant historical insights and “optics” was introduced into the philosophy and history of science by Thomas S. Kuhn in 1962.¹ A similar concept was at the same time proposed by Michel Foucault, who, however, rather spoke of “episteme” and of changing “discourses.”² Still, both shared the idea that each period in history uses its own dominant optics, principles and approaches to social and scientific problems, which can get completely rejected and replaced in a new historical epoch (paradigm). Thereby, although the “paradigms” in the theory of T.S. Kuhn as well as “epistemes” in the theory of M. Foucault are considered to be mutually exclusive and therefore two paradigms (epistemes) cannot co-exist at the same time, still, it is claimed that the dominant paradigm often latently contains elements of a new, subsequent paradigm, whereby it is the accumulation of inconsistencies in the ruling paradigm that ultimately leads to the abandonment of the dominant optics and to the acquisition of new optics – i.e. the acceptance of a new paradigm (episteme, discourse). This general observation should thereby apply to all aspects of human life and knowledge, including law and legal thinking.

Thus, one might claim that currently it is the “absolutist” and “statist” paradigm, episteme, discourse, or approach to law and legal science that prevails nowadays, perceiving law as a normative system created and enforced by the State. Similarly, already in 1983 at a conference in Lund, Sweden, Jan M. Broekman³ considered

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jurisprudence today to have only one ruling paradigm – the paradigm of the judicial application of law. On the other hand, Marxist philosophy and theory of law claimed that a completely different paradigm of law applies in capitalist, and vice versa, in socialist society. Western European legal theory was in turn partially willing to speak of two paradigms instead of one, but only in the sense of legal science being based either on formalist platforms (being the case of legal positivism, including socialist formalism) or anti-formalist platforms (being the case of legal realism, or generally of sociological approaches to law). At the same time, however, it was still pointed out that the only paradigm that is truly appropriate and practical (at least in the European continental legal system), is the exclusively formalistic paradigm, covering both the capitalist and socialist legal system.

In the following part/section, we shall therefore examine whether and to what extent legal paradigms truly shifted in the transition from bourgeois, capitalist (criminal) law to socialist (criminal) law. In order to do so, we shall use the example of the legal history of Czechoslovakia in order to identify any specificities of “socialist” criminal law, to assess its “paradigmatic” nature.

1. Criminal Law in the Territory of Russia before and after 1917

Before testing the theory of a new “socialist” legal paradigm in criminal law, it is necessary to start with introducing the historical legal roots of Russian (later Soviet) criminal law, from which the “new paradigm” was supposed to grow. Thereby, the basis of Russian criminal law until the victory of Bolshevism in 1917 was a very casuistic Criminal Code revised in 1846, being based on a purely formal, positivist concept of crime. This approach was then revolutionarily replaced after 1917 by a completely contrasting situation of a sociological approach to law, at the same time leaning on the ideas of Marxist philosophy.⁴

While the sociological approach had already been abandoned by the 1930s, the Soviet theory of criminal law was throughout the period of its existence consistently based on Marxist thought, albeit with certain modifications as introduced by leading political figures of the regime. Hence, until 1956 the theory was called “Marxist-Leninist-Stalinist philosophy” and after 1956 “Marxist-Leninist philosophy.” The official philosophy was in general based on two principles: of dialectical materialism and historical materialism. In addition, it was also based on the idea of a class struggle. These three features deserve some clarification, since they were the reasons why socialist criminal law was supposed to represent a different, new paradigm of law, notwithstanding the return from sociological to a more formalistic approach since the 1930s:

According to historical materialism, law is a part of the ideological superstructure, built (and dependent) on its economic base. Changes in the economic base bring about changes in the ideological superstructure. This influence, however, is mutual – meaning that the superstructure can also change the base; that is the essence of dialectical materialism, in turn. Finally, according to the third mentioned element, the class struggle, it was claimed that each State represents a rule of one class (oppressors) over another class (the oppressed). Law was, therefore, primarily seen as an instrument of class power.

While the Soviet (and more generally, socialist) legal science claimed to have “unmasked” the class character of criminal law in capitalist countries, at the same time it frankly admitted the reverse class character of Soviet (socialist) law – in favour of the working class. The class character of Soviet (not only criminal) law was thereby determined foremost by the nature of the entities of criminal law (e.g. socialist organizations, workers, class enemies), the choice of sanctions (e.g. the new institute of protective measures) and the interests protected by criminal law (being mostly the construction and protection of socialism). Criminal law theoreticians in the USSR have therefore declared themselves to represent a special, Marxist-Leninist criminal school, which was claimed to have differed from classical and positivistic schools of criminal law. Thereby, until 1930s it was indeed different – namely closer to the sociological school of criminal law; however, since the times of Vyshinsky, formal elements, characteristic also of Western European legal schools, began to prevail from the 1930s.

To offer an example of sociological influences in early Soviet criminal law, it can be briefly summarized here that according to Sec. 7 of the Soviet Criminal Code of 1927, anyone was considered socially dangerous who, due to their characteristics, way of life or contacts with the world of criminals, or by its overall moral and intellectual status, could represent a danger to society. Socially dangerous was thus, under Soviet criminal law, in a somewhat circular definition, any person who either by their actions or by their status (moral, intellectual, etc.) represented a danger to society. The doctrine of Soviet criminal law of the 1920s namely emphasized that a criminal act is foremost a social phenomenon. Legal practice thereby even took the view that it was not necessary to wait until the offender commits an offense dangerous to society, rather society had the right to take action against the individual as soon as the dangerous character of the person became clear. Still, in assessing the social danger of individual and the degree of that danger, Soviet courts had only very general criteria available; they were to draw both from the nature of the person of offender and from their actions. Legal practice was not able to use these incomplete guidelines, especially when it was necessary to criminalize the so-called anti-Communist Party activities, the content and nature of which permanently changed according to immediate political interests.

6 Id. at 39.
Criminal repression based on the dangerous nature of the perpetrator (the material nature of crime) was not, however, a purely Soviet “invention.” It was in fact proposed as early as in 1903 at a conference of international forensic society (Internationale Kriminalistische Vereinigung) in Hamburg. Still, it was in the USSR that this approach became a legal norm, insisting on the preference of material elements (dangerousness) of the offense, respectively on assessing the perpetrator’s personality in the spirit of the sociological school of criminal law, at the expense of formal features of the offense.

From the 1930s onwards, however, based on numerous unpleasant experiences, a requirement was voiced in the Soviet legal scholarship for every criminal offense to have its binding formal features laid down in the wording of the Criminal Code. Thus, the radical “material nature of crime” was abandoned, together with gradual abandonment of analogy in criminal law.\(^7\) Soviet criminal law therefore began to resemble standard formalist systems of criminal law, even though the institute of social danger represented in the person of an offender remained preserved in the Criminal Code as a sign of the dialectic synthesis of formalist and former anti-formalist tendencies. It was this new form of (limited) material understanding of criminal offense that was then taken over at the turn of the 1940s and 1950s by the criminal legislation of the states of Eastern Europe, the material understanding of crime being thereby officially proclaimed and recognized as a qualitatively and historically (paradigmatically) new definition of a criminal offense, characteristic of a socialist society – being both more just and more scientific.

The new “socialist” understanding of criminal law was reflected also in the Czechoslovak Criminal Code of 1950. Criminal offenses were only actions that were dangerous to society, making it possible that while an action on the one hand complied with the formal features listed in the Criminal Code, but on the other hand, its degree of danger was not so high as to be considered a criminal offense. Still, unlike in Soviet criminal law, it was excluded to consider as a criminal offense an action that did not meet the formal characteristics listed in the Criminal Code, notwithstanding the fact that the social danger of the action was high. The Czechoslovak criminal law of the 1950s similarly did not allow for the analogy to the detriment of perpetrator.

It was thereby claimed that in Czechoslovakia, previous Soviet experience with the creation and application of criminal law was used. Indeed, before the new

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\(^7\) An analogy to the detriment of the offender had already been introduced into the Soviet law in the first Criminal Code of 1922. The aim under Art. 5 was to provide for any possible “protection of working people’s government from crime and from the elements dangerous to human society.” Analogia legis has therefore been explicitly enshrined in Art. 10. In the period shortly before World War II it was accepted in criminal law science in the USSR that analogy was no longer necessary. This view was reflected in the draft of the Criminal Code of the USSR of 1938, where an analogy was no longer provided for. The discussions finally ended with the adoption of the Basic Principles in 1958 where the analogy was definitely abandoned.
Criminal Code was adopted in 1950, a period of anti-formalism and judicial activism (just like in the USSR in the years following 1917) was necessary in applying the previous capitalist criminal law rules. Since the 1950s, however, despite the anti-formalist rhetoric, the formalistic approach started to prevail, clearly culminating in the 1970s and 1980s.⁸ Czechoslovakia thus closely followed the historic experience of the USSR, its criminal law finally accepting the formalist shape and form.

2. Soviet Models of Criminal Law in Czechoslovakia
(1948–1989)

In the territory of today’s Slovakia (until 1918 being a part of Austrian-Hungarian Empire, and in 1918–1992 being a part of Czechoslovakia), the former Hungarian Criminal Code on Crimes and Contraventions No. V/1878 was effective until 1950. This Code expressed in its Sec. 1 the traditional formalist understanding of criminal offenses by stating that “crime or contravention is only an act that the law has declared as such.”⁹ It was only the new (Soviet-inspired) Criminal Code No. 86/1950 Coll. that introduced the material understanding of crime for the first time in modern history of (Czecho)Slovakia.¹⁰

However, even before the 1950 Code, some Acts of Parliament that signalled the future concept of criminal law were adopted very soon after February 1948, when after a governmental crisis the Communist Party of Czechoslovakia gained the exclusive monopoly of power for over 40 years. The principles laid down in these early laws thereby remained as basic postulates of the people’s democratic and socialist criminal justice way until 1989.

Throughout the whole period of communist rule in Czechoslovakia, two basic motivations were hidden behind the reform of the criminal justice system: on the one hand, the effort for overall control of justice as a component of state power, and on the other, effort to introduce regulations following the Soviet pattern.¹¹ With these aims in mind, changes in criminal law had already been prefigured by Act No. 231/1948 Coll. for the protection of the People’s Democratic Republic. It is possible

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¹⁰ Darina Mašľanyová, Nebezpečnosť činu pre spoločnosť ako materiálny znak trestného činu [Danger of Offense for Society as a Material Element of an Offense] 6 (Bratislava: Akadémia policajného zboru v Bratislave, 1999).

¹¹ Zdeněk Kühn, Socialistická justice [Socialist Justice] in Communist Law in Czechoslovakia, supra note 8, at 825.
to infer already from the title of the Act that it replaced the former Czechoslovak Act No. 50/1923 Coll. on the protection of the Republic.

The 1948 Act regulated anew, more strictly but also more vaguely, criminal responsibility for crimes against the external and internal safety of the Republic and against the safety of international relations.\(^{12}\) Compared with Act No. 50/1923 Coll. there has been a significant increase in the penalties for most of the criminal offenses; while Act No. 50/1923 Coll. imposed the death penalty only for military betrayal, a death sentence was from now to be imposed for treason, spying, allegiance against an ally, war destruction, war treason, and assault on the life and body of state officials. In most of the cases, the death penalty was exclusive. Finally, some new types of punishment were also introduced: the loss of civil rights and the loss of citizenship.

On top of the crimes already found in the 1923 Act on the protection of the Republic, new offenses were introduced in the 1948 Act: offenses of support and propagation of fascism and similar movements, the misuse of the office of the clergy, provisions protecting the economic system of the people’s democratic regime, central planning, and protecting against sabotage and endangering the success of economic planning. Act No. 231/1948 Coll. for the protection of the People’s Democratic Republic has thus become one of the legal backbones of the new regime, and was also widely applied in subsequent political show-trials at the turn of the 1940s and 1950s, aimed mainly against the opponents of the new regime. (All in all, based on the data from post-1989 rehabilitations (under Act No. 119/1990 Coll.), since 1948, 1288 persons were convicted in Slovakia under the 1948 Act.\(^ {13}\))

\[2.1. \textbf{Changes in the System of the Judiciary}\]

Another Act of Parliament having an impact on the criminal justice system, following immediately after February 1948, was Act No. 319/1948 Coll. on the popularization of the judiciary. According to the legislator, it brought about a true equality of the parties, the principle of searching for material truth, the elimination of formalism, simplification, speeding up and lowering the costs of judicial proceedings. The courts were thereby called upon to protect the socialist state and its social system in the first place, as well as the peaceful international relations within the world socialist bloc. Finally, the legislation explicitly declared the ideological and instrumental nature of the judiciary.

Besides introducing a two-tier court system of district courts and regional courts (still operating in the Slovak Republic to the present day) instead of the previous three-tier system, this Act also introduced – under the headline of “popularization

\(^{12}\) Antonín Růžek, Rok 1948 v trestním právu [The Year 1948 in Criminal Law], 88 Právnik 224 (1949).

of the judiciary” – a new institution of lay judges at all ordinary courts, whereby the law put them “on a par with professional judges and assured their majority.”\textsuperscript{14} The lay judges were to be Czechoslovakian citizens aged 30–60 years old, who were registered in the permanent voter list, were of full integrity, were reliable and devoted to the people’s democracy.

In addition, the popularization of the judiciary was manifested also by the nomination of new professional judges of blue collar origin, educated for the role of a judge in two-year law courses. In these courses, both blue-collar judges and prosecutors were prepared for their new roles, often without any secondary education. These lawyers were thus characterized by insufficient formal education, but on the other hand by much appreciated distrust to the traditional legal culture, and in contrast by their trust in the Communist Party, system and ideology. Soon, in 1951, out of a total of 280 graduates of the short-term law courses, 55 were presiding in district courts, one was a judge of the Supreme Court and 115 were employed in the District Prosecutor’s Offices.\textsuperscript{15}

Finally, many of the older judges have shown even greater zeal for the regime than their younger colleagues, hoping to maintain their positions. Often they even gained prestigious seats in the senates deciding in show-trials, precisely because their political past was not very solid and unambiguous, and this was supposed to be a test to show their loyalty to the new regime.\textsuperscript{16}

Either way, many of the judges became members of the Communist Party, being thus directly subjected to Party discipline and Party training. At the same time, however, one must also not forget that the actual decision-making by judges was additionally controlled by prosecutors, the “elite of communist justice” who could challenge both the criminal and civil decisions of any court, including the Supreme Court.\textsuperscript{17}

\subsection*{2.2. 1950 Recasts – Substantial Changes in the Criminal Justice System}

By the government decree of July 1948, the Ministry of Justice was required, as far as possible, to draw up and submit, before 1 September 1950, drafts of new Codes which fall within the competence of the Ministry – i.e. civil and criminal codes of both substantive and procedural law. The process was thus to be completed within the set deadline of two years, giving the process the name of “legal bi-annual.”

To meet this goal, the Ministry of Justice set up a codification unit, a codification commission, and two major expert commissions for civil and criminal law. The Criminal

\begin{footnotesize}
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\item Ladislav Vojáček & Karel Schelle, \textit{Právní dějiny na území Slovenska} [Legal History in the Territory of Slovakia] 36 (Ostrava: KEY Publishing, 2007). Interestingly, in criminal proceedings, the function of lay members of the senate was preserved in Slovakia until these days, albeit with limited competences.
\item Kühn, \textit{Socialist Justice}, at 826.
\item \textit{Id.} at 826 ff.
\item \textit{Id.} at 826.
\end{enumerate}
\end{footnotesize}
Law Commission was further divided into two subcommittees on criminal code and criminal procedural law, and these were further divided into 13 subcommittees for the individual parts of substantive criminal law, procedural criminal law and military criminal law. In addition, the Ministry of Justice established an administrative and organizational department to monitor the literature and legislation of the USSR, and an information and publicity department, which aimed to popularize the works of the legal bi-annual.

To continue with the simplification of the criminal justice system, the members of the commissions and subcommittees included – besides law professors, representatives from courts, public prosecutors and notaries – also representatives from trade unions, youth workers and employees of the largest factories and other organizations. The involvement of non-professionals in this process was to be a guarantee of a popular element ensuring the working class interests.

On 28 October 1949 the draft codes were submitted to the Minister of Justice A. Čepička. Upon their approval, the result was the adoption of a Criminal Code (Act. No. 86/1950 Coll.), Criminal Procedure Code (Act No. 87/1950 Coll.), Criminal Administrative Code (Act No. 88/1950 Coll.) and the Code of Administrative Criminal Procedure (Act No. 89/1950 Coll.). Out of these, we shall only pay attention to the former two.

The new Criminal Code of 1950 was based on the premise that

socialism eliminates the economic base of capitalism,

and that

the bourgeoisie, in order to regain lost power by all means fights the people’s democracy and hates socialism and is therefore trying to prevent the building of socialism.

Criminal Law has therefore gained a somewhat new function – that of creating and also protecting the new social relations, including building a new socialist society.

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The purpose of the Criminal Code was to protect the People’s Democratic Republic, the construction of socialism, the interests of the working people, and to educate everyone to observe the rules of socialist coexistence. Thus, criminal law introduced certain educational moments following the Soviet model of criminal law, considering as one of its main tasks to educate and change the personality of the perpetrator and to ensure their inclusion into society. The emphasis on the educational nature of criminal law was manifested particularly by the newly introduced “protective measures”, as new forms of sanctions (this still applies in the Slovak criminal law system today). The regulative function, protective and repressive functions have thereby stepped somewhat into the background, highlighting the educational function instead. This has been linked to the aim of the legislator to emphasize and point out that the people’s-democratic society is better than the previous capitalist one, providing greater care of the people.

Still, the main objective of criminal law was undoubtedly the protection of the new regime from any political opponents and enemies. It was for this reason that the greatest protection was given to the people’s democracy, the construction of socialism, and the economic interests of the state, while the protection of individuals was in the background. Strikingly, the explicit “destruction” of all enemies of the new regime was the main goal of criminal sanctions under the Criminal Code of 1950.

A fundamental change in comparison with traditional criminal law has also been the introduction of the Soviet model of the material concept of offense, together with a change in the overall categorization of offenses. Starting here with the latter, the tripartite division of criminal delicts into crimes, contraventions and violations was replaced by one category solely, namely that of a criminal offense. The new 1950 Code abolished the category of contraventions and excluded violations from the jurisdiction of courts, transferring them into the competence of the administrative authorities. A still, more radical change was that the Criminal Code introduced the material understanding of a criminal offense as one of the fundamental principles of criminal law. The principle was laid down in Sec. 2 of the Criminal Code as follows:


24 Anna Miškárová, Výchovný účel trestného práva [The Educational Purpose of Criminal Law], 34(9) Právny obzor 818 (1951); Vladimír Solnaj, Represe a výchova ve vývoji čs. trest. práva [Repression and Education in the Development of Czechoslovak Criminal Law], 99 Právník 446 (1960).

25 Solnaj 1960, at 446. Under Sec. 17, the purpose of punishment was to destroy the enemies of the working people, to prevent the offender from committing another offense, and to educate the offender to comply with the rules of socialist coexistence. At the same time, the imposed penalty had to act educationally on other members of society. Theoretically, it was a combination of punishing the perpetrator and preventing other criminal activities, while taking a class approach – since the working people were the main focus of the legislator.
an offense is any activity dangerous to society, where the outcome referred to in the law was caused by the offender.

This legal definition outlined three basic elements of the new concept of an offense – the principle that the action must be dangerous to society, the principle of no offense without guilt, and a requirement that the offense meets the formal features listed in the Criminal Code. Hence, to consider an action a criminal offense, it was not enough to meet the formal features of the offense, but the action also had to be a culpable conduct, dangerous to society. An action dangerous to society was, quite understandably, foremost any conduct directed against the state or an action which otherwise violated the legal order created by society in the process of the transition to communism, which corresponds to the purpose of criminal law enshrined in Sec. 1 of the 1950 Code, being the protection of the People’s Democratic Republic.

The material concept of offenses was based on the social danger of the action, but criminal law – just like in the USSR – did not define the concept of “conduct dangerous to society.” Still, if the judge assessed that the offense showed no signs of danger to society, it was not a criminal offense, even though the formal elements of an offense were met. Additionally, if the danger of the offense was only minor, criminal prosecution could have been stopped by the prosecutor. There was thus a combination of two principles introduced, namely that of the material perception of the offense and that of the discretionary power of the prosecutor, which both constituted an exception to the principle of legality on which the criminal law was traditionally based. The system in question was therefore criticized as somewhat contradictory.

Still, this contradictory effect of the material concept of an offense was later on efficiently used in the light of democratic development after 1989. Under the new circumstances, many of the actions previously considered dangerous ceased to be regarded as such, and in the context of the rehabilitation Acts, the material concept of an offense was used in reverse mode – to abolish any sentences and judicial awards issued on the basis of the first three chapters of the special part of the Criminal Code of 1950, which were providing protection to the people’s democracy and its economic system. Those offenses were namely not considered dangerous by the democratic society after 1989. This was confirmed by Act No. 119/1990 Coll. –


a total of 37,590 rulings (out of which 8,160 judgments were issued in the territory of today’s Slovak Republic) concerning offenses pursuant to the first chapter (against the Republic) of the special part of the 1950 Code was abolished, together with 66,003 rulings (including 19,042 judgments from the territory of Slovakia) relating to offenses pursuant to the second chapter (economic offenses) of the special part of the 1950 Code (mostly concerning the crime of endangering the economic planning – equalling to 59,388 judgments, out of which 17,031 were issued in Slovakia), and finally the total number of 2,456 rulings (including 602 judgments from the territory of Slovakia) relating to offenses under the third chapter (against the order in public matters) of the special part of the 1950 Code (paras. 163, 164, 165, 166, 167–168, 169, 173–174) was abolished in 1990.

However, this was still not the end of the material concept of an offense in (Czech and) Slovak criminal law. It was only with the Slovak recast of criminal law in 2005 (by Criminal Code No. 300/2005 Coll.) that the element of the danger of an action for society was removed, except for certain minor cases. In those few remaining exceptions, the term “material corrective” became a new criterion for defining the boundary between a criminal contravention (newly re-introduced category of criminal offenses) and administrative violations – under Sec. 10 para. 2 of the Criminal Code:

It is not a contravention, if given the way of the act and its consequences, the circumstances under which it was committed, the degree of fault and the motive of the perpetrator, the severity of the action is negligible.

The material corrective also still applies when determining the type and term of punishment under Sec. 34 para. 4 of the 2005 Criminal Code. Hence, it can be concluded that the material understanding of criminal offenses remains a fundamental concept of criminal law in Slovakia, despite the fact that it was imported into Czechoslovak law, respectively Slovak criminal law under the influence of Soviet law.

### 2.3. Criminal Procedure and the Office of Prosecution in the 1950s

Czechoslovak (and Slovak) criminal procedural law has similarly gone through many changes since 1948. The works on the new criminal procedural code culminated

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30 Id.

31 Id. at 117, 158. For this offense, particularly private farmers were penalized, because the failure to supply set amounts of agricultural products was claimed to disturb the operation of the whole economic system. Criminal sanctions for self-employed farmers have become one way of putting pressure on them to join united agricultural cooperatives. To a large extent, this offense was also used against persons (especially miners) who, by skipping work or abandoning workplaces threatened the running of the economy.

32 Id. at 117, 169–181.
in 1950 in the adoption of the Criminal Procedure Code – Act No. 87/1950 Coll. However, procedural criminal law was already influenced by the above mentioned Act No. 319/1948 Coll. on the popularization of the judiciary.

The class character of criminal procedure as a specific feature of criminal justice in this period was highlighted already in Sec. 1 para. 2 of the Criminal Procedure Code, which provided that

the procedure should take a shape so as to educate citizens to remain vigilant against the enemies of the working people and other violators of building efforts and to meet their civic obligations.

The class character and the call for the fight against the enemies of the working people was then unfortunately manifested in a line of so-called “monster-trials” as an effective tool of persuasion and education, and of increasing the alertness and vigilance in detecting, isolating and... suppressing enemies of the state and people’s democracy.33

From the instructional material of the Ministry of Justice on Public trials and their Organization (August 1951) it namely clearly follows that the cases tried before the general public intentionally concerned mainly the class enemies, namely rich villagers (kulaks), former entrepreneurs, tradesmen, factory owners or members of the bourgeoisie, and in the case of workers, these were mostly leading employees of national enterprises or cooperative farms, and the officials of local administration. These trials all had pre-processed scenarios and casts, including what sections of the Criminal Code were to be used, the tasks of individual actors were predetermined, and the overall political line of the trials was always determined in advance.34 In these trials, a very non-formalistic approach to criminal law and procedure (including safeguards of fair trial) was taken.

Ex post, the main fault for the procedural failures connected to show-trials was already attributed in the 1950s to prosecutors, an office rebuilt in the same era under soviet models by extending the scope of prosecution competences way beyond the traditional area of criminal justice.35 (Even today, in the Slovak Republic public

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33 Vorel et al. 2004, at 224.
34 Karel Kaplan & Pavel Paleček, Komunisticky režim a politické procesy v Československu [Communist Regime and Political Trials in Czechoslovakia] (Brno: Barrister a Principal, 2001).
35 Act No. 319/1948 Coll. on the popularization of the judiciary changed the status of former state representatives; these authorities were for the first time called prosecutors/prosecutions.
36 Jozef Čentéš et al., Dejiny prokuratúry na Slovensku [History of the Prosecutor’s Office in Slovakia] 81 (Bratislava: Atticum, 2014). Being guardians of socialist legality, the prosecutors could have entered any court proceeding at any stage, in the interests of the state or the workers. The Public Prosecutor’s
prosecution still plays a significant role in the system of protection of legality, albeit its role in civil court proceedings has been limited recently, in the context of recast civil procedural codes.) This led to the adoption of the new Criminal Procedure Code of 1956.

2.4. Strengthening Legal Guarantees at the End of 1950s

In 1953, after the death of the chairman of the Czechoslovak Communist Party, Klement Gottwald, a few weeks after the death of J.V. Stalin, and upon the subsequent revelation of J.V. Stalin’s personality cult (1956), Czechoslovakia gave up the previous repressive approach to criminal justice and started rethinking the future direction of society anew. Changes were thereby initiated also in the criminal justice system.\footnote{v ojáček & schelle 2007, at 416.}

The Criminal Code of 1950 was amended twice in this period – a major amendment was adopted in 1956 (Act No. 63/1956 Coll.) and a minor in 1957 (Act No. 68/1957 Coll.).\footnote{Juraj Vieska, O novelisaci trestního zákona [On Amendments to the Criminal Code], 4 Socialistická zákonost 391 (1956).} The amendment of 1956 has removed the most serious legal shortcomings. It focused mostly on sanctions, where it set out the direction of the individualisation of the sentence and the removal of its severity. The capital penalty was mostly replaced by a custodial sentence of 25 years. Where the Criminal Code previously only allowed for death penalty, the amendment introduced a 25-year imprisonment penalty as alternative. The amendment further deleted the provisions on the mandatory imposition of a financial penalty and of the penalty of property forfeiture.

The amendment also introduced changes in the special part of the 1950 Criminal Code – those provisions of the special part were deleted which excluded the possibility of imposing a conditional sentence and the possibility of reducing the sentence. The conditional deferral of imprisonment was newly possible in case of a custodial sentence of no more than two years (compared to the previous limit of one year). The penalty of loss of citizenship was erased completely. Following the amendment, it was also not possible to impose a ban on a profession and a ban on residence permanently, but only for a period from one year (or three years in case of the ban on residence) to ten years. There was also one reason for the cessation of the criminal nature of an act added newly, namely that of the extinction of the danger of an action for society.

Furthermore, some offenses (e.g. treason) were specified in greater detail, while others were abolished (e.g. Sec. 129 on hostilities against the Republic) and some new offenses were introduced, such as intrusion into the territory of the Republic,
terrorism, speculation, parasitism, hooliganism and pimping. New criminal offenses were based, in particular, on data derived from the practice of the judicial and law enforcement authorities.\(^{39}\)

The second amendment, Act No. 68/1957 Coll. on artificial interruption of pregnancy, amended the Criminal Code of 1950 in that the offense of killing a human foetus (Sec. 218) was abolished. Recently, impunity has been introduced for a woman who discontinues her own pregnancy or asks or wants someone to do so. The Act also laid down the conditions for discontinuation of pregnancy in a health facility with the consent of the woman, based on a decision of a special medical commission.\(^{40}\) (The same principles have been retained up till today in Slovakia.)

The Czechoslovak Communist Party nationwide conference of 1956 additionally set out some new main principles for the work of the security authorities, prosecution offices and courts in this period: the strengthening of prosecutorial supervision, ensuring the consistent application of the presumption of innocence in criminal proceedings, improving the educational role of all law enforcement bodies, ensuring mutual control of their work, and the consistent application of socialist legality have been enumerated as the main tasks.\(^{41}\)

This was reflected in the new Criminal Procedure Code of 1956 (Act No. 65/1956 Coll.), which even strengthened the principle of legality (the prosecutor has a duty to prosecute all offenses brought to their attention), the principle of officiality (the criminal justice authorities were to act *ex officio*) and the principle of indictment (the judge could start the criminal hearing only on the basis of an indictment filed by a prosecutor). All the authorities were obliged to collect not only evidence on the circumstances that were against the accused, but also in favour of the accused.

The new Criminal Procedure Code of 1956 specifically touched upon the preparatory procedure, since it was at this stage mostly that the failures occurred in the 1950s. As part of the preparatory proceedings, investigation was newly entrusted to the prosecutor’s office and to the investigators of the Ministry of the Interior. Additional safeguards included the setting of time limits on the termination of the investigation (Sec. 185), as well as introducing the institute of acquainting with the results of investigation, to which the attorney of the accused must have been admitted. In order to ensure a higher degree of control over the work of the law enforcement authorities, a pre-trial hearing was also introduced as an optional stage of criminal proceedings.\(^{42}\) Obligatory pre-trial hearings were introduced in four cases

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40 See also the Decree of the Ministry of Health No. 249/1958.

41 Petra Gřivnová & Tomáš Gřivna, *Trestní právo procesné [Criminal Procedural Law]* in *Communist Law in Czechoslovakia, supra* note 8, at 587.

42 See also Explanatory memorandum to Act. No. 63/1956 Coll.
(in death penalty cases, cases of imprisonment, which exceeds the upper limit of two years, cases where the accused was in custody, and in proceedings against a juvenile and refugee). Changes have also been brought about with respect to some innovative procedural safeguards that should have been self-evident, but have been violated in the past (prohibition of forcing the accused to confess, the banning suggestive questions, etc.).

Furthermore, unlike in the previous Criminal Procedure Code of 1950, in all cases a two-level procedure was introduced. The Supreme Court could therefore no longer rule as the first and only instance. Finally, the new Criminal Procedure Code, in comparison with the former, included also a chapter on indemnity for torture and punishment and a chapter on mutual assistance with foreign countries. The new legislation certainly meant progress, but in practice, the rigidity in thinking and procedural steps often prevailed even in the years that followed.

2.5. Socialist Criminal Law – Optimism in the 1960s

After the enactment of the 1960 Constitution which declared the victory of socialism in Czechoslovakia, the political leaders made efforts to change the most important Codes of Czechoslovak law as well, in order to better reflect the new ideological standpoints adopted by the Constitution. Foremost, it was deemed necessary to recast the whole criminal law sector and to adopt a new criminal code and a new criminal procedure code.

The 1960s were thereby somewhat exceptional in the Czechoslovak legal history, with strong idealism about reaching a number of the regime’s goals, i.e. achieving socialism and reaching the awareness of citizens to the extent that criminal law may give priority to social self-regulation. These ideas were reflected in the wording of the Criminal Code of 1961, its conceptual basis and its implementation.

In line with the idea of criminality dying out in socialism and therefore a lower need for the state repressive apparatus, the Czechoslovak Communist Party conference of 1956 voiced a requirement for the increased participation of workers in the protection of public order and in the protection of property in socialist ownership. This was to be manifested in a separate body of workers to be established to deal with certain types of charges and with prosecuting certain types of offenses. Thus, Act No. 24/1957 Coll., which regulated the establishment of disciplinary commissions in companies, was enacted. These commissions had the task of dealing with and sanctioning offenses against property in socialist ownership, if being of lesser social danger. According to the cited Act, the head of the relevant socialist organization or an employee of that organization or, in accordance with this Act, or another authority created within the trade unions could decide in the given cases. A survey showed...
that by the end of 1959, 827 disciplinary commissions of that kind were established in Slovakia. Altogether, there were only 49 individual decision-makers in Slovakia, with collegiate authorities prevailing.

In addition to the disciplinary commissions mentioned above, under the influence of the hopes of approaching socialism, unofficial “courts of comrades” had already started to be established in 1959. In contrast to disciplinary commissions, these tribunals were not formed under any law; rather, they were being created within the trade unions and were to deal with minor offenses that violated the principles of socialist co-existence. This trend was thereby officially supported and accepted as an expression of citizens’ awareness. This tendency was then transformed into the official establishment of the people’s local courts under Act No. 38/1961 Coll.44

The new Criminal Code No. 140/1961 Coll. entered into force on 1 January 1962. The new Code leaned to a certain extent on the wording of the Criminal Code of 1950, but on the other hand, certain provisions linked to the suppressive function of the state and the “dictatorship of the proletariat” had vanished or had been replaced with new terminology, building on the “socialist” constitution. The new Code also witnessed a reduction in “sharp formulations,” which was made possible due to the success of the previous criminal repression of the 1950s, having fulfilled its purpose: to liquidate, punish and intimidate a large portion of potential opponents of the new regime. This was evidenced by an overall reduction in the crime rate, which reached in 1960 its statistically lowest numbers – e.g. the number of inmates had fallen to 54% in comparison with the year 1951.45

The new nature and character of criminal law was already clearly stated in Sec. 1 of the general part of the 1961 Code, which defined the purpose of the Criminal Code as follows: to

   protect the social and state establishment of the Czechoslovak Socialist Republic, socialist property, rights and legitimate interests of citizens and to educate towards the proper fulfilment of civic duties and towards the observation of the rules of socialist coexistence.

A class interest was seen here in the line of priorities in which the Code enumerated objects that were provided protection (the social and state establishment of Czechoslovakia, socialist property and finally the rights of individuals). The class struggle was claimed to be also reflected in the requirement of a certain level of danger to society under Sec. 3 para. 4 of the Criminal Code of 1961.


45 Id. at 405.
Still, unlike in the 1950 Code, the purpose of punishment was no longer the explicit destruction of working people’s enemies; on the contrary, emphasis was put on protecting society against criminals and on the educational aspect, i.e. to prevent the offender from continuing the criminal activity and to educate the convict to lead a proper life of a working person, serving thereby as a model to other members of society.

The effective protection of society and its individual members, and an increase in the educational role of the punishment were reflected in the system of penalties, the level of penalties and the new arrangements of conditional release from custody. In general, the severe sanctions of the 1950s, which contributed to the effective fight against “class enemies” were mitigated. The penalties of property forfeiture, ban on exerting a profession, expulsion, and financial penalties have been reworded. The Criminal Code was giving priority to pecuniary fines in the range of 500 to 50,000 crowns instead of custodial sentences. Finally, with reference to the Constitution of 1960 and to the special care that “socialist society dedicated to the youth,” the seventh chapter of the special part of the Criminal Code was devoted to the punishment of juveniles. Criminal Code No. 140/1961 Coll. also reduced the custodial sentences to the maximum permitted period of 15 years while retaining the death penalty only as an exceptional punishment.\textsuperscript{46} The death penalty should have been used only in cases of the most serious crimes and only in the event that a different penalty would not meet the purpose of the punishment. All these adjustments should have made it possible for the courts to take into account in each individual case all the particularities of the case and to choose a punishment best fitting the perpetrator, with regard to personality and the characteristics of the offender. Therefore, in addition to the custodial sentence and corrective measures, the courts had the possibility to impose numerous additional penalties as separate punishments.

Individual criminal offenses were divided into twelve chapters of the special part of the Criminal Code, in a systematic resembling that of the 1950 Code. The ordering of individual chapters thereby expressed the priority given to the protection of the state and of socialist society, only then providing protection to the rights of individuals. The systematics were only slightly modified in comparison with the previous adjustment of 1950: a new fifth chapter on offenses grossly disrupting civic coexistence was introduced, combining offenses that had been scattered in various chapters of the special part in the Criminal Code of 1950. The provisions of this chapter should have mainly protected groups of people or individuals against less intense conduct such as threats, use of violence or defamation based on conviction, nationality, or race. The fight against alcoholism, hooliganism and other so-called “parasitic”\textsuperscript{47} social phenomena was also included in this chapter, being reflected

\textsuperscript{46} Benčík & Čič 1973, at 44.

\textsuperscript{47} Kuklík 2009, at 413.
in offenses such as drunkenness, hooliganism, parasitism, pimping, threatening morality, but also, for example, defamation or failure to provide assistance.

The tenth chapter was also a new one, comprising military offenses and crimes against humanity including the acts of supporting and promoting fascism and similar movements or expressing sympathy for these, acts of warfare, war cruelty, misappropriation of the Red Cross sign, etc.

However, maintaining the old systematics did not mean keeping the inner system of individual chapters intact. The visible changes occurred mainly in chapter one on “the crimes against the Republic,” which omitted two sections, and in chapter two on “economic crimes,” which newly included crimes against property in socialist ownership, which were previously classified as general property crimes. The new Code has also introduced a large criminalization by including broadly defined acts of “preparation for offense.” A similar change touched upon the newly introduced concept of “attempt.” Finally, in connection with the conspiracy to commit an offense, another new concept was introduced – namely that of an “organizer,” denoting a new form of participation in a criminal act. A very serious change was seen in the introduction of so-called “Rauschdelikt,” i.e. committing an offense under the influence of alcohol or other narcotic substances, which was modelled after a Soviet pattern in the new provision of Sec. 12 para. 2 of the 1961 Criminal Code – meaning that in a case of limited capacity self-inflicted with the use of alcohol, respectively narcotics, criminal responsibility was not excluded and the perpetrator was fully responsible for the offense committed.

Changes have also been introduced with respect to previously existing offenses, in particular those relating to the economy. It was mostly the provisions on the protection of socialist property and provisions governing economic offenses that were redefined. Some offenses that disturbed the socialist economy and state discipline, as well as some military offenses that seriously undermined discipline and order in the armed forces, have been clarified. The relations between states of the world socialist system have newly become protected in particular by the fact that the Code allowed to prosecute the most serious forms of “counter-revolutionary” acts aimed against the states of the world socialist system. Finally, as new offenses, those against fundamental human rights were inserted into the Criminal Code of 1961, based on numerous international treaties and conventions.  

In general, a new view of criminal law and its role in society – essentially as an “ultima ratio” – and its subsidiary function, rather than being a daily instrument of state power, was reflected in the text of the 1961 Code. In line with this approach to criminal law, a specific feature of Czechoslovak criminal law was claimed to be the principle of socialist democratism, which meant that criminal law expressed the will

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of all working people. Czechoslovak criminal law was finally claimed to be democratic also in that its individual legal provisions were formulated in a clear manner comprehensible for the widest masses of people.\textsuperscript{49} Some further manifestations of democracy were also seen in cooperation with social organizations, in the election of judges and the like.

In addition, the principle of legality (in contrast to analogy) was also still in force – reflecting the historical model of *nullum crimen, nulla poena sine lege.* Czechoslovak criminal law was thus built on the so-called “socialist legality principle.” Furthermore, the principle of liability for guilt and the principle that only the offender can be punished by the punishment, and only the court may impose a penalty or a protective measure on the offender was still respected, just like in the 1950 Criminal Code.

Another feature of the Czechoslovak criminal law of the 1960s was claimed to be the principle of so-called socialist humanism, which was manifested in the fact that the role of criminal law was foremost humanistic – to ensure the protection of socialist society, peace and peaceful work, the undisturbed life of working people, peaceful coexistence of the nations, the inviolability of life, health, freedom, dignity and of property interests of citizens. Criminal repression was considered as a rational repression that should not cause unnecessary suffering to the perpetrator. This was emphasized, for example, in the provision stating that punishment must not be humiliating (Sec. 23 of the 1961 Criminal Code), or in the provision that the death penalty is a measure that is exceptional and instead of it there is a wide range of less stringent measures available. Cruel punishments, which contradicted the view of socialist society, excessive imprisonment and the death penalty coupled with special hardships, were precluded. Where possible, a more moderate measure was to be given priority before more stringent punishments.\textsuperscript{50}

The punitive element was to be applied only to the extent necessary, while it was to be gradually weakened in the future, emphasizing rather the educational aspect of criminal law. Czechoslovak criminal law was thus said to be based on the principle of the unity of repression and education. The purpose of punishment should have namely been to educate and lead the offender to live a proper life of a working person. The penalty was hence to act educationally upon the sentenced, and to intimidate other “morally unstable” members of society.

Finally, some additional principles of criminal law in Czechoslovakia, proclaimed by the then legislator and by the follow-up commentaries and treatises on Czechoslovak socialist criminal law, should have been the principle of proletarian internationalism and socialist patriotism, while on the contrary, manifestations of bourgeois nationalism and racism (e.g. supporting and promoting fascism and similar movements, the defamation of nation and race, etc.) were to be sanctioned.


\textsuperscript{50} Id. at 14–16.
Finally, a few words on criminal procedure. Just like the Criminal Code, also the new Criminal Procedure Code of 1961 proclaimed the need to re-adjust criminal proceedings to the fact of reaching socialism and to gathering forces for the transition to communism.\(^{51}\) The new Act No. 141/1961 Coll. (Criminal Procedure Code) thereby followed the model of the Criminal Procedure Code of 1956, its purpose being to regulate the “procedure within criminal justice so that offenses are properly investigated and the perpetrator punished.” The proceedings were to observe the principle of socialist legality, prevent criminality, and educate citizens to honour their duties towards the state and society. It is thereby also important to mention that many provisions of the Criminal Procedure Code of 1961 followed the earlier adopted Act No. 38/1961 Coll. on peoples’ local courts, entitled to try minor offenses, including violations and property disputes, if they were referred to the local court by a prosecutor or a court.\(^{52}\)

The above specificities of the socialist criminal law were claimed to capture the difference in nature of socialist and capitalist criminal law: while the criminal law of capitalist states protected only social relations based on private property and served the interests of a minority of society (or individual), socialist criminal law was claimed to protect the interests of all workers and socialist property. The Socialist 1961 Codes were, as a result, claimed to be qualitatively different from the codes of capitalist states. Their provisions protected the socialist state in particular against any forms of resistance against the then political system (treason, destruction, spying), and further protected economic discipline, socialist property, socialist order in public affairs, etc. They also punished the abuse of property, parasitism, etc., as offenses which were not at all known to capitalist criminal law. Clearly, activities that were the basis of “successful business activity” in the capitalist social system, were considered offenses in the socialist state (speculation, abuse of property, parasitism, etc.).\(^{53}\)

After 1989 this system of criminal law was marked by many changes. Foremost, capital punishment was definitely abolished, and some types of offenses have been deleted from the Criminal Code (mainly those used to persecute political opposition). Most of the principles and rules, however, were preserved even in conditions of the renewed “capitalism,” allowing for our research question on whether the socialist and capitalist criminal laws were indeed that different as claimed.

### 2.6. Getting Sober in the 1970s

The period of social and legislative optimism of the 1960s did not last for long. Between 1963 and 1964 there was an increase in the rate of violent crimes,

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\(^{51}\) Kuklík 2009, at 413.

\(^{52}\) Gřínová & Gřívna 2009, at 588.

crimes against life and limb, etc. In June 1964, the Czechoslovak Communist Party leadership even stated that the criminal laws were interpreted in a benevolent, liberal manner, with pseudo-humanist views, which ultimately had an impact in the rise of criminality, especially of the repeated criminality and on the weakening of state authority and trust in law. This was manifested in particular by the failure of the people's local courts to meet the respective expectations. These courts should have been a proof that the state and law is dying out and the role of protecting the public order is shifting from the state authorities to the autonomous bodies. The failure of local courts proved this premise wrong and the courts were abolished by Act No. 150/1969 Coll. The amendments to the Criminal Code also followed soon, abandoning the unrealistic idea of extinguishing criminality for good.

In the 1960s, moreover, the neighbouring countries of Czechoslovakia – especially Poland and the Democratic Republic of Germany – began to worry that Czechoslovak experiments will spread to their countries and endanger the unity of the Soviet bloc in general. It was therefore accepted that “the defense of socialism is a shared international duty of all states of the socialist system” and this thesis was interpreted as an international legal reason for the military intervention of the Warsaw Pact armies into Czechoslovakia in August 1968. Later, this concept was called the “Brezhnev’s doctrine.”

After the intervention, at the national level, the situation was called in Czechoslovakia as “the defeat of counter-revolution in the Czechoslovak Socialist Republic,” leading to some consequences also in the sphere of criminal law – mainly to a new attempt at strengthening the protection of socialism, the fight against imperialism, and against anti-socialist forces. It was not a return to the Stalinism of the 1950s, to terror, but still it was also not a democratic pluralism either. This new situation was called “normalization.”

In 1969, the first changes in criminal law were brought about in this context by a Statutory Act of the Bureau of Federal Assembly No. 99/1969 Coll. on certain transitional measures necessary for the consolidation and protection of public order. This was to have a temporary effect on the prosecution of offenses and violations. The matter was to be decided by a District Court’s single judge on the basis of a criminal notification by the police. The detention period was extended to three weeks and the attorney of the accused person could take part only in the main court proceedings. On the basis of this Act, an amendment to the Criminal Procedure Code was adopted (Act No. 149/1969 Coll.). The amendment extended competences of the courts to prosecute criminal contraventions (the new type of criminal offenses) – specific provisions were introduced regarding the investigation and trial of contraventions, which were dealt with differently from the general criminal offenses. The amendment further upgraded the jurisdiction of regional courts and district courts (including military district courts) and strengthened the institute of a single judge (deciding instead of a senate).
Another amendment to Criminal Code No. 148/1969 Coll. expanded both the general and the special part of the Criminal Code. Signs of discontent, respectively of forming a political opposition to the regime could be punished by a “ban on residence,” introduced after the demonstrations on the first anniversary of the occupation of Czechoslovakia by the Warsaw Pact countries. The amendment allowed the offenders to be moved outside big cities. The purpose of this sanction has thus shifted in comparison with its previous purpose, which was to provide the more effective protection of society against “anti-social elements, especially repeat offenders, troublemakers, parasites and thieves.”

Furthermore, the maximum length of the custodial sentence was raised from 15 years to 25 years by Act No. 45/1973 Coll. The conditions for the imposition of the death penalty were amended as well, but still as a truly exceptional punishment, which could have only been imposed for offenses specified in the Code, and only if the sentence of imprisonment was not sufficient to meet the purpose of the sentence.

Finally, as a measure of post-penitentiary care, a “probationary supervision” was introduced by Act No. 44/1973 Coll., with so-called curators assisting the convict in the process of resocialization.

However, the above enumerated changes having to do with the change in the regime and in international relations were not of such a nature to completely replace the basic principles of “socialist criminal law” that were identified in the previous subchapter.

Conclusion – Shifting the Sociological or Legal Paradigm?

Although the criminal law of the Eastern Bloc countries witnessed a number of specificities, especially in its anti-formalist phase (in the USSR until the 1930s and in the rest of Eastern Europe at the turn of the 1940s and 1950s), later on, following the pattern of Soviet law, formalism found its way back into the criminal law of socialist countries, showing since then only minor specificities in contrast to the “capitalist” criminal law.

Therefore, it seems that the claims by socialist legal theorists that they have introduced the next stage in the development of criminal law, and a new paradigm of (criminal) law, this argument can be considered questionable – in the light of the above account of the Czechoslovak experience with socialist criminal law, it namely seems that albeit socialist theorists accepted a different approach to “protected interests” in criminal law, being the protection of socialist society, its economy and international relations, this may not be enough in fact to recognize socialist law as

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representing a truly different paradigm of criminal law. It may even be claimed that in the 1960s, when the political objective of destroying a class enemy was achieved, the criminal law in the Eastern bloc actually even more approached the Western European standards and the continental paradigm of criminal law. Similarly, Western European criminal law was throughout the 20th century closely observing the evolution in Eastern Europe, leading the Western European legislators to omit certain traditional crimes against morality (homosexuality, prostitution56) from their Criminal Codes.

Hence, the differences between socialist and capitalist criminal law do not seem to confirm the existence of two contradictory paradigms of criminal law, at least not in the Kuhnian or Foucaultian meaning. Both political (and socio-economic) formations and blocs namely successfully applied the same paradigmatic model of statist criminal law, where public interests prevails – notwithstanding whether the public interests give priority to protection of state and regime or to other values such as human freedom, dignity, life, health, property, and so on. The statist paradigm of criminal law is therefore generally accepted in Europe at least since the end of the 19th century, being characteristic in that the state actually took the position of the victim of a crime,57 or – more realistically assessed – took the position of guarantor of values specified and protected by criminal law. This happened to the extent that even in “capitalist” criminal law the injured person, the victim and their relatives or members of their family were moved to a second row.

In the last decades of the 20th century, this “statist” approach (paradigm) was criticized by criminal lawyers, especially in the USA and subsequently also in Western Europe, seeking the ways to reform the criminal justice system so as to take into account also the interests of the victims, and at the same time to qualitatively change the relationship between the state and the perpetrator. A solution to these issues is thereby offered by the representatives of the so-called “restorative justice” school, the origins of which are mainly associated with the work of Howard Zehr from 1990,58 and the essence of which is the resolution of a dispute to the satisfaction of the injured party/victim, but also to the satisfaction of the community, without undue (and in fact often ineffective) disciplinarization of the offender. The very idea of restorative justice, thereby does not mean abandoning the concept of punishment; penalties are to be applied further on, but not as an end, but only as a tool to reach the goal of restoring the relationship between the criminal law entities.59

However, this concept has numerous opponents pointing to the fact that the restorative justice theory has many goals, but at the same time unspecified instruments, missing criteria and uncertain evaluation standards.\(^60\) Moreover, supposedly it is hard to imagine restoring physical damage.\(^61\) In any case, however, the concept of restorative justice undoubtedly represents a sort of a step towards the next stage in history of criminal law, respectively, according to some opinions, a return to the origins of continental European criminal law from before the 18\(^{th}\) century (a “pre-statist” period of criminal law). It is this evolution that might potentially lead to a “new” paradigm of criminal law, replacing the paradigm of “statist criminal law” that prevailed in continental Europe in the 20\(^{th}\) century, including the criminal law of both Capitalist and Socialist blocs.

Finally, also the philosophers of criminal law and punishment, who follow-up upon Foucault, for example Gilles Deleuze (1925–1995), repeatedly refer to the emerging next stage in the development of criminal law at the turn of 20\(^{th}\) and 21\(^{st}\) centuries. In particular, Deleuze notes that Foucault’s elaborate characteristics of the so-called disciplinary societies were indicative of the 18\(^{th}\) and 19\(^{th}\) century statist period, which peaked at the beginning of the 20\(^{th}\) century. A distinctive feature of such a disciplinary society thereby was the use of environments of “closure” (schools, barracks, factories, hospitals, and, last but not least, prisons or labour camps). However, according to Deleuze, at the end of the 20\(^{th}\) century, Europe moves from disciplinary societies to qualitatively different, “controlling” societies, which instead of disciplining use information technology and computers to control the citizens. The world has, according to Deleuze, arrived at a new level of capitalist life, where man is no longer “closed” in the factory, but rather is “only” controlled – for example, by being indebted (mortgaged). According to Deleuze, this change from disciplinary to a control society is also reflected in the prison regime and in criminal law in general – specifically in use of alternative punishments, such as electronic bracelets.\(^62\) The new type of control society attempts to control the risks, and does not attempt to discipline the body or soul of the offenders.\(^63\)

Hence, in this context, one might also raise a different question instead of the question of a paradigmatic shift from capitalist to socialist law – namely the question of to what extent the socialist society was a precursor of a shifting to a post-modern control society,\(^64\) using the omnipresent control by the Communist Party? Again,


\(^{64}\) Marxists believed that the cause and solution to criminality lies in the society itself, not in the law. See Quigley 2007, at 34–36.
however, no major difference in comparison to Western Europe using modern technologies of control might be identified in the end…

References


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In the Russian Empire, family law did not constitute an independent area of law and was a part of civil law. Family relations were handled by the church. Divorces were hard to get and disapproved of by the church and society. The status of illegitimate children was disfavored; they were not allowed to have the birth status of their mothers or her last name, to inherit the property of the mother and her relatives, nor were their mothers and relatives allowed to inherit from them. Illegitimate children had no right to the father's financial support or property and could not inherit from him. The Bolsheviks addressed the issue of family law immediately after coming to power in 1917. Their main goal was to repeal pre-revolutionary regulations and to discontinue the Russian Orthodox Church's leading role in handling marriages and divorces. The first efforts undertaken by the Bolsheviks in the realm of family law were remarkably progressive, namely simplification of the procedures of marriage and divorce, providing women with many rights that were non-existent before October of 1917, elimination of the concept of illegitimacy, and granting the children of unmarried couples rights equal to those of children of officially married parents. In 1920, Soviet Russia became the first state to legalize abortions. Sadly, most positive developments of the early Bolshevik years disappeared in the 1930s–1940s. Family law followed the general pattern of escalation of repression and strengthening of regulations.

Keywords: family law; marriage; divorce; illegitimate children; abortion; Bolshevik law.

Introduction

The phenomenon that became known as Soviet law came into existence shortly after the October Revolution of 1917. Purporting to eliminate everything related to the previous regime, the Bolsheviks planned to repeal the pre-revolutionary legislation in its entirety. At the same time, they understood that it was impossible to create a brand new legal system from scratch, and from the very beginning, Soviet law appeared to be a mixture of pre-revolutionary law, Marxist-Leninist ideology, and revolutionary legal consciousness. All areas of law underwent tremendous transformation, but changes in family law were the fastest. There are sufficient grounds to state that the October Revolution of 1917 resulted in another revolution – the revolution in the realm of family law. The initial task to replace the “bourgeois family” was formulated in the Manifesto of the Communist Party of 1848. The Founding Fathers of Marxism stated that

the proletarian is without property; his relation to his wife and children has no longer anything in common with the bourgeois family relations... Law, morality, religion, are to him so many bourgeois prejudices, behind which lurk in ambush just as many bourgeois interests.¹

The general attitude towards early Soviet law changed together with the political regime in Russia. Under Soviet rule, the first laws of the Bolsheviks were referred to as model examples of the class-based legislation characterizing the period of the dictatorship of the proletariat. After the break-up of the Soviet Union, the Bolshevik legislation became an object of criticism together with other features of Bolshevik rule. Whatever the attitude, it was always one-sided. The main goal of this article is to demonstrate that early Bolshevik acts appear to be a mélange of good and bad. Remarkably progressive developments (such as acts regulating family law), came

into existence simultaneously with a number of disruptive and ugly regulations, especially in the realm of criminal law. Some early Bolshevik legislative efforts represent the initially good intentions of the Bolsheviks aimed at the improvement of the legal status of women and illegitimate children, the simplification of marriage and divorce procedures, and legalization of abortion. Unfortunately, later these intentions became transmuted into their opposite.

1. Ideological Basis of Early Soviet Family Law

The works of A. Goichbarg and A. Kollontai served as a source of inspiration for the drafters of the first Soviet family code. Alexander Goichbarg, previously a privat-docent at the law school of St. Petersburg University, was the author of the first Soviet scholarly piece on family law, which was published in May of 1918. In early 1918 he became the head of the Department of Codification and Legislative Proposals of the People’s Commissariat of Justice. Until the mid-1920s, Goichbarg was almost the only legal scholar who addressed the specific features of Soviet family law. He took an active part in the development of the most important pieces of early Bolshevik legislation, namely the Code of Laws on Labor of 1918 and the Code on Marriage, the Family, and Guardianship of 1918 (hereinafter referred to as the 1918 Family Code). Goichbarg’s “New Family Law” explained the key characteristics of Soviet family law. The key goal of this work was to present the main features of the first Soviet decrees on family issues in the context of the Bolshevik ideas on the principles of legal regulation of marriage, termination of marriage, invalidity of marriage, “previous marriages,” and relations between spouses, parents, children, guardians and their wards. Goichbarg aimed to demonstrate that the Bolshevik revolution created the new family law “free of chains and prejudices of the pre-existing exploitative state.” He viewed family law as a part of civil law. According to Goichbarg, family law embraced three areas: marriage law; relations between spouses, parents and children; and guardianship. In his next work “Marriage, Family and Guardianship Law of the Soviet Republic,” he argued that the Soviet legislation considers the “origin” (proiskhozhdenie) and not the “conclusion of marriage” to be the basis of the family or kinship. Goichbarg pointed out that the Soviet legislation completely separated family relations from matrimonial relations. He stated that family relations or kinship were recognized by Soviet legislation irrespective of the nature of the union of the parents, and of whether they were officially married.

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3 Id.

During the early years of Soviet rule, the Bolsheviks’ legislative efforts were firmly founded on class-based ideology, so the “origin” (proiskhozhdeniya) played a crucial role. The stated goals of the Bolsheviks were to eliminate the exploitation of man by man, create a classless society, and ensure the worldwide victory of socialism. Chapter 4 of the 1918 Constitution of the RSFSR proclaimed that at the decisive moment in the battle of the proletariat with its exploiters, the members of the exploiter class were banned from holding official positions in any branch of the Soviet Government. Naturally, the exploiters were also prevented from voting.\footnote{Article 65 of the 1918 Constitution contained an explicit list of categories of individuals deprived of voting rights.}

Affiliation with a certain class could also serve as an aggravating or a mitigating circumstance. The 1926 Criminal Code of the RSFSR established a list of especially aggravating circumstances, which included committing a crime “with the purpose of restoring bourgeois rule” or “by a person one way or another belonging currently or in the past to the class of individuals that exploit other people’s labor.”\footnote{Уголовный кодекс РСФСР 1926 г. [Criminal Code of the RSFSR of 1926], Art. 47(b) (Nov. 2, 2017), available at http://www.consultant.ru/cons/cgi/online.cgi?req=doc;base=ESU;n=3274#0.} Committing a crime for the first time, by a worker or peasant or “though beyond the limits of necessary defense, but with the purpose to defend against infringement of Soviet Power, the revolutionary legal order, or to defend the defender himself, his rights or another person”\footnote{Id. Art. 48(a).} constituted a mitigating circumstance.

In Marxist-Leninist theory, law, family and the state were assumed to be in the process of withering away in the face of the birth of world communism. The authors of the 1918 Family Code expected that the family as a phenomenon, as well as family law, would eventually disappear. Goichbarg and other revolutionary lawyers believed that under socialism children, the elderly, and the disabled would be supported by the state; all housework would be socialized, and women would no longer be economically dependent on men. The family would lose its social functions and be replaced by free unions of men and women based on mutual love and respect.

Alexandra Kollontai, one of the first Russian feminists, a Communist revolutionary, the People’s Commissar of Public Assistance in the first Bolshevik Government in 1917–1918, and the head of the Women’s Department of the Central Committee of the Russian Communist party of Bolsheviks from 1920, addressed this issue in “The Social Basis of the Woman Question,” the first Russian Marxist work on this subject published in 1909. She argued that in order to become really free, a woman has to throw off the heavy chains of current forms of the family, which are outmoded and oppressive. For women, the solution of the family question is no less important than the achievement...
of political equality and economic independence… In the family of today, the structure of which is confirmed by custom and law, woman is oppressed not only as a person but as a wife and mother, in most of the countries of the civilized world the civil code places women in a greater or lesser dependence on her husband, and awards the husband not only the right to dispose of her property but also the right of moral and physical dominance over her… Does one have to repeat that the present compulsory form of marriage will be replaced by the free union of loving individuals? The ideal of free love drawn by the hungry imagination of women fighting for their emancipation undoubtedly corresponds to some extent to the norm of relationships between the sexes that society will establish. However, the social influences are so complex and their interactions so diverse that it is impossible to foretell what the relationships of the future, when the whole system has fundamentally been changed, will he like. But the slowly maturing evolution of relations between the sexes is clear evidence that ritual marriage and the compulsive isolated family are doomed to disappear… Women can become truly free and equal only in a world organized along new social and productive lines.8

Professor Sergey Kara-Murza argues that Bolsheviks strictly followed the provisions of the “Manifesto of the Communist Party” and removed almost all limitations in the realm of sexual relations immediately after the October Revolution of 1917.9 Propaganda of sexual freedom was conducted under the slogan “Make Way for the Winged Eros!,” which was suggested by Alexandra Kollontai in her essay that was published under this title. In this essay, Kollontai severely criticized the Unwinged Eros by stating that it contradicted the interests of the working class:

“it inevitably results in surfeit and physical depletion… impoverishes the soul, impedes development and strengthening of spiritual bonds… and is usually based on inequality of rights in sexual relations, a woman's dependence on a man, male dominance or lack of sensitiveness, which apparently slows down development of comradeliness.”10 Kollontai pointed out that bourgeois ideology required a person to demonstrate empathy,

sensitiveness, and a wish to help others (the qualities, which, according to Kollontai, were so much needed by the builders of new culture) to the one and only person – his (her) sweetheart. For the proletarian ideology, the most important thing was to wake up and develop these qualities in a person; such qualities were expected to be demonstrated not only in the relationship with one’s sweetheart, but also with all members of the collective. She also introduced the notion of “sexual communism.”

As William Rozenberg states, Kollontai and some other Bolshevik women argued quite early that special attention had to be paid to family issues through separate “women’s sections,” but most opposed this as unwarranted (and divisive) attention to gender. According to Kara-Murza, all these aforementioned efforts contributed to the conflict between Marxists and traditional Russian society, which prioritized family as one of the fundamental values. In 1923–1925, the People’s Commissariat of Justice developed three new drafts of the Family Code, which followed the line of the “Winged Eros.” When published, these drafts occasioned a huge public debate. Kara-Murza pointed out that peasants strongly opposed these drafts stating that marriage de facto in the absence of official registration undermined the fundamentals of the agricultural household and was incompatible with the principles of the patriarchal family.

So-called “protectionists”... thought that the new law would place women in a much harder position. This group included Communist party officials, skilled workers, white-collar employees and also prominent lawyers.

Rozenberg mentions the party’s growing “Thermidorian reaction” in this area and lists possible reasons, including popular reaction, particularly among male peasants, to the party’s support of women’s independence. The other was the unwillingness on the part of party figures to give these issues the energy and attention they required, since other problems had higher priorities. He points out that

still, the explosion of traditional myths and prejudices concerning the “appropriate” roles of men and women in society, the freeing of church restraints in this regard, and particularly the liberation of women in many national minority areas from conditions approaching forced female servitude, remained one of the revolution’s most remarkable cultural achievements.

12 Kara-Murza, supra note 9.
14 Kara-Murza, supra note 9.
15 Bolshevik Visions, supra note 13, at 66.
2. Conclusion and Termination of Marriage

Russian family law became an independent area of law only after the October Revolution of 1917. There was no codified family law in the multinational and multi-religious Russian Empire. Both bride and groom, irrespective of their age, had to obtain parental consent:

Getting married in the absence of permission of parents, guardians or foster parents shall be prohibited.\(^\text{16}\)

In order to get married, both military and civil servants had to receive the written permission of their supervisors. Marriages and divorces were handled by the church. Couples who belonged to different confessions and wanted to get married had to seek the approval of the Tsar and of the churches they belonged to. In most cases, either the bride or groom had to convert. Divorces were hard to get and disapproved of by the church and the society. Divorces were handled by specialized church courts. Sometimes the party at fault was prohibited from getting married in the future. Possible reasons for such prohibition included

(a) termination of marriage in the event of adultery committed by one of the spouses;
(b) if a married person entered into a second marriage, and the previous marriage was not terminated before that in any manner;
(c) if one of the spouses was missing for five years.\(^\text{17}\) In this case, if a missing person showed up and failed to present sufficient excuses for such a long absence, he had to be sentenced to lifetime celibacy. However, this rule did not apply to the military officers of lowest ranks who were taken captive or reported missing in wartime.\(^\text{18}\) The number of marriages allowed by the church was also strictly regulated: members of the Russian Orthodox Church were prohibited from entering into a fourth marriage.\(^\text{19}\)

According to Professor Gabriel Shershenevich, a family union creates two types of family rights: a husband’s right to have controlling authority over his wife and children,\(^\text{20}\) who, in return, had the right to be financially supported by their

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\(^{17}\) Id. Art. 37.

\(^{18}\) Устав духовных консисторий [Charter of the Clergy Consistory], Art. 236 (St. Petersburg: Synod’s publishing house, 1883).


\(^{20}\) This authority included powers similar to manus mariti (in Roman family law, in a cum manu marriage the wife was placed under the legal control of her husband and subordinated to him) and patria potestas (in Roman family law, the power that the male head of the family exercised over his children).
Shershenevich argued that the rights to mutual love and respect set forth in law should not be treated as family rights since these rights were not legally enforceable.

A husband has controlling authority over his wife, parents – over their children, and guardians – over their wards. A right to financial support belongs to the wife in relation to her husband, to children in relation to their parents and vice versa… The right to have controlling authority possesses an absolute nature, whereas the rights to financial support belong to the category of rights in personam.\(^\text{21}\)

He pointed out that Russian legislation placed the husband’s authority over his wife above the wife’s father’s paternal powers; in the event of contradiction between the paternal powers and the husband’s power, the latter prevailed. The husband’s authority allowed him to require his wife to obey his legitimate orders; specifically, the husband had the right to require his wife to be with him in his place of domicile. Without his permission, the wife was not entitled to stay even temporarily in another place. At the same time, the husband’s right of controlling authority went together with his obligations in relation to his wife. These obligations included a duty to provide for her decent financial support and to be faithful to his spouse. According to Dmitry Meyer, violation of fidelity either by husband or by wife constituted a criminal offence in the Russian Empire.\(^\text{22}\) Meyer mentioned that in different classes of Russian society, the husband’s controlling authority over his wife was exercised in practice in various forms. Educated people exercised this right mildly with due regard to the modern ideas about the high role of women and their equality to men. In uneducated classes, which constitute the majority of the population of our Motherland, the husband’s right to have controlling authority over his wife is exercised in a rather bitter and rude mode. The husband not only appropriates the right to be the master of his wife… he also thinks he’s empowered to beat her.\(^\text{23}\)

Early Soviet acts regulating family issues had the main ideological goal of repealing the pre-revolutionary system of concluding and terminating marriages. The Joint Decree of the All-Russian Central Executive Committee (VTsIK) and Soviet of People’s
Commissars (Sovnarkom) on Divorce of 16(29) December 1917, was the first act of the new regime that introduced fundamental changes in the area of family law. Divorce procedure was simplified; divorces were subjected to the jurisdiction of local courts. All pending divorce cases or cases in which decisions had not entered into legal force were invalidated, and case materials had to be transferred for keeping to local courts. Parties were entitled to bring up new divorce requests under the new Decree.

Another Joint Decree of VTsIK and Sovnarkom, “On Civil Marriage, Children and Vital Office Records” followed on 18(31) December 1917. This act was also a breakthrough in the area of family law. Civil marriage officiated by a representative of the state was proclaimed the only form of marriage that was officially recognized in Soviet Russia. Marriage requirements were made very simple: mutual consent of bride and groom and an age requirement: 18 years of age for men and 16 years for women. For the native population of the Transcaucasian area, the requirements were different: 16 years old for men and 13 years old for women. Marriage was strictly prohibited if one of the couple was mentally ill or was married with that marriage still in force. Marrying an immediate family member was not allowed.

The Code on Marriage, the Family, and Guardianship was put into effect in October of 1918. Being a follow-up to the Decrees on Divorce and Civil Marriage, the Code embraced the Bolshevik idea on the temporary nature of law in general and family law in particular. As Wendy Goldman states, the 1918 Code of Laws on Vital Records, Marriage, the Family and Guardianship captured in law the revolutionary vision of social relations based on women’s equality and the “withering away” of the family.

A number of provisions of the new Code aimed at elimination of the “bitter legacy of the czarist regime” in the family law realm. If one of the spouses changed the place of residence, the other was not required to do the same. Only civil marriages registered in a Vital Records Office established rights and duties of spouses. Marriages concluded by a religious ceremony or by a clergyman entailed no rights and duties unless registered as provided by law. Religious marriages concluded before


27 Id.

10 December 1917 in accordance with Arts. 3, 5, 12, 20, 31, or 90 of the Digest of Laws of the Russian Empire (Part 1 of Vol. X) had the legal force of registered marriages.

The Code confirmed the simplified divorce procedure established by the Decree of 16 December 1917, and established uncontested divorce and divorce at the request of a spouse. Under Art. 88, divorce requests could be executed in writing or expressed orally and then put on record.

Certain provisions clearly indicated that its authors gave careful consideration to the problems of motherhood and childhood protection. According to Art. 140,

a woman who is pregnant and not legally married should, not later than 3 months before giving birth, submit an application to the registry office at the place of residence, with the time of conception, the father’s name and place of residence… A legally married woman can submit the same application if the child conceived by her is not her legal husband’s.

The Registry Office obligingly notified the person mentioned in the application, and the latter had the right to challenge the mother’s application in court (Art. 141).

Article 144 of the Code arouses mixed feelings. It stipulated that

if the court finds that, at the time of conception, the child’s mother had sexual relations with the person mentioned as the father, but also with other men, the court brings the latter as respondents and demands that they participate in expenses related to (as mentioned in Art. 143) “pregnancy, childbirth and child support.”

On 1 January 1927, the 1918 Family Code was officially replaced by the RSFSR Code on Marriage, Family and Guardianship, which was adopted in November of 1926. The new Code established that marriages de facto had almost the same status as did marriages duly officiated in the Vital Records Offices. Divorce procedure was made even simpler. It was not necessary to go to court anymore: divorces were brought under the competence of the Vital Records Offices.

Moreover, the new Code legalized the termination of marriage in the absence of one of the spouses. The absent spouse had to be informed about the fact of divorce. According to another provision of the new Code, a single mother had a right to indicate the father of the child in the birth certificate without any proof. The only requirement was that she had to submit an application to the Vital Records Office. After the issuance of such a birth certificate, the father had to be informed about it. He also had a right to contest it in court. With the aim of protecting the rights of children, mothers were entitled to submit an application indicating the father’s first and last name and place of residence to a Vital Records Office before or after childbirth. A person indicated as a father had to be notified of it by a Vital Records Office.
Office and, in the absence of objections from him, after 30 days he was included on the birth certificate as the father.

In early 1930s, the idea that law, family and the state will inevitably wither away disappeared from the domestic political agenda. The followers of Marxism discussed the problems of the forms of family in the future society in a less contentious context. August Bebel in his “A Woman and Socialism” argued that the family would transform into a union based on a private contract “without any interference of the officials.” Kara-Murza points out that the Marxist vision of the issue strongly disagrees with the Russian culture:

in late 1920s the subject of family relations was practically withdrawn from “vulgar Soviet Marxism.”

Slowly but steadily, the Marxist view on family relations was bypassed, and constituted one of the subjects of intra-party disagreement. In 1917–1936, the Soviet Union completely reviewed the role of family in society – from the utopian “withering away of the family” to its “state and ideological support.” According to W. Goldman, family became a part of the “new Holy Trinity of the party ideology” together with “socialist statehood” and “socialist legality.”

Article 27 of the 27 June 1936, joint ruling of the Central Executive Committee and Council of People’s Commissars “On the Prohibition of Abortion [and] Provision of Financial Aid to women Giving Birth” symbolized the first step towards the re-formalization of marriage.

In order to change the existing laws on marriage, family and guardianship and to oppose irresponsible attitude towards family and family obligations, in the course of handling a divorce, both divorcing spouses shall be summoned to the Vital Records Office and receive a divorce stamp in their passports.

In comparison with the wordings from the 1918 and 1926 Family Codes, the language of this paragraph is very telling. This paragraph also sends a completely different message: formalities do matter in the realm of family relations. Divorce registration fees were also increased: 50 rubles for the first divorce, 150 rubles for the second, and 300 rubles for each subsequent divorce.

29 Kara-Murza, supra note 9.
In the early 1940s, it became obvious that certain provisions of the 1926 Code had become non-enforceable. This happened due to a variety of reasons, with World War II being the key factor. The war completely changed every aspect of life in the Soviet Union including the demographic landscape. The Great Purge and World War II cost tens of millions of young men’s lives. A great number of children were left fatherless. An 8 July 1944 Decree of the Presidium of the USSR Supreme Soviet “On Increase of the Government Assistance to Pregnant Women, Mothers of Large Families, Single Mothers, on Strengthening of Protection of Motherhood and Childhood, on Establishing the Honorary Title ‘Mother-Heroine,’ the Order of ‘Maternal Glory,’ and the ‘Maternity Medal’” introduced tremendous changes in the existing legislative framework. This Decree abolished the previous equality between registered and informal marriages and fundamentally changed the attitude of the Soviet state towards official recognition of the matrimonial relations between spouses. Article 19(2) of the Decree stated that only a duly officiated marriage established rights and duties of spouses stipulated in the republican family codes. Couples who lived in a de facto marriage were allowed to officiate their union by registration of their marriage with the indication of the length of the period of cohabitation. Article 22 established the obligation to make a mandatory record of the registered marriage in the passports with indication of the name and birthdate of a spouse, as well as the place and time of the registration of marriage.31

Divorce procedures were also modified. The Decree returned the function of termination of marriage to the courts and established a mandatory two-tier procedure. Article 24 stipulated the obligatory requirements for initiating the court proceeding of dissolution of marriage, including publication of information about the beginning of the divorce proceedings in the local newspaper at the expense of the spouse who filed for divorce. Under Art. 25, the people’s court had to determine the reasons for divorce in order to undertake measures for reconciliation of spouses, and subpoena both spouses. In case of necessity, the court could also subpoena witnesses. If the people’s court failed to reconcile the spouses, the plaintiff was eligible to file for divorce in an upper court. A. Koshcheev argues that before the Decree of 8 July 1944 was issued, the governmental bodies simply registered the fact of divorce; after the Decree came into effect, courts began to play an excessively active role in deciding whether it would be reasonable to preserve a particular marriage.32


32 Кошелев А.В. Расторжение брака по советскому законодательству, 4 Вестник Вятского государственного университета 75 (2010) [Albert v. koshcheev, Termination of Marriage under
with minor children could not get an uncontested divorce in a Vital Records Office. Instead, they continued to live together, because judges were instructed to save as many marriages as possible. In order to do that, in any divorce case a judge had to give the parties a so-called “reconciliation period” at least twice. The average length of such period was 6 months. Article 23 established that divorces had to be handled in open court hearing. If necessary, a hearing in camera was also possible upon the request of the spouses, but this decision was at the court’s discretion.

The 10 November 1944 Decree “On the Procedure of Recognizing Informal Marriage in the Event of One of the Spouses Dying or Going Missing” stipulated that an informal marriage which existed before the Decree of 8 July 1944 could be legally acknowledged. In order to do that, the surviving partner was entitled to file an application to the people’s court in order to be acknowledged as spouse of the person dying or going missing according to the legislation previously in force (Arts. 11 and 12 of the 1926 Code of the RSFSR and appropriate provisions of other republican codes). But this provision was hypocritical, because not many people knew about it, only a few could provide evidence of a preexisting informal marriage, and even fewer were ready to take their case to the courts, which usually acted as punitive agencies.

Due to inconsistency of the case law of that time, grounds for rejection of a divorce lawsuit and the reasons for obligatory termination of marriage were widely debated. Koshcheev adds that the complicated divorce procedure established by the Decree of 8 July 1944 was sometimes unjustified and unreasonable. The Resolution of the USSR Council of Ministers of 29 August 1946 No. 1945 was adopted as a follow-up to the Instruction of the USSR People’s Commissariat of Justice of 27 November 1944 No. 1622 “On the Order of Adjudication of Divorce Cases by the Courts.” Resolution No. 1945 established that if one of the spouses was certified as missing, was missing in action, convicted for a lengthy term of imprisonment (at least three years), or suffered a chronic mental disease, the other spouse had the right to file for divorce directly to the upper court without preliminary consideration of a case in the people’s court. In the event of a divorce from a prisoner, the latter was required to be notified in writing. Publication of information in a local newspaper was also mandatory.
February of 1947 saw further restrictions in the realm of family law: the Decree of the Presidium of the Supreme Soviet of 15 February 1947 imposed a ban on marriages between Soviet citizens and foreigners. This act remained in force until 26 November 1953.

People’s attitude towards divorce also changed and became hostile. Local Communist Party committees discussed divorce cases in all their juicy details, and character references of every divorced Soviet citizen contained the same wording: “The Communist Party Committee is aware of the fact of divorce.” Koshcheev points out that an attempt to terminate marriage, even when *de facto* the family ceased to exist, was treated as immoral and condemned with all appropriate consequences, including public censure and expulsion from the Communist Party.36

3. Property Relations of Spouses

Married women were allowed to conduct certain types of professional activities to the extent these activities did not interfere with their spousal responsibilities. Professor Vsevolod Udintzev pointed out:

if engaging in trading or business prevents a woman from fulfillment of her family obligations, her husband has a right to forbid it

and marked that in such cases a husband’s consent constituted a general rule36. He stated that if the spouses lived separately, there were sufficient grounds to presume the implied consent of the husband to his wife’s engagement in business or other commercial activities. Alexander Bashilov made the point that whereas the Russian imperial legislation did not require a husband’s consent for his wife to start a commercial business by his wife, such trading business could be halted at any time at the husband’s request.37

Shershenevich addressed this issue in more detail:

In order to carry on trade, a married woman doesn’t need her husband’s prior consent, and her husband has no right to veto his wife’s trading, which she performs on her own behalf. Nevertheless, pursuant to Art. 103 of the Civil Laws, which establishes the duty to live together for married couples, the husband is entitled to force his wife to follow him and leave her business in the event the husband selects a different city as a place of habitual residence.

35 Koshcheev 2010.


If so, the wife could appoint her trade representative and continue doing business on her own behalf through this trade representative. In the event the wife was underage, and her husband was her guardian, in order to carry on trade she had to obtain his prior consent. In the event the guardian of the under-age wife was a person other than her husband, the wife needed to get the guardian's and not the husband's consent.\(^{38}\)

In the Russian Empire, property relations between spouses were limited to the husband's obligation to support his wife financially and also to the right of each spouse to inherit a proper part of the other spouse's property (in the event the spouse died without leaving a will). The husband's obligation to support his wife financially was derived directly from the legislation of that time and included the duty to provide food, housing and clothing. Meyer specifically noted that such financial support had to be in accordance with the husband's standing, though the legislation didn't offer precise definitions on this point. The wife's right to receive financial support from her husband was unaffected by the fact of whether she had property of her own or not. The surviving spouse was entitled to receive the so-called "ukaznaya chast'" (statutory share) of the late spouse's property: one seventh of the real estate assets and one quarter of the personal property.\(^{39}\)

Article 105 of the 1918 Family Code provided that marriage did not result in community property, so a married woman remained the owner of the property that belonged to her before marriage. At the same time, spouses were allowed to enter into all property and contractual relations permitted by law. Interspousal agreements aimed at denial of property rights of one of the spouses were invalid and not binding both as to third persons and between the spouses in question.\(^{40}\) Per Art. 107, an impecunious spouse incapable of work was entitled to financial support to be rendered by the other spouse in the event the latter could afford to do so. This right was preserved after divorce in case the circumstances constituting grounds for financial support persisted.\(^{41}\)

The 1926 Family Code established that property belonging to the spouses before marriage remained their separate property. Property which was acquired by the spouses at the time of their marriage constituted community property. In the event of a property dispute, the court had to determine the amount of the community property belonging to each spouse (Art. 10). The 1926 Code also stipulated that marriages de facto had almost the same status as did duly officiated marriages, so provisions on property of married couples applied to the property of persons

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38 Шершеневич Г.Ф. О праве замужней женщины на производство торговли, 7 Журнал гражданского и уголовного права 107 (1888) [Gabriel F. Shershenevich, On the Right of Married Woman to Engage in Trade, 7 Journal of Civil and Criminal Law 107 (1888)].


41 Id. Art. 130.
who cohabit, but are not officially married, if they recognize each other as spouses or if the fact of marital relations was established by court.\textsuperscript{42}

The subsequent Soviet family legislation followed the principle of community of property in a marriage, whereas the property acquired by the spouses before marriage constituted their separate property. E. Chefranova points out that the introduction of the legal regime of community property of spouses was determined by the logic of the creation of the Soviet socialist system, as well as by the intention to establish the priority of the interests of society and to minimize the private sphere in people’s lives.\textsuperscript{43}

4. Legal Status of Illegitimate Children

As some scholars (S. Zhilayeva, E. Selyutina) argue, in the Russian Empire, it was better to be an orphan than an illegitimate child. The legal status of children born out of lawful matrimony was never equal to the legal status of children born to duly married parents. For the first time in Russian legal history, a clear demarcation line between the legal statuses of legitimate children and the “offspring of adulterers” was put in the 1649 Council Code of Tsar Alexey Mikhailovich. The Decree of the Governing Senate\textsuperscript{44} of June established that illegitimate children had to be assigned to the people who raised them, and had to stay with these people forever “like serfs.” The Russian Empire was a class-based society, so the general rule was that the birth status of an “offspring of adulterers” was equal to the status of the mother. However, this principle did not apply to the illegitimate children of women who belonged to the Russian nobility: normally the noble status of their mothers was not conferred on them. An exception could be made in a form of a special Emperor’s favor. Selyutina states that Russian legislation of the 19\textsuperscript{th} century provided “bastards” with the right to receive financial support from the biological father, if the mother was in poor financial standing. Property relations between an illegitimate child and his mother included the child’s right to receive financial support from his mother and the corresponding obligation to take care of her in her old age. Children born out of wedlock were not entitled to inherit the property of the mother and her relatives, nor were the mother


\textsuperscript{44}The supreme body of state power in the Russian Empire, which was appointed by and subordinated to the monarch.
and her relatives entitled to inherit the property of a child born out of wedlock. The higher the status of a mother, the stronger were the negative consequences for her illegitimate child.¹⁴ Before 1829, there was a possibility to legitimate a “bastard” by subsequent marriage of the parents (\textit{legitimatio per subsequens matrimonium}), who had to petition the sovereign and request legitimization of their child who was born prior to their marriage. However, a final decision was at the discretion of the monarch, who usually allowed such legitimation. ¹⁵ In 1829, such petitions were prohibited. The 1880s saw active public debate on the issue of legislative derogation of “adulterates”; both Russian society and legal scholars expressed concerns on this issue. ¹⁶ Vasily Rozanov also addressed this problem in his “The Family Question in Russia”. In its official statement of 1880, the State Council of Russia pointed out that there is a strong bond between parents and children (even illegitimate ones), and the very fact that a child is born imposes important obligations on both parents and children.

Being deprived of both the privileges that could be inherited from their parents and of family and home, being labeled by their illegitimate birth status, these children must have exceptionally strong feelings about their miserable position, which they do not deserve. They suffer because of their status and, therefore, they can naturally multiply the number of those who are displeased with the existing social system and, consequently, with the Government. ¹⁷

The Law “On Approval of the Rules of Improvement of the Status of Illegitimate Children” was approved by the State Council on 3 June 1902. This act was an important milestone in development of the legal status of illegitimate children in the Russian Empire. The definition “illegitimate child” was replaced with the milder notion “extramarital child.” The new law introduced an important positive development: children who were born in invalid marriages (those concluded in violation of the legislatively established conditions and in the presence of obstacles for conclusion of marriage) were recognized as legitimate. The new law allowed an extramarital child to take his mother’s last name with the consent of the mother and father (if the latter was alive at that time). Extramarital children still had no right to the father’s property. Child support obligations of the father in relation to his extramarital child possessed a secondary nature and applied only if the mother was in poor financial

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¹⁵ Id. at 64.

¹⁶ Meyer, supra note 22.

standing. Law said nothing about the possibility to establish maternity in court, nor about voluntary acknowledgement of paternity, or the inheritance rights of illegitimate children in relation to their father. Such children could not inherit after their mother in the way legitimate children did. Irina Voynilova argues that the 1902 law was of a progressive nature; it synthesized the European experience of regulation of legal status of illegitimate children. For the first time in the history of development of Russian legislation, the principle of “welfare of illegitimate children” was made a priority.\(^\text{49}\) However, the Law did not change the social status of children born outside of the wedlock. Whatever the mother’s status, her extramarital child was assigned to the so-called poll-tax-paying classes – peasants and low-middle class (meshchane\(^\text{50}\)).

An exception was made only for the Baltic provinces, where illegitimate birth status had no impact on general legal capacity of an illegitimate child; such persons could also hold public offices.\(^\text{51}\) Interestingly, the civil legislation of the Baltic provinces treated illegitimate children in a more liberal way compared to the civil legislation of the Russian Empire:

> Any adultery committed by people who are not married, shall result in civil consequences, including obligations of the seducer in relation to the woman he had seduced, or the obligations of both of them in relation to their child(ren), as may be the case.

Big changes came up to the agenda immediately after the October 1917 Revolution. The Decree “On Civil Marriage, Children and Vital Office Records” of 18(31) December 1917 provided equal rights to both legitimate children and to children born out of wedlock. These provisions were very progressive for that time. The remarkably progressive Art. 133 of the 1918 Family Code confirmed these provisions and eliminated the concept of illegitimacy. Children of unmarried couples were granted rights equal to those of children of officially married parents. Provisions of this Article applied also to children who were born out of wedlock before the Decree on Civil Marriage of 18 December 1917.

According to William Rosenberg, growing numbers of homeless and illegitimate children were indeed a serious problem.\(^\text{52}\) The key tasks of the Bolsheviks at that time


\(^{50}\) Unlike members of the Russian nobility, peasants and meshchane had to pay poll-tax, and were subject to the “conscription obligation” on a random basis; unlike representatives of other classes, peasants and meshchane could be physically punished.


\(^{52}\) Bolshevik Visions, supra note 13, at 65.
were to abolish the role of the Russian Orthodox Church in family relations, to free men and women from the tsarist structures on marriage, and to improve the status of illegitimate children. In order to comply with these Bolshevik ideas, the 1918 Family Code aimed to provide a transitional legal framework for that short period in which legal duties and protections were still necessary.

Despite the aforementioned problem with homeless and illegitimate children, the 1918 Family Code imposed a ban on adoption. Article 183 provided that,

> From the moment of the entry into force of the present law, the adoption of either one’s own or someone else’s children is not allowed. Any such adoption made after the time specified in this Article does not entail any responsibilities or rights for [either] the adoptive parent [or] the adoptee.

The abolition of the institution of adoption in a country where hundreds of thousands of children had been left orphans as a result of the World War I, the revolution, and the Civil War, was not only unreasonable and cruel, but also primarily ideological.

Russia was then a largely agrarian country, and it was claimed that peasants often adopted orphans in order to exploit them in farm labor. In this context, the abolition of adoption was proclaimed a necessary and temporary measure for the prevention of child exploitation. This justification did not, however, prevent the authorities from extending universal labor duty to all children aged 16 or older. The universal duty to work was established on the constitutional level (by Chapter 2 of Sec. 1 of the Constitution of the RSFSR of 1918) “for the purpose of eliminating the parasitic strata of society and organizing the economic life of the country.” Per Art. 4 of the 1918 Labor Code, students had to exercise their labor duty in the schools. The ideological explanation for this discrepancy was that the soviet state aimed to abolish child labor, but in view of the Civil War and a severe shortage of schools and orphanages, the prohibition of child labor would inevitably result in a rise in juvenile crime. No one explained why it was acceptable for children to be assigned labor duty but unacceptable for them to live in an adoptive family in the countryside and work on a farm. The abolition of adoption in 1918 unequivocally demonstrated how the unceasingly proclaimed policy of government care for children worked in practice.

Adoption was reintroduced by the 1926 Family Code. Professor John Hazard points out that with the growth of crime committed by parentless children left without care after the revolution and civil war, the government chose to again permit adoption of children as a means of providing supervision for homeless waifs. He adds that the necessity of adoption was evidenced by the statistics showing the potentiality of crime among children not cared for within a home. 53 The formal

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procedure had to be performed by the guardianship authorities and then registered in a Vital Records Office. Adopted children and adoptive parents had the same individual and property rights and responsibilities as did the members of regular families. The Code addressed guardianship as an extremely important function that was regulated in details in its Chapter III.

An 8 July 1944 Decree of the Presidium of the USSR Supreme Soviet “On Increase of the Government Assistance to Pregnant Women, Mothers of Large Families, Single Mothers, on Strengthening of Protection of Motherhood and Childhood, on Establishing the Honorary Title ‘Mother-Heroine,’ the Order of ‘Maternal Glory,’ and the ‘Maternity Medal’” abolished the previous equality between illegitimate children and children born into a registered marriage. Under Art. 20 of the Decree, it was no longer possible to establish paternity by a court order. A single mother’s right to file a judicial claim for the recovery of alimony for a child born outside of wedlock was annulled by the same article. At the time of registration in a Vital Records Office, a single mother’s child received his mother’s last name; the child’s patronymic had to be indicated by the mother (Art. 21). Under Art. 19 of the Decree, informal marriages were no longer recognized by the Soviet state. In so doing, as Albert Koshcheev points out, the state freed itself from the obligation to pay pensions to the children whose deceased military parents had not been legally married. Mothers of such children were considered single mothers and were eligible only for an allowance, which was much smaller than a serviceman’s survivor’s benefit.54

5. Abortion

Historically, the church strongly opposed abortions and considered abortions as murder, and the Russian Orthodox Church was no exception. According to Canon 21 of the Synod of Ancyra (314 A.D.), an adulteress who killed an unborn child, or a person who prepared a poison with the purpose to kill an unborn child, was to be banned from the blessed ordinance for life.55 Under Canons 2 and 8 of Saint Basil the Great it is clearly stated that a woman who intentionally killed her unborn child shall be convicted as a murderer.

Those who perform malpractice in order to induce miscarriage, are murderers, as well as those who take poisonous substances with the purpose to kill an unborn child.56

54 Koshcheev 2010.


These Canons were included in the Book of Rules of the Russian Orthodox Church; in 680–681 A.D. they were confirmed by Canon 91 of the VI Ecumenical Council.57

In the Russian Empire, abortions were criminalized (Arts. 1461–1463 of the Code of Punishments) and punished by deprivation of rights and imprisonment: from 4 to 5 years for a pregnant woman who performed an abortion, and from 5 to 6 years in a civil correctional penal battalion for a person, who procured an abortion for the pregnant woman. If an abortion was performed without the knowledge and consent of the pregnant woman and caused serious health damage or death, the punishment was more severe – up to 10 years of hard labor.58

After the 1917 Revolution, the attitude towards abortion completely changed, and Soviet Russia pioneered legalization of abortion.

The 18 November 1920 ruling by the People’s Commissariats of Health and Justice entitled “On Protection of Women’s Health” is a compelling example of reasonable and progressive legislation from the early years of Bolshevik lawmaking. Despite considering abortion an evil, the government of workers and peasants foresaw the gradual disappearance of the procedure as a result of “strengthening the socialist system and anti-abortion propaganda among the masses of the working female population.” The criminalization of abortion was strongly opposed:

Contrary to producing any positive results, this measure would drive this procedure underground and would make women victims of unscrupulous and often ignorant abortionists... As a result, up to 50% of women are infected, and up to 4% of them die.

“In order to protect women’s health and the interests of the race from ignorant and selfish predators and considering repressive methods in this area clearly counterproductive,” the resolution ruled as follows:

I. Artificial termination of pregnancy procedures are allowed free of charge in the setting of Soviet hospitals, which guarantees that such procedures are harmless to the maximum extent possible.

II. It is strictly and expressly prohibited for anyone other than a licensed physician to perform such an operation.

III. Those responsible for administering such an operation [without a license] shall be disqualified and brought before the people’s court.59


Draconian restrictions on abortion were introduced in the USSR in the mid-1930s. The Short Course of the History of the All-Union Communist Party (of Bolsheviks) (1938) specifically addressed this issue by stating that

due to the increase of prosperity of people, in 1936, the Government issued the law on prohibition of abortions.\textsuperscript{60}

The following are some excerpts from the 27 June 1936, joint ruling of the Central Executive Committee and Council of People’s Commissars “On the Prohibition of Abortion [and] Provision of Financial Aid to Women Giving Birth.”\textsuperscript{61} This act remained in force until 1955.

1. In connection with the established fact that abortion is a health hazard, such procedures shall be banned both in hospitals and in other specialized health facilities, as well as at medical offices of private practitioners, or at places of residence of pregnant women. Abortion shall be allowed only in cases where continuation of pregnancy is a life-threatening condition, or can cause serious damage to the health of a pregnant woman, as well as when parents suffer from serious hereditary diseases, and exclusively in the setting of a hospital or a maternity clinic.

2. Abortions performed outside a hospital setting, or in a hospital setting, but in violation of the above conditions, shall be considered a criminal offense punishable by imprisonment of 1 to 2 years, and abortions performed in unsanitary conditions or by persons without specialized medical education shall be punishable by no less than 3 years in prison.

The penalty for pregnant women “terminating pregnancy in violation of this prohibition” was a public reprimand, and a repeat violation of the law was punishable by a fine of up to 300 rubles.

Prohibition of abortions, like many other strict legal prohibitions, backfired: the number of abortions went up dramatically. By 1939, the number of reported abortions had increased by more than 150,000 compared to 1937. From 1936 to 1955, most abortions were carried out illegally, often in unsanitary conditions. As a result, many women died or lost the ability to have children in the future. As was the case elsewhere, in the Soviet Union, prohibition and repression of abortion did not solve the problem, but only exacerbated it. Prohibited goods and services simply


\textsuperscript{61} \textit{Supra} note 30.
move into the informal market. We have been through this many times, and every
time with a negative result.

**Conclusion**

In the 1930s–1940s, most positive developments of early Bolshevik family law
were repealed by later regulations. Equality of official and informal marriage was
discontinued together with the simplified divorce procedure, and termination
of marriage was placed in the exclusive competence of courts. Equality of rights
of legitimate children and children born to unmarried parents, one of the main
achievements of the Bolshevist family law, was also annulled. The striking contrast
between the title and the content of the 8 July 1944 Decree gives a good example of
a typical Soviet hypocrisy. Instead of the “strengthening of protection of motherhood
and childhood” declared in the title of this Decree, single mothers were deprived of the
right to establish paternity in court, to file a judicial claim of recovery of child support,
or to get serviceman’s survivor’s benefits. The country that pioneered legalization of
abortion recriminalized abortion in 1936. Amazingly, in the 1940s Soviet family law
responded even to the beginning of the Cold War, and marriages with foreigners,
previously allowed under Art. 8 of the 1926 Family Code, were prohibited.

The attitude towards divorce also underwent a fundamental transformation.
The Soviet state had been totally indifferent to the fact of a person’s divorce in the
1920s and 1930s; in the 1940s, a divorce became a negative characteristic. Also,
divorces were made a public matter, and it was up to the court to decide whether
there were sufficient grounds for divorce. According to Koshcheev, analysis of the
case law of that time clearly shows that under the Resolution of the Plenum of the
Supreme Court of the USSR of 16 September 1949 “On Court Practice on the Cases
of Termination of Marriage,” the courts oftentimes rejected divorce lawsuits if the
reasons for divorce contradicted the principles of Communist morality.62

Changes in Soviet family law from 1917 to the 1940s reflect the transformation
of the perception of the role of the family in the Soviet state. Whereas in 1917–1920s
the family as an institution was expected to “wither away” together with the state
and law, in the 1930s the attitude started to change. Making the family a part of
the “new Holy Trinity of the party ideology” together with “socialist statehood” and
“socialist legality” called for stricter regulations.

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62 Koshcheev 2010.


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The aim of this paper is to show how the Marxist conception of ownership was introduced in Poland after World War II, and how it was then removed. The paper shows also to what extent the regulations introduced in Poland were different from the ones in force in the Soviet Union. In particular, the provisions of the Constitution of the Polish People's Republic of 1952 and the Civil Code of 1964 are elucidated. The author points out that contemporary Polish courts sometimes question the legal meaning of some civil-law institutions from the period of 1944–1989.

Keywords: property law; social property; individual property; Polish People's Republic; single state property fund; Constitution of the Polish People's Republic of 1952.


Table of Contents

Introduction
1. The Initial Period
2. Constitution of the Polish People's Republic of 1952
3. The Civil Code of 1964
4. The Period of Decline
Postlude
Introduction

It is known that Marx defined Communism as a system in which “bourgeois property,” i.e. private ownership related to the means of production, is abolished. An attempt to implement this idea was made in Soviet Russia after the Bolshevik Revolution. A Polish scholar, Adam Lityński, qualifies the changes that took place at that time as unprecedented in the history of the world. Tsarist law ceased to exist completely, and by the summer of 1918 ownership relations were completely changed (in Lityński’s words: “the most thorough expropriation in history”). The changes were revolutionary: the law of succession was abolished, the law of obligations was changed, and family law was based on completely new rules. Equally important, the distinction between the *ius privatum* and *ius publicum* virtually ceased to apply, and issues previously covered by civil law became subject to public law. Lityński also contends that this change was a novelty in legal development.

The aim of this paper is to show how the Marxist conception of ownership was introduced in Poland after World War II, and how it was then removed. The author’s objective is to show that, due to social conditions, the full transformation of Polish property law according to a Soviet pattern was not possible. Therefore, even if the theoretical concepts of such authors as Anatoly V. Venediktov were introduced to Polish scholarly literature in the 1950s, they were implemented into legislation as late as the 1960s. By this time, however, it was obvious that, e.g., introduction of social property into agriculture was virtually impossible on a large scale. After 1989 the regulations of social property were treated only as a burden which should be thrown off as quickly as possible. The paper also shows the way in which contemporary Polish courts treat property law institutions which functioned before the period of transformation.

1. The Initial Period

In the Polish lands occupied by the Red Army, Communists began to take over in the summer of 1944; the formal manifestation of their power was the so-called Manifesto of the Polish National Liberation Committee of 22 July 1944. The changes in substantive law they introduced were not as deep as those introduced in Soviet Russia after the October Revolution. The reasons for this were quite obvious. First, in the USSR, the Civil Code of the Russian Soviet Federative Socialist Republic of 1922 (with changes introduced in the late 1920s) and the Constitution of the USSR of 1936

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established the basis of property law. These legal acts emphasized the protection of socialist property, but they were far from the radicalism of the Communists’ first decisions, at the turn of 1917 and 1918. Secondly, it was decided that in Poland, the approach to the Soviet model of property law would be to introduce it gradually.\(^3\)

The Communists’ first decision concerning property law was the issuance of the Decree of the Polish National Liberation Committee of 6 September 1944 on the implementation of agricultural reform.\(^4\) It was issued to show that the pre-war Polish government had promised to carry out an agricultural reform, but that reform was not carried out, while the Communist government was able to bring about the reform. The effect of the Decree was to allocate land to dwarf farms and to give land to landless peasants, while farms benefiting from the reform could not have more than five hectares of medium-quality land (Art. 13(2)). Somewhat paradoxically and contrary to the Soviet model, the Decree led to the emergence of farms which were small but owned by farmers themselves. The model of collectivized agriculture was to be implemented later, as a result of agricultural cooperatives.\(^5\) Still in 1944, legal regulations permitting the state to take over forest property were adopted.\(^6\)

It must be pointed out here that before World War II it was not possible to finalize the unification of *in rem* law. There were four basic systems for regulating this law in the Polish lands: the Napoleonic Code, the German BGB, the Austrian ABGB and the Russian law (from the Tsarist period). Just after World War II, this law was unified by the Decree of 11 October 1946 on property law.\(^7\) Interestingly, it does not refer to Soviet law at all, but to the achievements of the pre-war Polish codification commission. The Decree adopted the French solutions in the field of land transfer. Article 43 provided that the agreement between the owner and the purchaser effected the transfer of ownership. Article 28 granted the owner the right to use objects, but not other persons, within the limits specified by the law, and to dispose of such items. The Decree did not contain any provisions referring to Communist

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4. Dziennik Ustaw [Journal of Laws], No. 4, item 17.


6. Decree of the Polish National Liberation Committee of 12 December 1944 on the acquisition of certain forests for State Treasury ownership (Journal of Laws, No. 15, item 82). The Decree introduced the principle that the state had a right to take over the property forests of more than 25 ha (Art. 1(1)).

ideology. As noted by the expert scholar in this subject, Anna Machnikowska, the view still prevailed that

the right of ownership retained its classical construction, but functioned in partially altered external conditions. One of them was the extensive introduction of the state into the rights of the owner; the other, the dissemination of property rights in the rural economy.

However, in 1950 “general provisions of civil law” were issued. They introduced two principles that were relevant for the interpretation of property rights. The general clause of abuse of a subjective right was supplemented with a statement concerning the violation of the “rules of social coexistence (współżycie społeczne) in a People’s Republic” (Art. 3). In addition, civil law provisions were to be applied

in accordance with the principles of the system and objectives of the People’s State.

With regard to the adoption of the Soviet model of ownership relations, the nationalization of industry had been taking place since the end of 1944. Initially, the state took over German-owned estates and the companies that had been under German control during the war. As a legal basis for the action, the brief Decree of 16 December 1918 on compulsory state administration was initially used. On 3 January 1946, the State National Council (“Krajowa Rada Narodowa,” i.e. the interim parliament) passed a law on the takeover of the basic branches of the national economy by the state. According to that act, all enterprises which were able to employ 50 employees per shift (Art. 3(1)) were subject to nationalization. Irrespective of the number of employees, the state took over mines and businesses in such industries as petroleum and natural gas, coke, electricity, the iron and steel industry, the arms

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9 Machnikowska 2010, at 76.
12 The legal status was sanctioned in this respect by the Decree of 8 March 1946 on abandoned and post-German property (Journal of Laws, No. 13, item 87).
13 Id. No. 21, item 67.
14 Id. No. 3, item 17.
and aerospace industry, the production of sugar and alcohol, “big and medium-sized textile industry” and the printing industry (including printing houses). Formally the takeover of production facilities was supposed to be accompanied by compensation. In the early period of Communist rule, provisions concerning land in Warsaw were issued, which caused the majority of land to become the property of the city.\textsuperscript{15}

In 1948, a process aimed at full nationalization of the means of production according to the Soviet standard was introduced. An eminent Polish lawyer, Andrzej Stelmachowski (1925–2009), distinguished the following types of nationalization: direct nationalization (this concerned, in addition to large and medium industry, pharmacies,\textsuperscript{16} the inland waterway fleet and church property), factual nationalization of minor industry, factual capital nationalization, factual nationalization of income, and nationalization in the form of providing the state with an exclusivity for conducting a particular activity. With regard to the nationalization of minor industry, the provisions of the 1918 Decree were still used, and decisions on the acquisition of the company and compulsory management were issued by the relevant ministers. These decisions were announced in the official journal “Monitor Polski.”\textsuperscript{17}

The takeover of capital assets took place through the introduction of provisions concerning monetary nominalism.\textsuperscript{18} According to them, all claims were converted in such a way that one pre-war Polish zloty was equivalent to one Polish zloty from the year of repayment. In addition, as a means of enhancing the effectiveness of these provisions, a tax on extraordinary enrichment during the war was introduced.\textsuperscript{19} The nationalization of income was the result of the takeover by the state, through the relevant tax, of most (85 percent) of the income from renting tenement houses which had remained private. In this period attempts were made to collectivize agriculture, imposing mandatory supplies and additional taxes on farmers who did not want to join the agricultural cooperatives. Formally, these cooperatives continued to operate on the basis of pre-war regulations from the 1920s; however, they were subordinated to local administrative bodies (district councils or powiatowe rady narodowe). The transactions concerning land formally owned by private farmers were actually limited by the application of legislation requiring consent for transactions issued by the competent administrative organs. In this situation, there were many

\begin{enumerate}
\item[15] Decree of 26 October 1945 on the ownership and use of land in the area of the capital city of Warsaw (Journal of Laws, No. 50, item 279). The legal implications of this Decree are significant even today.
\item[16] On the margin, it can be added that all pharmacies were nationalized under a separate act: the Law of 8 January 1951 on the acquisition of the ownership of pharmacies by the State (Journal of Laws, No. 1, item 1).
\item[17] Stelmachowski & Zaradkiewicz 2013, at 247.
\item[18] Decree of 27 July 1949 on acquiring new and determining the amount of unpaid monetary liabilities (Journal of Laws, No. 45, item 332). This legal act is still valid today.
\item[19] This tax was originally regulated in the Decree of 13 April 1945 on extraordinary war enrichment tax (Journal of Laws, No. 13, item 72). The rules governing this tax were changed several times.
\end{enumerate}
informal transactions that were invalid from the legal point of view.\(^\text{20}\) Moreover, on 20 March 1950 the Statute concerning the local organs of unified state authority was enacted.\(^\text{21}\) Under its authority, local government in Poland ceased to exist and its assets were taken over by the state. In this way, the foundations of uniform state ownership were created in Communist Poland.

During this period, ideological pressure also increased. Anna Machnikowska wrote:

> Economic transformations had been given a clear, ideological message... the justification for the changes was presented by the dogmas of Soviet law and economics. Among them was the theory of property development and its improvement. According to its content, private ownership was definitively displaced by social ownership (agricultural cooperatives).\(^\text{22}\)

### 2. Constitution of the Polish People’s Republic of 1952

In the early 1950s, the Communist authorities were preparing to introduce Soviet property regulations into Polish legislation. An appropriate commission was appointed for this purpose, but it did not complete its work until 1952. However, the assumptions of the new codification indicated only the introduction of the division into social and individual ownership.\(^\text{23}\) The details of the solution, however, were not provided.

The so-called Stalinist Constitution, passed on 22 July 1952, was of key importance for the implementation of the Soviet regulations of ownership.\(^\text{24}\) Ownership issues were governed by Arts. 11 to 13 of this act. Article 11 contained a program norm concerning the promotion of a cooperative movement by the state. It was also pointed out that cooperative property, as a form of social ownership, benefited from special care and protection from the state. Article 12 contained a provision for guarantees of individual property and the right to inherit it. According to this provision, individual property included land, buildings and other means of production belonging to “peasants, craftsmen and cottagers.” In turn, Art. 13 referred to personal property.

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\(^{21}\) Journal of Laws, No. 14, item 130.

\(^{22}\) Machnikowska 2010, at 87.

\(^{23}\) See Jan Wasilkowski, Własność i inne prawa rzeczowe [Ownership and Other Property Rights], 5–6 Państwo i Prawo 841 (1951).

\(^{24}\) Journal of Laws, No. 33, item 232. The term “Stalinist constitution” does not refer only to the period in which it originated. A copy of the draft constitution in Russian exists, in which Joseph Stalin introduced his own amendments.
It was argued in the literature that the Constitution of the People’s Republic introduced an economic understanding of property. Therefore, in the legal doctrine of that period, it was considered that the Constitution contained a broader, economic concept of property, and civil law contained a narrower, legal approach towards property.\(^{25}\) As for the comparison of the provisions of the Constitution of the Polish People’s Republic and the Constitution of the USSR of 1936, the scholars emphasized the similarities, although at the same time there were differences: the Soviet Constitution favoured full nationalization of the means of production, while the Constitution of the People’s Republic recognized the private ownership of part of the land.\(^{26}\)

Against the background of the mentioned constitutional provisions, the types and forms of property were distinguished in the Polish legal doctrine of that period. Theoreticians argued that according to these provisions, social (socialist) property was to be the basic type of property in the economic system, while capitalist property was tolerated in the transitional phase; however, with the building of socialism it was to be liquidated. There was a view that these two types of property were in opposition to each other (this position was mitigated in literature after 1956). In turn, the division of ownership into forms consisted of: 1) social ownership, which was divided into state (“nationwide”) and cooperative property; 2) smallholder property, i.e. the property of craftsmen and peasants protected by the Constitution (which used the term “individual property”); however, in the future this was going to disappear; 3) capitalist property, which was in decline and did not enjoy protection; 4) personal property personal property, only for the owner’s private use (the means of private consumption). Personal ownership – as was believed – had a fairly wide range of subject matter and included, among others, single-family houses. The absence of ownership of social organizations was considered to be a certain weakness of the Constitution of 1952.\(^{27}\) As far as cooperative ownership is concerned, Seweryn Szer has pointed out that from a civil law point of view it was the property of a legal person, i.e. a co-operative, but it did not blur its character as a group property.\(^{28}\)

The process of replacing Polish legal doctrine with the views expressed in Soviet legal literature began in 1952. Then the work by Anatoly Venediktov (1887–1959) of


\(^{26}\) Machnikowska 2010, at 91.

\(^{27}\) See Stelmachowski & Zaradkiewicz 2013, at 251–252.

\(^{28}\) See Seweryn Szer, *Własność spółdzielcza. Z wyjątkiem własności spółdzielni produkcyjnych w rolnictwie* [Cooperative Ownership, with the Exception of Property of the Agricultural Production Cooperatives] 49–53 (Warsaw: Państwowe Wydawnictwo Naukowe, 1960). (Szer’s work was published after 1956 and takes account of changes in the cooperative movement that took place after that year (it denigrates the “degeneration” in the cooperative movement during the Stalinist period), although it is written from a Marxist point of view.)
1948, which was of key importance for Soviet theory of property, was translated.\(^{29}\) The two-volume book edited by Dmitry Genkin (1884–1966) was also published; the issues of ownership in the USSR were described by the editor himself.\(^{30}\) Among Polish lawyers, Jan Wasilkowski (1898–1977) was a leading author who introduced concepts developed on the basis of Soviet law to Polish legal literature and (being a member of many expert committees) to the legislation. From the 1950s to the 1970s he published numerous works on property law, and on ownership in particular. He praised Venediktov, who in his opinion proposed a well-grounded general definition of property, understating property as the appropriation of natural resources by the individual (according to Marxist theory, it took place in different ways in particular formations), and as the “social relationship of production,” which is a relationship between persons but “against the background of means of production.”\(^{31}\)

Yet in the period of Stalinism, in 1954, a project of new civil code, developing the constitutional provisions of 1952, was published.\(^{32}\) Thus, it contained such elements as: the principle of uniformity of state ownership, an inhomogeneous notion of ownership, the special protection of social property and the special legal capacity of state enterprises. Despite political pressure, work on the code was delayed, and detailed property regulations were met with the critique of prominent lawyers: Stefan Grzybowski (1902–2003) and Stefan Ritterman (1904–1970).\(^{33}\)

In October 1956, a somewhat delayed “thaw” took place in the Polish People’s Republic, which also led to changes within ownership relations. The authorities allowed the dissolution of agricultural cooperatives, resulting in the liquidation of almost 80% of the cooperatives (about 8,000), and the division of their assets among their members.\(^{34}\) In this way, an attempt to collectivize agriculture in Poland had finished. On 13 July 1957, the Agricultural Property Act\(^ {35}\) was passed, which liberalized the terms of sale of land. It introduced the upper limits of the area of the farm that could be the subject of a transaction. It was possible to purchase a farm of up to 15 hectares, and in the case of breeding farms, up to 20 hectares.\(^ {36}\)

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31 Venediktov 1952, at 18, 37.


33 Machnikowska 2010, at 95–96. (In 1955, a new project, close to the previous, was published.)

34 Stelmachowski & Zaradkiewicz 2013, at 252.


36 These provisions were detailed (and to some extent changed) by the Act of 29 June 1963 on limiting the division of agricultural holdings (Journal of Laws, No. 28, item 168). It introduced, among others, the rules of inheritance of farms, which were binding until the beginning of the 21st century. See Stelmachowski & Zaradkiewicz 2013, at 254–255.
property was regulated by the Act of 17 February 1961 on cooperatives and their unions.\footnote{Journal of Laws, No. 12, item 61.} It introduced a certain autonomy for the cooperative movement in relation to the state, and also regulated the right to housing in a housing cooperative (a new property law was introduced, featuring the cooperative ownership right to premises, which exists in the Polish legal system to this day).

### 3. The Civil Code of 1964

Property regulations, corresponding to the Soviet model, were finally included in the provisions of the Civil Code of 1964. Article 126 distinguished three categories of social property, i.e. state property (“nationwide” property; in such a way this form of property was also named by Venediktov), cooperative property, and the property of social organizations (the latter was not mentioned in the Constitution of the People’s Republic of Poland). Article 129 stated that social property, which was the foundation of state system, benefited from special legal protection. This special protection was manifested in the regulations which, in the case of state property, excluded the protection of purchasers in good faith (Art. 171), indicated that the debt collection claims of state entities vis-à-vis individuals and corporations outside the so-called socialized sector were not time-limited (Art. 223, para. 2), and public property could not be acquired by usucaption (Art. 177). It is also important that Art. 128 of the Code consistently implemented the principle of a unified state ownership fund. State legal entities exercised only the rights resulting from the property right in relation to the assets of the state that were under their management (Art. 128, para. 2).\footnote{In the Soviet Union, Andrey Vyszinsky presented the thesis of the validity of this principle in 1938. See Andrey Vyszinsky, Zagadnienia teorii państwa i prawa [Issues of the Theory of State and Law] 142–144 (Warsaw: Książka i Wiedza, 1952). Venediktov justified it theoretically in the aforementioned work published 10 years later. In turn, its regulation was included in the Civil Code of the USSR, dated 8 December 1961, and in the Civil Code of the Russian Soviet Federative Socialist Republic of 1964. As Adam Lityński points out, this principle can be interpreted as a return to the nineteenth-century view that fiscus was the owner of all state property, and state entities exercised the power over that property as stationes fisci (though they were also allowed to be given their own property). See Lityński 2012, at 225–226.} This provision was the fulfillment of long-standing postulates of lawyers associated with the communist regime.\footnote{See, e.g., Seweryn Szer, Prawo cywilne. Część ogólna [Civil Law. General Part] 118–121 (Warsaw: Wydawnictwo Prawnicze, 1955). The lawyer wrote on this subject: “Undoubtedly, Soviet practice should be here the precept de lege ferenda for us”. Id. at 119.} As Andrzej Stelmachowski emphasized, as a result of this principle,

superior units could always interfere in the ownership relations of subordinate units. Fixed asset management was limited and dependent on superior units that could not only create and liquidate subordinate units, reorganize, e.g. by...
moving individual plants from one enterprise to another... In fact, state legal entities behaved like owners only in reference to third parties.\(^{40}\)

It is worth noting that during the period of the Polish People’s Republic, the scholar argued with the idea of unity of state property, which had been justified especially by Jan Wasilkowski. He also was of the opinion that the privileges of social property undermined the principle of equality of parties, being a fundamental principle of civil law.\(^{41}\)

4. The Period of Decline

In the 1970s, when Edward Gierek was the first secretary of the United Workers’ Work Party (the so-called Gierek era), the corset of rules restraining individual farming was loosened. In 1971, the system of mandatory deliveries of agricultural products ceased to be in effect, and the provisions of the Act of 26 October 1971 regulating the ownership of agricultural holdings\(^{42}\) allowed the legalization of the factual states that were the result of the so-called informal land trading (i.e. agreements which were not concluded in the required form of a notarial act). However, in the mid-1970s there was a return to the promotion of “socialized” agriculture by the authorities, this time in the form of “state agricultural farms” (the equivalent of “sovkhzozy” in the USSR). This policy, however, collapsed at the end of this decade.\(^{43}\) Therefore, individual farms have remained the basis of agriculture in Poland. Indeed, after protests by workers and farmers in 1980, this state of affairs was reflected in the legislation. First, in 1982, Art. 131 of the Civil Code was changed,\(^{44}\) providing protection for individual farms. Certainly, this change disrupted the structure of the Code of the time, which provided for a privileged position for social ownership. Then, in 1983, the Constitution of the People’s Republic was amended, introducing in Art. 15, point 3, the principle of state protection of family farms and their stability.\(^{45}\)

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\(^{40}\) Stelmachowski & Zaradkiewicz 2013, at 257.


\(^{42}\) Journal of Laws, No. 27, item 250.

\(^{43}\) See Stelmachowski & Zaradkiewicz 2013, at 258–259.

\(^{44}\) Act of 26 March 1982 amending the Civil Code and repealing the Law on the regulation of ownership of agricultural holdings (Journal of Laws, No. 11, item 81).

After workers’ protests in August 1980, two legal acts which were of crucial importance for the functioning of state-owned enterprises were adopted. The first gave the self-governing structures of work crews some input into the management of these enterprises, and the second stated that the management of these companies should be based on the principles of self-management, self-reliance and self-financing. These legal regulations did not invalidate the principle of unity of the state property fund, but made a significant breakthrough in modifying the management of it.

At the end of the existence of the Polish People’s Republic, changes were also visible in the legal literature. In 1984, Walerian Pańko (1941–1991) in his very erudite and authoritative book “On the Property Right and Its Contemporary Functions” devoted a chapter to the issue of the socialization of property. It must be noted that the chapter title is already significant, because it uses the term “socialization of property” and not “socialized property.” The author wrote about giving property to local administration units (municipalities); he also discussed the self-government of employees in state-owned enterprises, thus referring to the creation of the Solidarity movement during the workers’ protests of 1980. He stated that

the socialization of property can only happen with socialization of the whole organization of society, and therefore – the socialization of the state itself.

This was a clear allusion to events in Poland in 1980–1981. Several remarks made by Pańko in his book reveal that the author tried to fill the notions of socialist property law which was still in force with quite different content. In the 1980s Pańko was among the scholars who prepared the ground for further changes in Polish property law.

The departure from the Soviet property regulations took place in 1988–1989, so even before the so-called Round Table talks and partially free elections of June

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48 Pańko was a disciple of Andrzej Stelmachowski and a professor at the Silesian University in Katowice. After the changes in the political system, in 1991 he was the president of the Supreme Chamber of Control. However, shortly thereafter, he died in a car accident.

49 This work includes, e.g., interesting remarks about the present the phenomenon of dematerialization of property (in the Western countries occurring since the end of the 19th century). See Walerian Pańko, O prawie własności i jego współczesnych funkcjach [On the Property Right and Its Contemporary Functions] 58–63 (Katowice: Wydawnictwo Uniwersytetu Śląskiego, 1984).

50 See Id. at 177–197.

51 Id. at 196.
1989. The Sejm adopted the groundbreaking Act of 23 December 1988 on economic activity,\(^52\) thus giving great freedom for the pursuit of individual business. Moreover, on 31 January 1989, Art. 128 of the Civil Code was changed\(^53\) entailing the abandonment of the principle of the unified state ownership fund.\(^54\) On 29 December 1989, a very substantial amendment of the Constitution of the Polish People’s Republic took place.\(^55\) It abolished the provisions on social property and introduced the general principle of protection of all property and the right of inheritance in Art. 7. It should be noted that the amendment of the Civil Code of 28 July 1990 repealed the provisions on various forms of ownership.\(^56\)

**Postlude**

Using the example of legal regulations concerning the easing of transmission and legal disputes around it, I will show, below, how the jurisprudence of contemporary Polish courts has approached the legal design of ownership from the period of Polish People’s Republic. In 2008, the new Art. 305.1 was added to the Civil Code.\(^57\) It includes the following content:

Real estate may be encumbered with a right in favour of an entrepreneur who intends to construct or which owns the facilities referred to in Art. 49, para. 1 (“transmission equipment for supplying or discharging liquids, steam, gas, electricity and similar facilities”) under which the entrepreneur may use the servient estate within a designated scope, in accordance with the purpose of the facilities (easing of transmission).\(^58\)

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\(^{52}\) Journal of Laws, No. 41, item 324.

\(^{53}\) Journal of Laws, No. 3, item 11.

\(^{54}\) Ultimately, the state legal entities – including state-owned enterprises – received ownership of the property they had been managing under the Act of 29 September 1990 on amendments to the Land Management Act and the expropriation of real estate (Journal of Laws, No. 79, item 464). However, the restored local government units (municipalities) acquired the “nationwide” property, which until that moment had been in the management of municipal councils, under the Act of 10 May 1990 – provisions introducing the law on territorial self-government and the law on self-government employees (Journal of Laws, No. 32, item 191). See Piotr Dubowski, *Mienie przedsiębiorstwa państwowego [Estate of a State-Owned Enterprise]*, 10(2) Rejent 47 (1992).

\(^{55}\) Journal of Laws, No. 75, item 444.


\(^{57}\) Act of 30 May 2008 amending the Civil Code and certain other acts (Journal of Laws, No. 116, item 731).

The aim of the amendment was to clarify the legal status in such a way as to allow transmission enterprises to conclude agreements establishing an easement with the landowners on whose premises the mentioned equipment is located. It should be noted here that many of these enterprises are successors to former state-owned enterprises. The lawyers of these companies, in the numerous processes concerning the compulsory establishment of the easement of transmission, began to use the concept of the usucaption of this easement, while the condition of the usucaption is to exercise that easement for 20 years in the case of good faith, and during 30 years in the case of bad faith. In case of such usucaption, there is no need to conclude an agreement with the landowner and pay the salaries. Despite critical voices in the literature,\(^5^9\) the courts began to accept this argument. Over time, there has been a legal problem: whether the 20-year or 30-year period necessary to obtain an usucaption includes the exercise of the easement by the state-owned enterprises which – we must emphasize – were only managers of state assets until 1990. However, more recent case-law has begun to allow such an opportunity, and the Supreme Court stated in a judgment in 2013 stated that

\[\text{a state legal person... in external relations with third parties had such a position as an owner.}\(^6^0\)

In this way, the Supreme Court undermines the very legal structure of the single state property fund, retrospectively, in relation to the legal relations that took place before 1989 (obviously, in this case, such an interpretation is in the interest of transmission companies).

The example presented here shows the attitude of Polish courts to civil-law legal institutions from the period before the political transformation. After 1989–1990 these institutions were often considered as an obstacle to the process of the introduction of a capitalist, market economy. To give at least two examples of this attitude, I would like to point out that the general clause of the principles of social coexistence has been retained in Art. 5 of the Civil Code; however it has become an almost defunct principle, devoid of almost all practical importance. In turn, the principle of material truth was largely restricted in the Polish Code of Civil Procedure due to amendments in 1996 and 2004. It has been emphasized by many legal scholars that this principle


was a relic of communist law and the principle of formal (judicial) truth is better suited to the conditions of a market economy. In this context, the approach of the courts towards the notion of social property is not surprising. It is surprising, however, that Polish courts have questioned the legal meaning of the notion of the single state property fund even in relation to the period before 1989.

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The article aims to describe the dynamics and characteristics of Russian law throughout 1905–1917 Revolutions. It considers how Russian law survived through the gradual breakdown of the autocratic state. The resilience studies’ approach is introduced to the study of the continuity of the Russian legal tradition. A fresh outlook of the resilience framework allows to answer the main research questions: how did the legal system of the Russian empire lose its equilibrium in the beginning of the 20th century and what resources were exploited in order to make Russian law work for the Soviet state and people?

Keywords: revolution; legal tradition; Russian legal tradition; resilience; Russian sovereignty; Russian parliament.


Table of Contents

1. 1917: Russian Law at the Crossroads
   1.1. Studies of Legal Traditions and Resilience Studies
2. The System Losing Equilibrium
   2.1. Sovereign Power
   2.2. Intermediaries of Russian Law
   2.3. The People
3. The October Revolution of 1917: Law’s Survival
   3.1. Sovereignty
3.2. Intermediaries of Soviet Law
3.3. The People
Conclusion

1. 1917: Russian Law at the Crossroads

There is a remarkable continuity which bridges past and present in the debate on the essence of Russian law. One of the pillars of this historical bridging is the public discussion reflecting an ideological clash between two opposite approaches to law and legality. Both approaches are embedded in the Russian legal tradition: both in legal institutions and discourses on law.

The universalist/liberal approach, emphasizing the normative meaning of law, is confronted by a traditionalist/conservative approach, for which law serves as a means to protect national traditions and current political interests. The clash of the two approaches is articulated in the contrast between two slogans: “verkhovenstvo prava” (the Russian analogue of “rule of law”) versus “diktatura zakona” (dictatorship of law). Both approaches claim to speak in the name of the people, who need to be protected by law, but with a radically different focus. The first approach underlines the need to protect individual rights (pravo) and freedoms which are being constantly challenged by the state, while the second stresses the value of public order and the state’s interests, as stipulated in legislation (zakon).

From a more general perspective, the first approach underlines the universal values of human rights protected by law, while the second approach stresses a positivist vision of law without the normative connotations of the human rights or natural law doctrines. Since the late 18th century, opposition between the two approaches has taken the form of political discussion. It became most visible in the time of radical political changes in the beginning of the 20th century. This debate forms an important continuity in the Russian legal tradition that has been balancing between the two poles of “zakon” and “pravo.” My article aims to explore the survival of this continuity during the time of the radical political break of the Bolshevik Revolution in October 1917. I am interested in a deeper understanding of how Russian law as an institution made its way through the revolutions when the very idea of law (both pravo and zakon) was suppressed by violence.

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1 Нерсесянц В.С. Право и закон [vladik s. Nersesiants, Law and Legislation] (Moscow: Nauka, 1983);

2 See, for example, discussion on “legal consciousness” and legal education of peasants in: Тисье М. Какое юридическое просвещение нужно в России?, 44(6) Неприкосновенный запас 21 (2005) [Michel Tissier, What Legal Education is Needed in Russia?, 44(6) NZ 21 (2005)].
Indeed, the Revolutions of 1905 and 1917, the abdication of the monarchy, and collapse of the Russian empire, resulted from a legitimacy crisis of the imperial elites, the imperial state, and its legal order. The law itself as an institution was questioned by the radical propaganda of the Bolsheviks. However, at a long run, the institute of law survived the October Revolution and appeared to be a very resilient element of the structure of state power.

Existing literature suggests two major factors that ought to be considered in relation to the emergence of Soviet law. The first factor is violent nature of the Soviets’ rule executed through legalized terror. The second factor is inertia of social and governmental practices, including usage of legal practices from pre-revolutionary times. Violence and inertia did not necessarily contradicted each other. On the contrary, they intertwined and provided a complex functional context of laws’ working in Soviet Russia.

Violence as a key factor of the foundation of the Soviet state is a well-researched theme. The Bolsheviks took power during war, and the practices of wartime mobilization provided a foundation for the Soviet political and legal order. Still, in spite of military practices and in addition to them, among the very few institutional checks on formulating and implementing Soviet policy, law played a remarkable role. There is a developing field of literature that describes the novelties of Soviet law that made its existence possible in the Soviet state. In line with an analysis of norms of Soviet law, there are studies on how the Soviets used the form of law as an instrument of legitimized violence, domination and control.

However, studies of the foundational period of the Soviet state demonstrate that law was not only an instrument of Soviet policy – it remained a context that continued. Continuity was relevant for both the pinnacle of political power and the local levels of everyday workings of Soviet law. At the top we have evidence of the meaningfulness of law as an institution in the development of Soviet ideology and

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5 In terms of substantial understanding of Soviet law, a lot of energy has been spent on highlighting ideological novelties of the socialist law and justice in the USSR. The Cold War narratives of competition of socialist and capitalist systems affected heavily these accounts, which still provide relevant descriptions of the Soviet legal institutions. See, for example, Harold J. Berman’s path-breaking study of Soviet law: Justice in the USSR: An Interpretation of Soviet Law (Cambridge: Harvard University Press, 1983), that was a revised and expanded edition, entitled "Justice in Russia" published in 1950 also by Harvard University Press.
the practices of governance.\textsuperscript{8} At the same time, local histories of early Soviet rule highlight the role of law and legal procedures in dispute resolution and control over social violence in rural and urban Russia.

The juncture of both “top” and “bottom” evidence law’s working (both as imagined by contemporaries and law’s actual working “as it was”) may be recognised in Stalin’s words addressed to Kaganovich in 1932 in relation to the means of collectivization: “A peasant man loves legality” (“muzhik liubit zakonnost’”). With this argument Stalin insisted on the usage of ordinary courts rather than the political police to prosecute theft of “socialist property.”\textsuperscript{9} Of course it was possible to allow by law the political police to prosecute violations of the socialist property. However, Stalin wanted to have the courts involved. Thus, one might suggest that it was not only enforcement by police that was needed. In order to make “socialist property” into a legal concept recognized by people, courts were to be used. Court procedures would involve various intermediaries of law to propagate the concept of “socialist property” and people in the courtroom either involved in the process, or just as audience, would participate in making “socialist property” the people’s legal will.

This article does not claim that Russian legalism was of essentialist nature, forming one of Russia’s “permanent conditions.”\textsuperscript{10} Indeed, as Peter Holquist puts it, historical heritage matters within the context of a particular time and space.\textsuperscript{11} Still, when historians are to capture changes in a particular setting of time and space it is methodologically fruitful to engage in debate on “persistent factors”\textsuperscript{12} since they influence the adaptive capacity of the social systems.

In this article I will consider how Russian law as survived through the gradual breakdown of the autocratic state during 1905–1917. For this purpose I will introduce the resilience studies’ approach to the studies of legal traditions as an example of the continuity of the Russian legal tradition. My main research questions will be: how did the legal system of the Russian empire lose its equilibrium in the beginning of the 20\textsuperscript{th} century and what resources were exploited in order to make Russian law work for the Soviet state and people?

\textsuperscript{8} Feldman 2006; Borisova 2012.


\textsuperscript{10} See the critique of this approach in Alfred Rieber, Persistent Factors in Russian Foreign Policy: An Interpretive Essay in Imperial Russian Foreign Policy 315, 322 (H. Ragsdale (ed.), Washington: Wilson Center Press, 1993).

\textsuperscript{11} Holquist 2003, at 630.

\textsuperscript{12} Rieber 1993, at 322.
1.1. Studies of Legal Traditions and Resilience Studies

For years continuity has been the main focus of the studies of traditions. This was stressed in Eric Hobsbawm’s classical definition of tradition as

a set of practices, which seek to inculcate certain values and norms of behavior by repetition, which automatically implies continuity with the past.¹³

Within this theoretical framework, scholars carried out research on practices of making traditions. Legal scholarship also followed this development.

The classical works of Harold Berman and Patrick Glenn provide an important contribution to the conceptualization of legal tradition as cultural information brought from the past into the present.⁴ This understanding of Berman and Glenn has been further developed by Edgar Schein and Jan Smits, who further explored the socio-legal dimension of “the transfer of information.”³¹ The socio-legal approach is focused on understanding the role of tradition for a certain community. As Schein summarized it: tradition is “the transfer of information within a community over a substantive period of time.”³²

This notion of “information transfer” bridges studies of legal traditions to more general “biological” explanatory patterns of natural science. In general the field of legal studies is open for attempts to utilize natural science and interpret law as an informational code, necessary for survival of particular socio-political identities recognized as “nations.”³³ My article departs from these attempts and proposes to use the conceptual framework of resilience for analysis of continuities and changes in the development of the Russian law through the political break of 1917.

The concept of resilience has been used since the 1970s as a systematic conceptualization of adaptivity and survival of ecological, social and political systems. As Holling put it in his classical definition of resilience, it is

a measure of the persistence of systems and of their ability to absorb change and disturbance and still maintain the same relationships between populations or state variables."³⁴


¹⁷ Smits 2015.

The focus of the resilience approach derived from studies of ecological systems and further developed its stress on adaptability. Unlike engineering resilience, which emphasizes when things return to a stable state, the ecological conceptualization of resilience is interested in restructuring. It is both through inner resources of the system and outside sources that a system recovers from instability and maintains its key features.

In social sciences the conceptual framework of resilience has been implemented for analyses of change in political and social processes. As for law, it has been mainly a nexus of ecology and sustainability that recently introduced the concept of resilience to legal studies.

In addition to this, resilience might be a productive conceptual framework for research of continuities and changes in law. It clearly enables us to avoid the dichotomy of either a “top-down” or a “bottom-up” point of view that scholars need to choose in order to provide a substantive and contextualized historical analysis. Resilience broadens the systematic understanding of a state as an ecosystem, in which authorities and people are interrelated in dynamic relationships of interdependence, which are more complex than just domination and compliance.

However, there is no consensus on resilience as an explanatory model for an analysis of social and political systems. A critical stance about it was voiced by left intellectuals and other critics of neo-liberalism. They criticized resilience as a neoliberal construct that is profitable for elites as a new “eco-discourse” of domination over subaltern. Taking this critical view resilience might serve as a neoliberal political fiction that takes agency from the suppressed people and helps those in power to present their domination in the natural science language of pure eco-survival.

This critique is useful, especially for my study of law through revolution. In my previous research I have studied how the relationship of domination and power were contested and reestablished by law in Russia, 1905–1918. Now, I would like to switch focus from the instrumentalist approach to law – as a means for struggling

for power – to a more systematic understanding of law, which goes beyond power manipulations. Being inspired by my joint project with Jane Burbank on Russia’s legal trajectories\(^\text{24}\) I will explore resilience of Russian law through three key groups of actors that were involved in functioning of law in Russia: the sovereign (and his aides), intermediaries, and the people. Revolutionary changes dramatically affected all three groups and within each of them there resources were found to face the instability and empower legal system’s further functioning.

2. The System Losing Equilibrium

The Revolution of 1905 challenged the mainstay of Russian state power: the institution of autocracy. In order to calm down radical uprisings all over the country and prevent bloodshed, some of the revolutionaries’ demands were fulfilled. A recognition of civil and religious liberties included people’s political rights – freedom of speech, freedom of assembly, and the right to organize unions and political parties. However, the Nicholas II’s greatest concession to society was an elected legislative body. The famous Manifesto of 17 October was published with the long-awaited statement of “an immutable principle that no law could be implemented without its approval by the State Duma.”\(^\text{25}\)

Liberals saluted the start of a Russian parliament, which they viewed as allowing the absolute rule of rightful law, i.e. law approved by the people’s representatives:

> The tremendous significance of parliamentary order lies in the fact that it creates the unity of lawmaking process which is the most necessary condition of strength and stability of legal order (законный порядок).\(^\text{26}\)

Legal order was considered to be a panacea for the severe political crisis coupled with the resounding military defeat in the Russian-Japanese war.

2.1. Sovereign Power

However, the ruling elite could not condone substantial participation in lawmaking by representatives. As Richard Wortman demonstrated, the tsar’s role as a pillar of the Russian Empire was telegraphed in numerous scenarios of power that presented the sovereign’s essential significance for the state. When Nicholas II


\(^{25}\) Главная думе в России в документах и материалах [The State Duma in Russia: Documents and Materials] 90–91 (Moscow: Gosyurizdat, 1957).

filled in the “occupation” field in the 1897 census form he put down “landowner” and clarified “Master of the Russian land.”

Nicholas II found the very idea of representation extremely dangerous for the state. As his diary and other personal materials demonstrate, the last Romanov tsar viewed his role according to the enduring tradition of a Russian sovereign autocrat whose laws enable him better to fulfil his function of the people’s protector and guarantor of justice. As Nikolay Karamzin put it in a classical formula:

> The monarch is the living law – merciful for the kind and castigating evildoers, the love of the former is obtained by the fear of the latter. If people are not afraid of the tsar they are not afraid of the law!

In opposition to this conceptualization of sovereign Russian law, there has been an influential dissident critique of the despotism of the Russian sovereigns as a prerequisite of “no law in Russia.” Indeed, the concept of autocratic legality was based on the unrestricted power of the autocrat. Both in theory and in practice an autocrat could overrule any law. However, the institution of autocracy did not prevent the development of legal institutions. The sovereign’s supreme power in lawmaking was the source of legitimacy of political power in Russia. Thus, the key legal and political issue arising out of the 1905 Revolution was the crucial structural challenge to autocratic sovereign power provided by the newly established representative lawmaking body that emerged in 1906.

Sovereign authority did its best to maintain its power within its former limits while, as one of Nicholas’ aides put it,

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29 Карамзин Н.М. Записка о древней и новой России в ее политическом и гражданском отношениях [Nikolay M. Karamzin, *Memoir on Ancient and Modern Russia*] 102 (Moscow: Nauka, 1991). This is exactly how the charisma of a Russian monarch, not abstract “law,” should be treated as a key legitimizing aspect of power.


from the outside point of view complying with the demands of establishing a parliamentary legal order.\textsuperscript{32}

Legislative activity by the people's representatives was designed in such a way, as a secretary of Council of Ministers' sessions revealed,

\textit{to provide the monarch with the ability to rule if necessary without their participation yet by means of legitimate instruments.}\textsuperscript{33}

This trend was embedded in the main documents of the “renewed regime,” as it was then called: the Statutes of the State Duma (20 February 1906) and State Council (20 April 1906), new Fundamental Laws (23 April 1906), and State Budget Laws (8 March 1906). The laws mentioned could not have been changed by either the State Council or the Duma – the two chambers of Russian elective body.

Thus, on the one hand, from the very beginning, crucial aspects of the political system were withdrawn from the competence of the people's representatives. On the other hand, supreme monarchial rule, inseparable from the executive authorities, retained a legislative mandate for operating, irrespective of the parliamentary structure. Nevertheless, sovereign's the authority was challenged and its prestige diminished.\textsuperscript{34}

The institution of the Romanov dynasty's sovereign autocratic power was challenged but law was seen as a means of sovereignty's resilience. The power of law was used in order to retrieve sovereign domination by limiting the capacities of the State Duma and putting down revolution through legalized repression. At the same time, the first State Duma was elected and many of the representatives were actually legal specialists. Legal means became the forum for severe political struggle between the supporters of autocracy and its opponents. The intermediaries of Russian law played a crucial role in this struggle. After the 1905 Revolution the most influential of them made their way to the Duma in order to be able to make law in Russia and challenge the sacred right of the Russian sovereign and his aides.

\textbf{2.2. Intermediaries of Russian Law}

Numerous groups of intermediaries of Russian law were involved in the communication of legal norms, their interpretation and enforcement.\textsuperscript{35} They can

\begin{itemize}
\item \textsuperscript{32} Крыжановский С.Е. Воспоминания [Sergey E. Kryzhanovskiy, Memories] 16 (Berlin: Petropolis, 1929).
\item \textsuperscript{33} Quoted in Власть и реформы. От самодержавной к советской России [State Power and Reforms. From Tsarist to Soviet Russia] 525 (B.V. Anan'ich et al. (eds.), St. Petersburg: Dmitry Bulanin, 1996).
\item \textsuperscript{34} Коловницкий Б.И. “Трагическая эротика”: Образы императорской семьи в годы первой мировой войны [Boris I. Kolonitskiy, “Tragic Eroticism”: Images of the Imperial Family During the World War I] (Moscow: New Literary Observer, 2010).
\item \textsuperscript{35} See further in Borisova & Burbank, supra note 24.
\end{itemize}
be categorised into three groups: (a) officials, (b) people from different social strata who participated in administration and court practice, but were not themselves “professional” officials, and (c) trained legal experts and entrepreneurs employed in both the public and private sectors.

The last group was the most visible and influential especially after the progressive achievements of the Judicial Reform of 1864 that exemplified a messianic attitude towards law. Adversarial procedures in the reformed courts enabled some legal professionals to propagate ideas of natural law by contrasting them to the repressive measures taken against the political opponents of the autocracy in Russia. Also, jury trials were introduced in 1864 as a form of societal participation in judicial process. As a result, courts became a tribune of a much needed political discussion, which resulted in a remarkable politicization of defendants in urban Russia.

After the first astonishing acquittals by jurors of revolutionary terrorists, the reforms were revised. Following Alexander II’s assassination by terrorists in 1881, administrative measures were used in order to prevent revolutionary activities. The intelligentsia voiced concerns about the “illegality” of these measures, which were followed by repressions. The lack of parliamentary institutions, nontransparent autocratic law-making, and administrative repressive measures that changed existing rules further propelled the intelligentsia to support the revolutionary movement.

Lawyers who became politicians used their professional expertise based on their knowledge of jurisprudence, in particular the natural law doctrine, to oppose the legal regime of the Russian empire. Preparing to use the law mainly as an instrument, they paid special attention to formal procedures (legal techniques). Publication and codification of laws started to be perceived as political actions legitimizing various orders of power. The ground was certainly set by jurist politicians, outstanding figures of the Constitutional Democrats’ party (kadety) who were the most influential in the first State Duma.

Their attention to formal matters may be observed from the perspective of the sociological studies of Bourdieu, who attributed “juridical formalism” as being a basic element of lawyers’ symbolic power. He observed that

strong juridical competence especially that of lawyers is closely connected with the competence of experts in juridical struggle trained to use forms and formulations instead of a weapon.


38 Id.
Having enlisted the support of the constituency, liberal leadership pressed change the rules of the game, not on the pages of specialist professional writings but from the rostrum of the State Duma, in which many of them saw a parliament, despite the reality. Opposing their own understanding of what the law should have been to the actual meaning of current state laws, they nullified the opportunity for their own legislative activity. This is demonstrated in a fragment of a speech by the jurist Professor Moisei Iakovlevich Ostrogorskiy (1854–1921) on the plenary powers of the Duma committees:

> It is not only important but undoubtedly necessary for the parliament, that members of the budget committee had the right to demand information and explanations from the state offices. Although it was not mentioned in the Statute of the State Duma, this right of elective representation is readily apparent from the very essence of any legislative institution, which reviews the state budget… Basing upon the parliamentary practice, I do state that we do not need any legal definitions in relation to the right to demand any kind of information and explanations from any government bodies. We do possess this right.39

### 2.3. The People

Ostrogorskiy's lecture on the rights of representatives was not only addressed to his fellow deputies of the first State Duma. His speech was also an example of legal populism that had developed in last decades of imperial Russia and targeted mostly the intelligentsia and those below – the people. The political message of his speech was to challenge the existing basis of the autocratic legal equilibrium. By saying that the Duma possessed a certain right without its formal stipulation in law Ostrogorskiy was claiming that after the 1905 Revolution the consensus of the autocratic legal order had to be reconsidered.

The connection between the sovereign and his people was essential for this consensus. That is why peasants were privileged in the electoral law of the first Duma (December 1906) among already privileged classes. The tsar insisted that a literacy census was not to stipulated in the electoral law, hoping that illiterate representatives will be more “traditional” in their support for autocracy.40 The “people's history” of Russian law still has to be written but research during recent decades allows us to highlight several major points.

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Firstly, the Russian sovereign ruled over diverse groups of the population, united in a vague concept of the “people” (narod) that puzzled Russian imperial elites. As Karamzin put it:

Would it be appropriate to begin a Russian code with, for example, a chapter on civil rights that have never actually existed, and do not exist, in Russia? We have only political [rights] or the particular rights of various state ranks; we have noblemen, merchants, the petty bourgeois, etc. – they all have particular rights – they have nothing in common except that they are called Russians.

Jane Burbank described this diversity as the “collective rights” regime of imperial rule. Indeed, the typical imperial, flexible approach in regulating law for different territories and social classes inhibited the development of uniform legal procedures. The existence of various legal regimes, depending on the region and social group, cannot be ultimately viewed as the politics of central imperial power. Special regulations were frequently created through a dialogue between interested parties; local authorities in particular initiated negotiations with the central authority due to a number of reasons: their own interests, interests of the region and its elites, as well as unprofessionalism or fear of responsibility.

Secondly, the collective rights of the people developed within an imperial structure of enlarging the Eurasian empire. Thus, “collective rights” stipulated in the written law of the Russian empire and guaranteed by the sovereign were not actually imposed by the tsar but negotiated with each group’s elites. The order and social justice provided by imperial law were perceived in terms of “tradition.” The continuity of people’s traditions was guaranteed by a sovereign whose power was presented as patriarchal. That is why the peasants were supposed to be natural supporters of autocracy and were remarkably privileged as desirable representatives, unlike workers. Even workers who actually had strong connections with the countryside were supposed to be contaminated by alien ideas of socialism.

Thirdly, the fact that the tsar granted the law and supervised its enforcement underlined the mutual responsibilities of sovereign and people. The sovereign protected people by providing order and justice through the legislative and judicial

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42 Karamzin 1991, at 90.


44 Nancy Kollmann calls it “moral economy” of people – ruler relationships in Russia in a long term perspective of imperial time: Kollmann 2017, at 139.
institutions of imperial power. At the same time the people provided the resources for institutions functioning within the empire. The administrative layer that had to make the imperial institutions work was the most complex and vulnerable link in this vertical chain. During the Russian monarchy intermediaries of Russian law were in charge of meeting the expectations of both the rulers and the people. These were intermediaries of Russian law who through centuries made it resilient, and it was due to their doubts about the justice and order of the “renewed” autocratic regime that the Duma monarchy did not persist through challenges of World War I.

3. The October Revolution of 1917: Law’s Survival

Significant hardships because of problems with the supply of resources as well as the personal vulnerabilities of Nicholas II as a sovereign and radicalization of the elites made the nexus of people – tsar – intermediaries very problematic. The elected legislative body within the autocratic imperial state could not help to overcome the elites’ radical natural law critique. The insurmountable challenges of World War I dramatically worsened the political and economic situation. In 1917, the Romanov dynasty vanished literally in several days. Since the sovereign was missing, in some months the moderate regime of the Provisional Government collapsed prior to the gathering of the Constituent Assembly. In October 2017 power was taken by the Bolsheviks acting under the banner of “Down with Minister-Capitalists! All Power to the Soviets.”

3.1. Sovereignty

Leon Trotsky acknowledged that the Bolsheviks had drawn lessons from the 1848 Paris Commune in understanding the need to conquer the state, in order to use the state instruments of coercion against their foes. Russian revolutionaries knew about the state’s functioning not only from their prison experiences; many of them, not exclusively Vladimir Ulyanov “Lenin,” had also studied law at university level with exactly the purpose of using it in the struggle against the autocratic regime. Now they used it along with the practices of terror in order to build up the core concept of the new political and legal system: sovereign power.

The first decrees of the Soviet authorities “On Peace” and “On Land” were adopted during the night of the take-over, 25–26 October 1917, at the Second All-Russian

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49 Hereinafter the dates are given in the “old style,” i.e. according to Julian calendar, until the Gregorian calendar was introduced on 14 February 1918.
Congress of Soviets, which was convened the day of the uprising. These decrees aimed to claim sovereignty by a radical departure from the existing order. The decree “On Peace” repudiated agreements with allies and created the result that the Bolsheviks broke with the international community. The decree “On Land” rejected private property and disavowed the basis of the national socioeconomic structure.\(^50\)

The Bolsheviks’ first decrees symbolized a breakdown of the existing rules which the Provisional Government had not dared to undertake without the approval of the Constituent Assembly. The Bolsheviks used the cover of the Second All-Russian Congress of Soviets for these radical changes but still they acted exactly as a Russian sovereign was supposed to: they changed the rules. According to the Russian legal tradition, ultimate authority to grant, make, and change law belonged to the sovereign.\(^51\) How then did they claim this authority?

Already at the very beginning of Soviet power, the source of its legitimacy was declared to be the people (\textit{narod}) and their agencies, i.e. the Soviets. This order was first established in practice at the Second All-Russian Congress. Thereafter, it was postulated in the first article of the Declaration of Rights of the Working and Exploited People enacted on 3 January 1918:

\begin{quote}
Russia is hereby proclaimed a Republic of Soviets of Workers’ Soldiers’ and Peasants’ Deputies. All power, centrally and locally, is vested in these Soviets.\(^52\)
\end{quote}

Later, the Declaration was included as the first chapter of the 1918 Constitution of the Russian Socialist Federative Soviet Republic (RSFSR), with some very important amendments – there was no mention of the Constituent Assembly.\(^53\)

The Bolsheviks had proposed that the Assembly adopts the Declaration in order to promulgate the supremacy of the Soviets as the main source of power. Otherwise, the long-awaited Constituent Assembly would be able to compete with the Soviets in their role as representatives of the will of the people. At the same time, the revolutionary government declared that the Assembly was “counter-revolutionary.” To strip the Assembly of its legitimacy, the Soviets were proclaimed as the only institution that could truly represent the people’s will. Freedom of the press was abolished. On 5 January 1918, when the Constituent Assembly finally

\(^{50}\) Ekaterina Privilova, \textit{A Public Empire. Property and the Quest for the Common Good in Imperial Russia} (Princeton: Princeton University Press, 2014).

\(^{51}\) Borisova & Burbank, \textit{supra} note 24.

\(^{52}\) Декларация прав трудящегося и эксплуатируемого народа [Declaration of Rights of the Working and Exploited People] in \textit{DSA. Vol. 1}, at 320, 321.

gathered, the All-Russian Central Executive Committee declared that its supporters challenged the power of the Soviets and thus were “enemies of the worker-peasants and of the October Revolution.”

Thus, Bolsheviks appeared to be extremely expeditious in acting like a sovereign by making essential laws and claiming that their sovereignty was legitimized. The latter was possible due to the support of many intermediaries of law who continued their work in spite of the radical political changes of the regime.

### 3.2. Intermediaries of Soviet Law

Those who communicated law to the people but wanted to keep their jobs had to face both ethical and pragmatic choices: to accept the Soviet rule and survive or to oppose it and become a counter-revolutionary. To give an example, the General Assembly of the Ruling Senate, a major judicial body of the former regime that supported the Provisional Government, issued a resolution on 23 November 1917 “against the insurrection against the legal authority of the Provisional Government.” However, the meeting of the workers of the Senate Typography section issued another resolution: not to publish the counterrevolutionary resolution of the senators. The Senate was shut down the next day.

This case demonstrates the revolutionary shift in power structures: in addition to violent suppression of counterrevolutionary forces, the technical workers of the state apparatus also played a crucial role in building the new Soviet state. As my previous research demonstrates, the Bolsheviks were most interested in making the intermediaries of Russian law work for them in order to establish their rule all over the country. Thus, as well as taking violent action against counterrevolution, the revolutionary leaders also tried to create clear formal practices for exercising the power that they had seized. Law intermediaries from the previous regime sympathetic to the new authorities were in huge demand.

By the fifth day of the revolution, 30 October 1917, the Council of People’s Commissars had already published the decree “On the Procedure for the Affirmation and Publication of Laws.” The importance of this document was indicated by its rhetorical conclusion “in the name of the republic,” which was included only in legislative acts of fundamental political importance. This decree and the others that followed shortly after were aimed at enabling the country’s new leadership quickly to take possession of prerevolutionary governing practices. The decree stipulated

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54 Телеграмма ВЦИК «О созыве Третьего Всероссийского съезда Советов» [Telegram of the All-Russian Central Executive Committee “On the Convocation of the Third All-Russian Congress of the Soviets”] in *DSA. Vol. 1*, at 284.

55 Borisova 2012.

the rules for official publication of laws which continued pre-revolutionary practice. The Bolsheviks were not the only force that aimed to seize the publication of law by trained intermediaries as a technical practice of governing.

Throughout 1918, the government in Siberia, under one of the Bolsheviks’ most powerful antagonists, Aleksandr Kolchak, published its own bulletin called “Sobranie uzakonenii i rasporiazheni pravitel’sva, izdavaemoe pri Pravitel’stvuiushchem Senate” (“Collection of Legislation and Resolutions of the Government Published under the Ruling Senate”). Of course, it might come as a surprise to some that in fact there was no Senate in the governing bureaucracy of Kolchak. However, it is likely that the Whites’ usage of the old name for their own legislative bulletin had the very same purpose: to utilize the legal practices of the former regime underline the legitimacy of their rule and to give it the appearance of legal order.

The similarity of the formal features of legislation as a specific function of the exercise of power by both the Reds and the Whites (for example, in the form of the publication of legislation in the Collection of Legislation or in the specific language of decrees) is striking. It suggests that law was seen as an administrative technique that ought to be seized alongside telephone lines, railway stations, and telegraphs. It is possible that the symbolic power of the customary form of the law also played a role in helping to legitimize the new regime.

However, in addition to the pre-revolutionary practices of publishing law, the Bolsheviks successfully used new forms of revolutionary adaptivity that were crucial for the dissemination of new laws. According to the aforementioned decree of 30 October 1917 “On the Procedure for the Affirmation and Publication of Laws” new laws had to be published in key newspapers. These publications were also considered official. When publishing revolutionary laws addressed to a general public, newspapers were provided with semi-explanatory semi-propagandistic articles about the new laws. Thousands of copies of Soviet newspapers of the formative years of the Soviet state aided immeasurably the dissemination of the Soviet law throughout the country.

The popular articles about Soviet legislation propagated the ideas of Soviet law. Their messages resembled and actually continued the ethos of prerevolutionary law: that law was to protect the good people and punish the evil doers.

3.3. The People

The Government of Workers and Peasants and its Commissars informed the population that Soviet law would provide justice and order. Also, the Government of Workers and Peasants declared that it would safeguard the interests of the working people. While lawmaking was done by a powerful sovereign which protected the people, those people would foster the “revolutionary legality” of the new regime and make the new law theirs through usage.

57 Decree “On the Procedure for the Affirmation and Publication of Laws,” supra note 56.
For people, the easiest way to operate with the new laws was by dealing with skillful intermediaries from the previous era. Thus, in addition to this continuity of usage by the revolutionaries of prerevolutionary legal techniques and legal ideas, the people themselves facilitated continuity of legal expectations in spite of the innovations of the Soviet legislators.

One of these innovations was a judicial reform aimed at strengthening the “popular” component of court practices by the inclusion of more representatives of the people. The involvement of ordinary people in court procedures was supposed to strengthen the anti-bureaucratic stance of the Bolshevik leaders and provide popular justice informed by the “revolutionary consciousness” of the people. However, instead of new people “bringing life” to courts via their revolutionary aspirations, the local population tended to rely on those who had experience in administrative and legal practices.

There was an interesting continuity in the very pre-revolutionary language of the officials of Bolsheviks’ Ministry of Justice (Narkomiust) unsatisfied with the performance of the local “backward” peasants’ judges in rural courts. In accordance with the will of the local peasants, the same judges continued in their posts, while some officials from the autocratic time – e.g. a former land captain (zemski nachalnik)58 – were elected as people’s judges. This did not live up to the revolutionary expectations of “revolutionary legal consciousness” of the Party leaders and confirmed the intelligentsia’s recurrent stance on peasants’ backwardness.

At the same time the Bolsheviks themselves relied heavily on the expertise of “spetsy” – specialists from the imperial administration. This phenomenon has been interpreted as exemplary of the pragmatism of the Soviet administration.59 If we shift our angle of view away from the political aspirations and practical needs of the top level of the Soviet authorities to that of the ordinary law users, we see another kind of legal pragmatism. The choice of a land captain who did well as part of previous administration to be a judge reflected the value of his legal expertise to the villagers who elected him.

Thus, intermediaries of Russian law and their knowledge of law’s functioning seemed to be pragmatically useful both for those who claimed sovereignty of a new state and also for those who continued to live in it. The Russian legal system was under a process of reconstruction with its basis being restored: the sovereignty of the Soviet government was realized through laws by intermediaries that were recognized by the people.

The system of Soviet-type power relations, in spite of its ideology of suppression of the autocratic past by the centralized command of law, was a continuation of the previous power relations in which people could use the tools of state power

58 As it was reported in Viatka region, in 1918: Retish 2013, at 1794.

59 Peter Holquist, “In Accord with State Interests and the People’s Wishes”: The Technocratic Ideology of Imperial Russia’s Resettlement Administration, 69(1) Slavic Review 151 (2010).
(e.g. fostering legality) in order to protect themselves. People who had normally been seen by elites as positioned politically outside and below the “authorities” were actually involved in the diffusion of the instruments of power,\textsuperscript{60} including laws, before and after both the 1905 and 1917 Revolutions. The irritation of the party inspector over the former land captain as a “people’s judge” resulted from an understanding that people did not just comply with legal commands from the center but appropriated legal order through intermediaries. The system of Russian law was more complex and resilient than top-down thinking in the extreme terms of exclusion versus inclusion, backward versus developed. In a situation of institutional change, the key features of Russian law were delineated more sharply in reaction to the challenges of the social and political environment.

Conclusion

In spite of the traditional interpretation of the October Revolution as a breakdown of the imperial state and its law, the revolutionary changes should be considered as a culmination of prerevolutionary legal trajectories.\textsuperscript{61} The crisis of legitimate power in Russia in 1905–1917 resulted from the clash of extremes of two major modes of elitist legal thinking. The natural law discourse of the universalist/liberal approach was opposed to the traditionalist/conservative approach, which underlined the supreme role of the tsar as a guarantor of rights. The theoretical and political discussions of the representatives of both approaches were fixed on the relationship of the three major elements of Russian law’s functioning: the sovereign, the people, and the intermediaries. In general, a fair allocation of power and justice between these three elements, as I have shown, should be considered as an equilibrium of forces that provided the resilience of Russian law.

The 1905 Revolution forced the autocratic sovereign to accept basic civil rights of that time (as demanded by universalist/liberal elites) but at the same time it challenged conceptualization of sovereign legality that developed in Russia (as defended by the traditionalist/conservative elites). Indeed, according to Russian legal tradition, the tsar was the supreme lawmaker responsible before God for order and justice in the Russian empire. No laws or legal principles could overrule this unique position of the Russian sovereign. That is why natural law rhetoric was treated as a major threat to the autocratic regime, while law was considered as a means to achieve order and provide justice to the population.

After the establishment in 1906 of an elective body (the State Duma) the sovereign power had to recover its authority in order to execute effectively its unseparated administrative and legislative powers. The extreme impetus for the recognition


\textsuperscript{61} Borisova & Burbank, \textit{supra} note 24.
of natural rights stipulated in 1905 in the Manifesto of 17 October resulted in an extreme usage of law as a technical means for providing order. Extreme violence in the struggle against political crime was a means to protect and reestablish the sovereign’s supremacy. New laws technically allowed all the harsh measures.62

As a result, the repressions and unfulfilled promises to let the representatives participate in lawmaking challenged loyalty of legal intermediaries to the tsarist just law. The functioning of the triad that had made Russian law resilient for centuries – the sovereign, the people and the intermediaries – was challenged. The justice and order provided by Russian law was questioned by the technically legal but nevertheless violent administrative measures of the government. Their legitimacy was in particular vulnerable in view of the newly established elective institution, members of which were not in a position to struggle against the political repressions.

World War I worsened the situation in terms of challenges to the existing legal order, subverted by military commands. The supremacy of the sovereign as a powerful protector of the people and guarantor of the legal system’s proper functioning through intermediaries had broken down. The lost equilibrium of the Russian legal system started to be restored after the Bolsheviks directly and aggressively claimed sovereignty of the peoples’ Soviets and managed successfully to seize the legal techniques of governance. They did what the Provisional Government did not: they claimed the sovereignty of the people through the Soviets and used legal means to make intermediaries operate it.

Both intermediaries and people complied with the Soviets’ aggressive claims of sovereign power after the long-lasting political crises of contested sovereignty and an increase of military practices of administration. The leaders of the new Soviet state acted like a sovereign: they changed rules and were ready to enforce them. In relation to intermediaries, they relied heavily on prerevolutionary legal techniques and used some new ones, like propaganda of new laws through popular articles in newspapers, in order to get the new laws communicated by both former and new intermediaries. In relation to the people, the Bolsheviks used and imaginative legal discourse of fostering legality that promised order and justice to those who complied.

As my analysis of Soviet legislation demonstrates, the Soviet legislators invested a great deal of energy to continuing the Russian government’s efforts to foster legality by means of legal techniques.63 The technical ethos of Russian law as

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62 See further Holquist 2003.
a means of governance was recognized by the Bolsheviks in their understanding of revolutionary legality as a technique. Russian law intermediaries of the autocratic regime appeared to cooperate with the Soviets. This co-operation enabled both the people and the new authorities to use law for their purposes.

The theoretical framework of resilience allows us to summarize that sovereign power has been a key element of Russian legal thinking through the 1905–1917 Revolutions. However, it was not the only element. The functioning of sovereign power also depended on two other elements: the intermediaries and the people. In general, the campaigns of “fostering legality” implied participation of all three groups of key stakeholders in the field of Russian law: the sovereign, the intermediaries and the people. The Bolshevik statesmen took power and could sustain it as sovereign power through use of law in addition to violence.

However, there was a new development in Soviet law within the long term Russian legal tradition. Soviet legal doctrine rejected an idea that something can be above the sovereign – an idea that was recognized by both universal and traditional legal thinking in prerevolutionary Russian law. The traditionalists put God’s command for mercy above the tsar, while universalists claimed the principles of natural law were above sovereign power. The Bolsheviks were clearly against any limits of their sovereign power, thus both God and a higher education in law were put under repression, and departments of law were closed in 1919.

However, by 1925 teaching of law was already back in Soviet higher education. The existing literature demonstrates that in 1925–1930s education in Soviet law was focused on the practical tasks of courts’ functioning and administration. This confirms the “technical” interpretation of Soviet law as a means of power. However, we should underline that the theory of law comes back into the educational curriculum in the beginning of 1930s. Was it a coincidence that it was literally in the very same year, 1932, when Stalin claimed that “a peasant man loves legality” that the Institute of Red Professors (Institut Krasnoi Professury) opened a department of “general theory of state and law”? Further research on the relationship of the people, the sovereign and the intermediaries in Soviet law will enable us to answer this question.

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65 Id.
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This article seeks to explain the enduring effect of the Soviet Union and its founding principles upon arbitration in the former Soviet space. It does so by reference to the Soviet Union's attitude towards – and contribution to – the development of arbitration, analysed in three stages: pre-1917, post-1917 and in the post-Soviet space. As part of that analysis the article considers what rights were being arbitrated in the absence of private rights that would otherwise be readily recognisable within an overtly capitalist jurisdiction. After analysing the Bolsheviks' attitude to arbitration, the article seeks to explain that a by-product of the distinctive goals of the USSR was a focus on arbitration as a mechanism for dispute resolution and to demonstrate how arbitration was a necessary component of the Soviet economy, developing as a tool through the arbitrazh tribunals and Moscow Convention 1972, both of which led to a two-track system which encouraged international arbitration but downplayed its significance at the domestic level. The article then seeks to explain the impact of the Soviet Union's approach to commercial arbitration upon modern arbitration in the post-Soviet space. A study of Russia, the CIS and the former Republics demonstrates the lasting impact of Soviet theory and practice on the post-Soviet arbitral environment.

Keywords: arbitration; Arbitrazh Courts; arbitrazh tribunals; commercial litigation dispute resolution; CIS; courts; international arbitration; litigation; Moscow Convention; New York Convention; Soviet Union; USSR.

Introduction

When the Bolsheviks wrestled power from the hands of St Petersburg’s Provisional Government in October 1917, it might be argued that the resolution of disputes by way of arbitration was not at the forefront of their minds. Indeed, there may be some truth in the proposition that the Bolsheviks had not fully thought-through the implications of their revolution for dispute resolution.

Yet, commercial relations continued to exist in Russia and the Soviet Union after October 1917. Indeed, there were also ambitious economic objectives to achieve following the publication of the first five-year plan in 1928, which inevitably focussed attention upon the interface between and performance of state corporate entities. That required individual organisations within the Soviet architecture to recognise that there were rights and obligations between them that required determination by a body other than the court system, which the Soviets’ detested for its “legal fetishism.”

Marxism-Leninism provided an exceptional brand of jurisprudence that was prepared to accept the importance of resolving disputes between commercial (even if not private) actors within the command economy. As with all other facets of economic and social life in the USSR, the revolution had a lasting impact upon the resolution of disputes by way of commercial arbitration.

One might ask how this impact could have been particularly sophisticated given that Marxism-Leninism disputed the very essence of economic exclusivity within a market economy. In those circumstances, what could the former states of the USSR inherit from the Soviet approach to arbitration?
As this article demonstrates, not only does this opinion betray an ignorance of the practical reality of the Soviet economy, it fails to appreciate the legacy (for better or worse) of the legal framework of the USSR on modern day arbitration of commercial disputes within the Russian Federation and the other former fourteen Republics.

Whilst a Soviet jurisprudence hampered the development of domestic arbitration, it encouraged international arbitration between commercial (invariably state) parties that has had a lasting impact upon the culture of arbitration in the former republics of the USSR.

This article explores the development of arbitration in the USSR in the following stages:

(1) Prelude – Attitudes to Arbitration: What was the attitude of the Bolsheviks to determining their own internal disputes extra-judicially?

(2) Awakening – The Subject of Arbitration: What was there to arbitrate in a jurisdiction devoid of private rights?

(3) Coming of Age – Key Features: What were the key features of the USSR impacting upon the development of arbitration?

(4) Maturity – Present Influence: In what sense is the Soviet model for arbitration influencing the landscape of arbitration, both in Russia and the former Soviet space?

1. Prelude – Soviet Attitudes to Arbitration

Before engaging with the development of arbitration in the Soviet Union, it is worth turning the reader’s mind to the attitudes that pre-existed the revolution among those who instigated it. From a cursory glance at these twilight years of Tsarist Russia, it becomes obvious that “the left” had a positive attitude towards the use of arbitration for the resolution of their internal disputes and much less predisposed to make use of the system of Tsarist courts.

1.1. Marxism-Leninism and the Otzovist Arbitration

Fundamentally, the leader of the Bolshevik faction of the Russian Social Democratic Labour Party (RSDLP) Vladimir Ulyanov “Lenin,” was entirely cognisant of the need within his own party political disputes to seek resolution of disputes by independent arbiters. This much is proven by his interaction with the Menshevik and Otzovist factions within the RSDLP.

This peculiar saga was set against a political dispute but was at its heart about the acquisition and dissemination of property.

\[1\] The Otzovist faction of the SDLP demanded complete withdrawal from the process of legal acquisition of political power in Russia. The name of the faction was derived from the infinitive verb of the Russian “to withdraw”: “otozvat.”
In January 1910, the Bolshevik wing of the RSDLP – which was later to form a break-away organisation modelled as the Bolsheviki – entered into an agreement with the remaining Caucasus within the RSDLP.

By way of a resolution of the Central Organ (i.e. the Central Committee of the RSDLP) an agreement was recorded for the dissolution of the Bolshevik wing of the RSDLP and the transfer of all of its property to the Central Committee. The dispossess of the Bolsheviks was a fundamental part of the agreement between the two wings and a key staging post in the anticipated formation of a central organ of the RSDLP for which Lenin himself had campaigned. There is a telling entry in the Sotsial-Demokrat published in December 1911, in which Lenin details his participation in an arbitration for the resolution of what was in essence a commercial dispute within the party arising from the abovementioned agreement.²

Lenin alleged that it was a condition precedent to the transfer of the Bolshevik’s property that all other factions within the party structure reciprocated with respect to their own property. The contract appears to have been “endorsed” by the Central Committee of the RSDLP on the grounds that if the condition precedent was left unsatisfied the Bolshevik’s assets were to be returned to their hands.

There are all sorts of interesting questions about the legal personality attributed to a faction within the RSDLP, but the crucial factor in this story of internal party struggle is that the Bolsheviks filed an application to the Central Committee in December 1910 on the grounds that the agreement was “null and void” and the assets should consequently be returned to the Bolsheviki.

The application was submitted to what Lenin refers to as the “trustees” of the Central Committee. It was referred to arbitration. The three arbitrators – Kautsky, Mehring and Zetkin – were appointed to provide resolution. Lenin’s works do not indicate how these three individuals were chosen. However, the history of revolutionary Europe will inform the reader that these were respected trustees of the socialist movement.

Karl Kautsky was to become one of the most critical commentators on the October Revolution and its consequences. Franz Mehring and Clara Zetkin were senior political figures within the German SPD who had made their name in the radical politics of early 20th century Germany. Simply put, these three arbitrators were trusted for their expertise in the politics of the left and the internal mechanics of left wing political organisations in revolutionary Europe. As is evident from this information, the Bolsheviks favoured the use of expert arbiters, entrusted with the power to decide a property dispute (albeit with a political context).

Interestingly, Lenin records that the “court of arbitration” determined that “up to 1 November 1911” part of the assets were to be turned over for account to the

² Vladimir I. Lenin, Collected Works. Vol. 17 (Dora Cox (trans.), Moscow: Progress, 1977); extract from Sotsial-Demokrat, 8(21) December 1911, No. 25.
Technical Commission and the Organising Commission Abroad. Lenin’s account of events is that in October 1910 Mehring and Kautsky resigned their posts as arbitrators (on what grounds we do not discover) and it was considered that Zetkin lacked authority to proceed with the arbitration.

Lenin determines that after 2 November 2011, the “Bolshevik faction” of the RSDLP was no longer bound by the agreement with the remaining wings of the Party. As a consequence, the Bolsheviks repossessed the printing plant and other property that was the subject of the dispute.

The dispute, however, provides an interesting window onto the compatibility of dispute resolution by way of the arbitral mechanism and the Soviet ideology. Some may retort that of course arbitration and mediation are an age-old mechanism of dispute resolution in any event. However, this is to misunderstand the point. The question at the heart of this paper is in what ways socialist revolution in Russia impacted upon dispute resolution by way of arbitration. The Otzovist Arbitration is an important insight into the Leninist view of the arbitrability of rights and obligations in respect of commercial assets.

The fact that the Bolsheviks partook in arbitration prior to the October Revolution should also be viewed within the context of their general aversion to a court system, which perpetuated the economic imbalance within the market economy by its obsession with legal formulae and rules – what was often termed “legal fetishism.”

It is worth underlining that Lenin was not averse to making use of the Tsar’s Courts in circumstances where he considered a civil injustice had been meted out upon the working man. These were not so much narrowed to labour disputes, but instead entailed the protection of commercial rights within a market economy:

Socialists are by no means against the Crown’s court. We are for the use of legality. Marx and Bebel turned to the Crown’s court even against their socialist opponents. It is necessary to know how to do this, and it is necessary to do it.\(^3\)

According to Pashukanis Lenin used the Crown’s court to intervene in a dispute between a profiteer and a humble boatmen.\(^4\) Lenin was, therefore, prepared to balance and prioritise his principles – use of an overtly capitalist judicial structure versus use of the courts to stamp out injustice.

In spite of this, it is undoubtedly clear that the general approach of the Soviets was to develop a scepticism towards the “legal fetishism” of formal judicial process. It

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\(^4\) *Id.*
was, in their view, an obstacle to the achievement of socialist objectives within what should be a planned economy. This fact is important, as will be understood below, when it comes to an analysis of the historical role for the Arbitrazh tribunals in the Soviet legal structure and their future impact upon the development of domestic arbitration within the former republics of the USSR.

2. The Awakening – the Subject of Arbitration

A superficial investigation of socialism within the Soviet Union would lead the observer to conclude that rights and obligations were non-existent accept those that were unidirectional (i.e. between the individual and the State). For reasons to be elaborated upon below, that was not always the case and is the key to determining why it is that in some respects arbitration increasingly flourished under successive Soviet administrations, encouraged by the need to resolve disputes between inter-state actors.

For many observers, the starting point for any analysis of the Soviet understanding of ownership is that the Soviet philosophy rejected the concept of property rights at all. That is entirely misleading. The foremost Soviet legal mind of the 1920’s, Evgeny Pashukanis, described how Leninism did not take issue with the natural economy (which he described as the relationship “between a man and a thing”) but with the “commodity-money economy” (the exchange of that thing). It is the question of appropriation, alienation and exchange among private individuals that so irked the Russian communist party (as the Bolsheviks became). Pashukanis sometimes referred to this as “enclosure.” At the heart of the problem is not property or its ownership per se but the exchange thereof by private actors. As Lenin recalled:

Marx repeatedly points out, how at the foundation of civil equality, freedom of contract, and similar principles of the Rechtsstaat, there lie the relationships between commodity producers.

Even so, in the light of the rejection of “exclusive material right,” what place could the arbitration of disputes have within the Soviet context?

At the root of any commercial arbitration is the contractual bargain. Though it is commonly accepted that the arbitration agreement and the body of the contract that

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5 It is essential not to confuse the word “Arbitrazh” with the “Arbitrazh Courts.” As this article explains “arbitration” conducted by the “arbitrazh tribunals” of the USSR was not arbitration as it is commonly understood today. Furthermore, the Arbitrazh Courts are not to be confused with courts of arbitration as understood throughout this field of practice. They are Federal Courts engaged in the resolution of formal litigation of commercial disputes and (in addition, since 2002) the enforcement of arbitral awards in the jurisdiction of the Russian Federation.

6 Pashukanis 1980.

7 Id.
forms the subject of the dispute exist independently (the doctrine of separability),
the contractual relationship between the parties inevitably dictates the remit of the
arbitration and its substantive subject matter.

Given Lenin’s negative mantra about freedom of contract and the perpetuation
of the commodity-money economy, what role was there to be for the arbitration of
rights as between actors within the USSR?

There was such a role for two reasons. The first is that the purist war communism
was swiftly being brought to an end by the mid-1920s. The second is that even
following the demise of market-based reforms by the end of the 1920s there was
still a need to recognise and resolve disputes between state actors, each of which
inevitably acted as commercial entities.

The first point to be made is that the Civil Code of the USSR developed in 1922
was famously formed against the backdrop of the end of “war communism” and the
creation of the New Economic Policy (NEP). The NEP recognised in a limited way the
necessity of market exchange and even the existence of private ownership, though
this was “drastically curtailed” in later revisions as the years of the NEP waned and
became a distant memory in the history of the USSR. The last years of Lenin’s
life, the Soviet Union recognised the need to row-back on some of its purist Marxist
theory for the sake of survival.

If the NEP was a recognition of the need for the market economy on a temporary
basis, the existence of a commodity-money economy meant the need for the
resolution of disputes between parties. However, the crucial role for the commercial
bargain lay not in the private sphere but in the public. Scott Newton has beautifully
articulated the great fallacy committed by many who, with a wave of the hand, dismiss
a planned economy as one devoid of the need for a sophisticated civil law system:

Nationalisation does not do away with private forms, it simply fills them
with public content… the Soviet state deprivatised the individual or “person”
while retaining it in form.

The answer is that the idealist Marxist-Leninist thought was, of course, quickly
eroded within the 1920s by virtue of the fact that state enterprise was an essential
feature of the Soviet economy. One of the fundamental features of the Soviet
economy as it developed in its early years was the concept of khozraschet (“economic
accountability”). Tied-up within this concept was the notion that state enterprises,
by virtue of their relationship with one another, with buyers and sellers within the

8 Scott Newton, Law and the Making of the Soviet World: The Red Demiurge 86–87 (Abingdon, Oxon; New
York: Routledge, 2016).
9 Id. at 90, note 43.
10 Id. at 89–92.
new Soviet market place, would inevitably take upon themselves liabilities and assets. They would have their own balance sheets.

Pashukanis viewed this as a transient feature of the new Soviet economy and saw the ultimate aim as the extinguishment of the legal personality attributed to state enterprises. This was, alas, simply a dream that was never realised. Though Pashukanis is widely considered today to have been the greater of the Soviet legal theorists in this respect, he committed a fundamental error when translating an ideological commitment into legal practice. Commercial “rights and obligations” in one shape or form survived the arrival of socialism and this, for the reasons noted above, was an inevitability.

By 1924 and the passing of Lenin, the Soviet Union had, therefore, conceded that – at least in the short term – it needed to recognise the existence of legal personality to which rights and liabilities attached. By and large these would morph into assets and liabilities held by state-owned entities. Nonetheless, where entities exist that can enter into contractual relationships with other parties, an environment for disputes (and the need for dispute resolution) inevitably emerges.

However, the consideration of paramount importance to Moscow’s legal theorists was to avoid the imposition of a regime of stringent legalistic rules that had in the past always propped-up the inequality of bargaining power that empire had nurtured and was viewed as one of the worst excesses of Tsarist capitalism.

Arbitration was in essence an attempt to escape from the institution of the state courts and the schema of rules that had been handed down within an inherently capitalist system. That scepticism of the state courts was, however, driven from above by the masters of the new era. In the modern age, there remains a degree of scepticism towards the state courts of the Russian Federation, which motivates litigants to seek redress by way of arbitral tribunals, but the process is driven from below by the participants rather than from some overarching political philosophy: it forced one individual to remark that

I do not think it is necessary to convince business people that international arbitration is better than the state courts when dealing with international commercial disputes.12

In conclusion:
(i) Even in the Soviet Union, there were rights and obligations that gave rise to disputes between commercial actors;
(ii) These disputes required resolution by way of proceedings that would be acceptable to the new Soviet ideology.

11 Newton 2016, at 90.
As we will consider below, as the Soviet legal system came of age, it was the arbitral mechanism that was encouraged as the key tool for dispute resolution between commercial actors, though the nature of arbitration differed between inter and intra-state actors.

3. Coming of Age – Key Features

Having considered the subject matter that might form part of an arbitral dispute – namely that there were still rights and obligations between commercial entities that survived the implementation of the Soviet ideology – it is important to consider the key features within the USSR that would influence the continuing development of arbitration in the former Soviet space.

Whilst the ideological commitment to socialism has passed, there are two themes that run through the Russian approach to international commercial arbitration that serve as a legacy of Soviet nurture: Firstly, the development of a strong culture of international arbitration between commercial actors within the Russian Federation and beyond by virtue of the mechanisms for inter-state arbitration that were established by Moscow, particularly during the 1970s. In this respect there remains the fear of external influence by actors despite the abandonment of ideological differences by virtue of what I will call the “Moscow Convention paradigm” that was generated during the Brezhnev years. Secondly, the slower pace of development in domestic arbitration in the Russian Federation, which is in part due to the aims and purposes of the arbitrazh tribunals that were set up during the Soviet period. This was arguably driven by the Soviet state’s obsession with a less rules-driven approach to commercial dispute resolution between intra-state actors.

The reader will note below that the author does not provide a comprehensive chronology of events in the development of commercial arbitration in the USSR. Instead, the focus is upon those crucial turning points in the development of this tool of dispute resolution. That is not to say that the period 1924 (the death of Lenin) to 1972 (the ratification of the Moscow Convention) was devoid of meaningful development. It is simply to acknowledge that the foundations of socialism in the USSR and the burgeoning of arbitration from the 1970s onwards are the crucial periods for this analysis of both the Bolshevik approach and the Soviet contribution to the development of commercial arbitration in the USSR.

3.1. Intra-State Disputes: Domestic “Arbitration”

One of the peculiar features of the Soviet command economy was the fact that state enterprises nonetheless brought “suits” against one another. This was facilitated by the Soviet legal architecture in the form of quite a radical and unique system of tribunals.

From 1921 Gosplan (Gosudarstvennyj planovyy komitet) was established to facilitate the economic re-structuring of the Soviet economy. In 1928 the first Soviet five-year
plan was published, with ambitious objectives for the Soviet economy to achieve under the oversight of Gosplan and the Council of People's Commissars tasked with issuing the decrees that would form the rather abstract legal architecture that would achieve them.

Marxism-Leninism promoted a new model of dispute resolution by way of the arbitrazh tribunals; a regime that was concerned with throwing off the legal fetishism of the past and achieving the clear goals of the planned economy. Article 163 of the 1977 Brezhnev Constitution stated that

> economic disputes between enterprises, institutions, and organisations are settled by state arbitration bodies within the limits of their jurisdiction.\(^{13}\)

These tribunals could have been the successful precursor to a modern, flourishing scene of domestic arbitration. They were not, for a number of reasons:

(i) This tribunal system was not judicial in nature, even though it performed a legal function. Arbitrazh tribunals were the very embodiment of the Bolshevik frustration with legal fetishism and were unaccompanied by judicial instruments to facilitate effective arbitration;

(ii) Arbitrazh tribunals had a fixed purpose, namely to facilitate the Soviet five-year plans, and were not primarily concerned with determining rights and obligations between parties for the purpose of achieving civil justice.

As can be gleaned from the above analysis, the arbitrazh tribunals were the precursor to the Russian Federation's Courts of Arbitrazh, but only in name rather than form. The tribunals were never intended to engage in the application of strict legal rights and were never intended to perform the function of a court of law in that sense. If one observes the Brezhnev Constitution of 1977 it becomes clear that these arbitrazh tribunals were not designed to administer "justice." Only the courts were intended to achieve this. The flip-side of this was that the USSR courts did not have jurisdiction to make determinations in respect of economic disputes between public enterprises.\(^{14}\)

They were primarily, however, concerned with commercial parties operating within what might be described as "the economic sphere."\(^{15}\) The arbitrazh tribunals were, therefore, bodies set up to resolve disputes between commercial parties that were not courts of law. The Soviet Union was from the outset placing non-

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judicial bodies at the forefront of the resolution of commercial disputes as a direct consequence of its philosophy that even dispute resolution needed to be infused with the distinctive world view of Marxism-Leninism.

That is not to say, of course, that the arbitrazh tribunals were unconcerned with rights and obligations as it might be tempting to contend. It is simply that the decisions regarding rights and obligations to which parties were subject were driven by economic and state necessity rather than any sense of civil justice as we might know it today.

What was unique about Gosarbitrazh (state arbitration) was that its work was undertaken both post and pre-contract. Actions for “failure to deliver, breach of warranty, and similar questions” would be brought to “Gosarbitrazh.” Rather distinctive within the Soviet system was the idea that a tribunal could draft a contract on behalf of the parties. The arbitrazh tribunals would step in to forge the very bargain between two parties who were finding it difficult to reach a meeting of minds.

The arbitrazh tribunals were perhaps more akin to the process of adjudication in form. However, they entailed a three-member panel involving a lawyer, a worker and a neutral party. It was in that sense a process that very much mirrored the three-man arbitral process so common in modern international arbitration – one appointed by each party with a neutral arbiter to balance the scales.

The Arbitrazh Courts which now exist in the Russian Federation as commercial courts were developed out of the Soviet arbitrazh tribunals. They had very distinctive roles and operated in a very different manner, but the subject of their decisions – commercial parties – was the same, albeit that the mandate of the arbitrazh tribunals was to facilitate the Soviet plans.

Essentially, the Arbitrazh Courts were not equipped to make the sorts of decisions that parties would expect of arbitral tribunals. Their decisions were not guided by legal principles but by the overriding objective of achieving the Soviet five-year plans. Neither were they facilitated in any way by judicial instruments or the domestic courts.

For all of these reasons, it has been said of the Soviet experiment with arbitration that while domestic private arbitration withered during the Soviet period, international arbitration flourished.

17 Id.
3.2. Inter-State Disputes: International Arbitration

Perhaps the most significant impact of the October Revolution in the field of arbitration was not witnessed until the 1970s, with the dawning of international arbitration between inter-state actors.

The Moscow Convention of 1972 (hereinafter Moscow Convention) was a seminal moment not simply for the USSR and the aligned movement but more widely for the development of international trade and arbitration.

The Moscow Convention was the product of the trade relations between members of the Council for Mutual Economic Assistance (COMECON). Established in 1949, it was a recognition of the strong trading relationship between the Soviet Union and its Eastern bloc. The political raison d’être for COMECON is often over-exaggerated at the expense of an important feature of the global context in which it was created: the Eastern bloc countries would inevitably come to develop strong economic ties with their sponsor, the Soviet Union. In those circumstances a body designed to manage and control that trading relationship was an important part of the future economic infrastructure for the nations that formed COMECON. Disputes between trading entities in any of the member states had to be referred to arbitration in the country of the respondent’s domicile. Alternatively it was open to the parties to choose a third country in which to have the dispute arbitrated providing that this country was also a signatory to the Moscow Convention.

The impact of this organisation (and the Moscow Convention to which it gave birth) upon international arbitration has often been overlooked. The framework for the practice of arbitration for the pursuit of trade goals that was generated by the inter-relationship between the nation states within COMECON was significant for a number of reasons.

Firstly it generated a network of arbitration centres throughout the signatory countries. Each member state of COMECON had its own domestic arbitration centre. The most influential of them all was the Foreign Trade Arbitration Commission (FTAC) based in Moscow. It was established in 1932 as a court of the USSR Chamber of Commerce and Industry and has outlived the Soviet Union even if in another guise, the International Commercial Arbitration Court, which is an arm of the Chamber of Commerce and Industry of the Russian Federation. In 1975, the Verkhovnyi Sovet afforded the FTAC independence from government, with its own procedural rules and competences.

19 It is often considered that COMECON was a direct response to the Marshall Plan of 1948, which was designed to engender stronger pangs of sympathy for a generous U.S. nation willing to dispense with its cash in Eastern Europe.


The second significant effect of COMECON on international arbitration was the aforementioned Moscow Convention, which applied a mandatory international arbitration regime to all those state enterprises of the Member States of COMECON (with some limited exceptions where exclusive jurisdiction was reserved to the domestic courts or governmental organs of the member states). It was designed to regulate the arbitration of disputes that arose from economic, scientific and technical cooperation between the signatory states. Though often overlooked, it was a landmark in the history of international arbitration that was rooted in the Soviet planned economy, rather than the more conventional commercial exchange between private enterprises. Signed on 26 May 1972 it is still technically in force between the surviving states that have not withdrawn – Bulgaria, Cuba, Mongolia, Romania and Russia.

Thirdly, COMECON foresaw that an increasingly globalised world would require greater harmonisation of the rules upon which international arbitration was conducted. The Moscow Convention was followed in 1974 by the adoption of Uniform Rules of Procedure for the arbitration courts within the COMECON countries’ chambers of commerce. A decade prior to UNCITRAL producing its first Model Law on International Arbitration, the USSR was driving COMECON towards greater harmonisation of the rules designed to enhance commercial dispute resolution.22

What the historical fact of the Moscow Convention demonstrates is that between those international actors with mutual aims and objectives, Moscow was actively encouraging a philosophy of international arbitration of the kind that UNCITRAL has increasingly attempted to promote in the 21st century.

Awards in any given dispute would be rendered “final and binding” by virtue of Art. IV(1) of the Moscow Convention. Though they were to be “voluntarily” enforced by the parties, in the event that this did not take place they could be enforced as any other judgment would be in the courts of a signatory state by virtue of Art. IV(2). This is a sophisticated regime for the recognition and enforcement of awards. Though, of course, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 had long pre-existed the Moscow Convention (and Moscow was a signatory), the USSR was engaged in the active promotion of principles of enforcement within its sphere of influence.

The Moscow Convention explicitly recognised that

the courts of arbitration in [member state] countries have proved in practice to be effective instruments for the solving of disputes connected with foreign trade transactions.

It is certainly true to say that the COMECON model for the arbitration of disputes was not always seen as being in keeping with foreign aims, objectives or

22 Pozdnjakov 1986, at 272.
understanding of commercial dispute resolution. This led some commentators to emphasise that Soviet monopolies needed to be “liberal in making concessions” if they were to develop a “healthy commercial exchange” with Western private actors.\textsuperscript{23} This ignores the fact, however, that the FTAC itself – by far the most significant of the arbitral centres and one which has a lasting impact upon the arbitration of international disputes on Russian soil today – built up a strong body of support among Western legal thought, especially due to its robust inclination to avoid what might be considered to be disputes with a particularly political hue.\textsuperscript{24}

Perhaps the greatest drawback to the FTAC was that at this stage of its evolution, the landscape of dispute resolution between domestic and foreign actors was limited to those within the Soviet sphere of influence. For example, it is noticeable that Yugoslavia was not a signatory state to the Moscow Convention presumably as a consequence of its non-aligned status. It might be submitted that this is one of the lasting features of the Soviet approach to the enforcement of awards in the Russian Federation. There is a continuing scepticism towards foreign arbitral awards that are out with that pre-existing sphere of influence. There was no wholesale adoption of what might be referred to as a “Westphalianist theory” of international arbitration within the Soviet legal architecture.\textsuperscript{25} It was only prepared to accept the sovereignty of other jurisdictions over its own state actors insofar as those jurisdictions met with its own unique legal and ideological world view. Prior to the liberalising reforms of the 1980s, Moscow would probably not have desired the participation of non-aligned movement countries in the Moscow Convention paradigm. This has obvious repercussions for the modern Russian approach to international commercial arbitration, which I discuss below.

The FTAC jurisprudence was also not entirely in keeping with the substance of European and Transatlantic thought on the mechanics of international arbitration. The doctrine of separability has in recent years been seen as a key feature of international arbitration, preserving as it does the evidence of consent to arbitrate a dispute, even though the substantive allegation that forms the dispute includes the nullity of the underlying contract between the parties, of which the arbitration agreement at least on its face forms part. However, it is this author’s submission that these differences can often be exaggerated. For example, Sir Alistair Blair-Kerr commented in 1989 that though in the rules of “the FTAC there are no direct references to the fact that an arbitration agreement (arbitration clause) is autonomous in relation to the contract” the conclusion could still be drawn that “the independence of an arbitration clause is not subject to doubt.”\textsuperscript{26}

\begin{footnotesize}
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\item[$24$] Hendrix & Nikiforov 2012.
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In spite of all of the above, there can be no doubt that the FTAC and the Moscow Convention paradigm enhanced in a significant way the arbitration landscape within not simply the republics of the former Soviet Union but also their aligned partners in COMECON.

The 1980s was the decade that created the perfect storm. Following Gorbachev’s speech to the 27th Party Congress in 1985, political and trade liberalisation was the theme of the hour. That would lead to new opportunities for the arbitration of disputes between entities that were permitted the formal civil rights and obligations founded upon the conventional (and private rather than public) contractual relationship that had been denied them for the previous 70 years.

The Soviet infrastructure was still geared towards facilitating the objectives of the planned economy. In the evolutionary process that the legal system went through over the remaining 6 years of Soviet government, synergies and incompatibilities would arise that would generate what I have already referred to as a burgeoning international arbitration scene in Moscow and dwindling opportunities to encourage domestic arbitration.

It is necessary to qualify the contention that the promise for domestic arbitration was less than for international arbitration. Due to the historical nature of the arbitrazh tribunals within the USSR, when the liberalisation of trade came in the 1980s the ordinary courts of the USSR did not possess the authority to rule upon commercial disputes – especially where a public entity was one of the parties. As a consequence the natural substitute was arbitration.

As time passed, however, this body of commercial expertise was indeed built-up by the Courts of Arbitrazh.

At the international level, however, the USSR was readying itself for trade with the West and the disputes that would emerge between them. It resorted to a model that had been widely tested in the past and was respected by jurists: the FTAC.

In 1987, the Presidium of the USSR Verkhovnyi Soviet renamed the FTAC the “Court of Arbitration” within the USSR Chamber of Commerce and Industry. The edict expanded the remit of the new Court to relations between enterprises that were Western, Soviet or otherwise. The FTAC also adopted the increasingly common norms in international arbitration. Rule changes in 1988 meant that the arbitration clause within an agreement was to have legal validity that was separate from the underlying Agreement of which it formed part (developing the now accepted jurisprudence in international Arbitration at the Soviet level).

At the point of its dissolution in December 1991, the Soviet Union had actively promoted international arbitration and contributed to the canon of international law devoted to regulating the arbitral environment.

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4. Maturity – Present Influence

Having addressed the Soviet attitude towards and contribution to arbitration, the final question that this article poses is: What is its legacy for international arbitration in the post-Soviet space? This question is addressed by using the Russian Federation and the CIS as case studies.

4.1. Russia

There are a number of respects in which Russia in the 21st century is an embodiment of the Soviet legacy as far as its approach to international commercial arbitration is concerned. Firstly, arbitration is seen as something other than the achievement of civil justice. Secondly, Russia retains a scepticism towards the enforcement of particular foreign arbitral awards. Each of these points are addressed in turn below.

4.1.1. Arbitration is Not Civil Justice


The new law regulates both international and domestic arbitration. Under the old law there were two regimes for the purpose of arbitrating disputes in the Russian Federation. The first regime regulated domestic arbitration between domestic Russian parties (Federal law of 24 July 2002 No. 102-FZ “On Arbitral Tribunals in the Russian Federation”). The second regulated what is often referred to globally as “international arbitration” (i.e. where there is some foreign entity involved in the dispute or where foreign laws are to be applied to the dispute) (Federal law of 7 July 1993 No. 5338-I “On International Commercial Arbitration”).

As with the Soviet Union, the Russian state remains unsure as to the purpose and role of arbitration in the resolution of commercial disputes and achieving civil justice as between two domestic parties. There is an ongoing perception that the primary purpose of the court system in Russia is very different from the purpose and objectives of commercial arbitration. Article 118(1) of the Constitution of 1993 makes it clear that “justice in the Russian Federation shall be effected only by a court.” This, of course, leaves room for the perception that domestic arbitrations are in essence not performing “civil justice” per se and have a very different function to a court of law. This, the author submits, is a consequence of the delicate relationship between the old arbitrazh tribunals and the more overtly legal judicial system, neither of which had any real relationship with one another and both of which pursued very different

objectives. As a consequence, it can perhaps be asserted that the domestic arbitral scene in Russia has not developed with the same purpose and speed as the field of international commercial arbitration and BIT arbitration.

4.1.2. Enforcement and the Arbitrazh Courts

There is, then, a distinction to be made between the two-track system of development emerging in Russia, which is a direct consequence of the Soviet system of commercial dispute resolution.

However, the second obvious impact of the Soviet approach to dispute resolution has fed-through into the manner in which Russia complies with its obligations under international law to promote the enforcement and recognition of foreign arbitral awards.

The Russian Federation has been a signatory to the New York Convention since 1960. When the Soviet Union was dissolved in December 1991, Russia became the successor state for the purpose of existing treaties with international organisations. However, there were no foreign awards enforced within the “Russian” jurisdiction prior to 1992.

In spite of the fact that awards have been enforced successfully within the Russian jurisdiction since that date, it has been contended that Russian approaches to the enforcement of foreign awards is still particularly revealing. Since 2002 responsibility for enforcing foreign arbitral awards has fallen to the Arbitrazh Courts.

Concerns about the extent to which the Arbitrazh Courts are an obstacle to the otherwise appealing arbitral resolution of disputes where enforcement will be necessary in the Russian jurisdiction, remain at the forefront of many minds.

Articles 35 and 36 of the International Arbitration Law sets out the basis upon which enforcement of a foreign arbitral award might be refused. For the purpose of the Arbitrazh Courts these principles are set out in Art. 244(1) of the Arbitrazh Procedure Code and include the rather infamous provision preventing enforcement on the grounds that it would be contrary to public policy.

Public policy concerns have often been cited as reasons for not enforcing a given award, including on the grounds that the relevant award is “punitive” or “disproportionate to the breach.”

Questions about the jurisdiction of the domestic Arbitrazh Courts and their role in the review of the decisions of arbitral tribunals remain. What is particularly interesting is that in 2011 the Supreme Arbitrazh Court determined that it was within the jurisdiction of the state courts to review a decision of an arbitral tribunal on the question of choice of law. That stands in contravention of the generally accepted principle that the decision of the arbitral tribunal on choice of law sits well within the tribunal’s field of competence and should not be subject to challenge within the domestic courts.

In fact, the Supreme Arbitrazh Court issued limiting and clarifying guidance in respect of the circumstances in which the public policy exception should apply in April 2013. Arbitrazh Courts in Russia were provided guidance that these were exceptional circumstances and should be applied sparingly.

Whilst one should avoid the temptation to reduce the technical decisions of Arbitrazh Courts to overarching political themes, it is clear that until 2013 there was a great deal of discomfort among commercial parties and investors regarding the enforcement decisions of Russia’s enforcement courts. That aversion to the judgment of tribunals seated in foreign jurisdictions is perhaps one of the primary legacies of the Moscow regime for the resolution of disputes between inter-state actors. Whilst the FTAC’s contribution to the field of international arbitration is not to be underestimated, it was until 1987 confined to the regulation of legal relationships between entities within the Soviet sphere of influence (if not within the formal jurisdictional boundaries of the USSR).

The consequence is a temptation in the literature for legal commentators to give prominence to the role of foreign arbitral institutions in disputes with a Russian element. The London Court of International Arbitration (LCIA) and the SCC in Sweden are often championed as strong alternatives to the Russian equivalent to the MKAS. In fact by 2008, MKAS continued to be the “leading international commercial arbitration body for Russia-related disputes.”

This gives hope to those who consider (rightly, in my opinion) that the adoption of the Russian Arbitration Act was just a further illustration of “a long tradition in Russia” of the appetite for resolution of commercial disputes by way of the arbitral mechanism.

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31 Hendrix & Nikiforov 2012.

32 Yuryev & Kantyrev, supra note 30, at 683.
4.2. Beyond the Federation

When the Soviet Union was dissolved formally in December 1991 its legal demise had been prefaced by what Mikhail Gorbachev regarded as an illegal act – namely the purported dissolution of the USSR by three entities acting in consort: the Ukrainian, Belorussian and Russian Soviet Socialist Republics. It has always seemed bizarre that the Soviet Union – associated so closely with the Kremlin for years – was in fact brought down by three soon-to-be independent countries, the largest of which also laid claim to the same Capital as the institution it sought to deconstruct. Nonetheless, on 8 December 1991, these three entities signed the Belazheva Accords that gave birth to the Commonwealth of Independent States (CIS).33

The label “CIS” would from this point on be attributed to many of the former republics of the USSR and would spawn its own rather niche approach to the practice of arbitration law. But the creation of this new creature of international law could not undermine the legacy of the Soviet years for the purpose of dispute resolution and international arbitration. This is most obvious upon a review of the two areas of greatest debate among participants in CIS-related arbitration: the culture of enforcement in the CIS countries and the growth of investor-state arbitrations.

4.2.1. Enforcement

The point made above regarding the extent and scope of the Moscow Convention is directly relevant to the enforcement of arbitral awards in the former Soviet space, except that on this occasion the principle of enforcement as between COMECON signatory states has been internalised within the former membership of the USSR.

In the late 1990s the member states of the CIS entered into the Agreement on Procedure for Mutual Execution of Decisions of Arbitration, economical Courts in the territories of the CIS. Arbitral awards made in any of the countries that are signatory states to this convention will be enforced in another member state on the basis of reciprocity. In these circumstances should the aim be to enforce an arbitral decision in a CIS member state it is safer for the venue and seat of the arbitration to be in a CIS jurisdiction.

4.2.2. Investor State Arbitration

One of the key consequences of the FTAC-inspired journey that the post-Soviet world has gone through is the growth of investor-state arbitration throughout the former republics of the USSR. This is arguably a product of many years of experience (indeed encouragement) of inter-state arbitration now applied to foreign business acting in the former USSR and the CIS countries.

A prime example of this is Kazakhstan. Kazakhstan is a signatory to the CIS Enforcement Agreement, the New York Convention (since 1995), the European

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33 It is commonly forgotten that though Leonid Kravchuk signed the Treaty, it was never ratified by the Verkhovna Rada and so Ukraine never in fact acceded to the CIS.
Convention on International Commercial Arbitration 1961 and, crucially, the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965. Within a few years of its independence, Kazakhstan was keen to emphasise the link between attracting further economic investment and creating a stable environment for dispute resolution.

More recently it has actively encouraged the development of a healthy environment for the resolution of investor-state dispute resolution. Pursuant to Art. 4 of the Law of the Republic of Kazakhstan of 8 January 2003 No. 373-II “On Investments,” an investor in Kazakhstan obtains a degree of the legal protection for their investments and Kazakhstan is a party to at least 39 state-investor conventions. Furthermore, the country is readiness itself for what it hopes is a bright future for the new Astana International Financial Centre Court and International Arbitration Centre.

As always the question is not so much the legal architecture to facilitate arbitration vis-à-vis the state of Kazakhstan but the enforcement of an arbitral award rendered pursuant to the investment laws.

Whilst Kazakhstan has not had need to resort to the “public policy” grounds as a basis to refuse to enforce an award rendered in a foreign jurisdiction, however Kazakhstan’s national law takes priority above and beyond the conventions of international law to which it is a signatory. It has been emphasised that Kazakhstan will only enforce those arbitral awards that have been rendered in the jurisdiction of a country that engages in the reciprocal enforcement of awards rendered by arbitral institutions in Kazakhstan.34

Kazakhstan has perhaps bucked the trend among the former USSR member states in that the Code of Civil Procedure even permits parties the right to have their property disputes before the court of arbitration. Domestic arbitration is encouraged in Kazakhstan with a vigour less evident, for example, in the Russian Federation.35

Conclusion

What lessons do we draw from the above analysis?
Firstly, the Soviet attitude to arbitration as a mechanism for dispute resolution was positive from the outset.
Secondly, the nature of rights and obligations within the commercial sphere of Soviet relations lent themselves to resolution by way of arbitration.

Thirdly, its contribution to the development of arbitration within and outside the USSR is not to be understated. Furthermore, the Soviet legacy for arbitration in the former Soviet space is self-evident.

In the ebb and flow of change at the political level, there emanated from Moscow a consistently distinctive approach to arbitration.

These developments, which in the case of Moscow’s contribution to arbitral disputes at the international level grew apace in the 1970s, encouraged – throughout the Soviet Union and beyond to its sphere of influence in the former republics – an inclination towards the resolution of commercial disputes by way of arbitration. That this same approach was not, in the Russian Federation at least, perhaps fostered at the domestic level is most likely a consequence of the particular role performed by the arbitrazh tribunals within the USSR prior to its dissolution in 1991.

There are some features of the post-1991 regime for the enforcement of arbitral awards rendered by tribunals seated in foreign jurisdictions that may discourage long and hard-fought battles in the Russian Arbitrazh Courts. This appears also to have been a priority for many parties when considering the ease with which arbitral awards may be enforced in the former states of the CIS. However, in the Russian Federation at least, the Supreme Arbitrazh Court in its extra-judicial statements and publications, has gone some way to encouraging the seeds that were sown in the Soviet era so as to ensure that the Russian Federation can remain at the forefront of development in this important field of commercial dispute resolution.

In addition there are strong signs that the growth of investor-state arbitrations in the former Soviet republics is but another example of the way in which the Moscow Convention paradigm has given rise to positive conditions for the development of arbitration in the former USSR.

As this article demonstrates, a century after the October Revolution and almost 26 years after the dissolution of the USSR, the lasting impact of Soviet theory and practice on the post-Soviet arbitral environment is unquestionable.

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The article offers a comprehensive overview of academic views on the strategy and issues of the legal regulation of the Soviet state standardisation system as it formed and evolved. The USSR had a ramified system of legislative acts and codes of practice that thoroughly governed all aspects of quality and safety assurance across all stages of the product lifecycle. They were collectively known as the state system of standardisation. Yet at the turn of the 21st century, this system was largely dismantled under the influence of economic liberalisation ideas, and its underlying documents lost their binding nature. Russia is currently phasing out of the so-called “market romanticism” period shaped by the idea of minimal state interference in the economy, when any imperative provisions of public law specific to the economy were perceived as administrative hurdles. We are witnessing the emergence of a new mechanism of state control over the Russian economy – one based on the principles of the optimisation of state regulation of economic activity. One of the manifestations of this process involves rebuilding the Russian standardisation system on a new footing. Making this process more effective calls for revisiting the Soviet experience and exploring both its strengths and pitfalls.

The article looks into the origins of standardisation in Russia, the key milestones in the history of Soviet standardisation, and the relevant legal regulation. Particular attention is devoted to how state standardisation institutions were established and how changes in the system of state agencies having jurisdiction over the matters of standardisation have influenced the efficiency of this system. The distinguishing features of the Soviet standardisation system, compared to those of other countries, are identified for each stage of system formation and evolution.

A fair amount of attention is given to an analysis of the Soviet paradigm of state regulation of the economy, as well as its historical and ideological underpinnings and key aspects. The way standardisation has been influenced by this paradigm, along with other
paradigms implemented in Russia in recent decades, is analysed. Correlations are drawn between specific aspects of the Soviet paradigm of state administration of the economy, legal issues of standardisation in the USSR and issues of Russian standardisation. The study was undertaken to explore the idiosyncrasies of the Soviet standardisation system attributable to the specifics of the entire economic, administrative, and legal system and ideology of the USSR. This will help identify the positive aspects of this system that were undeservedly discarded upon the transition to the new economic conditions, along with the unresolved legal issues that stand in the way of an effective standardisation system in the Russian Federation.

The study explores standardisation issues through a systemic and structural analysis of Soviet standardisation laws in conjunction with Russian and international legislation and practices. It incorporates a critical review of the major findings of academic and analytical studies focusing on standardisation issues. The study calls for an integrated approach that is indispensable to exploring the conditions under which the Soviet standardisation system formed and evolved in conjunction with changes in the academic community’s perception of the legal nature of standards.

A comparative law study of international experiences concerned with the regulation of standardisation issues primarily focuses on the legislation of the biggest economies. This made it possible to draw a general correlation between the evolutionary trends and specifics of the Soviet standardisation system and the corresponding systems in these countries. The legalistic, systemic and structural, comparative law, and historical law methods of study helped determine the optimal course for legislative improvements in this field.

Keywords: standard; standardisation; Soviet paradigm of state administration of the economy; deregulation paradigm; normative legal act; legal nature of normative legal act.


Table of Contents

Introduction
1. Notion and Legal Nature of Standardisation
2. Standardisation in the Context of the Paradigm of State Administration of the Economy
   2.1. Standardisation in the Context of the Soviet Paradigm of State Administration
   2.2. Deregulation Paradigm and Standardisation
3. Legal Nature of Standards
Conclusion
Introduction

Standardisation is one of the crucial mechanisms behind the progress of human civilisation. Society’s evolution follows two trends. One is variability, or society’s striving and ability to innovate. The other one is stability, or a desire to secure the achievements and make them permanent. When one of these trends prevails and overrides the other, this destroys the underlying fabric of a society’s culture and disrupts its adaptive mechanisms. Indeed, rapid changes occurring over a prolonged period are likely to undermine the functional bonds among various components and strata of society to a point where it starts to resemble “loose sand” (A.N. Lutoshkin). On the other hand, a striving to preserve the status quo at any cost results in stagnation, which is attributable to the inability of society, its specific systems and subsystems to be receptive to external and internal stimuli for progress. This brings us to the biggest challenge of managing a state: the need to maintain an ongoing balance between the variability (progress) and stability (cohesion) of society. The former is achieved via a consistent innovation policy, while the latter is made possible through standardisation, or making the positive achievements permanent by codifying them in standards.

Standardisation, as a form of human social activity, originated a fairly long time ago and was originally associated with material production. The earliest historical evidence of standardisation dates back to the third millennium B.C. when the ancient Egyptians began using stones finished to precision to build their pyramids. The history of Russian standardisation also goes back several centuries. The earliest mentions of standards designed to secure the buyer’s right to receive goods of proper quality were documented in the 9th–13th centuries. Standards were mentioned in the ukases (decrees) of Ivan the Terrible dealing with the calibration of cannon balls. They introduced ring gauges for cannon ball sizing. Official state standards appeared under Peter the Great. Under his rule, standardisation was consistently implemented over a quarter of a century and covered shipbuilding, weapons manufacture, and construction, as well as other critical sectors of the economy at the time. In 1713, Peter the Great established the first government quality inspection committees in Arkhangelsk, Vologda, Narva and other cities. They inspected the quality of flax, timber, hemp, and other goods exported from Russia. Peter the Great also instituted prepackaging rules for export goods.

1 See Степин В.С., Кузнецова Л.Ф. Научная картина мира в культуре техногенной цивилизации [Vyacheslav S. Stepin & Lidia F. Kuznetsova, Scientific Picture of the World within the Industrial Civilization Culture] (Moscow: Institute of Philosophy of the Russian Academy of Sciences, 1994).

2 Определение Сената на просительные пункты, поданные Великобританскими купцами через Английского посла, от 25 января 1713 г. “О браковании пеньки и льна у города Архангельска” [Senate Decree on Requests Submitted by UK Merchants Through the English Ambassador of 25 January 1713 “On Hemp and Flax Quality Inspection Outside the City of Arkhangelsk”] in Полное собрание законов Российской империи с 1649 года. Т. V [Full Collection of Statutes of the Russian Empire since 1649. Vol. V], Art. 2635 (St. Petersburg: Printing Shop of the Second Department of His Imperial Majesty’s Own Secretariat, 1830).
Standards and standardisation gained an even greater importance as the global economy transitioned to mass production based on the manufacture of standardised, i.e. interchangeable, parts.

The international experience has revealed an extensive range of problems and tasks that can be resolved with the help of (or sometimes only through) standardisation. These include the issues of labour and employment of the population,\(^3\) anti-corruption efforts,\(^4\) performance of government functions, and provision of public\(^5\) education\(^6\) and healthcare services. Standardisation theoreticians\(^7\) also attribute such phenomena as literacy, chronology, and even beauty standards to the results of standardisation.

Be that as it may, one of the most important domains of standardisation involves the standardisation of products and the processes of product design (including surveys), manufacture, construction, installation, commissioning, operation, storage, shipping, distribution, and disposal.

The USSR created one of the most effective standardisation systems in the 20\(^{th}\) century. One proof of its effectiveness is the fact that when the International

\(^{3}\) For example, the numerous conventions of the International Labor Organization (ILO), as well as acts of supranational (communitarian) law that form the groundwork of national employment programmes in many countries, which include the establishment of reskilling and retraining centres for the working-age population, free employment services, unemployment benefits, community outreach, institution of job quotas for young people and other socially vulnerable groups in the labour market.

\(^{4}\) The United Nations Convention against Corruption (UNCAC) of 31 October 2003, and the derivative acts of national legislation of the state signatories of this Convention, such as Federal law of 25 December 2008 No. 273-FZ “On Anti-Corruption Efforts,” use a concept such as “anti-corruption standards” and interpret it as a system of prohibitions, restrictions, and permissions that directly or indirectly regulate the conduct of various parties (judges, public and municipal officials and individuals with equivalent status, such as managers of state-owned corporations, civil society institutions, etc.). For details, see Иванов С.Б. и др. Противодействие коррупции: новые вызовы: Монография [sergey B. ivanov et al., Combating Corruption: New Challenges: Monograph] (t.ya. khabrieva (ed.), Moscow: Institute of Legislation and Comparative Law under the Government of the Russian Federation; infra-M, 2016).


\(^{6}\) Scholars have observed that educational standards play a twofold role in the Russian Federation. On the one hand, they guarantee a uniform educational space and serve as a yardstick for the quality of education. On the other hand, they ensure the appropriate variability of curricula at the relevant levels of education and allow the formulation of curricula adapted to different levels of complexity and specialisations with due account of the academic needs and abilities of students. For details, see Андрченко Л.В. и др. Образовательное законодательство России. Новая веха развития: Монография [Lyudmila v. Andrichenko et al., Educational Legislation of Russia. New Evolutionary Milestone: Monograph] (N.V. Putilo & N.S. Volkova (eds.), Moscow: Institute of Legislation and Comparative Law under the Government of the Russian Federation; Yuriusprudentsiya, 2015).

Organization for Standardization (ISO) was established in 1946, the USSR was not only among the founding countries but also manned the secretariats of several technical committees, including TC 37 “Terminology (General Principles and Coordination).”8 Soviet integrated product quality management systems (e.g. the zero-defects workmanship system developed in the mid-1950s at mechanical engineering plants in the Saratov Region, the Gorky “First Product Quality, Reliability, and Longevity” (KANARSPI) system, and the Lviv Standardization-Based Integrated System for Product Quality Management, etc.) served as prototypes for the widely used ISO standards of the 9,000 series.

The Soviet standardisation system was based on scores of legislative acts and codes of practice, chiefly state, industry-specific, and republican standards. They thoroughly governed all aspects of quality and safety assurance across all stages of the product lifecycle in all sectors of the national economy. Their purpose was twofold: On the one hand, they ensured the manufacture of quality industrial and agricultural products. On the other hand, they created conditions favouring lower production costs and an overall reduction in production-related outlays. The latter was accomplished through the unification of designs and the establishment of a reasonably limited mix of part types and sizes, machinery assemblies and devices, mechanisms, equipment and instruments, machining jigs and tools. This ensured the interchangeability of specific parts and components of machinery and products, while also contributing to a more efficient utilisation of feedstock and materials. The relevant requirements were established by standards applicable to various types of products (model specifications; general specifications; parameters and/or dimensions; product mixes, grades, acceptance procedure standards, operation and maintenance rules, etc.). The state standard of the USSR entitled ГОСТ 1.0-68 “State Standardization System. Basic Provisions”9 (hereinafter ГОСТ 1.0-68) also outlined other aspects of standardisation, such as the regulation of manufacturing processes and the definition of units of physical quantities, terms and symbols.

Under the conditions of a command economy, the Soviet standardisation system served as a major regulator of the social fabric and, yet again, was fairly effective. Yet the transition to a new economic reality changed the role and place of standardisation within the system of regulators of societal relations. Everything changed: the structure of the standardisation system and the scope of items and processes subject to standardisation, the legal force of the underlying documents, and the principles and procedure of drafting and applying standards. And yet the reform that brought about such drastic changes lacked appropriate academic

8 This Technical Committee formulated the core terminology used by ISO and all of its members.
underpinnings. Its objectives and stages were not properly coordinated. This caused a drain of standardisation professionals from research institutions and industrial enterprises. The quality of national standards development deteriorated in many areas of standardization, and the overall effectiveness of standardisation declined.

Russia presently faces the task of reversing these negative trends. This calls for a reassessment of the role and place of standardisation within the system of state administration of the economy and for the elaboration of a new legislative model of standardisation. This model should combine both evolved and fundamentally new legal instruments, ensure the legal continuity and preservation of best practices, and offer new legal solutions. This, in turn, calls for a comprehensive study of the Soviet standardisation experience.

This study aims to explore the idiosyncrasies of the Soviet standardisation system attributable to the specifics of the entire economic, administrative, and legal system and ideology of the USSR. This will help identify the positive aspects of this system that were undeservedly discarded upon the transition to the new economic conditions, along with the unresolved legal issues that stand in the way of an effective standardisation system in the Russian Federation. In light of the drastic changes that have taken place in the standardisation system, it would be impractical to study the Soviet experience in this field in isolation from the modern reality. This study therefore analyses the changes in the standardisation system attributable to the command economy and the transition to the new economic conditions.

1. Notion and Legal Nature of Standardisation

The International Organization for Standardization (ISO) defines standardisation as an activity of establishing, with regard to actual or potential problems, provisions for common and repeated use, aimed at the achievement of the optimum degree of order in a given context.

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GOST 1.0-68 offered a similar, albeit more specific, definition. This document defined standardisation as

an activity of establishing and using rules aimed at the achievement of order in a given context for the benefit and with the involvement of all the concerned parties, in particular the achievement of universal optimum cost savings while ensuring the proper conditions of operation (use) and adhering to safety requirements.\(^{12}\)

It went on to elaborate:

Under the conditions of the socialist command economy, the most crucial aspect of standardization is its active role in the administration of the national economy, which is manifested through planned activities of the public authorities, enterprises and organizations aimed at establishing and applying mandatory norms, rules, and requirements geared toward the acceleration of technological progress, greater labour productivity, and product quality improvements.\(^{13}\)

It proclaimed the goals of standardisation to be:

– acceleration of technological progress, and greater effectiveness of social production and labour productivity, including the labour of engineers and managers;
– improvement of product quality and assurance of consistent optimum quality;
– reconciliation of product requirements with the country’s defence needs;
– creation of conditions favouring extensive exports of high-quality products compliant with global market requirements;
– improvement of national economy administration procedures and formation of a sustainable product mix;
– development of product engineering and manufacturing specialisations;
– sustainable utilisation of production resources and sparing use of material and human resources;
– protection of public health and the safety of workers;
– promotion of international economic, technological, and cultural cooperation.\(^{14}\)

In other words, standardisation was a tool of the planned and goal-oriented activities of the state. It was a means of implementing its technical and economic policies.

\(^{12}\) Clause 1.1 of GOST 1.0-68.

\(^{13}\) Id.

\(^{14}\) Clause 2.1 of GOST 1.0-68.
To achieve its goals, the state – represented by the relevant authorities – used standardisation tools and means to establish product specifications and regulate product quality, thereby influencing the activities of business entities in the manufacturing industry, construction, retail, public catering, logistics, and distribution. As such, standardisation was a form of administration by the government represented by its executive and administrative agencies. This activity involved creating unified norms, rules, and requirements for products subject to standardisation, which were intended for an indeterminate circle of entities and individuals, as well as implementing them and ensuring compliance.

Yet one cannot help agreeing with those scholars who believed that no single enterprise can exist and operate in isolation from others. All of them are united by “nourishing” economic ties embodied in the legal form of a contract. In supplying products to one another in pursuance of contracts or production targets, enterprises proceed from the premise that product quality must conform to state standards, specifications or approved specimens under the Fundamentals of Civil Legislation of the USSR and Union Republics as well as other acts of legislation.16

The Fundamentals of Civil Legislation also defined the possible grounds for deviations from the requirements of state standards, specifically where the contract required supplying products whose quality exceeded the quality specifications of the standards (Art. 47 of the Fundamentals).

Legal provisions governing the issues of standardisation were industry-specific and, as such, formed an integrated (cross-disciplinary) institute of law when taken together. Public law (administrative law) provisions predominated in this context. Yet as the standardisation system evolved, a trend towards an expansion in permissive principles emerged. This trend further intensified during the transition from the command economy to a market economy.


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15 Clause 7.1 of GOST 1.0-68 defined the term “implementation of a standard” as “activities aimed at ensuring compliance with the standard.” “Compliance with a standard” was defined as “adherence to norms, rules, and requirements prescribed by the standard within its scope of application from its effective date.”

16 See Емельянова М.Б. Вопросы стандартизации и качества продукции (правовой аспект проблемы) [Maria B. Emelyanova, Standards and Product Quality (Legal Aspect of the Problem)] 11 (Tallinn: Estonian Academy of Sciences, 1967).

is presently the fundamental act governing standardisation in the Russian Federation. It associates standardisation primarily with technical regulation. Standardisation is interpreted as

an institution of law aimed at improving the living standards of citizens and the competitiveness of products, work and services.

This institution is called upon to ensure:

– the promotion of good faith competition among vendors of products, work, and services;
– the manufacture and distribution of innovative and hi-tech products;
– the elimination of formal obstacles to trade;
– improvements in the safety and quality of products, work, and services;
– the protection of the life and health of citizens, the assets of individuals and legal entities, state and municipal property;
– the protection of the environment, life and health of animals and plants;
– the prevention of practices that are misleading to buyers, including consumers;
– energy efficiency and the conservation of resources.

Under this Federal law, the standardisation in the Russian Federation is founded on the principles of the voluntary application of standardisation documents, on the one hand, and the mandatory application of standards in the instances specified by Russian laws, on the other. Under this Federal law and technical regulation legislation, standardisation is portrayed as a decentralised system founded on the principles of voluntary application and freedom of contract. For example, according to Clause 1 of Art. 21 of the Federal law of 27 December 2002 No. 184-FZ “On Technical Regulation”¹⁹ (hereinafter Federal law “On Technical Regulation”), a voluntary conformity verification procedure offers a way to prove that a product subject to standardisation conforms to national standards or other standardisation documents. Conformity verification is carried out at the applicant’s initiative on the terms of the contract between the applicant and the certification authority.

If you look at standardisation from the perspective of the application of the law, it is important to mention that the following question represented a substantial aspect of the debate about the role and place of standardisation in Soviet society: Are requirements of state standards a guaranteed minimum or the upper limit of possible requirements? Some scholars²⁰ believed that a standard established a minimum

²⁰ See, for example, Бахчисарайцев Х.Э. Договор поставки и борьба за качество продукции [Christopher E. Bakhtchisarai'tsev, Supply Contract and Product Quality Assurance] 14–15 (Moscow: Juridical
of requirements for product quality and therefore permitted contract givers and contract acceptors to raise them contractually, and this should not be considered a violation of or deviation from the standard. This position was substantiated by the fact that the obligation to comply with the requirements of a standard should not be an obstacle to product quality improvements or restrain the initiative of enterprise teams aimed at inventing new ways to enhance product quality. Other scholars maintained that product quality should not deviate from the requirements of a standard because standardised product manufacture implies making products in strict accordance with all of its indicators; a violation of at least one indicator should result in product rejection. Unauthorised deviations from a standard in either direction could compromise the whole idea of standardisation in Soviet society. Hence the only possible way to make products with parameters exceeding those set out in standards involves amending the relevant standard. It is safe to say that the proponents of the latter position had the upper hand in this dispute, considering the fact that, according to expert estimates, compared to the requirements of a mandatory minimum set out in standards, the provisions of Russian legislation under which enterprises were allowed to manufacture products of a higher quality were very seldom used.

We attribute this to the fact that the primary objective of standardisation was seen not as the achievement of the optimum degree of order in a given context, as defined in the documents of the International Organization for Standardization (ISO), but as the formalization of comprehensive technical, economic, and aesthetic parameters of each type of product by the socialist state represented by its relevant authorities.

Literature


22 Broslavsky 2015, at 50.

This issue seemingly lost its relevance under the conditions of the transition to a new economic reality, when all standards turned into acts subject to voluntary application. In reality, if a standard is an act subject to voluntary application, the product manufacturer is free to decide how to interpret the provisions of the standard: as a guaranteed minimum or as an upper limit of possible requirements. This issue has yet again been brought to the fore by the passing of the Federal law “On Standardization in the Russian Federation.” Indeed, what should a manufacturer do if his products exceed the requirements of a standard appearing on the list of mandatory standards? Should he lower the product quality? Or should he violate the law by straying from the requirements of the standard? This question remains unanswered for the time being.

2. Standardisation in the Context of the Paradigm of State Administration of the Economy

In each historical era, the principles of legislative regulation of the nation’s economy are underlain by a specific theoretical paradigm and a specific vision of the state’s role in the economy. To quote a notable Soviet scholar, Piotr Nedbaylo,

> legal norms cannot be treated as a kind of self-sufficient entities that are a product of the “legislator’s pure will.” The state is limited by objective laws of social development in all of its activities, including the promulgation of legal norms.24

The specifics of state regulation of the economy are shaped by the need to address a certain range of tasks that arise due to “market failures” and which cannot be resolved “automatically.” Accordingly, it is the paradigm of state administration of the economy adhered to by society and the state that predetermines the use (application) of various regulators of society’s economic activities. This includes standardisation.

The mutual influence between society’s dominant paradigm of state administration of the economy and the processes by which the standardisation system forms and evolves is inherent in all countries.

For example, the Japanese Constitution of 3 May 1947,25 was called upon to create a liberal democratic state after the Western fashion, albeit with the preservation of the monarchical rule. For this reason, among the fundamental rights of its people,

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the Constitution states that the “the right to own or to hold property is inviolable” (Art. 29, para. 1). The Constitution also stipulates (Art. 25, para. 2) that

in all spheres of life, the State shall use its endeavours for the promotion and extension of social welfare and security, and of public health.

In the field of standardisation, this constitutional provision gives national industrial standards different levels of legal force. Standards for the mineral extraction and processing industries are acts subject to voluntary application, whereas standards for medicinal products, agricultural crop pesticides, and mineral fertilisers are mandatory.26

2.1. Standardisation in the Context of the Soviet Paradigm of State Administration

The Soviet state had ambitious goals from day one. The Constitution (Fundamental Law) of the Russian Socialist Federated Socialist Republic (hereinafter 1918 Constitution) passed by the 5th All-Russian Congress of Soviets on 10 July 1918,27 set out the goal of

eliminating all forms of exploitation of a human being by another human being, the complete eradication of the class system, the merciless suppression of exploiters, the establishment of a socialist organization of society, and the triumph of socialism in all countries.

Notable steps toward this goal included:
– in the economy – the abolition of private ownership of land, forests, mineral resources, water, “livestock and deadstock,” exemplary estates and agricultural enterprises, banks, factories, plants, ore mines, railroads and other means of production and transportation; the transfer of these assets into state ownership,28 and the institution of a universal labour duty;29
– in politics – the institution of the “power of laborers over exploiters.”30


28 Clauses (a)–(g) of Art. 3 of the 1918 Constitution.

29 Clause (f) of Art. 3 of the 1918 Constitution.

30 Clause (c) of Art. 3, Art. 7 of the 1918 Constitution.
Scholars observe that the revolutionary wording of the 1918 Constitution not only inspired destructive forces. It justified them by painting pictures of a bright future of “a socialist organization of society and the triumph of socialism in all countries” – a future “without a class system or a government.” After serving its purpose, the 1918 Constitution made way for other, more traditional constitutional acts – the Fundamental Laws of the USSR of 1924, 1936, and 1977. They did away with the vehement wording, the figurative language, and the poetic forms, all the while retaining much of the inner substance.

Having entrenched the underlying principle of socialism – “from each according to his ability, to each according to his contribution” – the Constitution (Fundamental Law) of the USSR (hereinafter 1936 Constitution) approved by a Resolution of the Extraordinary 8th Congress of the Soviets of the USSR on 5 December 1936 proclaimed labour to be an obligation and a matter of honor for each able-bodied citizen according to the principle of “he that will not work shall not eat.”

Meanwhile, the Soviet economy was shaped and guided by a state national economy plan in the interests of augmenting the public wealth, steadily improving the workers’ material and cultural standards, strengthening the independence of the USSR and reinforcing its defence capability.

The Constitution (Fundamental Law) of the USSR passed by the Supreme Council of the USSR on 7 October 1977 (hereinafter 1977 Constitution) was even more

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32 Art. 3 of the 1918 Constitution.
33 Id. Art. 9.
34 Конституция (Основной Закон) Союза Советских Социалистических Республик, утвержденная постановлением Чрезвычайного VIII Съезда Советов СССР от 5 декабря 1936 г., Известия ЦИК СССР и ВЦИК, 1936, 6 декабря [Constitution (Fundamental Law) of the USSR, approved by a Resolution of the Extraordinary 8th Congress of the Soviets of the USSR on 5 December 1936, Bulletin of the Central Executive Committee of the USSR and the All-Russian Central Executive Committee, 6 December 1936].
35 Art. 11 of the 1936 Constitution.
pragmatic. It proclaimed the overriding goal of social production under socialism to be the satisfaction of the growing material and spiritual needs of the public.\(^{37}\) To achieve this goal, the state controlled the extent of labour and consumption based on the above-mentioned underlying principle of socialism.\(^{38}\) The Soviet economy was treated as a single national economy complex encompassing all sectors of social production, distribution, and exchange in the territory of the country,\(^{39}\) which had, at its core, the socialist ownership of the means of production in the form of state (national) and collective farm or cooperative ownership.\(^{40}\)

The Soviet paradigm of state regulation of the economy was also consistent with these constitutional precepts. The primary aspects of this paradigm included:\(^{41}\)

– direct state control over the production and commercial activities of enterprises with a prevalence of planning and command methods of the regulation of economic relations;
– a predominance of inspection, oversight, and permissive functions of the executive and administrative agencies over the considerably smaller ratio of analytical and regulatory functions;
– the use of bylaws to institute the bulk of requirements binding on business entities;
– a combination of industry-specific and territorial administration of the economy;
– an externally directed administrative regulation (from government agencies to business entities).

In the context of this paradigm, the state acted as an “all-in-one administrator” (as figuratively described by Prof. Mikhail Piskotin) that regulated not just the processes of economic and social development of the country as a whole but also the production and commercial activities of specific enterprises. To quote him, the methods of umbrella administration were mostly the province of the agencies with overarching terms of reference – the Government of the USSR, governments of Soviet republics, executive committees of local Soviets and functional agencies (chiefly those of the planning and financial nature).

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37 Art. 15 of the 1977 Constitution.

38 Id. Art. 14.

39 Id. Art. 16.

40 Id. Art. 10.

Notably, even they often resorted to methods of direct administration of enterprises, associations, and other subordinated entities by giving them direct tasks, reallocating their resources, etc. As for the industry-specific agencies of state administration, they relied on such methods almost exclusively.42

This distinguishing feature of the Soviet system of state administration was so prevalent as to become reflected even in works of fiction. For example, a novel by Alexander Bek tells a tale of a newly appointed commissar in charge of steel rolling and casting, who demands that the head of the central directorate submit reports on the performance of not just every plant subordinated to this central directorate, but also of every shop within such plants, every furnace and every mill.43

Obviously, this understanding of the government’s role and place in society’s economic domain could not help but influence the evolution of the Soviet standardisation system. Hence, it acquired the following attributes (Table 1):

– the binding nature of standards. Acting as an “all-in-one administrator,” the government gave orders to the subordinated enterprises about the types of products they had to make. The government established all product parameters and characteristics (including aesthetic) and defined the requirements to be satisfied by products at every stage of their lifecycle. Notably, the Soviet standardisation system was created by a society that proclaimed the ideals of asceticism.44 As such, it focused on eliminating the “irrational” and “unnecessary diversity of products.”45 This understanding of the objectives of standardisation was reflected not just in the academic literature but also in normative legal acts concerned with standardization;46


44 This moral construct was entrenched not just in the Moral Code of the Communism Builder, which proclaimed an intolerance of acquisitiveness and infringement on public interests, but also in works of fiction (see, for example, novels by the brothers Arkady and Boris Strugatsky, “The Final Circle of Paradise,”“Monday Begins on Saturday,” and “Tale of the Troika”).

45 Emelyanova 1967, at 10.

the comprehensive nature of standardisation. Finished product requirements were established on the basis of the comprehensive standardisation of the quality parameters of the given product, as well as the feedstock, materials, semi-finished products, and components required for its manufacture;\footnote{Clause 1.1 of GOST 1.0-68.}

the regulation of virtually every step taken by product manufacturers on the part of the socialist state represented by its relevant agencies. Scholars\footnote{See Явич Л.С. Советское право – регулятор общественных отношений СССР [Lev S. Yavich, Soviet Law – Regulator of Social Relations in the USSR] 15 (V.I. Koretsky & S.A. Radzhabov (eds.), Stalinabad, 1957); Явич Л.С. О путях воздействия права на общественные отношения, 6 Советское государство и право 31 (1959) [Lev S. Yavich, On Ways in Which the Law Influences Social Relations, 6 Soviet State and Law 31 (1959)]; Райгородский Н.А. Роль права в ускорении технического прогресса, 2 Правоведение 34 (1961) [Nikolay A. Raigorodskiy, Role of Law in the Acceleration of Technological Progress, 2 Jurisprudence 34 (1961)].} observe that, unlike in capitalist societies, where the government influences the development of productive power only indirectly, the socialist state exerted both direct and indirect influence on the development of both productive power and manufacturing relations. Indirect influence was manifested in the fact that the government had to institute a type of legal regulation of manufacturing relations whereby workers would have a material interest in increasing their labour productivity and developing productive power. Direct influence was exerted by the government by way of prescribing specific methods of production through legislative provisions and codes of practice, particularly standards. To quote Nikolay Raigorodskiy,

the Soviet state had an extensive arsenal of legal means of influencing the development of technology and accelerating technological progress. All it took was for the relevant agencies, while being aware of such legal means, to make better and full use of legal regulation to this end, particularly by \textit{directly ordering} their subordinated organizations (particularly enterprises) to use \textit{specific} more advanced methods of production in terms of the engineering, technology, and management of production.\footnote{Raigorodskiy 1961, at 43.}

This objective was also accomplished with the use of standardisation, as evidenced by the provisions of GOST 1.0-68. This standard called for the development of not just standard specifications (comprehensive technical requirements for specific products) but also standards of model production processes, which would specify the methods and tools for performing and monitoring the process operations involved in manufacturing products of a specific group or type with a view to implementing an advanced production process and ensuring uniform product quality;\footnote{For details, see Ogryzkov 1973, at 97.}
the organisation of the standardisation system according to the industry-specific principle. According to GOST 1.0-68, industry-specific standards (known by their Russian abbreviation “OST,” as transliterated) were one of the core elements of the Soviet standardisation system. They were approved by the ministry or department in charge of the manufacture of the relevant type of product. Activities aimed at the implementation of requirements established by the national and industry-specific standards were an equally important aspect of executive and administrative efforts by industry-specific ministries and departments, as well as cross-industry monitoring and oversight agencies;

the emphasis of the standardisation system on solving product quality issues and arranging quality control. These issues dominated the attention of the Soviet state throughout its history as being critical to ensuring the proper living standards for the population. To quote Valery Kuibyshev, a notable party member and Soviet politician,

the Bolshevik struggle for quality should serve as an additional lever for accelerating the socialist rebuilding of the entire national economy.\textsuperscript{51}

The government looked for (and found) ways to improve the legislative and institutional mechanisms of product quality assurance and quality control. For example, Resolution of the Central Committee of the Communist Party of the USSR and the Council of Ministers of the USSR of 4 October 1965 No. 729 “On the Improvement of Planning and Stepping up Economic Incentives for Industrial Manufacture,”\textsuperscript{52} instituted a process of state certification of product quality. This system existed (with slight modifications) up until the late 1980s, when USSR Council of Ministers Resolution of 21 April 1988 No. 489 “On the Rebuilding of the Activities and Organizational Structure of the State Standards Committee of the USSR”\textsuperscript{53} approved the substitution of this system with a national product certification system. The state mark of quality was instituted in 1967.\textsuperscript{54} It is also important to mention the


\textsuperscript{53} Legal reference system “ConsultantPlus” (Oct. 25, 2017), available at http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=ESU&n=10317&dst=0&profile=UNIVERSAL&mb=93&div=LAW&BASENODE=69774703-3926803787&SORTTYPE=0&rs=282590.2271127933&SEM=-&ts=17862534090446935763202574&opt=1&\%D%1\%E\%E%2\%E%F\%2\%E%0\%D%E%E\%E%0\%E%E%1\%E%2\%E%0\%D%1\%D%0\%E%E%F\%2\%E%F\%0\%D%0%2\%E%E%4%E%0%204890.

Regulation on State Acceptance of Products at Associations and Enterprises, which was approved by the USSR Council of Ministers in May 1986.

Soviet standardisation agencies proceeded from the premise that the proper quality of products was assured at the product design and manufacturing stages. In light of this, quality control was viewed as an ongoing process across all stages of the product life cycle, from design to consumption. To quote Vitaly Ogryzkov,

an essential precondition to product quality assurance involves determining and subsequently formalising at the legislative level the critical technical, economic, aesthetic, and other properties of products, which can ensure product suitability for its intended use at the relatively low cost of social labor given the current level of technological progress.

Having asserted that state standards and other standardisation documents are the means by which the government establishes mandatory product quality requirements, this scholar interpreted them as legal guarantees of quality, i.e. as legal norms used by the socialist state to ensure that state-run organizations meet their obligations to manufacture and sell quality products, and also to protect the interests of product consumers.

<table>
<thead>
<tr>
<th>Certain Features of the Soviet Paradigm of State Administration of the Economy</th>
<th>Idiosyncrasies of the Soviet Standardisation System</th>
</tr>
</thead>
<tbody>
<tr>
<td>– Proclamation of the ideals of asceticism</td>
<td>– Focus of the standardisation system on eliminating the “irrational” and “unnecessary diversity of products”</td>
</tr>
<tr>
<td>– Economic activities under the conditions of a command economy</td>
<td>– Systemic and comprehensive nature of standardisation</td>
</tr>
<tr>
<td></td>
<td>– Planning of standardisation in the context of state planning of research, development, and experimental activities</td>
</tr>
<tr>
<td></td>
<td>– Proclamation of the need to make standardisation proactive</td>
</tr>
</tbody>
</table>

56 Ogryzkov 1973, at 43.
57 Id. at 50.
58 Clause 5.1.1 of GOST 1.0-68.
Several significant aspects are worth mentioning. In light of the mandatory nature of standards, the Soviet standardisation system had considerable protectionist potential. Both products made in the Soviet Union and those imported into the USSR had to meet the requirements of the relevant state standards. For example, the Regulations Governing the Design and Safe Operation of Steam and Hot-Water Boilers established that boilers and their components as well as semi-finished products used in their manufacture procured abroad must meet the requirements of these Regulations. The buyer must verify that the quality of equipment and materials to be supplied meets these Regulations prior to entering into a contract. Any deviations from these Regulations must be cleared by the buyer with the USSR State Committee for Industrial and Mining Safety Oversight prior to entering into a contract.

Boiler strength calculations must be done according to applicable standards of the USSR Ministry of Heavy Mechanical Engineering, except where the umbrella organization of the boiler manufacturers can prove that the calculations done using the methods adopted by the supplier satisfy the requirements of the relevant standards. The umbrella research organization must confirm that materials of foreign brands meet the requirements of these Regulations and are suitable for use on a case by case basis. Copies of the relevant documents must be appended to the boiler data sheet.59

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59 Правила устройства и безопасной эксплуатации паровых и водогрейных котлов, утвержденные Госгортехнадзором СССР 18 октября 1988 г.; согласованы с ВЦСПС 29 марта 1988 г., с Госстроем
In other words, where foreign-made products did not meet the requirements of the state standards of the USSR, a separate permit had to be obtained for the importation and subsequent use of virtually every product item. This offered a way to protect the domestic market and the interests of Soviet manufacturers in foreign trade.

Another distinguishing feature of the Soviet standardisation system was that it was managed by the government. Standardisation was an object of goal-oriented activities of the government and a means of implementing its technical and economic policies.\(^{60}\)

This is one way in which the Soviet standardisation system was different from the standardisation systems in Western Europe and the USA, where private organisations played a significant role in the field of standardisation until recently (and still do in a number of countries).

One of the downsides of the Soviet standardisation system is the excessive regulation of the processes of production setup of new types of products. In particular, GOST 15.302-81 established the procedure for production setup of products previously manufactured at other enterprises, while GOST 15.311-90 regulated the procedure for production setup of serially or mass-produced products that had to be manufactured according to detailed engineering designs of foreign companies. The latter standard applied to products wholly or partly intended to be sold in the domestic market, but was still subject to the terms of contracts and agreements concluded with international companies.

The Soviet paradigm of state administration exhausted itself in the last quarter of the 20\(^{th}\) century. Negative trends in the field of standardisation began manifesting themselves more and more often: Documents of the state standardisation system increasingly started appearing independently of one another. Their requirements were contradictory in a number of cases. This complicated the functioning of the standardisation system as a single whole aimed at the achievement of specific goals. Standardisation also lost its proactive nature in many sectors of the economy. The process of revising and updating state standards and other standardisation documents slowed down appreciably at a time when maintaining the collection of technical regulations at an adequate level required updating at least 10 percent of

\(^{60}\) Халап И.А. Правовые проблемы стандартизации в СССР: Автореф. дис. ... канд. юрид. наук (Ilya A. Khalap, Legal Issues of Standardization in the USSR: Author’s abstract of a thesis for the degree of candidate of jurisprudence) 5 (Moscow, 1969).
that collection annually.\footnote{Концепция развития национальной системы стандартизации, одобрена распоряжением Правительства Российской Федерации от 28 февраля 2006 г. № 266-р, Собрание законодательства РФ, 2006, № 10, ст. 1129 [National Standardization System Development Concept, approved by Russian Government directive No. 266-r of 28 February 2006, Legislation Bulletin of the Russian Federation, 2006, No. 10, Art. 1129].} This led a number of experts to conclude that toward the end of the Soviet period, the standardisation system degenerated into something that was diametrically opposed to it, basically becoming one of the factors contributing to economic stagnation.

Crises affecting the economy as a whole and other aspects of life in the Soviet state started to intensify. These processes caused the government to abandon the command economy and begin a transition to a market economy.

2.2. Deregulation Paradigm and Standardisation

The Russian Constitution adopted in 1993 proclaimed the principles of the freedom of economic activity (Art. 8, para. 1) and the equality of all forms of ownership (Art. 8, para. 2) to be the foundation of the legal policy of the Russian state. Notably, the concept of “market fundamentalism” (a term coined by Joseph Stiglitz) became ingrained in the public consciousness and, by extension, in law-making in the final years of the 20th century. Its quintessence is the notion that only unrestricted market activity leads to the creation of an effective and stable economy,

whereas

- governments are less familiar with the inviolable economic principles and less motivated by them, which is why their interference is most likely to disrupt the functioning of market mechanisms.\footnote{Стиглиц Дж. Доклад о реформе международной валютно-финансовой системы: уроки глобального кризиса. Доклад Комиссии финансовых экспертов ООН [Joseph Stiglitz, Report on the Reform of the International Currency and Financial System: Lessons from the Global Crisis. Report of the UN Financial Experts Committee] 72 (Moscow: International Relations, 2012).}

In the Russian Federation, the ideology of market fundamentalism became embodied in the so-called deregulation paradigm with such key features as:\footnote{Кхабриева & Лукьянова 2016.}

- the minimisation of government involvement in economic processes: According to this paradigm, government involvement in society’s economic processes must be limited to establishing the conditions for economic activities, along with clear and consistent rules of economic conduct, and guaranteeing the legitimacy of
transactions and the discharge of mutual obligations by business entities (with the use of the legal enforcement mechanism, where appropriate);
– the abolishment of the institution of government planning;
– the predominance of indirect government regulation of economic activity;
– administrative regulation aimed at creating conditions that maximally favour entrepreneurial conduct aligned with the interests of consumers.

The transition to new economic principles also necessitated reform in the field of standardisation. The changes affected both the fundamental approaches to forming the standardisation system and the legal status of its constituent documents.

Law of the Russian Federation of 10 June 1993 No. 5154-I “On Standardization”64 expanded the scope of standardisation documents applicable within the Russian Federation by including international (regional) standards, as well as standardisation rules, norms, and recommendations. The same act of legislation introduced the division of the requirements of state standards into mandatory and recommended. Only requirements prescribed by state standards to ensure the safety of products, work, and services for the natural environment, the life and health of people, and property, as well as the technical and informational compatibility and interchangeability of products, the uniformity of control methods, and the uniformity of markings, were recognised as being mandatory for agencies of government and administration, and business entities. Other requirements of state standards for products, work, and services had to be complied with by business entities only pursuant to a contract, or if so instructed, by the engineering documentation of the product manufacturer or supplier, or the work and service provider. Accordingly, one and the same act could include both mandatory and optional norms and provisions. Notably, the wording of many acts making up the state standardisation system made it impossible to decide conclusively whether or not a particular rule was mandatory. This led to a widespread practice whereby the relevant authorities would publish clarifying documents designed to outline the scope of standards and their mandatory requirements. Moreover, in a number of instances – the controlling and oversight agencies decided at their own discretion which provisions merited a review and which did not.

Such conditions resulted in a perfectly logical subsequent stage of system reform called upon to establish quality and safety requirements for products and manufacturing processes. It involved separating mandatory and optional requirements and provisions into different categories of acts. Only technical regulations could establish requirements subject to mandatory application and observance. In their turn, standards (which lost their status as state standards) were viewed as acts subject to voluntary application. The relevant procedure was

instituted by the Federal law “On Technical Regulation.” This Federal law (in its original wording) interpreted standardisation as an activity that involves establishing rules and characteristics with a view to their voluntary recurring application, aimed at the achievement of order in the context of manufacture and marketing of products, and making products, work, and services more competitive.

In turn, a “standard” was defined as a document that establishes – for purposes of voluntary recurring application – the product characteristics, the rules and characteristics of the processes of manufacture, operation, storage, transportation, sale, and disposal, performance of work or provision of services.

The state standardisation system in the Soviet Union was closely integrated with a legal system that regulated a broad range of issues. As a result, many acts of legislation that established certain requirements included references to standards (primarily state standards). When standards became optional, this created legal uncertainty in a number of cases. For example, clauses dealing with taxable assets and activities liable for the mineral severance tax (Art. 337 of the Tax Code of the Russian Federation) until recently included references to state standards of the Russian Federation, industry-specific standards, regional and other standards. This gave rise to claims that this tax was not completely legitimate.

Other notable changes introduced by this Federal law include:
- the abandonment of industry-specific regulation of relations arising in connection with the drafting, adoption, application, and implementation of mandatory requirements for products and processes of product manufacture and distribution;
- a change in the legal status of work and services whereby mandatory state requirements can no longer be established in respect of work or services;
- the abandonment of total control over activities of business entities in favour of the establishment of minimum product safety requirements. The Federal law

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“On Technical Regulation” stipulates that only those requirements without which product safety cannot be ensured may be mandatory. Requirements with respect to product quality and consumer properties, design and workmanship (except where the absence of such requirements makes it impossible to achieve the objectives of technical regulation), and properties accumulated over time, which are capable of causing harm, not immediately, but after a certain “accumulation threshold”\textsuperscript{66} has been exceeded, cannot be mandatory.

The following are specific features of the standardisation system consistent with the deregulation paradigm (Table 2):
– any entity or individual can develop a standard;
– provisions of regional and international standards, as well as the standards of other countries may be applied in the Russian Federation. Notably, such standards do not need to be endorsed (approved, sanctioned for use in the Russian Federation) by the public authorities of the Russian Federation or adapted to the Russian conditions in any way. The only condition that must be complied with is that such standards had to be registered in the Federal Data Fund of Technical Regulations and Standards. Any concerned party could initiate the registration process;
– simplification of the hierarchical structure of the standardisation system.

<table>
<thead>
<tr>
<th>Certain Features of the Deregulation Paradigm</th>
<th>Idiosyncrasies of the Standardisation System</th>
</tr>
</thead>
<tbody>
<tr>
<td>– Abandonment of command economy principles</td>
<td>– Permission for any entity or individual to develop a standard</td>
</tr>
<tr>
<td></td>
<td>– Recommendatory nature of the national standards development programme prepared by the national standardisation authority</td>
</tr>
<tr>
<td>– Minimisation of government involvement in economic processes</td>
<td>– Change in status of national standards to optional</td>
</tr>
<tr>
<td></td>
<td>– Permission to apply provisions of regional and international standards as well as standards of other countries in the Russian Federation</td>
</tr>
<tr>
<td>– Combination of function-specific government administration with self-regulation of economic activities</td>
<td>– Transition to a two-tiered system of standards (national standards and corporate standards)</td>
</tr>
<tr>
<td>– Indirect government regulation of economic activities in combination with multicentric corporate regulation</td>
<td></td>
</tr>
</tbody>
</table>

\textsuperscript{66} In the latter case, Clause 7 of Art. 7 of the Federal law “On Technical Regulation” requires the establishment of requirements with respect to the notification of buyers about potential harm and the factors contributing to it.
– Minimisation of inspection, oversight, and permissive functions of the executive and administrative agencies
– Focus of government administration on the elimination of administrative hurdles
– Administrative regulation aimed at creating conditions that maximally favour entrepreneurial conduct aligned with the interests of consumers

– Focus of the standardisation system on addressing product safety issues but not product quality issues
– Entrenchment of the principle of the inadmissibility of the creation of obstacles to the manufacture and distribution of products, performance of work, and provision of services to a greater extent than is minimally necessary for product safety assurance
– Legislative entrenchment of the principle whereby the greatest possible consideration must be given to the legitimate interests of the concerned parties when elaborating standards
– Abandonment of industry-specific rule-making in the field of technical regulation and standardisation

It is safe to say that while in many Western countries, such as France and Germany, the standardisation system at the turn of the 21st century evolved along the path of making standards more binding and increasing their weight in the eyes of the law, our country moved this process in the opposite direction.

Practical experience shows, however, that by following the deregulation paradigm, we not only failed to resolve the existing standardisation problems but also aggravated them. In particular, the process of the revision of standards was brought to a halt in the early years of the 21st century in the face of the ban on industry-specific rule-making. Adherence to the deregulation paradigm in other aspects of Russian society also gave rise to certain problems. Deindustrialisation, rampant crime, unemployment, capital drain to international offshore jurisdictions, and the barely averted loss of economic sovereignty are just a few of them. It became obvious that society could not evolve without the government’s active involvement in many sectors of the economy and social life. These challenges were answered by legal solutions in which the role of the government was different fundamentally from that of a “night watchman” and observer of economic activity.

A new paradigm of state administration of the economy is currently developing in the Russian Federation. It is known as the optimisation paradigm. The main features that set it apart from the deregulation paradigm are:67

– the focus of government regulation on maintaining a balance between public and private interests;
– a differentiated approach to using the tools of state administration of the economy depending on the specifics of the managed entity and factors that are external in relation to the given managed entity.

67 Khabrieva & Lukyanova 2016.
In the context of this paradigm, the Russian government views standardisation as one of the essential tools of a public policy aimed at raising the living standards of the population and making products, work, and services more competitive.\textsuperscript{68} That is why the enactment of the Federal law “On Standardization in the Russian Federation” became one of the most crucial steps on the path toward the institution of the optimisation paradigm. The major innovation introduced by this act of legislation is that, while preserving the principle of the voluntary application of standards, it has substantially changed the procedure for applying them. According to part 1 of Art. 26 of this Federal law,

documents of the national standardization system shall be applied on a voluntary basis in equal manner and to the same extent regardless of the country and/or place of origin of products (goods, work, services), unless specified otherwise by Russian laws.

In analysing this innovation, it is important to mention the following. The provision whereby laws of the Russian Federation may establish the mandatory nature of standards does not contravene the principle of the voluntary application of standards. This can be explained using the example of Federal law of 30 December 2009 No. 384-FZ “Technical Regulations on the Safety of Buildings and Installations\textsuperscript{69} (hereinafter Technical Regulations on the Safety of Buildings and Installations). According to part 1 of Art. 6 of these Technical Regulations, the Government of the Russian Federation must approve a list of national standards and codes of practice (parts of such standards or codes of practice) whose mandatory application ensures compliance with the requirements of said Federal law\textsuperscript{70} (hereinafter List). Part 4 of the same Article reinforces this provision by stipulating that the national standards and codes of practice appearing on the List are mandatory. However, the fact that a particular national standard has been included in this list does not change its legal nature, because it will be applied on a mandatory basis only for the purposes of ensuring compliance with the requirements of the Technical Regulations on the


\textsuperscript{69} Собрание законодательства РФ, 2010, № 1, ст. 5 [Legislation Bulletin of the Russian Federation, 2010, No. 1, Art. 5].

\textsuperscript{70} The list of national standards and codes of practice (parts of such standards or codes of practice) whose mandatory application ensures compliance with the requirements of the Federal law “Technical Regulations on the Safety of Buildings and Installations” was approved by Russian Government Resolution of 26 December 2014 No. 1521 (Собрание законодательства РФ, 2015, № 2, ст. 465 [Legislation Bulletin of the Russian Federation, 2015, No. 2, Art. 465]).
Safety of Buildings and Installations, but will still be applied on a voluntary basis to ensure compliance with other technical regulations.

The validity of this interpretation is corroborated by the provisions of part 3 of Art. 6 of the Technical Regulations on the Safety of Buildings and Installations, according to which the requirements for buildings, installations, and other assets subject to technical regulation, as well as the approaches to ensuring their safety, which are prescribed by the national standards appearing on the List, may vary. In such case, the project owner (contract giver) may choose which of these requirements and approaches to follow in the context of design (including engineering surveys), construction, retrofitting, major repairs, or demolition (dismantling) of a building or installation. It is perfectly obvious that, in deciding to follow the requirements and approaches established by certain national standards and codes of practice appearing on the List, the project owner (contract giver) will simultaneously decide not to follow the requirements and approaches outlined in other national standards and codes of practice that also appear on the List. It is solely up to the project owner (contract giver) to choose the requirements of which standards to follow and which to ignore.

Overall, the new paradigm of state administration of the economy (the optimisation paradigm) is at a formative stage, which is why its constituent components may change. This can accordingly cause changes in the understanding of the role and place of standardisation in Russian society. This understanding will be shaped by the existing contradictions between actual social relations in the economy and the course of evolution of these relations. That is why the formulation and development of the optimisation paradigm calls for continued efforts to improve the academic and legal underpinnings of standardisation and for a reasonable approach that defines the role of standards in the regulation of economic relations. In particular, this requires the exploration of the issue of the legal nature of standards.

3. Legal Nature of Standards

Legal scholars extensively resort to studying the legal nature of various acts and phenomena as a way to determine the substance of their objects of study. This makes it possible to identify the specific features and typological attributes of the phenomenon being studied, and to perform their typification on this basis. This contributes to improvements in the structure of the Russian legal system and increases the effectiveness of the influence of Russian legislation on processes specific to the state and society.

In different periods of the evolution of standardisation, Soviet and Russian scholars offered different interpretations of the legal nature of standard-setting acts.

The Soviet state devoted a great deal of attention to the issues of standardisation from day one. For example, the USSR restored its membership in the International
Metric Convention in 1925 by a Resolution of the USSR Council of People’s Commissars of 21 July 1925. This Convention and the accompanying regulations (Charter of the International Bureau of Weights and Measures) were recognised as binding on the USSR.\textsuperscript{71} The issues of ensuring the uniformity of measurements were addressed at the national level even earlier than that. Pursuant to the Decree of the Council of People’s Commissars of the Russian SFSR of 14 September 1918 “On the Institution of the International Metric System of Measures and Weights,”\textsuperscript{72} all Soviet institutions and public organisations were obligated to begin implementing the international metric system of measures and weights beginning on 1 January 1919, with the transition to be completed by 1 January 1922.\textsuperscript{73}

During that period, scholars interpreted an all-union standard\textsuperscript{74} as a regulatory legal act or even an act of legislation. For example, Gleb Krzhizhanovsky, who was not only the first chairman of the USSR State Planning Committee and chairman of the State Committee on the Electrification of Russia, but also an academician with the USSR Academy of Sciences, suggested that a state standard be treated

as a law governing the relations between the manufacturer and the consumer.\textsuperscript{75}

A similar position was upheld by Boris Shlifer, who believed that a standard was an act of legislation expressed in the form of a technical document.\textsuperscript{76}

This understanding of the legal nature of a standard crystallised in the course of the formation of the Soviet standardisation system during the pre-war period and was attributable to several factors:

– preconditions of a technical nature. For example, Vladimir Lenin said:

\begin{quote}
\textsuperscript{71} Собрание законов СССР, 1926, № 32, ст. 191 [Collected Laws of the USSR, 1926, No. 32, Art. 191].
\textsuperscript{72} Известия ВЦИК, 1918, № 199 [Bulletin of the All-Russian Central Executive Committee, 1918, No. 199].
\textsuperscript{73} This transition was actually finalised only in the latter half of the 20\textsuperscript{th} century.
\textsuperscript{74} The term “state standard” appeared only in 1940. See Постановление Совнаркома СССР от 23 августа 1940 г. № 1523 “О Всесоюзном Комитете по Стандартизации при Совнаркоме СССР,” СП СССР, 1940, № 22, ст. 545 [Resolution of the USSR Council of People’s Commissars No. 1523 of 23 August 1950. On the All-Union Committee on Standardization under the USSR Council of People’s Commissars, Collected Resolutions of the USSR, 1940, No. 22, Art. 545].
\textsuperscript{76} Шлифер Б.Г. Советско-правовая сущность стандартизации [Boris G. Shlifer, Soviet Law Substance of Standardization] in Сборник законодательных материалов по вопросам стандартизации [Collection of Legislative Materials on Standardization] 3, 7 (Moscow: Standardization and Optimization, 1932).
If it's the will of the government, it should be expressed as a law laid down by the authorities;\textsuperscript{77}

– the binding nature of standards;
– the role which the standardisation system played in the processes of the state's transition to a new “model” of social and economic development and the creation of the nation's industrial infrastructure.

The first step toward forming a standardisation system was the Decree of the Council of People’s Commissars of the Russian SFSR of 30 September 1921 “On Government Contracts and Supplies (Regulation),”\textsuperscript{78} which obligated the contractor to “complete the assignment within the contractually stipulated time frame in a manner satisfactory to both the contractual terms and reasonable technical requirements,” while obliging the supplier to “supply goods of an appropriate quality.” Unscrupulous contractors and/or suppliers faced both material and criminal liability for violating the requirements of this Decree.\textsuperscript{79}

An equally important milestone was the enactment of the Resolution “On Standardization of Export Goods” of 27 April 1923 by the Labour and Defense Council of the Russian SFSR.\textsuperscript{80} In the context of this study, this Resolution is remarkable in that it delegated the functions of elaborating and approving standards, and pre-packaging and packaging requirements to be satisfied by export goods, to the executive and administrative authorities of the USSR: the People’s Commissariat on Foreign Trade and other concerned agencies, which were required to coordinate their standards with the Supreme Council on the National Economy of the Russian SFSR and the Internal Trade Commission under the Labor and Defense Council of the Russian SFSR. As a result, standards were given the status of regulatory acts, whereas documents previously developed by the Committee on References and Standards (uniform standards for car and truck tires, raw hides, cotton, etc.) were


\textsuperscript{78} Известия ВЦИК, 1921, № 230 [Bulletin of the All-Russian Central Executive Committee, 1918, No. 199].


\textsuperscript{80} Собрание узаконений РСФСР, 1923, № 37, ст. 392 [Collected Legislation of the Russian SFSR, 1923, No. 37, Art. 392].
not regulatory acts because they had not been enacted by public authorities, but were merely sent out to recipients via the local offices of the Supreme Council on the National Economy of the Russian SFSR.

It is also important to mention the Regulation on Standardization Authorities, approved by Resolution of the USSR Council of People’s Commissars of 17 June 1933 No. 1230. Under this Regulation, both the All-Union Standardization Committee under the Labor and Defense Council (the supreme standardisation and metrology authority) and the industry-specific standardisation committees were authorised to approve all-union standards. This system existed until 1936, when pursuant to Resolution of the USSR Council of People’s Commissars of 26 June 1936 No. 1123 “On Reorganization of Standardization Practices,” the All-Union Standardization Committee was disbanded and its functions of approving the “most important standards drafted by people’s commissariats” were delegated to the USSR Council of People’s Commissars itself. In other words, their status was elevated to that of normative legal acts of the USSR Government. Other all-union standards, i.e. standards for “products of the sectors of the economy under the jurisdiction of the people’s commissariats of the USSR,” were approved by the relevant people’s commissariats. In other words, they were industry-specific acts. However, the requirements of the standards were binding and had to be applied and complied with in all cases.

This approach, whereby all-union state standards for products were drafted by the people’s commissariats responsible for the manufacture of the relevant products in the absence of a single standardisation authority that could coordinate the relevant activities, resulted in numerous overlaps caused by the fact that standards for the same products were drafted by different agencies, to say nothing of numerous gaps and contradictions in the standardisation system. A situation was fairly common in which the people’s commissariats that approved all-union standards, while defining the obligatory complete delivery set of products, failed to include in the product delivery set any items (accessories or spare parts) manufactured by other enterprises outside their jurisdiction. This made impossible, or at the very least, substantially complicated the use of products compliant with this standard for their intended purpose. For this reason, this approach was declared to be wrong via Resolution of the USSR Council of People’s Commissars and the Central Committee of All-union Communist Party (Bolsheviks) No. 1211 “On All-Union State Standards and the

81 СЗ СССР, 1933, № 39, ст. 235 [Collected Legislation of the USSR, 1933, No. 39, Art. 235].
82 According to Art. 20 of this document, industry-specific standardisation committees were required to submit their standards to the All-Union Standardization Committee immediately after approval.
83 СЗ СССР, 1936, № 33, ст. 304 [Collected Legislation of the USSR, 1936, No. 33, Art. 304]. This document was revoked upon the enactment of the USSR Council of Ministers Resolution of 9 December 1968 No. 956 (СП СССР, 1968, № 23, ст. 168 [Collected Resolutions of the USSR, 1968, No. 23, Art. 168]).
Procedure for Implementing Them.”\textsuperscript{84} The same Resolution reestablished the All-Union Standardization Committee tasked with:\textsuperscript{85}

– developing and approving all-union state standards concerned with product grades;
– establishing the mandatory time frame and procedure for enacting all-union state standards;
– maintaining a consistent numbering of all-union state standards and registering them in the prescribed manner;
– arranging research and experimental efforts associated with standard-setting;
– publishing all-union state standards, scholarly works, catalogs, collections, and other printed materials relating to standardisation.

Meanwhile, the “two-tiered” system of standardisation was preserved: “Particularly important standards” were still approved by the USSR Council of People’s Commissars according to the list approved by the same Resolution of the USSR Council of People’s Commissars of 23 August 1940.

It is important to mention that in the pre-war period, standardisation entirely revolved around the accomplishment of the primary economic goal: The creation of an industrial infrastructure in the shortest time possible. In light of this, standardisation in the Soviet Union acquired the features described above. These features drastically set it apart from standardisation in other countries. They included:

– an understanding (perception) of standardisation as a means by which the government implements its technical and economic policies as part of the system of the administration of the national economy;\textsuperscript{86}
– the prevalence of imperative methods of legal regulation of relations in the field of standardisation. This is one of the reasons why the Soviet state instituted criminal liability for violations of product quality requirements (and subsequently, requirements of all-union standards) before instituting administrative liability;
– the binding nature of all-union standards, irrespective of the level at which they were approved.

World War II and the period of rebuilding of the national economy that followed seemed to prove this approach to be right.\textsuperscript{87} A high level of interchangeability of

\textsuperscript{84} СП СССР, 1940, № 20, ст. 485 [Collected Resolutions of the USSR, 1940, No. 20, Art. 485].

\textsuperscript{85} Постановление о Всесоюзном Комитете по Стандартизации при Совнаркоме СССР, утверждено Постановлением Совнаркома СССР от 23 августа 1940 г. № 1523, СП СССР, 1940, № 22, ст. 545 [Regulation on the All-Union Standardization Committee under the USSR Council of People’s Commissars, approved by Resolution of the USSR Council of People’s Commissars No. 1523 of 23 August 1940, Collected Resolutions of the USSR, 1940, No. 22, Art. 545].

\textsuperscript{86} Khalap 1969, at 5.

\textsuperscript{87} According to expert estimates, the USSR had over 8,600 active state standards by the time World War II broke out; 35% of those standards applied to products of the mechanical engineering and
parts and materials was ensured, specifically thanks to competently organised standardisation efforts, a solid academic footing underlying the state standards, and methods of legal regulation of standardisation adequate for the wartime conditions. This made it possible to convert the manufacturing industry to the needs of the defence industry, evacuate enterprises from the country’s east, and rebuild the economy in the post-war years.

Nonetheless, a new stage of reorganisation of the system of state administration in terms of standardisation had already begun in 1948, when the All-Union Standardization Committee was incorporated into the USSR Council of Ministers’ State Committee on Advanced Technology Implementation in the Economy as the Standardization Directorate. After this committee was disbanded, the Standardization Directorate was subordinated to the USSR Council of Ministers (1951) and was incorporated into the USSR State Planning Committee in March 1953.88 The Standards Committee was only recreated as an independent executive and administrative agency in 1954, following the enactment of Resolution of the USSR Council of Ministers of 13 August 1954 No. 1720 “On Improvement of the State Standard Drafting and Approval Procedure.” These transformations, which reflected a more extensive ongoing process – a search for an optimal system of state administration of all the sectors of the Soviet society, received conflicting interpretations from the academic community. Some experts believed that the delegation of standardisation authority to the USSR State Planning Committee created conditions favouring the coordination of planning with standardisation efforts.89 Others found that it would have been more appropriate to combine the metrology and standardisation management functions within a single government agency, as this would enhance the role of this activity in the accomplishment of economic development, technical and scientific progress objectives.90

The search for an optimum system of state administration of the economy continued after 1954. In the 1950s and 1960s, the Soviet state attempted a transition from the predominantly industry-specific principle to a predominantly territorial principle of administration of the manufacturing industry and construction. It was believed that this would help overcome

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88 Cited from Id. at 90, 93.
89 See, for example, Yakovleva 1954, at 58.
90 See, for example, Стандартизация в России. 1925–2000 [Standardization in Russia. 1925–2000] (G.P. Voro
nin ed.), Moscow: Standards Publishing House, 2000; Савич Н.М. Развитие законодательства о стан-
дартизации и качестве продукции за 50 лет, 25 Основные проблемы развития стандартизации и управле-
numerous departmental barriers that stand in the way of continued development of specialization and cooperation in the manufacturing industry, and ensure that available reserves are utilized to the fullest.\textsuperscript{91}

One of the key elements of this reform involved disbanding 10 all-union and 15 union-republican ministries of the USSR and the corresponding ministries of the Union republics, and substituting them with national economy councils tasked with managing industrial enterprises and organisations of union-republican subordination.\textsuperscript{92} The reform of the system of state administration also affected the field of standardisation:

– the Committee on Standards, Measures, and Measuring Instruments under the USSR Council of Ministers lost its “monopoly” over the approval of state standards. In particular, the Regulation on the State Construction Committee of the USSR Council of Ministers, approved by USSR Council of Ministers Resolution of 15 July 1958 No. 752,\textsuperscript{93} tasked the USSR State Construction Committee with approving state standards for construction materials, products, and utility equipment of buildings, as well as standards for construction tools;

– centralisation in the matter of approval of standards, specifications, recipes for food products and industrial goods manufactured for sale to the population by enterprises of union-republic ministries of the Union republics, enterprises of the local industry, and cooperative organisations was found to be superfluous. In light of this, the Councils of Ministers of the Union republics were authorised to make amendments and additions (“taking into account the local conditions”) to the approved state standards for food products and industrial goods manufactured by enterprises of union-republic ministries of the Union republics, enterprises of the local industry, and cooperative and public organisations.\textsuperscript{94} This provision was


\textsuperscript{93} СП СССР, 1958, № 13, ст. 105 [Collected Resolutions of the USSR, 1958, No. 13, Art. 105].

\textsuperscript{94} Постановление Совета Министров СССР от 2 марта 1957 г. № 225 “О передаче на решение Советов Министров союзных республик вопросов, связанных с утверждением рецептур, технических условий, стандартов и розничных цен на продовольственные и промышленные товары,” СП СССР, 1957, № 4, ст. 41 [USSR Council of Ministers Resolution No. 225 of 2 March 1957. On the Delegation of the Authority to Approve Recipes, Specifications, Standards, and Retail Prices for Food Products.
slightly amended subsequently: According to para. 2 of Subclause (a) of Clause 2 of USSR Council of Ministers Resolution of 16 October 1959 No. 1185 “On Measures to Improve State Standardization and Normalization Efforts,” deviations from the requirements of state standards, and amendments or additions to said standards became possible only with permission from the Committee on Standards, Measures, and Measuring Instruments;

– national economy councils were also vested with powers in the field of standardisation. They were entrusted with the functions of drafting state standards and submitting them for approval, as well as approving the recipes and specifications for manufactured products and the most critical process instructions within the scope of authority given to the national economy council. USSR Council of Ministers Resolution of 17 September 1964 No. 817 broadened the scope of their functions and authority by establishing that national economy councils shall prepare drafts of not just state standards, specifications and process instructions for products made by enterprises of the national economy council, but also drafts of inter-republican and republican specifications. In addition, national economy councils were tasked with monitoring the application of state standards, specifications, and instructions.

During this period, the notion of a standard as the “aggregate of technical and other requirements applied by the state to products for which the standard was approved” became increasingly popular in the scholarly community, alongside the “normative concept” of the legal nature of a state standard, which stemmed from the works by Gleb Krzhizhanovsky and Boris Shlifer.

However, this “dispersion” of standardisation functions and powers among government agencies at different levels predictably compromised the effectiveness of standardisation as a method of state administration of the national economy. The negative effects of the decentralisation of standardisation were documented in USSR Council of Ministers Resolution of 11 January 1965 No. 16 “On Improvement of Standardization Efforts in the Country.”

and Industrial Goods the Councils of Ministers of the Union Republics, Collected Resolutions of the USSR, 1957, No. 4, Art. 41].

95 Legal Reference System “ConsultantPlus.”

96 Положение о совете народного хозяйства экономического административного района, утверждено постановлением Совета Министров СССР от 26 сентября 1957 г. № 1150, СП СССР, 1957, № 12, ст. 121 [Regulation on the National Economic Council of an Economic Administrative District, approved by USSR Council of Ministers Resolution No. 1150 of 26 September 1957, Collected Resolutions of the USSR, 1957, No. 12, Art. 121].


98 Yakovleva 1954, at 57.

Sectors of the manufacturing industry, Union republics, and national economy councils have a large number of unsynchronized and overlapping regulatory documents that define product quality; there is no comprehensive standardization of feedstock, materials, and finished products. Standards in specific sectors of the economy, chiefly the light and food industries, are excessively detailed, the document reads. Looking to reverse these negative trends, said Resolution of the USSR Council of Ministers:

– ordered that all state committees, ministries, and departments of the USSR, Councils of Ministers of the Union republics, and national economy councils take stock of their existing standards for the most important types of products and update them;

– broadened the functions and powers of the State Committee on Standards, Measures, and Measuring Instruments. In particular, it was tasked with coordinating standardisation efforts in the sectors of the economy and establishing a uniform system of technical regulations in the country. It also stipulated that industry-specific technical regulations were to be developed by state committees, ministries, and departments of the USSR only in accordance with the plan approved by the above-mentioned State Committee;

– approved a decision to establish a uniform state procedure for drafting, approving, formalising, and registering state standards and other standardisation documents. GOST 1.0-68 was the document that defined this procedure.

It should be emphasised that the above-mentioned negative trends are just one aspect of the problems caused by an abrupt transition to administration based on the territorial principle. This caused a gap between the industry-specific and territorial allocation of labour, disrupted the established inter-district industry ties, and promoted the development of elements of autarchism. As a result, in the latter half of the 1960s, the positive potential of the economic reform was already exhausted. The economy was reverting back to traditional sources of economic growth, and the administration of the economy returned to an equally traditional industry-specific principle of organisation, which included the disbanding of the national economy councils.

In the field of standardisation, the return to the industry-specific principle of administration was marked by the formation (finalisation) of the Uniform State Standardization System in the form in which it existed up until the collapse of the Soviet Union and the transition from “developed socialism to capitalism.”

1) The types of standardisation documents had been defined by the end of the 1960s – early 1970s. According to clause 3.1.1 of GOST 1.0-68, standards in the Soviet Union were subdivided into the following categories: state standards of the USSR – GOST; industry-specific standards – OST; republican standards of Union republics –
RST; standards of enterprises (associations) – STP. They established the range of norms, rules, and requirements for the products subject to standardisation, defined the types, kinds, and grades of products, their quality parameters, the appropriate tests and testing techniques and methods; prescribed the requirements for product packaging and labeling, the procedure for product transportation and storage, as well as established general technical quantities, units of measurement, and symbols. Specifications that established the range of requirements for specific types, grades, or articles of products were an equally important element of the system;

2) A system of government and administrative agencies tasked with the implementation of standardisation was formed. Within this system, state standards were approved by the State Standards Committee, except for state standards subject to approval by the USSR Council of Ministers and the USSR State Construction Committee. The state pharmacopoeia and temporary pharmacopoeia monographs for medicinal products, which had the effect of state standards and established medicinal product quality requirements, were approved by the USSR Ministry of Health. Industry-specific standards were approved by a ministry (department) in charge of the manufacture of the given type of product depending on its industry-specific jurisdiction; republican standards were approved by the councils of ministers of Union republics or, if authorised by the latter, the state planning committees of the republics or the state construction committees of the Union republics (in respect of products within the product mix of the USSR State Construction Committee). Finally, the standards of enterprises (associations) were approved by the relevant enterprises (or associations). Depending on the type of product, specifications were approved by various entities ranging from all-union and union-republican ministries and departments of the USSR to city councils of people’s deputies and enterprises, production associations, firms, groups, integrated enterprises, as well as collective farms and Soviet farms;

3) The standardisation procedure was defined, and liability for violations of mandatory standards was established.

Under the conditions of constant reforms of the standardisation system, the scholarly community developed several interpretations of the legal nature of state standards. Some scholars believed that a standard is a “technical regulation embodied in a legislative act,” while others emphasised its dual (technical and legal) nature. The “normative concept” of the legal nature of a state standard also remained relevant. Moreover, in the late 1960s, this concept received a major boost

100 Шелестов В.С. Правовые формы регламентации качества продукции: Конспект лекций (на украинском языке) [Vladimir S. Shelestov, Legal Forms of Product Quality Regulation: Lecture Notes (in Ukrainian)] 8 (Kharkiv, 1966).

101 See Emelyanova 1967, at 65.

102 See Яковлева Е.М. Вопросы качества продукции в договоре поставки [Elena M. Yakovleva, Product Quality Issues in a Supply Contract] 22 (Dushanbe, 1964); Халап И.А., Белахов А.Л. Правовое
in the form of GOST 1.0-68, which seemed to resolve the debate as to the legal nature of a standard. It stipulated that standards

are normative and technical documents on standardization, which establish an assemblage of norms, rules, and requirements for the product subject to standardization, and have been approved by the relevant authorities.\footnote{Clause 1.3 of GOST 1.0-68.}

It yet again confirmed the above-mentioned distinguishing idiosyncrasies of the Soviet standardisation system: the binding nature of state or other standards, the leading role of government agencies, not just in shaping the legal space within which standardisation activities are undertaken, but also in drafting and approving the standards.

Nonetheless, the debate continued. Many scholars interpreted a standard as a normative act or a normative legal act,\footnote{See, for example, Khalap 1969, at 23; Ogryzkov 1973, at 74.} which was generally consistent with the provisions of GOST 1.0-68. Yet there were also those\footnote{See Замалин В.С. Стандарт – это ускоритель прогресса, 4 Стандартизация (1965) [Vladimir S. Zamalin, Standard is an Accelerator of Progress, 4 Standardization (1965)]; Красавчиков О.А. Государственный стандарт – система правовых норм, 5 Советское государство и право 72 (1977) [Oktyabr A. Krasavchikov, State Standard is a System of Legal Norms, 5 Soviet State and Law 72 (1977)].} who harshly criticised both the “documentary” and “normative” concepts of the nature of a state standard, instead suggesting that the latter be viewed as “an aggregate of technical and other requirements applied by the state to products for which the standard was approved”\footnote{Yakovleva 1954, at 57.} or as a system of legal provisions that govern social relations arising in connection with products subject to standardisation and that strictly separate a state standard proper from a normative legal act of the relevant authority through which this standard was approved. The proponents of the concept of a standard as a system of legal provisions pointed out the following specific features of a standard:

1) Standards occupy a special place within the mechanism of legal regulation; in and of themselves, standards do not give rise to any rights or obligations for the parties to the relations regulated by them. A standard always interacted with other legal provisions that could belong to different industries;

2) Standards did not incorporate legal sanctions in light of the above-mentioned circumstance: Virtually every GOST standard stated that violations of this standard were “punishable under law”;
3) The content of standards could be drafted using not just linguistic forms of expression of the thoughts and will of the authority approving the standard, but also other methods of expression such as graphics or mathematical formulas.

The scholarly debate about the legal nature of a standard remains just as relevant in the post-Soviet era. In analysing the nature of standardisation documents, some scholars\(^{107}\) have been discussing two independent phenomena: a standard in the sense of a technical regulation and a standard in the sense of a regulatory act of legislation. The concept of a standard as a system of legal (technical and legal) norms, which is not a normative legal act, was revived.\(^{108}\) Although Federal law “On Technical Regulation,” and subsequently, Federal law “On Standardization in the Russian Federation,” have established that national standards are acts subject to voluntary application, a number of scholars still suggest that they should be treated as normative legal acts, or more precisely, as “normative legal acts subject to voluntary application.” We believe that this approach cannot be considered correct.

The legal literature defines a legal act as a written document adopted by an authorised entity at law, which is official in its nature and has a binding force, expresses an order of the authorities or regulates societal relations,\(^{109}\) as an external manifestation of the will of the state, its agencies, local government agencies, or specific individuals, and which incorporates the elements of society’s legal system and is aimed at the individual and normative regulation of societal relations.\(^{110}\) In other words, all scholars who have explored the nature of a legal act in general and a normative legal act in particular have emphasised its binding nature; it must be complied with by all individuals and legal entities to whom it is addressed. Meanwhile, a national standard is deprived of normative properties by the above-mentioned legislative acts and, as such, does not have the attributes of a legal (normative legal) act.

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108 Such a statement of the issue contravenes the position of the ISO, which believes that the document and its table of contents should be treated as a single whole. See Clause 3.2 of Guide 2:2004 “Standardization and Related Activities – General Vocabulary,” supra note 23.


An analysis of the provisions of the Federal laws “On Technical Regulation” and “On Standardization in the Russian Federation,” taken together, makes it possible to identify the following attributes of a national standard:

– it is an official written document in respect of which a specific drafting and approval procedure has been established by law (Chapter 5 of the Federal law “On Standardization in the Russian Federation”) and which is intended for repeated application by an indeterminate circle of persons;

– even though a standard is approved by the federal executive agency in charge of standardisation (the Federal Agency for Technical Regulation and Metrology),\(^{111}\) whether or not the legal relationship covered by the standard will arise is determined by the will of two entities: the state, which approves the standard, and the legal entity that decides to conduct its business in accordance with the provisions of the standard, either at its own initiative or by agreement with its contracting parties;

– a standard is an act subject to voluntary application. This is one of the fundamental principles of standardisation in the Russian Federation. In particular, it is embodied in the provisions of Clause 4 of Art. 16.1 of the Federal law “On Technical Regulation,” according to which the voluntary application of standards and/or codes of practice shall be sufficient for compliance with the requirements of the relevant technical regulations, and the failure to apply them may not be interpreted as noncompliance with mandatory requirements. In such case, the application of preliminary national standards, corporate standards, and/or other documents for assessing conformity to the requirements of technical regulations is allowed.

Accordingly, a standard (national standard) is a legal document whose provisions are applied repeatedly by an indeterminate circle of persons for an indeterminate period of time, and which is an act subject to voluntary application that does not contain any mandatory provisions. All the while, one cannot help but agree that

national standards used in conjunction with technical regulations are regulatory tools that help the state implement its product safety assurance policy.\(^{112}\)

This is specifically its essence and meaning in the context of the Russian legal system. This kind of interpretation of a standard is consistent with the paradigm of the optimisation of legal regulation of the economy, which is presently taking shape in the Russian Federation.\(^{113}\)

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111 Clause 5, Art. 2, Chapter 5 of the Federal law “On Standardization in the Russian Federation.”


113 Khabrieva & Lukyanova 2016.
Conclusion

To sum up the findings of the study, it is important to mention that the Soviet state devoted a great deal of attention to the development and improvement of its standardisation system throughout its history. The first regulatory legal acts were enacted in the Russian SFSR in the early years of Soviet rule. In many countries of the world, standardisation systems also started to form in the first several decades of the 20th century. For example, the British Standards Institution (BSI) was established in 1901, the German Committee for Norms for Mechanical Engineering in 1917, and the French Permanent Standardization Committee in 1918. Yet the standardisation system that formed in the USSR was substantially different. Specifically:

– a distinguishing feature of the Soviet standardisation system was that it was managed by the government. Standardisation served as one of the tools for managing the national economy and was interpreted by both the public authorities and the scholarly community as a consistent activity aimed at establishing and applying mandatory requirements in the interests of Socialist society as a whole. Many elements of the Soviet standardisation system, primarily state standards, were integral to the system of the legal regulation of a broad range of issues. Many legislative acts presently contain references to provisions of national standards when it comes to establishing certain requirements or procedures;

– a distinguishing attribute of the Soviet standardisation system is the binding nature of standards, which defined quality requirements from the technical, economic, and legal perspectives, as mentioned by the quoted authors. This feature of the Soviet standardisation system resulted from the predominant Soviet paradigm of state administration of the economy whereby all aspects of economic activity were strictly regulated by the government. This paradigm was in turn brought to life by both the patterns of our country’s historical evolution and by ideological factors. The mandatory nature of state and other standards had its pros and cons. The former includes the fact that the binding nature of standards turned them into legal guarantees of product quality. It is no accident that modern consumers prefer to buy products with “made to GOST” labels.

The negative effects are as follows:

– a situation in which all product requirements, without exception, are mandatory drastically limits the manufacturer’s initiative and prevents him from upgrading products in a timely manner so as to keep up with the needs of consumers. Specific manufacturers and the entire economic system become unreceptive to innovation, which, in turn, undermines the adaptive mechanisms of the economic system and society at large;

– the binding nature of state and other standards in combination with an unstable system of the state administration of standardisation efforts has given rise to a wide variety of opinions on the legal nature of a standard. Scholars identified at least four concepts of the substance of a standard: the “resultant” concept, whereby a standard
was viewed as a result of specific standardisation efforts; the “documentary” concept, according to which a standard was interpreted as a technical regulatory document; the “normative” concept, which treated a standard as a normative legal act; and the “systemic” concept, which construed a standard as a system of legal norms. One proponent of the latter concept, Oktyabr Krasavchikov, who explored the legal nature of a standard, reached a paradoxical conclusion that there was no “watershed” between the technical provisions of standards and the “regular provisions” of the law. It is important to mention that other scholars uphold the “systemic” concept of the legal nature of a standard to this day, even though national standards are recognised as acts subject to voluntary application under Russian law. Overall, the debate regarding the legal nature of a standard is ongoing.

Further, a new paradigm of state administration of the economy (the optimisation paradigm) is taking shape in the Russian Federation. Its primary components should be a combination of public law and private law methods of state administration, along with a differentiated approach to using the tools of state administration of the economy depending on the specifics of the managed entity and factors that are external in relation to the given managed entity. As part of this paradigm, there is also a need to rethink the standardisation mechanism, and the opportunities and limitations for the application of standards in the accomplishment of the economic and social development tasks faced by Russian society.

There is a need for a new understanding of the legal nature of a standard, as the attributes of a standard laid out in the Federal laws “On Technical Regulation” and “On Standardization in the Russian Federation” make it possible to treat a standard exclusively as a legal document without normative properties. The interpretation of a standard as a recommendatory act does not make it possible to fully utilise the potential of standardisation as a regulator of the economic life of Russian society.

Detailed studies of the Soviet standardisation experience should therefore continue.

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Two Portraits on the Background of the Revolution: Pitirim Sorokin and Mikhail Reisner

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The article is a comparative analysis of the intellectual biographies and the creative heritage of two thinkers, Pitirim Sorokin and Mikhail Reisner, who left a notable mark on 20th century legal, sociological and philosophical thought. The choice of these personalities is largely due to their diametrically opposed reaction to the 1917 revolutionary events in Russia, which decided their destinies and had a direct impact on the nature and content of their theoretical research.

The article examines the facts of the thinkers’ pre-revolutionary biographies which preceded the paradox of the choice made by each of them: Reisner’s gilded childhood and youth did not prevent him from supporting the revolution, in spite of its horrors, while the poverty and adversities suffered by Sorokin from an early age turned him into a tough and uncompromising opponent of the revolutionary chaos and the Bolshevik reforms.

The article pays special attention to the theoretical difference between the thinkers’ positions as well as the philosophical ideas and moral beliefs embodied in their legal and sociological conceptions. The role of the schools of thought in the formation and development of their theoretical views, mindset and ideological attitudes is traced. The strong connection between the scientific traditions and academic fields is shown and the magnitude of the influence of Reisner’s and Sorokin’s teachers and spiritual guides (Jellinek, Kovalevsky and others) is defined. Arguments are provided for the theses on the essential nature of influence of ontological assumptions and methodological preferences in the scientific and theoretical formulations of Sorokin, who supported of the primacy of social reality, and Reisner, who adhered to the primacy of unwritten law.
A common thread running through the entire analysis is the theme of subsequent reflection over the country’s fate after, and the truth of, the revolutionary changes by these two very dissimilar authors, who became contemporaries and participants in one of the most significant events of the 20th century, an event changed the course of global history.

Yet, both authors, whose contribution to the development of the sciences on society and law is beyond any doubt, give substantial grounds for comparative analysis of their ideas, assessments and views. So different in their reaction to what was happening, in their young years they were expecting the revolution with equal ardency, they were looking forward to the destruction of the old world and the creation of a new, more rational and, of course, fairer society in its place. Both of them were influenced by the ideas of European enlightenment during their education, both were full of hopes for Russia’s progressive development. Both Pitirim Sorokin and Mikhail Reisner would later give up most of the illusions of their youth, each of them would overcome positivism in his own way and each of them would make his choice in favor of certain ideals while having – certainly – to sacrifice the other ones. What would affect the choice of these two outstanding scientists, what would predetermine their intellectual and value-related preferences? One might try to find the answer to this question both in the circumstances of their destinies and in the peculiarities of their research biography.

Keywords: Pitirim Sorokin; Mikhail Reisner; Russian Revolution; Russian Orthodox Church.


Table of Contents

Introduction
1. Revolution. The Life “Before”
2. Revolution. The Meeting
3. Revolution. What’s Next?
Conclusion

Introduction

A hundred years ago, an event that forever divided the history of our country into the “before” and the “after” took place. Someone Ivan Bunin – would call this event
the “cursed days,” while others would call it a great victory for the Russian people in the struggle for their rights.

For certain representatives of Russian legal thought, the revolution of 1917 became not only a sketch of the reality but also their own portrait background, on which the colors of life displayed their palettes.

In this article, using the contours of a contrasting comparison, we will describe the portraits of two representatives of the Russian political thought: Mikhail Reisner and Pitirim Sorokin. One believed that, in 1917, the “Russian Troika” finally found its high road, i.e., the road of its own greatness and the salvation of the neighboring nations. The other did not accept the Revolution just like the Revolution did not accept him, he found himself in exile and, at the same time, in the words of D. Merezhkovsky, “on a mission” – a mission dedicated to the existing and future generations.

1. Revolution. The Life “Before”

Both are originally from childhood – the country’s citizen of honor and a modest average everyman. Each of them had his own childhood, with the indescribable colors of the parental home, school fun and first encounters with adults.

Mikhail Reisner’s and Pitirim Sorokin’s childhood can hardly be called similar. However, paradoxically, Pitirim Sorokin – a pauper and a person of humble parentage – found himself in opposition to revolutionary Russia, while Mikhail Reisner – a representative of the “people of miscellaneous ranks” – on the contrary, dived headlong into the Marxist movement. But first things first.

1 “Cursed Days” is the name of a diary by Ivan Bunin where he writes: “the magnificent, centuries-old life that had reigned throughout the entire great expanse of Russia was suddenly cut short and replaced by a bewildering existence, one that was rooted in a pointless, holiday-like atmosphere and in an unnatural abandonment of everything that human society had lived by... there had been a great death in our huge, thousand-year-old home. this home had now been thrown open wide and filled with a huge holiday mob, which no longer saw anything sacred or forbidden in its rooms.” For Bunin, the years after the revolution became the years of “a day of revenge, a time for a universal damnation of these days”: Ivan A. Bunin, Cursed Days: Diary of a Revolution 113, 115, 125 (Chicago: Ivan R. Dee, 1998).

2 “It is not descendants but contemporaries who are the better observers and judges of historical events. The experience of the former, founded only on certain documents, is very unsatisfactory, while the experience of the latter is direct; the acquaintance of contemporaries with events is adequate, as they perceive them daily and personally, while the knowledge of descendants is indirect, occasional, fragmentary and disfigured. This statement is, at any rate, true in the case of those contemporaries who enlarge the circle of their personal experience by the experience of other people, by statistical observations and other scientific methods of supplementing and correcting the individual experience. Utilizing these aids, the contemporary generation is better guaranteed against mistakes than a historian who studies these events some generations after and against the errors of a foreigner observing from a distance the rare and occasional facts that reach his notice” (Pitirim A. Sorokin, Sociology of Revolution (Philadelphia: J.B. Lippincott Company, 1925)).
P. Sorokin was born at the end of the 19th century on Zyrian lands in what is now the Komi Republic. One of Pitirim’s first childhood memories is striking:

A winter’s night. The room in a peasant house is poorly lighted by burning dry birch splinters that fill the room with smoke and elusive shadows. I am in charge of replacing each burnt splinter in the forked iron holder that hangs from the ceiling.

A snowstorm howls outside. Inside, my mother lies on the floor of the room. She is motionless and strangely silent. Nearby, my older brother and a peasant woman are busily occupied. Father is away, looking for work in other villages. I do not understand exactly what has happened but I sense it is something catastrophic and irreparable. I am no longer as cold and hungry as I was a short time ago; yet I suddenly feel crushed, lonely, and lost. A howling storm, fugitive shadows, and the words “died” and “death,” uttered by my brother, and “poor, poor orphans,” mumbled by the peasant woman, deepen my sorrow. I wish father were here but he is not, and we don’t know when he will return.

And further on, after the loss of his mother, Pitirim Sorokin’s life was far from idyllic. A constant struggle for existence and survival became its leitmotif...

Mikhail Reisner was born in 1868 in the town of Vileika, Vilnius province (which was then part of the Russian Empire), into the family of a civil servant descended from Baltic intelligentsia nobles. His father, Andrey (1840–1900), an honorary citizen of the Province of Livonia, “loved art” and “had a good library,” was in the military but later on, after leaving military service due to illness, worked in the Baltic excise offices, where he “rose to the rank of collegiate councilor.” The scientist’s mother, Ekaterina (1848–1928), was one of the daughters of Mikhail Khrapovitsky, who is believed to be a direct descendant of Aleksander Khrapovitsky (1749–1801), the State Secretary of Catherine II.

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3 P. Sorokin’s date of birth is not known for certain. P. Sorokin himself wrote that he was born on 21 January 1889. The passports (of 1911 and 1917) found in the archives show 20 January as his birth date: Pitirim A. Sorokin, A Long Journey: The Autobiography of Pitirim A. Sorokin (New Haven: College and University Press Services, 1963).

4 “Zyrian” or “Komi” is one of the branches of the Finno-Ugric family. In 1911, P. Sorokin’s work on the anthropology of his ancestors – “К вопросу об эволюции семьи и брака у зырян” (“Evolution of the Family and Marriage of Zyrians”) – was published.


There were five children in the Reisner family: two sons and three daughters – Mikhail was the eldest. In his autobiography, he mentioned that he was brought up “in the overall spirit of intellectual romanticism and, from a young age, was looking for a recipe for the salvation of mankind,” one day he wanted to become a member of the clergy, another day he threw himself into mysticism and Tolstoyism, and then Dostoevsky had a strong influence on him.8

With this background, there was no need for Michael Reisner to do per diem jobs in order to earn a living in his childhood. He followed the way of the educated class paved by his ancestors, spending his youth searching for his individual path and the social development for his country.

Pitirim Sorokin met his youth twenty years later than Mikhail Reisner. By that time, the young Pitirim had very many of the steps of his long journey behind him. More than once he could fall headlong from the spirals of time: from the scaffolding of numerous per diem jobs when he was a child and, later on, making his way through the barriers of class inequality in imperial Russia. However, his long journey continued and his fate kept him safe. As for his homeland’s background, in the first decade of the 20th century (when Pitirim was in his twenties), it already had the experience of one small “victorious” war, the first Russian revolution and even several convocations of the first Russian parliament. The changes in social life could not but affect the social attitudes of the young generation of the empire’s citizens. The traditional values were being replaced by social and democratic ideals in the minds of the young. Here is how Pitirim Sorokin himself describes his experience of entering the political life of the country:

My newly formed ideas were reinforced by the Russo-Japanese War of 1904 and particularly by the brewing storm which resulted in the Revolution of 1905. The combined impact of all these forces was so powerful that within two years after my enrollment at the school most of my previous religious, philosophical, political, economic, and social ideologies had collapsed. My previous religiosity was supplanted by a semi-atheistic rejection of the theologies and rituals of the Russian Orthodox Church. Compulsory attendance at church services, imposed by the school, notably stimulated this revolt. My previous Weltanschauung and values were replaced by “scientific theories of evolution” and “natural science philosophy.” My former acceptance of the Tsarist monarchical regime and its “capitalist” economy was replaced by republican, democratic, and socialist views. Previous political indifference gave way to revolutionary zeal. I became an enthusiastic missionary for the anti-Tsarist revolution and the leader of the Social-Revolutionary Party in the school and adjacent regions. It contrast to the Social Democrats, the Social-

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Revolutionary Party claimed to be the party of all labor classes – peasant, worker, and intellectual. Unlike Marxist materialism and the economic interpretation of man and history, the philosophy and sociology of the Social-Revolutionary Party were much more idealistic and integralistic. They emphasized strongly the role of creative ideas, voluntary efforts, the “struggle for individuality” versus the “struggle for existence,” and the importance of non-economic factors in determining social processes and human conduct. My previous Weltanschauung was more congenial to this kind of ideology than to the “proletarian,” “materialistic,” “economic” ideology of Marxian social-democracy. This congeniality explains why I chose the Social-Revolutionary over the Social-Democratic Party and why, throughout my subsequent life, I have never been “infected” by most Marxian ideologies.\(^9\)

Originating from different social classes, socio-economic groups and even geographical areas of Russia, Mikhail Reisner and Pitirim Sorokin meet their youth behind university desks, choosing university as the first laboratory for their political and law-related ideas, views and dreams.

Mikhail Reisner’s entry into university was a predictable event for him and his family. The University of Warsaw was chosen only because it was not far from his father’s place of work and

in view of complete indifference to scientific knowledge, since it was [his] dream to devote [his] life to religion.\(^10\)

However, during his years of studying at the Imperial University of Warsaw, M. Reisner proved to be a talented and capable student and, in his fourth year, even received a university cash reward of 40 rubles for his research paper “On Local Governance.”

In 1892, M. Reisner graduated from the University of Warsaw with the right to begin a doctorate and, by order of the Senior President of the Warsaw Court of Justice, was assigned to work as a junior candidate for a position in the Judicial Department under the Lublin District Court. However, Reisner failed to start a research career at the University of Warsaw. In November 1895, aspiring to obtain an academic degree, M. Reisner applied to St. Vladimir Kiev University. He studied for his tests for a master degree at Kiev University under the supervision of an outstanding Russian legal scholar, Professor Evgeny Trubetsky. The topic of his master’s thesis was research on “The Senate’s Position in the Russian National Law.” After defending his thesis, he went on a long trip to Germany – to Heidelberg University. His academic supervisor

\(^9\) Sorokin 1963, at 43–44.

\(^10\) Reisner 1989, at 143.
at the University was the famous German lawyer, Georg Jellinek, who developed a dualistic concept of state-and-law [regulatory], combining legal positivism and a socio-psychological approach to the study of state and law. Of particular interest is his interpretation of social relations as an intermediary between the state and an individual. As long as state coercion (compulsoriness) does not stand behind social relations, they transform into relations of dependence conditioned not so much by the will of its members but rather by the peculiarities of perception thereof as intuitively clear and naturally developing relations.

Later on, it would be working with Jellinek that would give Reisner an impulse towards studying the psychological aspects of jurisprudence. In 1898, after returning from Heidelberg, M. Reisner received an invitation to join the newly formed Law Department at Tomsk Imperial University and accepted it. He worked as a teacher at Tomsk University until his next trip abroad – a trip which lasted a year and a half (from 12 May 1901 to 1 September 1902). A change in Reisner’s political views would become apparent right after his return. During a public lecture, he came forward with a biting criticism of the imperial regime, got fired from the university and went abroad again. While abroad, Reisner became an illegal representative of the revolutionary Russia in the public opinion of Europe.

For some time, Reisner was the head of the Paris School of Social Sciences through which he tried to create an international socialist school. In 1905 he joined the Bolshevik Party, and in 1907, after the political amnesty, M. Reisner finally returned to Russia and began teaching at St. Petersburg University as a privatdozent at the Department of the History of the Philosophy of Law. He was also elected professor of Advanced (Postgraduate) Courses for Women.

Therefore, during the two decades preceding the Revolution, Mikhail Reisner was able to enter the university walls not only as a student but also as a teacher for several generations of Russian lawyers.

On the other hand, Pitirim Sorokin was just entering the university world in the first decade of the new 20th century. Moreover, the trip from the provinces to university in St. Petersburg was a daring undertaking for Sorokin:

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12 Reisner 1989, at 144.
The cheapest train-fare from that city to St. Petersburg was some eight rubles while my “unexpended balance” had by then been reduced to some three rubles. Having no alternative, I bought a ticket to one of the stations not far from Vologda and boarded the train in the hope of traveling the rest of the way to the city in the “rabbit” class, as ticketless passengers were called in Russia. With my ticket, I passed the first inspection of passengers by the train conductors unnoticed and, hiding myself on the steps of one of the train cars, I remained undetected by the next few inspections. But during one of the subsequent inspections “the rabbit-passenger” was discovered, ordered back into the car, and questioned. I told the conductor quite frankly that I was going to St. Petersburg to find a job and gain an education, that with my money I could afford a ticket only to the station which we had already passed, and that I had hoped to ride the rest of the way as a “rabbit.” Whether the conductor happened to be a particularly kind man or my frank explanation impressed him favorably, he told me that I could continue my trip to St. Petersburg under the condition that I earn my fare by cleaning the cars, particularly the lavatories, and by helping the train-stoker in his work. Gladly accepting his decision to earn my fare with this sort of labor, I safely reached the city. When I stepped onto the platform of Nikolaevsky station in St. Petersburg, I still had in my pocket an “unexpended balance” of fifty kopecks (the equivalent of twenty-five cents at the current rate of exchange).

Before entering the Department of Law of St. Petersburg University, Sorokin studied at evening classes and at the Psycho-Neurological Institute. Here is what he writes about those years of his becoming familiar with urban civilization:

My mental and cultural development was advanced not only by school but also by my avid absorption of the great cultural values accumulated in St. Petersburg. During these years I was like a sponge thirstily drinking in as much as could of the immortal achievements of human genius in science and technology, philosophy and the fine arts, ethics and law, politics and economics. Any great city has, along with an accumulation of hollow and poisonous pseudo-values, a gigantic treasury of universal, eternal, and immortal values stored in its schools and laboratories, cathedrals and libraries, in its museums and art galleries, in its theaters and symphony halls, in its great buildings and historical monuments. In this sense, any great city is an immense school for man’s ennoblement or degradation, for the development or stultification of his creative potentialities. Unfortunately, many urbanites,

14 It was there that he met the prominent Russian lawyer and sociologist M. Kovalevsky.
especially in this age of commercialized and vulgarized pseudo-culture, do not select what they absorb from the rich culture of the great cities. In such an age, huge masses and a crowd of “sophisticated barbarians” take in from this culture – mainly through the press, radio, television, advertising, and other means of communication – empty trivia, glittering nothings, poisonous toys, and short-lived “successes.” As a result, they largely remain “the groomed manikins of civilization” hardly superior to uncivilized savages in their intelligence, moral conduct, and creativity.  

Pitirim Sorokin is known in the sphere of legal science as the author of works on the “theory and encyclopedia” of law. In 1919, Sorokin’s work “An Elementary Textbook on the General Theory of Law in Connection with the Theory of the State” was published. In his student years at the Faculty of Law of St. Petersburg University, he wrote a work entitled “Crime and Punishment, Service [Achievement] and Reward: A Sociological Essay on the Main Forms of Social Behavior and Morality” under the supervision of his teacher, M. Kovalevsky. In these works, Pitirim Sorokin, drew his readers’ attention to the problems of legal progress and the effectiveness of lawmaking and law enforcement activities, crime and punishment, an ideal society and the ideal law thereof. In the latter case, he followed the natural-law-based approach to the legal phenomenon, repeatedly emphasizing that the law of an ideal society is the law serving an individual and the interests of their development… if, as history progresses, law liberates an individual more and more, increasing their basic rights… it will be the first proof of the legal progress of humankind.

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15 Sorokin 1963, at 62.

16 In 1917, Pitirim Sorokin wrote a research thesis with the same title as a privatdozent of St. Petersburg University (Department of Criminal Law). The thesis defense was scheduled for March 1917. However, the events of February 1917 left the issue of getting a degree in Russia open forever. Pitirim Sorokin would certainly get his academic degrees and titles in the near future but in another country, another continent, another life…

17 P. Sorokin wrote that even a highly rational or thoroughly elaborated code is doomed to be ineffective if it goes against the spontaneous beliefs of the population... the prohibition of alcoholic drinks law in the United States serves as an example.

18 To some extent consider deleting following the path of F. Dostoevsky in search of the “crime – punishment”/“punishment – crime” determinants, P. Sorokin exclaimed: “Just as every crime is the punishment for the person against whom the crime is directed – vice versa – every punishment in its material nature is a crime against the criminal.”

2. Revolution. The Meeting

No matter how the anarchists of the past centuries and the real actors imagined the revolution, it came as a Stranger for both groups. Whether it was a magnificent or a terrible one, depended on subjective judgment.

Pitirim Sorokin joined the political struggle in his early youth and heard the summoning sound of the revolutionary bells at the very epicenter of the political struggle. He was a personal secretary to A. Kerensky when the latter was the head of the Provisional Government, held a number of elective posts in the Socialist Revolutionary Party and in the peasant Soviets, edited the “Delo Naroda” (“Cause of the People”) newspaper, and was elected a member of the Constituent Assembly. However, as P. Sorokin points out:

At the end of 1916 and in January 1917, the over-all situation of the nation became quite critical. A few lines from my “Leaves from a Russian Diary” vividly describe it. “It is clear that we are now entering the storm of the Revolution. The authority of the Tsar, the Tsarina, and all the Government has terribly broken down. Defeat of Russian arms, poverty, and the wide discontent of the people inevitably call forth a new revolutionary clamor. The speeches of Shulgin, Milyukov, and Kerensky in the Duma, and especially Milyukov’s denunciation of the “stupidity and treason of the Government,” have awakened a dangerous echo throughout the country… University life tends to become more and more disorderly. On the walls of the lavatories one reads such sentences as: “Down with the Tsar!, “Death to the Tsarina of Rasputin!”… The newspapers have become audacious in attacking the Government. Prices are rising frightfully. Bread lines before the shops are longer and longer. Bitter complaints from poor people waiting for hours in these lines become more and more rebellious… The soldiers returning from the front speak of the Government with hatred and extreme indignation… Street demonstrations by poor women and children demanding “bread and herring” became larger and noisier… The rioters today stopped tram cars, turning over some of them, plundering a good many shops, and even attacking policemen. Many workmen have joined the women; strikes and disorders begin to proliferate… The Russian Revolution was begun by hungry women and children demanding bread and herring. They started by wrecking street cars and looting a few small shops. Only later did they, together with workmen and politicians, become ambitious to wreck that mighty edifice – the Russian autocracy. The orderly routine of life is broken. Shops and offices are closed. Political meetings are held in the University instead of lectures. Revolution has set one foot over the threshold of my country… The police are idle and irresolute. Even the Cossacks have refused to disperse the crowds. This means that the Government is helpless and their machine
broken. Rioters have begun to kill policemen... The end is very near... or is it only the beginning?²⁰

The first phase of the euphoria of the revolution ended for P. Sorokin – just like for the British ambassador to Russia, J. Buchanan – on the second day of its victory in Petrograd on 28 February 1917. The second, destructive, phase began when the revolution turned into a violent whirlwind sweeping away everything in its path.

The personal experience of meeting the Stranger will also influence the theory of the revolution later formulated by Sorokin. Just like de Tocqueville, he could see the phased structure of the revolutionary movement:²¹

In the full development of their life-cycle, all great revolutions seem to pass through three typical phases. The first phase is usually of short duration. It is marked by the joys of liberation from the tyranny of the old regime and by great expectations of the reforms promised by all revolutions. This initial stage is radiant, its government humanitarian and benign, its policies mild, vacillating, and fairly impotent. “The worst of the beasts” in man begins to awaken. This short overture is ordinarily succeeded by the second, destructive phase. The great revolution now turns into a furious tornado indiscriminately destroying everything in its path. It pitilessly uproots not only the obsolescent institutions but also the vigorous ones which it destroys along with the dead or moribund values; it murders not only the uncreative power elite of the old regime but also a multitude of creative persons and groups. The revolutionary government at this stage is ruthless, tyrannical, and bloodthirsty. Its policies are mainly destructive, coercive, and terroristic. If the tornado phase does not utterly ruin the nation, its revolution eventually enters the third, constructive phase. With the destruction of all counter-revolutionary forces, it now begins to build a new social, cultural, and personal order. This order is constructed not only of new, revolutionary ideals but includes the restoration of the more vital of the pre-revolutionary institutions, values, and ways of life which had been temporarily destroyed by the second phase of revolution and which revive and reassert themselves regardless of the wishes of the revolutionary government. The post-revolutionary order, therefore, usually represents a blending of the new patterns and way of life with old but vital and creative patterns of pre-revolutionary times.²²


²¹ In his most important work, “The Old Regime and the Revolution,” A. de Tocqueville wrote: “…the Revolution had two distinct phases: one during which the French seemed to want to destroy every remnant of the past, another during which they tried to regain a portion of what they had thrown off” (Alexis de Tocqueville, The Old Regime and the Revolution (New York: Harper & Brothers Publisher, 1856)).

²² Sorokin 1963, at 105.
In general, Pitirim Sorokin assesses the revolution quite negatively, calling it “a great tragedy” that is rich in slogans and hymns of freedom and is very poor in the corresponding deeds... using the language of medicine, it resembles “atypical diseases,” the course and development of which a doctor is unable to predict... sometimes starting with a minor symptom that does not cause any anxiety, they unexpectedly result in death…

As a true sociologist, P. Sorokin convincingly proved on the pages of his monumental work, “Sociology of Revolution” – not only with the instrument of words but also with the instrument of figures (statistical data) – that revolution reduces the population, by leading to an increase in the mortality rate and to a decrease in the birth rate.

At the same time, P. Sorokin emphasized that there are ways of improving and reconstructing the social order other than through revolutionary experiments:

1. Reforms should not trample human nature or contradict the basic instincts thereof. The Russian revolutionary experiment, as well as many other revolutions, fail to avoid these mistakes.

2. A thorough scientific study of specific social conditions must precede any practical reform thereof.

3. Each reconstructive experiment should first be tested on a small social scale. The scale of reforms can only be expanded if they demonstrate positive results.

4. Reforms should be implemented by legal and constitutional means.

The outcome of the meeting between Pitirim Sorokin and the Stranger will be forced emigration. Shortly before his departure from Russia, Sorokin came to see a fellow student from their university years, Pyatakoff, in order to arrange for the release of a common acquaintance from prison. They had a very peculiar conversation.

I said to him, “Pyatakoff, let me ask you, do you really believe that you are creating a communist society?”

“Of course not,” he replied frankly.

“You admit that your experiment has failed, and that you are building only a primitive bourgeois society. Why then are you banishing us?”

“You do not take into consideration,” said the man, “that two processes are going on in Russia. One is the re-creation of a bourgeois society; the other is

23 See in detail Sorokin 1925, at 10.

24 For example, looking at revolutions of “huge aggregates,” P. Sorokin writes that the 766–781 civil war in China reduced the population from 53 million to 2 million people.

25 For more details see Sorokin 1925, at 14–15.
a process of the adaptation of the Soviet Government to it. The first process is going on faster than the second. This involves a danger to our existence. Our task is to delay the development of that first process but you and the others who are to be exiled are accelerating it. That is why you are banished. Perhaps after two or three years we will invite you to come back.”

“Thank you,” I said. “I hope to return to my country – without your invitation.”

As for Mikhail Reisner, his impressions of meeting the revolution were different. He unconditionally accepted it. And the revolution not only refrained from sending him overseas on board the next philosophical ship but also did something that would have been impossible under the previous political order: it turned his interpretation of the psychological school of law into a working one. Being a supporter of the Marxist doctrine, in his work “The Theory of L.I. Petrazhitsky, Marxism and Social Ideology” (1908) the scientist substantiated his doctrine of the class “intuitive” law, defending the proletariat’s right to revolution based on the argument that the system of intuitive law is the foundation of the majority of all social upheavals.

Mikhail Reisner pointed out that

the intuitive right of different classes leads to the tragedy of rebellion and suppression, revolution and reversal. Each class comes under a banner of its own law – the oppressive class clings to the authority of traditional symbols, ideas and regulatory practice, while the rebelling class – rather than relying on considerations of historical necessity or the laws of sociology – relies on demanding “justice” based on philosophical, moral and historical grounds.

According to Reisner, in the post-revolutionary society, the revolutionary legal consciousness can and should become the source of law. Starting from October

26 Sorokin 1963, at 196.

27 “The Russian revolution... shook all the established legal laws to the ground and immediately brought us back to the origins of every law, to truth and justice, as they were put into the existing law by various social classes” (Рейснер М.А. Право. Наше право. Чужое право. Общее право [Mikhail A. Reisner, Law. Our Law. Foreign Law. Common Law] 5 (St. Petersburg; Moscow: Tip. raboch. izd. “Priboy,” 1925)).

28 “Only after tracing the psychological nature of ethical, aesthetic, legal, religious, etc. experiences, can we find out... what law is with respect to economic phenomena and social ideals, what role it can and must play in the process of general transformation, in what way class and group-based struggles should be transformed into dogmatic, peremptory rights and, finally, what kind of legal shape, form or organization the “society of free willing people” that will arise on the basis of social, rather than state, sovereignty can take” (Рейснер М.А. Теория Л.И. Петражицкого, марксизм и социальная идеология [Mikhail A. Reisner, Theory of L.I. Petrazhitsky, Marxism and Social Ideology] 37–38 (St. Petersburg: Obshchestvennaya Polza, 1908)).

29 Id. at 159–160.
1917, M. Reisner actively joined the Soviet state-and-law building, becoming in charge of the State Law Section of the Department of Legislative Proposals of the People’s Commissariat of Justice, which allowed him to participate directly in the legislative process. It was he who managed to convince Lunacharsky and – later – Lenin, to include provisions on revolutionary consciousness in the 1917 Decree “On the Court.” He believed that the Soviet courts

embraced the latest trends of legal science and stepped on the foundation which European society was mastering only gradually and with great difficulty... They can judge and are judging not only based on the written law... they have a possibility to judge according to the rules of law living in the people’s soul. This law is not written... it’s people’s law, constantly forming in their legal conscience. In this sense, we also have a provision allowing people’s courts to act based on the revolutionary legal consciousness. Such legal consciousness is an ever-living source of new legal ideas and provisions which, due to their non-dogmatic nature, can continuously follow life, can translate all its new forms, all its new requests, into the shape of a legal solution governed by truth and justice.

M. Reisner ardently accepted the revolution; P. Sorokin became an active critic and opponent thereof. Both were outstanding researchers, both were excellent theorists. However, P. Sorokin did not immediately find himself in the counter-revolution camp. In his student years, like many educated young people of that time, he hoped for a revolutionary change in the society, believing that the rational transformation of its institutions would make people’s lives happier and society more just. Sorokin’s views became the reason for his conflict with the authorities resulting in repression as early as during the first Russian revolution. However, after leaving prison, he did not continue fighting the regime: instead, he turned all his talent and energy to researching the criminal sphere of society.

I was arrested and imprisoned four months before graduation because of my political activities in 1906; and then, I became a starving and hunted revolutionary, and a night school student at the Psycho-Neurological Institute and St. Petersburg University. Two more imprisonments gave me first-hand experience of criminology and penology – the field of my graduate study and then of my first professorship. In addition to several papers, in my junior year, I published my first volume on crime.30

Meanwhile, the aforementioned book by Sorokin entitled “Crime and Punishment, Service [Achievement] and Reward: A Sociological Essay on the Main Forms of Social Behavior and Morality” allows us to reconstruct the views of the newcomer-theoretician on the nature, possibilities and boundaries of social change. This work fully manifests the unique nature of Sorokin’s approach to explaining the social structure as well as the role of morality and law therein. It also shows the origins of his understanding of the revolution as well as the reasons for his attitude to the revolutionary events, a witness and a participant of which he happened to be.

P. Sorokin was a sociologist, and a sociologist in the very original sense in which this term was used in the doctrines of A. Comte, E Durkheim, and other positivist-objectivists who saw society as a reality separated from individuals and even groups. When describing society, even Karl Marx (who was considered an anti-positivist), brought the laws of social development to the foreground, although he still believed that the world around us could be changed but as a result of comprehending the logic of history rather than arbitrarily. P. Sorokin’s criticism of the Bolsheviks’ ideas and activities can be explained by a variety of factors, including party affiliation, personal motives, commitment to liberal values, etc. However, in addition to political beliefs and biographical circumstances, one cannot ignore the theoretical and methodological guidelines unclear who is referred to the school of thought, that he studied as a student.

Therefore, for P. Sorokin, the law is an integral element of social reality “contributing to social progress” and following its own specific laws, in full compliance with the common social and even common sociological patterns. However, in the language of the American sociologists of the time, social reality or rather the law-containing part of social reality, is called a cultural system.

For Sorokin, law is first of all a system of norms forming one of the major culture systems. In the total culture system of an inhabited area, he says we find five major culture systems. One of them is ethics, consisting of law and morals. This is an empirical generalization since, according to Sorokin, every organized group and its culture has a set of ethical values. In other words, every culture divides human actions and other events into opposite classes: right-wrong; approved-disapproved; recommended-prohibited; sacred-sinful; moral-immoral; and lawful-unlawful. In this sense, the ethical mentality (of which law is a part) is a universal and permanent component of any culture.31

In this respect, law is ontologically connected with the notion of a social form, whether it is a form as a relationship or a form as a model of expected behavior.

Certainly, with such ontological assumptions and methodological principles, the very thought that custom is primary in law and unwritten law represents something like the essence of such a phenomenon as written law, looks ridiculous and absurd. Therefore, it is no coincidence that, even later on, when constructing a complex system and dwelling upon the ideational component of society, P. Sorokin remains faithful to the original understanding of the nature and essence of law. And it is no coincidence that, in his assessment of the revolutionary events from the point of view of law, P. Sorokin does not discourse upon any special circumstances, clearly and unequivocally determining the events happening in Russia during that period as a denial of law:

the Criminal Code of Soviet Russia enacted in 1926, during the destructive period of the Revolution, like the actual administration of justice under the system, represented a decided retrogression in the direction of barbarity.  

As for M. Reisner, his attitude to the revolution is also fully justified from the point of view of his philosophical and legal ontology and the methodology stemming from it. As discussed, the proponent of distinguishing between bourgeois and proletarian law is convinced that written law is based on unwritten law. Moreover, he believes that social reality (as well as legal reality) is the result of individual decisions and, ultimately, the result of the coexistence of the will of every individual in a single space of interaction. M. Reisner believes that the social world consists of unique individuals, somehow interpreting their interests and principles as well as rights and obligations, while P. Sorokin sees the existence of society as a single reality in which the universal is the law for everything individual. Therefore, a difference in ontology generates a difference in methodology, leading to a difference – sometimes even diametrically opposed – in interpretation and evaluation of the same events.

3. Revolution. What’s Next?

Mikhail Reisner saw the post-revolutionary path of Russia as optimistic and the Soviet state itself – in contrast to a “normal” state – as a “state of revolution,” “something essentially different from a state of peaceful, well-established order.” Reisner saw the Soviet state as a

transitional form, an instrument of revolution, a means of destroying the state.  

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Curiously enough, in his opinion, a similar fate awaited the Communist Party itself: the party membership should be replaced by

close ties with the socialist fatherland... in the form of devotion and love for the new system of labor brotherhood.\textsuperscript{35}

However, as M. Reisner noted, a peculiar feature of the Soviet democracy was its “deep-rooted” self-management, which gave the working people

the possibility to integrate their needs and their understanding into all the floors of the Soviet building.\textsuperscript{36}

When speaking about citizens’ rights and freedoms stipulated in the Constitution of the RSFSR, Reisner noted the following:

All of these are the natural results of the transition of social production to the working class and distribution of the fruits of its labor among the producers. Such is the nature of each individual article in the Declaration of the Rights of the Working and Exploited People. It speaks directly about the benefits granted to the masses. These benefits are only a consequence of the abolition of private ownership of land and means of production and their content cannot be legally defined now – even approximately.\textsuperscript{37}

He would die only 11 years after the revolution,\textsuperscript{38} without seeing all the colors of the socialist state.

The earthly course of Pitirim Sorokin would continue for a long half-century after October 1917.\textsuperscript{39} During this time, his scientific views and philosophical beliefs would evolve – and very considerably.\textsuperscript{40} The features of Russian idealism would become more and more noticeable in the integral sociology that he created, manifesting themselves, in particular, in consider deleting the three-term model, of cultural

\begin{itemize}
\item \textsuperscript{35} Reisner 1923, at 86.
\item \textsuperscript{36} \textit{Id.} at 359.
\item \textsuperscript{37} \textit{Id.} at 333.
\item \textsuperscript{38} M. Reisner died on 3 August 1928.
\item \textsuperscript{39} P. Sorokin died in February 1968.
\end{itemize}
development giving three names – ideative (ideational), idealistic and sensual – to the three phases (or types) of development of the latter. In this case, the division is already based on the attitude toward the supersensible and supra-rational God. He would remember Russia more than once with warmth in his later works. It is not by chance that the historians of sociology would see that, as the years passed by, he increasingly manifested himself as a representative of the Russian intellectual tradition and less as the scientist, empiricist and positivist he was remembered as by the contemporaries of his younger years.

Later in his life, he sought a return to his Russian roots via supra-empirical studies in his works on altruism and creative love. Sorokin’s career illuminates both the similarities and differences between Russian and American sociologies, something that can provide a platform for distinguishing a unique Russian approach to sociology.41

In his fundamental work, “Sociology of Revolution,” he would write:

But perhaps you will ask me: If revolution, called forth by the oppression of instincts, oppresses them still more, wherein does hope lie? If famine, war and despotism lead to revolution, and revolution leads to still greater famine, war and despotism, do we then not face a tragic vicious circle from which no outlet can be found? How shall we unravel the question? What is exceedingly simple and for all deep-rooted revolutions in a very stereotyped, uniform manner. The question is not unravelled. It is solved at one stroke. Death solves it. This outlet never betrays and is always at the disposal of man. A society which has not known how to live, which has been incapable of carrying through adequate reforms but has thrown itself into the arms of revolution has to pay the penalty for its sins by the death of a considerable proportion of its members; it has to pay the contribution demanded by the unclear who.

Only if after having paid that contribution it has not perished completely, will it acquire, in a certain measure, the possibility to exist and live, not by cutting itself loose from the past, not by brutal mutual struggles, but, on the contrary, by a return to most of its former foundations, institutions and traditions (only the absolutely effete ones among them perish) by powerful labor, cooperation, mutual help and unity among the individual members and the different groups of society. If society is incapable of accepting this outlet then revolution ends in its complete degeneration and destruction.42

42 Sorokin 1925, at 412.
Conclusion

Once again, Russia has stepped over the threshold of a new century. Behind it are the experiences of two world wars, the experiments of a national and integrational nature, new and old pages of history which, as we know, teach nothing but only punish for not learning its lessons. The Russians continue dreaming. What goals and what means will the new generations choose to make their dreams come true? Only time will tell.

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