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Formalism, realism and conservatism in Russian law

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FOREWORD

In this first Chapter, we will analyze the combination of the decisionist and formalist elements in Russian law, and previously Soviet law. This analysis will prepare the methodological ground for further elaborations on the impact of this combination on different aspects of legal regulation in Russia.

We will argue that Soviet law is often viewed as based on legal positivism, while its ideological background and the practices of political interference are considered in an extralegal (political) dimension. This Chapter calls this approach into question and suggests that the alleged dualism can be considered in light of the basic presuppositions and methods of the Soviet (Russian) theory of law and state. The methodological presumption that we develop in the present Chapter is that Russian jurisprudence was and still is based on a combination of formalism and anti-formalism, which provided a certain degree of unity and coherence of legal knowledge. Our examination addresses the philosophical and methodological origins of this decisionism and argues that the particular character of Russian (Soviet) law can be explained against the backdrop of this theoretical combination, which brings together conservative social philosophy, the Schmittean conception of “exception”, methods of legal positivism, and the spirit of legal nihilism. These particularities and their methodological background are, in our opinion, among the distinguishing features of Russian law and legal culture. In the following chapters, we will show how the study of these particularities can provide clues for a better assessment of the conservative attitude of Russian law toward minority rights.

29 A previous version of this Chapter was first presented at the 2018 Annual Conference “Legal Identities and Legal Traditions in Central and Eastern Europe” of the Central and Eastern European Network of Legal Scholars (CEENELS) at the University of Latvia (Riga). The Chapter benefited enormously from feedback from a number of colleagues who gave their feedback during and after the Conference, especially Dr. Rafał Mańko and Professor Cosmit S. Cercel. An elaborated version of this Chapter was published in 43(4) *Review of Central and East European Law* (2018), 483-518. The present Chapter is an updated version of that work.

INTRODUCTION

One of the interesting comparative-law ideas in recent years has been the argument that there is a specific (Central and) Eastern European legal tradition (family, circle) that is distinguished from other traditions (including the Western legal tradition) by common history, ways of legal thinking, and specific approaches to the application of the law.³⁰ This idea can be a rich source of parallels and comparisons about legal developments on the European continent and helpful for explaining why similar institutions transplanted from the Western legal tradition have different effects in the countries of Eastern Europe (the countries of the former Soviet bloc).

What might be the correct *tertium cooperationist* (along with history, institutions, and other criteria well established in comparative law) in order to determine the correct explanation for differences in legal traditions? Every system (in continental-law countries at least) departs from the general formula: legal norms are established by competent social institutions (the state), they must be observed regardless of one's personal convictions, but they can be disobeyed in certain situations. This principle, albeit common to many legal systems, is developed in Russian law through a set of theoretical ideas about the law, its nature, machinery, purposes, and value. In the following pages, we will dwell on some of the particularities of Russian law that result from different intellectual frameworks. This analysis will also require us to address Soviet law as the historical source of contemporary Russian law.

There is something specific about Russian attitudes to the law that often strikes foreigners who do business with Russians or simply observe how Russians use their laws.³¹ This elusive "something" can be conceptualized as a set of ideas and attitudes in a legal community,³² a general consciousness or experience of law that is widely shared by those who inhabit a particular

30 Rafał Mańko, Cosmin S. Cercel, and Adam Sulikowski (eds.), *Law and Critique in Central Europe: Questioning the Past, Resisting the Present* (Counterpress, Oxford, 2016); and Rafał Mańko, Martin Škop, and Markéta Štěpáníková, "Carving Out Central Europe as a Space of Legal Culture: A Way Out of Peripherality?", 6(2) *Wrocław Review of Law, Administration & Economics* (2018), 4-28.

31 The descriptions of Russian legal culture in the 19th century made by the Marquis de Custine provide paradigmatic examples of Western perceptions of Russian law and of the culture that underpins this law. See Astolphe de Custine, *Letters from Russia* (Review Books Classics, New York, NY, 2002). See, also, George F. Kennan, *The Marquis de Custine and His Russia in 1839* (Hutchinson, London, 1972); and Vladimir Bibikhin, *Vvedenie v filosofiiu prava* (Institut filosofii RAN, Moscow, 2005). For a more generalized perspective, see, for example, Elise Kimerling Wirtschafter, "Russian Legal Culture and the Rule of Law", 7(1) *Kritika* (2006), 61-70.

32 Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Clarendon Press, Oxford, 1995). In this respect, the present analysis will be confined only to the ideas and attitudes of legal professionals and will not imply any generalizations about the Russian population.

legal environment.³³ The general consciousness of law was (in the Soviet past) and still is (in contemporary Russia) situated at the crossroads between legal formalism and decisionism. Still, in this respect, Russian law is far from unique, and its epistemic schemas are similar to how rules and exceptions are conceptualized in other countries, as their dichotomy is central to every legal system, *e.g.*, the textualism and judicial activism in US courts and the respective legal philosophies behind these approaches, which Karl Llewellyn once generalized as “formal style” and “grand style”, respectively. However, there are some particularities of the theoretical combination of formalism and decisionism in Russia that will be partly examined in the present Chapter.

For the purposes of this Chapter, the former will mean the priority of a literal interpretation of the law, the mechanical conception of the application of the law, and the idea that the law is limited to sources that are established or recognized by the state. Decisionism will refer to somewhat contrasting ideas: the law is what law officers (judges, prosecutors, police officers, etc.) consider to be legally binding for themselves and others, with these law officers being limited not by legal texts but by factual power relations.

In the previous version of this Chapter, the term “realism” was utilized to describe this second (decisionist) dimension of law. This terminology prompts lengthy discussions between legal philosophers as to what is to be understood by “realism” in law. The ordinary language usage refers to American legal realism represented by such names as Jerome Frank, Karl Llewellyn or Felix Cohen. This version of realism borrowed methods from the social sciences to carefully study the law as experienced by lawyers, judges, and average citizens and promoted a progressive vision for American law and society. There are some affinities between this version of legal realism and what we describe in the present volume by the term “decisionism”, although affinities do not mean a “proximity” or “identity”. Reviewing this volume, Professor Kathryn Hendley has justly indicated at the fact that for an average reader “legal realism” will mean its American version and that this could result in confusion. Therefore, we have revised the terminology accordingly. In fact, this volume has not been intended to be a place for philosophical debates about legal realism, which would lead the research in a quite different direction. Still, the affinity between the idea that the law is what judges say the law is and decisionism—in the practice of Russian (Soviet) courts—can have the same methodological base. The scholarly debates of the early 20th century gave rise to anti-formalist legal conceptions not only in the USA but, also, in the Russian Empire (the ideas of Leon Petrażycki or his followers, who are often called “the Polish school

33 Roger Cotterrell, “Comparative Law and Legal Culture”, in Mathias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press, Oxford, 2006), 710-737.

of legal realism” or the school of “Eastern European legal realism”³⁴). In addition, there is the rich literature of the Scandinavian legal philosophers also known as “legal realists”: Karl Olivecrona, Alf Ross, Axel Hägerström and others. In contemporary legal philosophy, one finds also the French (Michel Troper, Eric Millards and others), the Italian (Ricardo Guastini, Enrico Pattaro and others) and other national schools of legal realism which do not follow the methods of American realism.

As a matter of fact, the term “realism” is broader than the methodological approach usually labeled as “American legal realism”: it is plurisemantic and reveals several competing meanings. From the philosophical point of view, realism implies that there is an object of cognition that exists independent of our conceptual schemes. In international law, realism is another term for *Realpolitik*, meaning that everything goes if backed by the strongest power, and legal issues are therefore decided by struggles between powers, as a final resort. In legal philosophy, realism refers to theories that assert that court decisions are products of judicial discretion and are not essentially determined by an interpretation or application of legal norms. In the arts, realism refers to the requirement to represent an object truthfully, without artificiality. The common feature in these different types of realism is that it conceptualizes a concern for “objective reality” and rejects impractical and visionary (ideal) dimensions: later, this will help us distinguish between realism and natural law. Applied to the law, the term “realism” in all these contexts could be utilized as a shortcut for the idea that the substance of the law is formed at the moment of interpretation and application of the law.

These two approaches are mutually exclusive in theory, but they were, nonetheless, combined in the legal practices of the Soviet regime and in Soviet legal theory. This contradiction was due to, among other reasons, the original ambiguity of the Marxist-Leninist attitude to the law. The law was understood as a tool of class oppression and at the same time as a necessary means of state governance under the conditions of the dictatorship of the proletariat. Following ardent debates in the 1920s about the nature and the future of the law, Soviet legal theory and practice in the late 1930s became a binary combination of formalism and decisionism—their characteristic features throughout Soviet history, which still survive in Russian law to this day.

The image of an experienced investigator, Gleb Zheglov (played by Vladimir Vysotsky), who trampled on the law in order to apprehend and convict criminals in the 1979 cult Soviet film *Mesto vstrechi izmenit' nel'zia*

34 Kazimierz Opalek, “The Leon Petrażycki Theory of Law”, 27(3) *Theoria* (1961), 129-150; Anna Ovsiannikova, “Rossiiskii pravovoi realizm” [Russian Legal Realism], in Evgenii Tonkov (ed.), *Tolkovanie zakona i prava* [Interpretation of Statutory Laws and Law] (Aleteia, St Petersburg, 2015); Edoardo Fittipaldi, “Introduction: Continental Legal Realism”, in Enrico Pattaro and Corrado Roversi (eds.), *A Treatise of Legal Philosophy and General Jurisprudence*, Vol. 12, tome 2 (Springer, Berlin, 2016), 297-316; and Jerzy Stelmach, Bartosz Brożek, and Julia Stanek (eds.), *Russian Legal Realism* (Springer, Berlin, 2018).

(The Meeting Place Cannot Be Changed), reflects this feature. One of the main lines in the film was uttered during a disagreement between Zheglov and a young, idealistic investigator named Sharapov, who saw the law as having value in itself and thought that it should not be trampled upon even with the best of intentions. Zheglov looked at things more realistically and insisted that “a thief’s place is in prison, and the public could not care less about how I put him there”. To that end, Zheglov argued in favor of using dubious tactics such as planting evidence. The ideological message of the film—and of legal ideology in general—was the idea that the “regime of socialist legality” did not, in fact, bind the hands of Soviet governmental officials, let alone those of the secret service or law-enforcement agents, when the supreme interests of socialist society (which meant of the Soviet state or of the Communist Party) were at stake and that required one act contrary to the law. As we will see below, the Soviet authorities adopted the same strategy.

The sympathies of those who watch the film obviously remain with Zheglov’s position, which is confirmed by the actions in the film. However, the logic of this conflict does not fit in the divide between anti-formalism and formalism, as there are no doubts that formal law is good and necessary: it is simply that, in some situations, excessive formalism might preclude the attainment of the goals enshrined in the law itself, and in these situations, formalism must be dropped. Problematizing the situation of exceptions to legal norms (their defeasibility) nudged Soviet lawyers in the direction of questions about the conditions and limits of this permanent state of exception in a way similar to Carl Schmitt or Giorgio Agamben. In the reality of the Soviet regime, however, no such discussion could have taken place, although it was implied in many scholarly discussions between Soviet lawyers. To a certain extent, the profound interest of some contemporary Russian scholars and politicians in Carl Schmitt and his ideas about sovereignty as the right to decide about exceptional situations³⁵ can be explained with reference to this decisionist dimension of Soviet (Russian) legal thinking.³⁶

The formalist element in Soviet and contemporary Russian law has been documented by many scholars³⁷ and is beyond doubt, but the decisionist

35 As demonstrated by Professor Bowring, an important number of those Russian scholars close to political decision-making processes, such as Aleksandr Dugin, Aleksandr Filipov, and others, base their conclusions and recommendations on Schmittian ideas. These ideas are also expressed in political discussions about Russia’s political leadership. See Bill Bowring, *Law, Rights and Ideology in Russia: Landmarks in the Destiny of a Great Power* (Routledge, Abingdon and New York, NY, 2013), 194-203.

36 On the intellectual proximity of Schmitt’s political theology and the Marxist-Leninist doctrine of the dictatorship of the proletariat, see Cosmin S. Cercel, *Towards a Jurisprudence of State Communism: Law and the Failure of Revolution* (Routledge, Abingdon and New York, NY, 2018), 72-96.

37 Eugene Huskey, “Vyshinskii, Krylenko, and the Shaping of the Soviet Legal Order”, 46(3-4) *Slavic Review* (1987), 414-428.

element so far largely has been viewed and criticized as a result of ideological indoctrination or political manipulation. Along with these perspectives, this combination of formalism and anti-formalism in Soviet law can also be explained against the background of the theoretical dualism between positivist and decisionist ideas that formed the starting methodological point in Soviet legal scholarship and education after 1938. This theoretical heritage is not thoroughly reconceptualized in Russian law, and an analysis of it might shed more light on the intellectual roots of the continued discrepancies between Russia and the West on sovereignty, human rights and other key legal issues.³⁸

1 METHODOLOGY

In comparative legal studies, different social attitudes to the law in various areas of the world are frequently analyzed through the lenses of “legal culture”, which can be broken down into external (societal) and internal (juristic) legal culture.³⁹ Nonetheless, this term stirs ardent debates in comparative-law scholarship, as it is suspected of being a means of arbitrarily ascribing cultural features to peoples and nations whose legal systems are different from the Western legal tradition.⁴⁰ By way of example, the literature on Russian legal culture is abundant with narratives about Russian “legal nihilism, which in fact refers to quite a wide and multifaceted range of phenomena and evaluations. The 19th-century Russian philosopher Alexander Herzen once expressed this nihilism in the celebrated words: “Complete inequality before the law has killed any trace of respect for legality in the Russian people. The Russian, whatever his station, breaks the law wherever he can do so with impunity; the government acts in the same way.”⁴¹ Strongly condemned by the Russian intelligentsia in the 1909 work *Vekhi*,⁴² this assumed Russian “aversion” to law became, over the years, proverbial in Western political scholarship, sometimes even becoming truly grotesque, suggesting that aversion to law in the nature of Russians.⁴³

38 See, for example, Mikhail Antonov, “Conservatism in Russia and Sovereignty in Human Rights”, 39(1) *Review of Central and East European Law* (2014), 1-40.

39 Lawrence M. Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation, New York, NY, 1975), 194ff. Regarding Russian legal culture, see Frances Nettercott, *Russian Legal Culture Before and After Communism: Criminal Justice, Politics, and the Public Sphere* (Routledge, Abingdon and New York, NY, 2007).

40 On methodological problems connected with the use of the term “legal culture”, see David Nelken, “Using the Concept of Legal Culture”, 29 *Australian Journal of Legal Philosophy* (2004), 1-26.

41 Alexander Herzen, “Du développement des idées révolutionnaires en Russie”, cited by Bogdan Kistiakovskii in his contribution to Marshall S. Shatz and Judith E. Zimmerman (transl. and eds.), *Vekhi: Landmarks* (M.E. Sharpe, Armonk, NY, 1994), 130.

42 *Vekhi: Landmarks*, *op.cit.* note 41.

43 Jessica C. Wilson, “Russia’s Cultural Aversion to the Rule of Law”, 2(2) *Columbia Journal of Eastern European Law* (2008), 195-232.

It is not at all unusual to read comments about “culturally predetermined” ways in which Russians allegedly express their lack of respect for the law, and swarms of Russian and Western commentators repeat mantras about Russian legal nihilism as if it were a universal intellectual tool for picking the lock of Russian law.⁴⁴ For example, Marina Kurkchiyan generalizes about today’s “Russian way of thinking and doing things”, in legal matters, as “something that combines the glossy outward trappings of western law with the more cynical inward conniving of the Russian tradition”,⁴⁵ concluding that “Russia is not on the way to a rule of law culture”.⁴⁶

Such an approach can be challenged from at least two perspectives. On the one hand, as one reads from sociological polls, different groups in Russian society may demonstrate different attitudes depending on their education, age, and other variables, and these are not so different from the attitudes of Western Europeans or North Americans.⁴⁷ On the other hand, cultural perceptions of law are not identical among Russians. The attitudes advocated by Dostoevsky, Tolstoy, and Solzhenitsyn are certainly anti-formalist and underplay law as inferior to morality or religion. If we think about the Russian liberal tradition,⁴⁸ however, things would appear differently and would definitely call into question black-and-white pictures of the Russian legal culture and its supposed “aversion” to the law.

44 See the analysis and criticism of this approach in Kathryn Hendley, “Who Are the Legal Nihilists in Russia?”, 28(2) *Post-Soviet Affairs* (2012), 149-186. In this article and on many other occasions, Professor Hendley persuasively shows that Russians are not more nihilistic about their legal rights and obligations than other peoples.

45 Marina Kurkchiyan, “Researching Legal Culture in Russia: From Asking the Question to Gathering the Evidence”, in Reza Banakar and Max Treves (eds.), *Theory and Methods in Socio-Legal Research* (Hart Publishing, Oxford, 2005), 277.

46 *Ibid.* Professor Kurkchiyan’s analysis of informal practices and paralegal mechanisms in Russia is correct. However, her general conclusion misses the point, as such practices and mechanisms normally thrive in every society, even in those that are paragons of a rule-of-law culture. This is well attested by of the extensive literature on legal pluralism (e.g., Brian Z. Tamanaha, “Understanding Legal Pluralism: Past to Present, Local to Global”, 30(3) *Sydney Law Review* (2008), 375-411), of which Professor Kurkchiyan is undoubtedly aware but—for some unclear reason—discards in her analysis of the “shadow law” in Russia (a term coined by the Russian legal theorist, Professor Vladimir Baranov). See Vladimir M. Baranov, *Tenevoe pravo* [Shadow Law] (NA MVD RF, Nizhnnii Novgorod, 2002).

47 See, for example, Marina Kurkchiyan, Varvara Andrianova, Kathryn Hendley, Gilles Favarel-Garrigues, and William Simons, *Experiences of Law in Contemporary Russia: Report and Analysis of a Workshop Held at Wolfson College, Oxford 4 October 2012* (The Foundation for Law, Justice and Society, Oxford, 2012), available at <http://www.fljs.org/sites/www.fljs.org/files/publications/Law-in-Contemporary-Russia_0.pdf>; Sergei Mel’kov, “Kak rossiiane sami otsenivaiut sostoiianie svoei pravovoi kul’tury?” [How Do Russians Themselves Evaluate the Status of Their Legal Culture?], *lawinrussia.ru* (29 October 2016), available at <<http://lawinrussia.ru/content/kak-rossiiane-sami-ocenivayut-sostoyanie-svoey-pravovoy-kultury>>; and Kathryn Hendley, *Everyday Law in Russia* (Cornell University Press, Ithaca, NY, and London, 2017).

48 Andrzej Walicki, *Legal Philosophies of Russian Liberalism* (University of Notre Dame Press, Notre Dame, IN, 1992).

To avoid intellectual traps of essentially contested terms like ‘(legal) culture’, some comparative legal scholars (see below) suggest examining ways of conceptualizing legal concepts and institutions in different legal epistemic communities. One can use the perspective of legal theories⁴⁹ to determine whether there is any specific way to theorize about law in Eastern European countries.

This terminological choice needs a brief clarification. The main theoretical questions for lawyers everywhere are how to find a solution to a legal problem and what they have to do in situations where their legal system does not provide a clear-cut solution. Finding a solution in such penumbra and lacunae cases logically implies an array of other questions: about the sources of validity, the nature and limits of interpretation, the hierarchy of norms, and so on—something close to what H.L.A. Hart dubbed the “secondary rules” of legal systems.

The conceptual limits within which different epistemic communities search for and formulate responses to these questions normally shape a country’s “working legal theory”, although their boundaries are not always clearly distinguishable. In this sense, one may say: “according to the prevailing Russian legal theory, there are so many approaches to this issue, and namely [...]”. Surely, there can in fact be different legal theories accepted among different groups of legal scholars or practitioners. The “jurisprudence” (both in the sense of case law and of the legal theory underpinning that case law) of one high court can be based on theoretical premises that are different from the premises accepted by another high court. The same goes for different law schools and think tanks. This notwithstanding, our hypothesis is that it is possible to generalize a set of ideas (a legal theory) that is more or less uniformly shared by most Russian scholars and practitioners.

We will not get into debates about the best terminology for describing differences between what Zweigert and Kötz labeled *Rechtskreise*,⁵⁰ which is a particularly contested issue in comparative law.⁵¹ Culture, tradition, mentality, ideology, or other terms can serve for this purpose, and the choice between them is purely a terminological matter, as they are in fact used in an interchangeable manner. Thus, in the words of John H. Merryman, “legal tradition is a set of attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a

49 Thomas Grey spoke in this context of the “working legal theory” shared by lawyers of a given legal community, as opposed to the “high theory” of legal scholars. See Thomas C. Grey, *Formalism and Pragmatism in American Law* (Brill Academic Publishing, Leiden, The Netherlands, and Boston, 2014).

50 Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Clarendon Press, Oxford, 1998). In the English translation from the German original, *Rechtskreis* was translated not as “legal circle” but as “legal family”.

51 On these debates, see the Chapter “Comparative Law and Legal Cultures” in Reza Banakar, *Normativity in Legal Sociology* (Springer, Berlin, 2015), 145–168.

legal system, about the way law is or should be made, applied, studied, perfected and taught".⁵² It is also quite close to Pierre Legrand's understanding of legal culture as legal mentality or episteme⁵³ or to what William Ewald called "law in the minds".⁵⁴ One could argue that this difference is a matter of the intellectual culture (or tradition) of lawyers: the particular ways they understand, interpret, and apply law.

For the purposes of the present analysis, Belarus, Ukraine, Russia, and the countries of Central Asia and the Caucasus will be included in the category of Eastern European countries. In this sense, this tradition also covers countries that, strictly speaking, do not belong to Europe geographically. Due to their common history, they developed similar legal theories known under the banner of "Soviet theory of state and law", which still has a grip on their legal education and research. Historically, these societies were included, although to different extents, in the Russian cultural sphere (including that of the legal technique and the intellectual representations that underpin this technique). Russia is the paradigmatic example of the Eastern European legal tradition, as it used to exert considerable cultural, political, and other influences on its neighboring countries in the region that once belonged to the Russian Empire, and then to the Soviet Union and also to the former Soviet bloc. From this vantage point, one can speak about Eastern European legal theory as, to some extent, tantamount to Russian legal theory.⁵⁵

A disclaimer must be added in advance to avoid misinterpretation. Speaking about a prevailing legal theory in the Soviet Union, and then in Russia and in other former Soviet countries, we do not suppose that this theory is shared by each and every Soviet/Russian lawyer. Undoubtedly, there are Russian lawyers who are completely skeptical about this theory and who do not teach it to their students, offering them other theories instead. But these possibilities are limited in several respects. On the one hand, students already at secondary school are inculcated with the formalist legal theory uniformly taught within the discipline of Social Sciences (*Obshchestvoznanie*). On the other hand, legal theory is intended to prepare

52 John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford University Press, Stanford, CA, 1985, 2nd ed.), 1-2.

53 Pierre Legrand, "European Legal Systems Are Not Converging", 45(1) *The International and Comparative Law Quarterly* (1996), 52-81.

54 William Ewald, "Comparative Jurisprudence I: What Was It Like to Try a Rat?", 143(6) *University of Pennsylvania Law Review* (1995), 1889-2149; and *id.*, "Comparative Jurisprudence (II): The Logic of Legal Transplants", 43(1) *The American Journal of Comparative Law* (1995), 489-510.

55 Doubtlessly, many prominent legal thinkers in the Russian Empire or in the Soviet Union were not Russians (e.g., the Ukrainian Bogdan Kistiakovskii, the Latvian Piotr (Peteris) Stuchka, the Pole Leon Petrażycki, and the Lithuanian Evgeny Pashukanis). Therefore, speaking about a "Russian theory", we use this term as a reference point to describe common features of the legal thinking developed in the Russian Empire and then in Soviet Russia; surely, this thinking was not ethnically Russian.

law students for further practical courses (constitutional law, criminal law, and so on) that are often taught by professors with the ironclad formalist-nihilist background acquired in Soviet times. And, unfortunately, it is true that law students, having learned the prevailing theory, would be better prepared for professional survival in the Russian legal system after graduation than those students who have learned natural-law doctrines and other theories that are marginal for Russian law. There are also compulsory educational standards imposed by the Russian Ministry of Education on the majority of Russian universities that reinforce this theory at law schools.⁵⁶ There is no need to mention the force of intellectual inertia and the interest of legal continuity and stability that is secured by stable conceptual and linguistic frameworks. These factual, normative, and intellectual constraints shape the prevailing legal theory in Russian jurisprudence.

2 HISTORICAL DEVELOPMENT

The development of this prevailing legal theory in Russia (and in the Soviet Union before) can also be described as an interplay of the formalist and decisionist approaches. On the one hand, there was a statist theory of law uniformly imposed in Soviet legal scholarship in the late 1930s, and, on the other hand, there was a disrespect for rights that permeated the legal system and justified anti-legal practices in situations considered exceptional (be it the struggle against “enemies of the people” or building a socialist society).⁵⁷ The obvious contradiction between these theoretical premises could be easily tolerated through the prism of Marxist-Leninist (Hegelian) dialectics, which sought the truth by the way of opposing two contradictory theses: a thesis and its negation lead to a true synthesis that overcomes the contradiction.⁵⁸

56 See the 2016 “Jurisprudence” bachelor’s degree standard, available at <<https://минобрнауки.рф/документы/9604/файл/8790/Приказ%20№%201511%20от%2001.12.2016.pdf>>; and the 2010 “Jurisprudence” master’s degree standard, available at <http://www.edu.ru/db-mon/mo/Data/d_10/prm1763-1.pdf>.

57 This disrespect, implying that expediency should triumph over legality, was analyzed by Vladimir Gsovski as a “pragmatic Soviet concept of law”. See Vladimir Gsovski, “The Soviet Concept of Law”, 7(1) *Fordham Law Review* (1938), 1-43, at 13-29. However, the term “pragmatism” does not seem to fit here, as many Soviet ideas and projects were rather irrational, as were the steps designed to carry out these projects.

58 Facing an evident contradiction between the Marxist thesis that the state would wither away under the conditions of socialism and his own thesis that the new socialist society needed to have “the mightiest and strongest state power that has ever existed”, Stalin did not shy away from recognizing this contradiction, reasoning that “this contradiction is bound up with life, and it fully reflects Marx’s dialectics”. See Joseph V. Stalin, “Political Report of the Central Committee to the Sixteenth Congress of the CPSU”, in *id.*, *Collected Works*, Vol.12 (Foreign Language Publishing House, Moscow, 1955), 38.

In the context of Soviet legal theory, the dialectical solution to the contradiction between formalism and anti-formalism implied that the law did not have its own value and that effective social regulation could be successfully carried out through administrative command and control. Professor Cercel writes that “the basic feature of this jurisprudential simulacrum is the art of contradiction, supporting a return to positivism and formalism, while at the same time pretending that this theoretical gesture is still consistent with Marxist theory”.⁵⁹ However, there were more coherent Marxists. For example, in the 1920s Evgeny Pashukanis argued that the best means of social coordination is to replace laws by directives that work like a *railroad schedule* regulates the movement of *trains*, and instead of court litigation to impose decisions in the way medical prescriptions are delivered to sick people.⁶⁰ Following Marx’s writings, every Marxist theoretician had to acknowledge that in the bright future, the state and its law would wither away, that the classless future would put an end to the contradiction between the form and the substance of law. This anti-legal thesis of Marxist philosophy was gradually softened by Soviet legal theorists who argued that the attainment of such a bright future could take a long time and that, in the meantime, Soviet law could be an effective tool for attaining said bright future and the hallmark of a new, Socialist society.⁶¹

Accessing Soviet legal tradition, researchers often indicate a strict positivistic approach to interpretation and application of law (some scholars dub this approach “hyperpositivism”⁶²), which is attributed to the influence of the German *Begriffsjurisprudenz* of the 19th century and to the statist doctrine of law rooted in the legal systems of the Soviet countries. In some opinions, the command theory of law propelled by Soviet legal positivists was a good match for the authoritarian political regimes in tsarist and then Soviet Russia and elsewhere.⁶³

This can be completely true in the case of pre-revolutionary legal theory in Imperial Russia, where the statist conception of the law, although in different forms,⁶⁴ clearly prevailed. It is more controversial when applied to

59 Cercel, *op.cit.* note 36, 105.

60 Evgeny Pashukanis, “The General Theory of Law and Marxism”, in *id.*, *Selected Writings on Marxism and Law* (Academic Press, London and New York, NY, 1980), 32-131.

61 See Rudolf Schlesinger, *Soviet Legal Theory: Its Social Background and Development* (Routledge & Kegan Paul, London, 1945), 258-272.

62 Rafał Mańko, “Weeds in the Gardens of Justice? The Survival of Hyperpositivism in Polish Legal Culture as a Symptom/Sinthome”, 7(2) *Polemos: Journal of Law, Literature and Culture* (2013), 218-226.

63 See, for example, Marc Raeff, *The Well-Ordered Police State* (Yale University Press, New Haven, CT, 1983); and Rafał Mańko, “Survival of the Socialist Legal Tradition? A Polish Perspective”, 4(2) *Comparative Law Review* (2013), 1-28.

64 About different variants of positivism in Russian philosophy, see Andrzej Walicki, *A History of Russian Thought: From Enlightenment to Marxism* (Stanford University Press, Stanford, CA, 1979), 349-370.

Soviet jurisprudence, although there are good reasons to argue that legal positivism always had a strong theoretical impact on Soviet legal theory. Nonetheless, fidelity to the letter of the law was not common among Soviet legal practices or moral standards, while a general disrespect for rights could not fail to influence the conceptualization and teaching of law, let alone its application.⁶⁵

These main features of this theory in the Soviet era (the formal requirement of fidelity to the letter of the law and a factual disrespect for legal rights and enactments) reflected the doublespeak of the communist ideology:⁶⁶ to proclaim one thing (*e.g.*, the guarantees and lofty ideals enshrined in the 1936 Soviet Constitution) and to do the contrary (the appalling atrocities carried out in purges under Stalin that began just after the adoption of this Constitution). But explaining law only through the prism of ideological indoctrination cannot satisfy lawyers, even if they accept that law is permeated by ideology.⁶⁷ Unlike ideologists, who may eventually be satisfied with a “false consciousness”,⁶⁸ legal theorists are supposed to provide coherent descriptions and explanations in order to intellectualize the law as it exists (and/or as it should exist). As shown by Harold Berman, Soviet law itself was not homogeneous and included at least three different intellectual components: socialist ideology, Russian legal culture, and a system of moral precepts (in Berman’s terms, the “parental factor”), which could eventually come into conflict.⁶⁹ Although the theoretical synthesis obtained by Soviet lawyers was not perfect, it provided for conceptual solutions that assured the unity of theoretical reflection about law and that still remain influential in post-Soviet legal theory. Its variables might differ (“constitutional identity” instead of “class consciousness”, “traditional values” instead of “communist morality”, etc.)

65 This conceptualization took place in the first years of Bolshevik rule: the idea that law is the means for imposing the class interest enshrined in the “Rukovodiashchie nachala po ugovnomu pravu RSFSR” [Guidelines on Criminal Law of the RSFSR], *Sobranie zakonov RSFSR* (1919) No.66 item 590. As Stuchka explained later: “When the Collegium of the Popular Committee of Justice [...] needed to formulate its own, so to say ‘soviet understanding of law’, we agreed the following formula: ‘law is a system (or an order) of social relations that corresponds to interests of the dominating class and protected by the organized force of this class’.” See Piotr I. Stuchka, *Izbrannye proizvedeniia po marksistsko-leninskoi teorii prava* [translation] (Latgosizdat, Riga, 1964), 58.

66 Hans Kelsen, *The Communist Theory of Law* (Praeger, New York, NY, 1955). To some extent, this doublespeak characterizes every ideology, which might suggest more general conclusions, not only about communist ideology.

67 “Law is both real and ideological, insofar as ideology in itself emerges from real, material structures and it hints [at] an unarticulated real. Yet, it also distorts the perception of reality, and this distortion is constitutive of reality.” See Cercel, *op.cit.* note 36, 67.

68 This definition of “ideology” derives from the Marxist theory of social class and refers to the systematic misrepresentation of dominant social relations in the consciousness of subordinate classes.

69 Berman, *op.cit.* note 8.

and even be described using terms borrowed from Western law, but the schema largely remains the same.⁷⁰

Historically, the ground for this dualism in Soviet legal thinking was prepared by legal developments that took place in tsarist Russia. In the course of the Westernization launched in Russia by Peter the Great in the early 18th century and continued by his successors, the legal culture of the landowning nobility and of officialdom (*chinovnichestvo*) was clearly separated from the mass legal culture of the peasantry⁷¹ and other social strata: the former having its hallmark in the statist perception of the law, while the latter tended to identify the law with moral truth (*pravda*) and to challenge the validity of formal legal enactments that eventually collided with the generally accepted precepts of truth.⁷² This duality prompted a discussion about the best fit between positivism and natural law in the Russian legal philosophy of the Silver Age,⁷³ as well as debates about the value of law that followed the publication of *Vekhi* in 1909.⁷⁴ These discussions revealed that the basic theoretical assumptions were incompatible: the revolutionary intelligentsia could criticize the law, understood as an incarnation of the state's will and consequently as a means of class oppression, while liberals asserted that the law was not about the sovereign's commands (at least, not

70 As to human-rights law, the Soviet doctrine of human rights presupposed that "the substance of human rights has a social content and meaning determined by the social, economic, and political structure of a given society in which the rights in question exist and function". See Christopher Osakwe, "Soviet Human Rights Law Under the USSR Constitution of 1977: Theories, Realities and Trends", 56 *Tulane Law Review* (1981-1982), 249-293, at 255. There is only a very slight, if any, difference between this theoretical position and today's exceptionalist discourses about a Russian constitutional identity determined by social and cultural particularities. See Benedikt Harzl, "Nativist Ideological Responses to European/Liberal Human Rights Discourses in Contemporary Russia", in Lauri Mälksoo and Wolfgang Benedek (eds.), *Russia and the European Court of Human Rights: The Strasbourg Effect* (Cambridge University Press, Cambridge, 2017), 355-384.

71 The majority of the population in the rural world lived according to their own legal norms independent of the official law, while there was another world that "represented an underdeveloped but emerging civil society of classes, defended by a reformist bureaucracy willing to face a modern world that traditional Russia preferred to ignore". See Frank Wcislo, "Soslovie or Class? Bureaucratic Reformers and Provincial Gentry in Conflict, 1906-1908", 47(1) *The Russian Review* (1988), 23. Something began to change at the turn of the 20th century (Jane Burbank, *Russian Peasants Go to Court* (Indiana University Press, Bloomington, IN, 2004)), but this process was not completed before the 1917 Revolution.

72 Richard Wortman, *The Development of a Russian Legal Consciousness* (University of Chicago Press, Chicago, IL, 1976).

73 This term denotes the Silver Age of Russian culture, which encompasses the first two decades of the 20th century.

74 *Vekhi: Landmarks*, *op.cit.* note 41.

only about them) but about justice—this implied the theoretical possibility of distinguishing between the legal and the arbitrary.⁷⁵

On the one hand, the main feature of the Marxist-Leninist theory of state and law that replaced the intellectual diversity of legal scholarship in Imperial Russia was rigid positivism in what concerns the pedigree criterion of law: there can be no law unless it is established or recognized by the state. On the other hand, the specifically Marxist approach to law was to consider it as a means of class domination. As Marx and Engels put it in *The German Ideology*, law is an expression of class relations and a juristic form of the ideology that allows one class, through the intermediary of the state, to dominate another.⁷⁶ From this point of view, the state is the very expression of class dominance,⁷⁷ while law was conceived only as a means of state coercion⁷⁸ and could not be conceptualized the other way round: as compelling the state to respect the rights of its citizens.

This theoretical mixture was reflected in the definition of law coined by Vyshinsky: “The totality of the rules of conduct, expressing the will of the dominant class and established in legal order”.⁷⁹ Seen this way, Soviet law meant “the aggregate of the rules of conduct established in the form of legislation by the authority of the toilers and expressive of their will”, and no law was possible without “the entire coercive force of the socialist state”.⁸⁰

3 THE ANTI-FORMALIST ELEMENT IN SOVIET LAW

The definition mentioned above does not, however, represent something that can be unambiguously characterized as “legal positivism”, as this theory did not suppose that power holders were bound, in their actions, by the law or by the notorious “will of the legislator”. Rather, on the contrary, this perspective implies that there is a supreme law above the statutory law that allows power holders to determine what will qualify as exceptions to the legal rules, remaining unaccountable for their choice and for their

75 Frances Nettercott, “Russian Liberalism and the Philosophy of Law”, in G.M. Hamburg and R.A. Poole (eds.), *A History of Russian Philosophy: 1830-1930* (Cambridge University Press, Cambridge, MA, 2010), 248-265; and Andrzej Walicki, “Russian Marxism”, *ibid.*, 305-325.

76 Karl Marx and Friedrich Engels, *The German Ideology* (Prometheus Books, Amherst, NY, 1998).

77 *Ibid.*, 60: “The rule of a definite class of society, whose social power, deriving from its property, has its practical-idealistic expression in each case in the form of the state.”

78 Karl Marx and Friedrich Engels, *Manifesto of the Communist Party* (International Publishers, New York, NY, 2007), 26: “Your jurisprudence is but the will of your class made into a law for all, a will whose essential character and direction are determined by the economic conditions of existence of your class.”

79 Andrei Vyshinsky (ed.), *The Law of the Soviet State* (The Macmillan Co., New York, NY, 1948, Hugh W. Babb, transl.), 50.

80 *Ibid.*, 51.

exercise of power in general.⁸¹ This supreme law refers to “a living reality, expressing the essence of the social relationship between classes”.⁸² Therefore, it reflects “objective realities” (economic relations, class struggle, etc.) and for this reason has greater validity as compared with statutory law. This latter notion stems from the subjective will of legislators, who can distort these objective realities.⁸³ This became particularly evident in Pashukanis’ commodity exchange theory of law and in Stuchka’s conception of revolutionary consciousness, as well as in the class theory of law generally.

Even if Stuchka’s and Pashukanis’ conceptions were, in the end, rejected and condemned by the Soviet theory of state and law,⁸⁴ the anti-formalist element of Soviet law remained undisputed: the state could do whatever it wanted with the rights of citizens, provided that a “legal form” was observed. This decisionism was justified in terms of the basis-and-superstructure logic with reference to objective needs supposedly reflected in the social consciousness that made it possible to overrule statutory norms in situations of exception. Such an attitude toward the law can be characterized as legal cynicism that wanted the law to be whatever pleased real

81 Lev S. Yavich, *Sushchnost’ prava. Sotsial’no-filosofskoe ponimanie genezisa, razvitiia i funktsionirovaniia iuridicheskoi formy obshchestvennykh ontoshenii* [The Nature of Law: A Sociophilosophical Understanding of the Genesis, Development and Functioning of the Legal Form of Social Relations] (Izdatel’stvo LGU, Leningrad, 1985); and Olufemi Taiwo, *Legal Naturalism: A Marxist Theory of Law* (Cornell University Press, Ithaca, NY, 1996). Characteristically, the same way of thinking is followed by contemporary Russian lawyers, including the Chief Justice of the RF Constitutional Court. See Valerii D. Zorkin, “The Essence of Law. Lecture before the participants of the VII St. Petersburg International Legal Forum on 18 May 2017”, *ksrf.ru*, available at <http://www.ksrf.ru/en/News/Documents/V.D.Zorkin_The%20Essence%20of%20Law_Lecture_2017-05-18.pdf>.

82 Andrei Vyshinsky, “The Fundamental Tasks of the Science of Soviet Socialist Law”, in *Soviet Legal Philosophy* (Harvard University Press, Cambridge, MA, 1951, Hugh W. Babb, transl.), 38.

83 This suggested to some scholars that the class theory of law had affinities with natural-law doctrines. See Francis F. Homan Jr., “Soviet Theory of Jurisprudence”, 14(2) *Cleveland State Law Review* (1965), 402-410. This author concludes that in Stuchka’s legal theory: “there was ‘natural law’ growing out of social intercourse. This ‘natural law’ had precedence over ‘artificial law’ consisting of statutes and governmental decrees”. *Ibid.*, 405. However, the Soviet conception of objectivity (e.g., Sergei S. Alekseev, “Ob’ektivnoe v prave” [Objective Law], *Pravovedenie* (1971) No.1, 112-118) had only a superficial likeness to the objectivity on which natural-law doctrines are based. Unlike these doctrines, Soviet legal theory denied absolute values and universal principles of practical rationality, so that this “objectivity” referred only to the economic basis. This basis was thought to be reflected in ideological superstructures, including the law.

84 Stalin’s attorney-general, Andrei Vyshinsky, was a proponent of this theory. On the theoretical situation at that time, see Lon L. Fuller, “Pashukanis and Vyshinsky: A Study in the Development of Marxian Legal Theory”, 47(8) *Michigan Law Review* (1949), 1157-1166.

power holders,⁸⁵ who had sovereign power to determine ways of attaining social objectives. This resulted in the practical conclusion that legal norms and individual rights could be legitimately trampled upon if this was considered expedient by those power holders.

Inviolable individual rights and freedoms were considered a hallmark only of the bourgeois law stemming from private property, while more progressive forms of social cohesion (socialism and communism) would deny this bourgeois “atomization” of society: its division into a mass of independent individuals each with their own inalienable and inviolable rights egoistically utilized against others and against the collective. “In a higher phase of communist society [...] the narrow horizon of bourgeois right will be fully left behind.”⁸⁶ In the bright future, people will learn not to distinguish between their personal interests and social interests; then the state and its law will wither away, and law books will be handed over to museums as reminiscences of the barbaric past.⁸⁷

This sort of cynical attitude prepared the intellectual ground and provided the ideological justification for building up, along with legal formalism, a parallel decisionist dimension of the law. In accordance with this theoretical construct (a mix of public morality, communist ideology, and materialist philosophy), “important” cases are decided in the best interests of society without regard to legal norms.⁸⁸ This construct unveiled the decisionist dimension of Soviet legal theory, according to which law is nothing but a result of an interplay between political and economic powers. If there are formal legal rules and informal rules employed in decision-making in courts and elsewhere, it is rather these informal rules that play the decisive role insofar as they are supposedly based on the “objective” structure of

85 “Power holders” is a broad category that includes not only state officials but, also, party bosses and cronies of political leaders who formally do not belong to state officialdom. The term “*nomenklatura*” would fit this category quite well in the context of this Chapter, but its connotation is linked only to the Soviet regime. See, for example, Michael Voslensky, *Nomenklatura: The Soviet Ruling Class, an Insider’s Report* (Doubleday, Garden City, NY, 1984, Eric Mosbacher, transl.), while this analysis refers to a more general situation in various cultures and under different political regimes.

86 Karl Marx, “Critique of the Gotha Programme”, in D. MacLennan (ed.), *Karl Marx: Selected Writings* (Oxford University Press, Oxford, 1977), 569.

87 Frederick Engels, *The Origin of the Family, Private Property and the State* (International Publishers, New York, NY, 1972, Eleanor Burke Leacock intro. and notes), 232: “Society [...] will put the whole machinery of state where it will then belong: into the museum of antiquity, by the side of the spinning-wheel and the bronze axe.”

88 Surely, this might also happen in legal systems that can express a strict commitment to a rule-of-law culture. On this problem in the European Union, see Gunnar Beck, “The Court of Justice, Legal Reasoning, and the Pringle Case: Law as the Continuation of Politics by Other Means”, 39(2) *European Law Review* (2014), 234-250; and *id.*, “The Court of Justice, the Bundesverfassungsgericht and Legal Reasoning During the Euro Crisis: The Rule of Law as a Fair-Weather Phenomenon”, 20(3) *European Public Law* (2014), 539-566. The US Supreme Court and its living constitutionalism doctrine, which explicitly allows decisions that are contrary to the letter of the law, represent another paradigmatic example.

society, which, in turn, reflects the economic basis of social life. Unlike the similar ideas of Roscoe Pound and the US legal realists about “law in books” and “law in action”, the real decision makers are not judges but state or party officials who are empowered to express and implement the will of the ruling class or, in other words, the state.

In practice, this decisionism implied that when provisions of a formal legal code (e.g., a civil or criminal code) collide with the principles set out in moral codes (e.g., the Moral Code of the Builder of Communism⁸⁹ or the Communist Party program), nothing guarantees that the former would prevail even in court. Moreover, the validity (binding force) of law in this logic was conceived as dependent on how the power holders appreciate the expediency of the application of legal norms in a given case.⁹⁰ If, in the opinion of judges and other law officers individual rights are against the collective interest, these rights would, predictably, hardly win any legal protection. Surely, in the avalanche of mundane cases, this reasoning was not applied, but in “high-profile” cases such “objective needs”⁹¹ could be referred to as grounds for an exception.

Legal proceedings against several Soviet dissidents (Volpin, Litvinov, Bogoraz, and others) in the 1960s can serve as examples of this exceptionalism: the dissidents presented their defense based on the Soviet Constitution and the statutory laws that directly allowed demonstrations (Art.124, 1936 Soviet Constitution, guaranteed Soviet citizens the freedom of speech and the right to meetings and demonstrations) and did not establish criminal liability for publicly expressing an opinion, while the prosecution and the charge framed the issue in larger socio-political and moral dimensions and condemned such “legal formalism” on the part of the dissidents.⁹² Another example is the 1960-1961 trial of illegal street currency traders (*fartsovshchiki*). In 1960, three *fartsovshchiki*—Ian Rokotov, Vladislav Faibishenko, and

89 Twelve principles that every member of the Communist Party of the Soviet Union and of the Komsomol was supposed to follow. See *Moral'nyi kodeks stroitel'ia kommunizma* [The Moral Code of a Builder of Communism] approved in 1961 as a part of the Third Program of the CPSU at the XXII Convention of the CPSU, available at <http://krotov.info/lib_sec/11_k/kom/munizm.htm>. On the correlation between legal and moral regulation in Soviet Russia in general, see Georges C. Guins, *Soviet Law and Soviet Society* (Martinus Nijhoff, The Hague, 1954); and George L. Kline, “Socialist Legality and Communist Ethics”, 8(1) *The American Journal of Jurisprudence* (1963), 21-34.

90 As Stuchka wrote in 1926, “From the standpoint of historical materialism, law does not exist as an independent power that regulates social relations.” Piotr Stuchka, *Entsiklopediia gosudarstva i prava* (Izdatel'stvo Komakademii, Moscow, 1926), 14. See, also, Augusto Zimmermann, “Marxism, Communism and Law: How Marxism Led to Lawlessness and Genocide in the Former Soviet Union”, 2 *The Western Australian Jurist* (2011), 1-60.

91 In 1938, Vladimir Gsovski stated that: “Although now the soviet jurists wish to use the traditional legal concepts [...] they are not prepared to inscribe on their banner the real supremacy of law and rights. They take the body of traditional jurisprudence but repudiate its soul.” Gsovski, *op.cit.* note 57, 43.

92 See Robert Horvath, *The Legacy of Soviet Dissent: Dissidents, Democratization and Radical Nationalism in Russia* (Routledge, Abingdon and New York, NY, 2005).

Dmitrii Iakovlev—were sentenced to eight years in prison for conducting illegal currency transactions, which was the maximum prison sentence for this *corpus delicti* according to the RSFSR Criminal Code. Just before the trial, the Criminal Code had been amended to introduce a maximum penalty of 15 years in prison for this *corpus delicti*. This new wording was not applied because of Article 6 of the RSFSR Criminal Code, which explicitly prohibited the retroactive application of laws that impose stricter punishment. When the verdict was brought to the attention of Khrushchev, he demanded harsher punishment based on the opinion of the working class. At the Politburo, Khrushchev cited letters from factories that discussed the case from moral and political standpoints and demanded that “tendencies hostile to society” be put to an end. The verdict was reconsidered, and the *fartsovshchiki* received the maximum prison sentence of 15 years. Still dissatisfied, Khrushchev adopted, in July 1961, a retroactive decree introducing the death penalty for conducting illegal currency operations, and at a third trial in 1961, the three *fartsovshchiki* were sentenced to death. This verdict was evidently contrary to the letter of Soviet criminal law but was justified based on the moral, political, and economic foundations of Soviet society.⁹³

Soviet legal scholarship formed a theory that reflected this doublespeak and dualism and revealed the formalist and the prerogative (decisionist) dimensions of the law. This more or less uniform legal dogma is, with no significant methodological changes since the Vyshinsky era, still widely recognized and taught at law schools, only superficially decorated with some odd elements that are alien to it, such as human rights or constitutionalism. For example, one leading Soviet/Russian legal theorist just replaced in his theory the concepts of “the state will” and “the will of the ruling class” with the concept of “the state will of the society”, arguing that this replacement made it possible to integrate human-rights and rule-of-law discourses into Russian legal positivism, hoping thereby to link Soviet legal theory with the Western legal tradition.⁹⁴ The statist and anti-liberal character of this Soviet legal dogma that survived the fall of Soviet rule still shapes the mindsets of Soviet (Russian) lawyers in a certain way and prompts them to draw

93 See Aleksandr E. Khinshtein, “Koroli i kapusta” [Kings and Cabbage], *Moskovskii komсомоlets* (21 December 1997), available at <<https://public.wikireading.ru/64142>>.

94 Mikhail I. Baitin, *Sovremennoe pravoponimanie na grani dvukh vekov* [The Contemporary Understanding of Law at the Turn of Two Centuries] (Pravo i gosudarstvo, Moscow, 2005), 59ff. See criticism of such approaches in Andrei V. Kashanin and Sergei V. Tret'iakov, “Obshcheteoreticheskie osnovaniia issledovaniia problem pravoprimereniia” [General Theoretical Bases for Researching Problems of Applying the Law], in Iu.A. Tikhomirov (ed.), *Pravoprimerenie: teoriia i praktika* [Application of Law: Theory and Practice] (Formula prava, Moscow, 2008), 12-73; Leonid Golovko, “Postsovetskaia teoriia prava: trudnosti pozitsionirovaniia v istoricheskom i sravnitel'no-pravovom kontekste” [The Post-Soviet Theory of Law: Problems with Its Positioning in a Historical and Comparative Context], in *Problemy postsovetskoi teorii i filosofii prava. Sbornik statei* [Iurlitinform, Moscow, 2016], 92-126; and Nataliia Varlamova, “Geterarkhichnost' sovremennykh pravovykh sistem i postsovetskaia teoriia prava” [The Heterarchy of Contemporary Legal Systems and the Post-Soviet Theory of Law], *ibid.*, 30-71.

conservative conclusions that fit contemporary exceptionalist narratives in Russia and turn out to be appropriate for the prevailing conservative ideology.⁹⁵ It is around this intellectual axis that legal thinking is organized in the community of Russian (Soviet) lawyers, and it is through this prism that this community creates and applies Russian law.

4 A DUAL SYSTEM OF LAW?

This construction could serve as justification for the widespread practices of extralegal reprisals, although to different degrees: from the extraordinary *troika* tribunals that, in the years of Stalin's purges, condemned millions to death without following the established criminal-court procedures (with the exception of some demonstrative mock trials) to the notorious practices of "telephone law"⁹⁶ in the years of *zastoi*. The presence of such practices in Soviet law gave some Western scholars reasons to speak about a "dualism" that reflects two concomitant legal orders: one, formal order imposing general legal rules applicable by default in "normal cases" and another, prerogative order that reserved privileges for power holders to interfere with "special cases" in an extralegal way.⁹⁷

Following Fraenkel's famous book on dual states,⁹⁸ such scholars identified two legal systems in the Soviet Union:

"One legal system that, day in, day out, maintains law and order, enacts and enforces the law, and adjudicates the disputes that inevitably arise among citizens and institutions in modern societies. Existing alongside this legal system is an arbitrary and repressive system used to punish critics of the regime."⁹⁹

The dualist logic is undeniably apt for describing political systems: in every politically organized society, we can find some channels for political powers that work according to the posited law and other channels that work independent of the posited law or even contrary to it. This logic is particularly suitable for a description of Russian political life over many centuries: from

95 See, for example, Angelika Nussberger, "Der 'russischer Weg': Widerstand gegen die Globalisierung des Rechts?", 53(6) *OstEuropa Recht* (2007), 371-386.

96 This term refers to formal influence or pressure exerted by the Communist Party on the Soviet judiciary, usually by way of telephone calls. See Alena V. Ledeneva, "Telephone Justice in Russia", 24(4) *Post-Soviet Affairs* (2008), 324-350.

97 Robert Sharlet, "Stalinism and Soviet Legal Culture", in Robert C. Tucker (ed.), *Stalinism: Essays in Historical Interpretation* (W.W. Norton, New York, NY, 1977), 155-179. Apparent in criminal- and public-law cases, this dualism also can influence civil and commercial cases.

98 Ernst Fraenkel, *The Dual State* (Oxford University Press, New York NY, 1941).

99 Gordon B. Smith, *Soviet Politics: Continuity and Contradiction* (Palgrave, London, 1988), 137-162, at 137. See, also, Sergei Alekseev, *Pravo: azbuka – teoriia – filosofii. Opyt kompleksnogo issledovaniia* [Law: ABC, Theory, Philosophy: An Experience of Multifaceted Research] (Norma-Infra, Moscow, 1998), 482-483.

the *zemshchina* and *oprichnina* division under Ivan the Terrible to the coexistence of the Soviet system and the Communist Party system in the Soviet Union, and, with some modifications, also today.¹⁰⁰

However, attempts to apply this logic to the legal sphere can result in unresolvable theoretical deadlocks for lawyers, although ordinary people have no trouble accepting it.¹⁰¹ If one admits that the prerogative use of law constitutes a parallel legal system, then one may conclude that Stalin's repressions were illegal from the vantage point of official Soviet law and at the same time were legal from the standpoint of another, parallel system of law. Legally, this would make no sense. Having two parallel legal systems, we can figure out what happens if a competent person in one system (a judge acting under the posited law, for example) makes one decision and a competent person in another system (a party boss acting under party law, for example) makes a decision with the opposite effect. In legal terms, these two decisions would collide, and a lawyer would have to decide on the prevalence of one of the decisions. Obviously, this description does not fit the realities of Soviet (and eventually Russian) law and is normatively erroneous.

To a lawyer, it is preferable to describe this configuration as one legal system in which a cohort of officials have factual discretionary power to decide about exceptions in the application of the law, although in terms of the official law such practices were illegal, or at least their legal validity was uncertain. A parallel system of justice existed only for a relatively short period of time in the years of Stalin's purges when troikas (commissions of NKVD officers who dealt with accusations against "enemies of the people" in the late 1930s) rendered millions of verdicts,¹⁰² coexisted with the state-run criminal courts. Professor Feldbrugge justly remarks that:

"In striving for a full understanding of Soviet law one cannot disregard manifestations which indicate a rejection of certain values and principles basic to most legal systems in the West [...], the belief that law should be more than just an instrument of politics, that the state most of all should respect certain basic human rights."¹⁰³

100 Richard Sakwa, "The Dual State in Russia", 26(3) *Post-Soviet Affairs* (2010), 185-206; and *id.*, *The Crisis of Russian Democracy: The Dual State, Factionalism and the Medvedev Succession* (Cambridge University Press, Cambridge, 2011), 1-52.

101 For an interesting sociological examination of how legal dualism might be reflected in the mindsets of ordinary people, see Kathryn Hendley, "Varieties of Legal Dualism: Making Sense of the Role of Law in Contemporary Russia", 29(2) *Wisconsin International Law Journal* (2011), 233-262.

102 Robert Conquest, *The Great Terror: A Reassessment* (Oxford University Press, Oxford, 2008), 286ff.

103 Ferdinand J.M. Feldbrugge, "Law and Political Dissent in the Soviet Union", in D. Barry, W. Butler, and G. Ginsburgs (eds.), *Contemporary Soviet Law* (Nijhoff, The Hague, 1974), 55.

It is hard to see what the added value might be of considering this parallel system as legal, at least for those who do not confuse the law and organized coercion, which can exist semi-autonomously in relation to one another. In the end, the verdicts of the troikas were found to be invalid (contrary to Soviet criminal law of the time), and the victims of the purges were rehabilitated during the Khrushchev Thaw. The same goes for “telephone law” and similar illegal practices in the Soviet system that were formally prohibited but went unpunished. As a result, they did not become legally valid and therefore cannot be classified as legal, constituent parts of a parallel legal system. A description of Russian law in terms of this institutional dualism would lead to serious conceptual confusion. In order to avoid such confusion, lawyers should carefully distinguish between *de iure* and *de facto*, between normative imputation and factual coercion.

A more appropriate tool for describing the dualism that was visible in Soviet law and is still apparent in contemporary Russian law is an analysis of legal thinking. On the one hand, from the standpoint of both Soviet and Russian law, judges and other law officers are bound only by the law (Art.112, 1935 Soviet Constitution; Art.155, 1977 Soviet Constitution; and Art.120, RF Constitution). On the other hand, lawyers in these legal systems do not consider legal norms as independent imperatives (whose validity is not dependent on someone’s will). Law is conceptualized formalistically as a set of imperatives (commands) mandated by the sovereign power. The specific Russian connotation of the term “state” (*gosudarstvo*)—*prima facie* referring not to the institutions but to the person of the ruler¹⁰⁴—could not but reinforce the decisionist element in Russian law. Based on this logic, the law is always a means to implement someone’s will: not the abstract will of an abstract legislator (which conceptually leads to conferring lawmaking power on judges) but the real will of political rulers or other power holders. To avoid subjectivism in the application of the law, judges are asked to implement the will of these power holders, which is real or, in this sense, objective for these judges, who are not trained to find “objective constraints” in practical rationality and in tacit social conventions.¹⁰⁵ This prompted the Soviet theory of state and law to look for a synthesis between formal and decisionist dimensions of the law.

104 Oleg Kharkhordin, “What Is the State? The Russian Concept of *Gosudarstvo* in the European Context”, 40(2) *History and Theory* (2001), 206-240.

105 In this light, one can explain the fact that most legal norms in Russia have always emanated from the bureaucracy (decrees, instructions, etc.) and not from an independent parliament. See William E. Pomeranz, *Law and the Russian State: Russia’s Legal Evolution from Peter the Great to Vladimir Putin* (Bloomsbury, London, 2018).

5 LEGALITY, DECISIONISM AND FORMALISM

One of the theoretical curtains used to hide the decisionist dimension of the law in Soviet legal scholarship was the conception of socialist legality (*zakonnost'*). This legality was conceived as permeating all activities of all authorities and, in some interpretations, all important aspects of private life too.¹⁰⁶ The idea of legality first appeared in the first years of Soviet rule when "revolutionary legality" was proposed by Stuchka as a counterargument to bourgeois legal theories of the rule of law.¹⁰⁷ As a matter of fact, this idea was coextensive with the concept of "revolutionary expediency" and contained a sort of theoretical solution to the problem of exception in law.¹⁰⁸ As Professor Cercel notes, the Soviet conceptualization of legality implied the exceptional character of the application of the law, as "legality was historically consubstantial with a normalized state of exception marked by extrajudicial measures, deportations and killings, and which was itself a state of exception".¹⁰⁹

At face value, this conception presupposed that the law is a set of independent directives that leave no room for interpretation to judges or other law officers. From the vantage point of formalism, there can be only one correct interpretation of a legal rule: the interpretation that reveals the true will of the sovereign, who imperatively sets out this will in statutes and other legal texts. This will is supposed to control all social relations. The coherence or persuasiveness of legal reasoning is irrelevant when it comes to the correct interpretation of this will. A judge simply has to establish the sovereign will (which in fact can well be the will of the *Politburo* (the Political Bureau of the CPSU which was the supreme government body in the USSR), a *partburo* (a local bureau of the CPSU) or a *partkom* (a committee of the CPSU) and settle cases based on that will regardless of the justification (if any) the judge gives for their decision or how coherent their reasoning is. This positivist account of law was (and still is) widely accepted at Soviet (Russian) legal academies, constituting one of the main conceptual foundations of the Soviet theory of state and law.

106 In the words of one of the main proponents of this theory, socialist legality is "a strict and indisputable observance and execution of Soviet laws by all organs of the Soviet state, by all establishments and social organizations, by all officials and citizens". See Mikhail S. Strogovich, *Osnovnye voprosy sovetskoi sotsialisticheskoi zakonnosti* [Key Problems of Soviet Socialist Legality] (Nauka, Moscow, 1966), 3. On this theory, see Gordon B. Smith, "The Development of 'Socialist Legality' in the Soviet Union", in Peter B. Maggs, Gordon B. Smith, and George Ginsburgs (eds.), *Law and Economic Development in the Soviet Union* (Westview Press, Boulder, CO, 1982), 77-97.

107 Postanovlenie IV Vserossiiskogo Chrezvychainogo S"ezda Sovetov (8 November 1918) "O revoliutsionnoi zakonnosti" [On Revolutionary Legality], *Sobranie zakonov RSFSR* (1918) No.90 item 908.

108 See, for example, Aron Trainin, "O revoliutsionnoi zakonnosti" [On Revolutionary Legality], *Pravo i zhizn'* (1922) No.1, 5-8.

109 Cercel, *op.cit.* note 36, 103.

But this was only one side of the coin. On its flipside, this conception of legality supposed the freedom of action for those decision makers who did not belong to law enforcement or the judiciary. If judges had to be bound by the law, this did not mean that high-ranking members of the Communist Party and other privileged individuals had to be bound by it as well. On the contrary, the Communist Party, as “the leading and guiding force in Soviet society”, had to specify the social priorities and the manner of implementing those priorities, including identifying cases in which it would be expedient not to observe the law.¹¹⁰ Evidently, the “bright communist future” could not be built by observing the law. In many practical situations, legal formalism only impedes the attainment of such lofty goals, and in this light certain political bodies were vested with the power to decide about the state of exception, to put this in Schmittean terms.

This conclusion is not surprising: if the law is conceived of not as a tool of practical rationality that makes it possible to reasonably manage individual and eventually public affairs, the application of the law (the law being taken as the sovereign’s will) would easily result in irregularities—the will of the sovereign (the state, the ruling class, etc.) is only an intellectual construct that cannot be established in any empirical way. Soviet judges and lawyers faced the same problems as their confrères in the West: in certain situations, the literal application of legal norms could result in injustice, and therefore the legal system had to provide a way to avoid this undesirable effect. The question was how to determine just what justice and injustice meant. If the law was understood merely as a set of commands, while the interpretation of the law in such situations required law officers to address not a practical rationality but the “objective needs” of the Soviet state, judges in such difficult cases should have consulted Party functionaries who could, *ex officio*, provide some “competent” advice. In this sense, telephone law was a logical sequence stemming from the prevailing legal theory, and in many instances it was a judge who called a *partkom* in uncertain

110 Art.6 of the 1977 Soviet Constitution defined the Communist Party of the Soviet Union as “the leading and guiding force of Soviet society and the nucleus of its political system”, which, armed with Marxism-Leninism, “determines the general prospects for the development of society and the course of the domestic and foreign policy of the USSR, directs the great constructive work of the Soviet people, and imparts a planned, systematic and theoretically substantiated character on their struggle for the victory of communism”. Constitution (Fundamental Law) of the Union of Soviet Socialist Republics, adopted at the Seventh (Special) Session of the Supreme Soviet of the USSR, Ninth Convocation, on 7 October 1977, in F.J.M. Feldbrugge (ed.), *The Constitutions of the USSR and the Union Republics: Analyses, Texts, Reports* (Sijthoff and Noordhoff, Alphen aan den Rijn, The Netherlands, 1979).

situations (where judges were not confident about the best interpretation of Soviet law), and not the other way around.¹¹¹

This concept was reconfigured in 1937, when Vyshinsky tried to provide a theoretical justification for Stalin's invectives against those Soviet legal scholars who denied the law and its value. Denouncing these "nihilist" moods that did not toe the Bolshevik Party line, Vyshinsky argued against Pashukanis and Stuchka, saying that:

"In reducing the law to policy, these gentlemen have depersonalized the law as the totality of statutes, undermining the stability and authoritativeness of the statutes, and suggesting the false idea that the application of the statute is determined in the socialist state by political considerations, and not by the force and authority of the Soviet statute. Such an idea means bringing Soviet legality and Soviet law into substantial discredit [...] and results in] disarming the working class in the face of its foes, and in undermining the socialist state."¹¹²

In Soviet jurisprudence, this exceptionalist conception of legality was developed with such categories as the "interests of the class struggle" or the "interests of building Communism" (*interesnyy kommunisticheskogo stroitel'stva*). Today, this exceptionalist approach to the law is based on ubiquitous references to sovereignty or traditional values, and it is not hard to recognize this line of thinking in contemporary debates about inviolable Westphalian sovereignty and the "limits of concession".¹¹³ It is remarkable that, in both cases, similar ideas, although with different axiological content, are utilized to achieve the same conceptual goals: to justify the unchecked sovereign power to be above the law and to deny the inviolable rights of citizens with the help of broadly interpreted exceptions. One could argue that this dualist attitude toward the law (the hyper-positivism and decisionism in the prevailing legal theory) still persists in Russian approaches to the law.¹¹⁴

111 Robert Sharlet, "The Communist Party and the Administration of Justice in the USSR", in D. Barry *et al.* (eds.), *Soviet Law after Stalin*, Vol. 3 (Sijthoff & Noordhoff, Alphen aan den Rijn, The Netherlands, 1979), 321-392; and Peter Solomon Jr., "Soviet Politicians and Criminal Prosecutions: The Logic of Intervention", in J. Millar (ed.), *Cracks in the Monolith* (M.E. Sharpe, Armonk, NY, 1992), 3-34. This situation resembles the *référé législatif* in revolutionary France, where judges had to ask the parliament how to interpret and apply the law if they were unclear about its meaning. It should be mentioned in passing that the 1789 Revolution in France was considered to be among the immediate predecessors of the 1917 October Revolution in Russia and, therefore, its events and experience could be legitimately referred to as a source of useful examples.

112 Andrei Vyshinsky, *K položeniui del na fronte pravovoi teorii* [About the Situation on the Legal Front] (Iurizdat, Moscow, 1937), cited in *Soviet Legal Philosophy* (Harvard University Press, Cambridge, MA, 1951, Hugh W. Babb, transl.), 329.

113 Valerii Zorkin, "An Apologia of the Westphalian System", 3(2) *Russia in Global Affairs* (2004), available at <http://eng.globalaffairs.ru/number/n_3371>; *id.*, "Predel ustupchivosti", *op.cit.* note 24.

114 For an example of the Russian-specific attitude toward international law, see Mälksoo, *op.cit.* note 7.

In the years of the Khrushchev Thaw after Stalin's death, some Soviet legal scholars (including Alfred Stalgevich, Stepan Kechekian, and Andrei Piontkovskii) sought to reconsider the formalist approach imposed by Vyshinsky. They argued that the law is based not only on state commands but, also, on social relations, consciousness, ideology, and other societal phenomena that shape legal normativity. However, the all-pervasive "state will" was supposed to be in the background of these "objective" elements of legal regulation.¹¹⁵ Therefore, this "broader approach" could not create theoretical obstacles for state officials or party bosses to carry out their intentions under the cover of "state will". To legitimize their discretion, it sufficed to mention that statutory norms would be overruled for the sake of some "objective needs" or "social determinisms". To a certain extent, in the 1960s this exceptionalist approach enshrined the use of general clauses in legislation that allowed very different interpretations.¹¹⁶

In this way, anti-formalism, the second element of Soviet legal theory, hidden in the shadows in Vyshinsky's legal theory, once again rose to the surface in the form of "objective determinisms" allegedly reflected by the collective consciousness, the official ideology, or social practices. Unlike in Western non-positivist legal theories, these "determinisms" did not address human rationality or moral principles as reference points for identifying a law's validity. The lengthy and extensive discussion among Soviet lawyers about both narrow and broad approaches to the law in the second half of the 20th century¹¹⁷ practically focused, for the most part, on the question of whether it was laudable or not to depict the law as it is (distorted in its applications by ideology and discretion) or to hide this prerogative side of Soviet law behind theoretical curtains. These debates were still ongoing on the eve of perestroika, and a group of influential Soviet legal theorists in 1986 called for "re-establishing on a broader theoretical foundation the unity of law, once analytically undermined, for representing law as a whole where all its parts interact, and for showing the place and the function of each part".¹¹⁸

115 See, for example, *Marksistsko-leninskaiia obshchaia teoriia gosudarstva i prava: osnovnye instituty i poniatii* [The Marxist-Leninist General Theory of State and Law: The Basic Institutions and Concepts], Vol.1 (Iurлит, Moscow, 1970), 377-378.

116 Gianmaria Ajani, "Formalism and Anti-formalism under Socialist Law: The Case of General Clauses within the Codification of Civil Law", 2(2) *Global Jurist Advances* (2002), 1535-1661.

117 The main points of these debates were summed up during a 1979 discussion among Soviet legal theoreticians about their understanding of Soviet law. Their proceedings were published in two issues of the central Soviet law review as "O ponimanii sovetskogo prava" [About An Understanding of Soviet Law], *Sovetskoe gosudarstvo i pravo* (1979) Nos.7&8.

118 Vladimir P. Kazimirchuk, Vladimir N. Kurdiavtsev, and Aleksei M. Vasiliev, *Pravovaiia sistema sotsializma: poniatie, struktura, sotsial'nye sviazi* [The Legal System of Socialism: Its Concept, Structure, Social Links], Vol.1 (Iurлит, Moscow, 1986), 28-29.

6 ACTUAL IMPLICATIONS

The persistence of such ideological attitudes does not necessarily mean that there are real social or cultural foundations for this theoretical dualism: taken as “false consciousness”, ideology does not imply any necessary congruence between its postulations and real facts, although it still can direct our social behavior.¹¹⁹ Therefore, this conceptual dualism in legal thinking does not necessarily presuppose any factual dualism between how mundane cases and high-profile cases are considered in Russian courts.¹²⁰ Because of their different characters, moral standings, personal experiences, or life conditions, judges can be closer to one or another pole of this dichotomy, no matter what they learned at law school. Nor is there any conceptual need to construct two parallel legal systems to explain the systematic practice of political meddling in judicial (and, more broadly, legal) decision-making.

It is rather an evaluative judgment to say that the number of high-profile cases justifies putting them into a particular class (a prerogative legal system that supposedly coexists with the system of official law) and, therefore, justifies a binary logic in describing Russian law. Given our focus on the intellectual representations that an epistemic community of lawyers may have about their law, we do not need to discuss whether the ideology that underlies these representations corresponds to facts or not. At the same time, logical inconsistencies do not weaken ideologies. One may well criticize the defeasible argument from authority (the cornerstone of the command theory of law) for its fallacy or argue that the formalist fidelity to the letter of the law logically excludes nihilist contempt for the posited law. However, these logical confusions do not necessarily discredit and sometimes may even reinforce ideological constructs and their “fetishistic mode of functioning”.¹²¹

This characterization of the prevailing legal theory (not of the legal system) in the Soviet Union as a dualist one leads to the conclusion that the positivism (formalism) that allegedly reigns in Central European jurispru-

119 Slavoj Žižek, *The Sublime Object of Ideology* (Verso, London and New York, NY, 2008); and Rafał Mańko, “‘Reality is for Those Who Cannot Sustain the Dream’: Fantasies of Selfhood in Legal Texts”, 5(1) *Wrocław Review of Law, Administration & Economics* (2015), 24-47.

120 One may well argue that political interference could potentially take place in any legal system, although to different degrees. The law is politics everywhere, as Duncan Kennedy and other proponents of critical legal studies (CLS) would say, and in this sense every legal system may reveal some elements of its “dark”, prerogative side—examples of cases decided in favor of power holders and contrary to the letter (spirit) of the law. The number of such cases would be lower in established democracies with lengthy rule-of-law traditions such as the United Kingdom, the United States, France and Germany than in authoritarian states or in transitioning legal systems, but this proviso does not undermine the veracity of the general postulation of CLS.

121 Žižek, *op.cit.* note 119.

dence¹²² did not unconditionally prevail in the Soviet Union or in former Soviet countries. Both in Soviet legal theory and in current Russian theory, the strict positivist attitude toward the law has always been significantly mitigated by decisionist considerations that made it possible to avoid applying the letter of the law in “high-profile cases”. Slavophiles, populists (*narodniki*), and monarchists underplayed the relevance of legal norms in imperial times: for the communist ideology, fidelity to the letter of the law was anything but valuable for the purposes of the Soviet regime.

This inevitably raises the question: what then could work as the supreme criterion of validity? Or, in other words, how can judges and other law officers identify the state of exception and/or those who have the power to decide about this state? A simple reference to formal legal acts (including constitutions) would not work here, as these acts are themselves defeasible and can be repealed by way of exception. The factual will of individual political rulers is a better indicator, and Pashukanis was well aware of this when he suggested that the administration in a socialist society would not need norms at all and would be better managed manually. As elucidated above, however, a number of practical reasons prompted the Soviet authorities to keep the law as a means of social regulation and to tackle this question in a different manner. One apparent response to this question follows logically from Lenin’s idea that there are some objective realities (“material basis”) that predetermine our thinking and action, which only reflect these realities.¹²³

But even this reflection is indirect. First, this basis is mirrored in the social consciousness, which is a reservoir of collective values and ideas and serves as the supreme source of normativity in society,¹²⁴ imposing itself over individual consciousness. Norms or principles that do not fit these sources can be considered devoid of binding force. The latter should rather be sought in vague conservative ideals that supposedly serve as manifestations of these realities. As hinted at above, this approach has many affinities with the natural-law doctrine, which is based on the same methodological strategy: to construe two parallel legal systems (posited law and natural law, the latter being the criterion of validity of the former).

122 Zdenek Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?*, in William B. Simons (ed.), *Law in Eastern Europe*, No.61 (Martinus Nijhoff Publishers, Leiden, 2011).

123 Jane Burbank, “Lenin and the Law in Revolutionary Russia”, 54(1) *Slavic Review* (1995), 23–44.

124 Typical of this logic, the first Bolshevik Decree on Courts “O sude” [On Courts], *Sobranie zakonov RSFSR* (1918) No.26 item 404, proclaimed that the legal norms of the previous government were valid to the extent that they did not conflict with the “revolutionary legal consciousness” (*revoliutsionnoe pravosoznanie*). This consciousness did not refer to the personal legal feelings and emotions of judges but rather to collective intuitions allegedly shared by the working class (the author of this decree, Mikhail Reisner, was a follower of the Polish legal realist Leon Petrażycki).

Both Soviet legal theory and natural-law doctrines thereby recognized that there is some “objective reality” that is supposed to be behind the law. Nonetheless, unlike in ius naturalist philosophy, such suppositions in Soviet law did not lead to discussions about moral or intellectual dimensions of this “objectivity” or about ways to rationally ascertain these dimensions. Having turned Hegelian philosophy upside down, Marx and his followers could not recognize the superiority of ideals over social practices, which is the central point in most natural-law doctrines.¹²⁵ Then, this “objectivity” is usually proclaimed from above, so that establishing objectivity implies an intellectual deconstruction of the ideological messages of political (or in some situations judicial) authorities by way of guesswork, fishing from them what ought to be done. This dimension was clearly visible in the ideological messages from the Communist Party, the Komsomol, and other ideological bodies in the Soviet Union and, to some extent, in directing guidelines decreed by the Soviet supreme courts.¹²⁶

History repeats itself, albeit with different configurations, in Russia and in other former Soviet countries where challenges to official narratives about this “objectivity” (be it national values, spirit, or identity) are often seen as subversive: in the end, they risk calling into question the lawmaking power of the state. If there were social authorities (public opinion, the legal community, the expert community, international bodies, and so on) that could assume the power to decide about an “objective dimension” of the law, their evaluations could undermine the prevailing scheme of the binding force of the law—everything decreed by the state is legally binding. In democratic countries, such “moral authorities” can exert far-reaching influences on lawmaking and on the application of the law, and they normally constitute an important element in the societal system of checks and balances that prevent the state from becoming authoritarian.¹²⁷ There is no need to point out how dangerous such “moral authorities” (be it the legal community or any other societal organism) could possibly become for authoritarian political regimes.

125 One could well argue that Marx’s wishful thinking about the proletarian revolution and classless society rested equally on idealism and not on material realities. See, for example, Nikolai A. Berdyaev, *The Origin of Russian Communism* (Univ. of Michigan Law School, Ann Arbor, MI, 1959, R.M. French, transl.). This is evidently true, but what matters here is how Russian Marxist-Leninists understood this perspective and not whether their understanding was correct.

126 Such directing guidelines (*rukovodiashchie raz’iasneniia*) were set forth in normative rulings (*postanovleniia*) of the presidiums of the supreme courts of the Soviet Union and of its constituent republics. Such guidelines contained instructions to lower courts on how to interpret and apply the law and were binding on them.

127 David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, Cambridge, 2006). Surely, these mechanisms can be subject to improper interference and lobbying, which can distort their work even in democratic countries. In light of the voluminous critical literature, there is no way to idealize these mechanisms in Western countries, and we do not attempt to do so here.

In this light, disrespect toward the law in Russia (the notorious “legal nihilism”) is not the inevitable result of a nihilist legal culture that, according to some scholars,¹²⁸ is specifically Russian. It can be understood as a result of an indoctrination that is not premeditated but that is the result rather of intellectual inertia. Accepted theoretical opinions about the law suggest that it be considered instrumentally, only as a means of carrying out the sovereign will, while rights are valid only insofar as they are tolerated by state power.¹²⁹

The many negative sides of legal nihilism notwithstanding, some philosophers would nonetheless argue that this dualist attitude toward the law is not something intrinsically wicked: such famous Russian thinkers as Vladimir Soloviev, Fyodor Dostoevsky or Aleksandr Solzhenitsyn justified contempt for the law by claiming that moral and religious precepts took priority over legal ones,¹³⁰ even if it stands beyond doubt that the relentless application of the decisionist approach can often result in injustice. Also, in some situations, the decisionist approach will possibly lead to better results than strict positivism of the “*Gesetz ist Gesetz*” sort, especially in countries with relatively poor-quality statutory laws. This was, in particular, the source of inspiration for Russian proponents of precedent law (the so-called “precedent revolution” flagged by the chief justice of the former RF Supreme Commercial Court, Anton Ivanov¹³¹) who, several years ago, called for the vices of Russian legislation to be cured by allocating more freedoms to high courts to broadly interpret and change statutory norms.¹³²

128 Manfred Hildermeier, “Das Privileg der Rückständigkeit. Anmerkungen zum Wandel einer Interpretationsfigur der Neueren Russischen Geschichte”, 244 *Historische Zeitschrift* (1987), 557-603; Laura Engelstein, *Slavophile Empire, Imperial Russia's Illiberal Path* (Cornell University Press, Ithaca, NY, 2009), 20-23; and René Provost, “Teetering on the Edge of Legal Nihilism: Russia and the Evolving European Human Rights Regime”, 37(2) *Human Rights Quarterly* (2015), 289-240.

129 Henry E. Hale, “Civil Society from Above? Statist and Liberal Models of State-Building in Russia”, 10(3) *Demokratizatsiia* (2002), 306-321; and Petr Preclik, “Culture Re-introduced: Contestation of Human Rights in Contemporary Russia”, 37(2-3) *Review of Central and East European Law* (2012), 173-230.

130 Realist approaches also exist in leading civil-law countries, e.g., the realist school of Michel Troper in France or the realist jurisprudence of Giovanni Tarello, Riccardo Guastini, and others in Italy, not to mention realism in US legal philosophy. Surely, these are based on axioms and ideas that are quite different from the Russian context. It goes without saying that realism in the Eastern European context leads to quite different results than in the Anglo-American or Scandinavian legal systems, where it does not have the nihilist connotation that is specific to the realist approach in Russian legal culture. The latter context refers to the absolute power of the sovereign to grant or take away rights.

131 Mikhail Antonov, “O nekotorykh teoreticheskikh voprosakh pretsedentnoi revoliutsii v Rossii” [Some Theoretical Questions Concerning the Precedent Revolution in Russia], 34(4) *Zhurnal konstitutsionnogo pravosudiia* (2013), 9-14.

132 William Pomeranz and Max Gutbrod, “The Push for Precedent in Russia's Judicial System”, 37(1) *Review of Central and East European Law* (2012), 1-30.

Even after the Supreme Commercial Court was disbanded in 2014, this decisionism still holds sway in Russian jurisprudence on the basis of this theoretical justification.

CONCLUSION

This undercurrent theoretical combination of the formalist and anti-formalist accounts of law existed throughout the history of Soviet law, implying that, on the one hand, there was a statist theory of law, and, on the other hand, there was decisionism inspired by the Marxist-Leninist class theory.¹³³ It is this decisionism that transpires in Russian (Soviet) legal thinking where the law is only an epiphenomenon of economic relations, so that “within the Marxist position the signifier law does not denote, if anything, a self-referential, closed system of rules; rather it points towards a specific part of social normativity entangled in the fabric of economic dynamics”.¹³⁴ The law is represented as either the result of class struggle or, in current debates, as the result of struggle for identity and sovereignty. Legal norms (propositions) as such have never been prioritized in either Soviet or Russian legal theory—these norms are normally seen as indicators of what the political will is and not as imperative, independent of the political, judicial, or other will. What is legal is what the political authorities order—that is the point at which legal formalism and decisionism perfectly fit each other. The liberal narratives about the intrinsic value of rights and of the law used to be (in Soviet law)—and still are—taken by many scholars *cum grano salis*, and in the prevailing official discourse they are often considered an artificial cover for subversive influences conducted with the help of such ideas as human rights or the rule of law.

This follows quite clearly from this theoretical position. At best, the law was accepted in Marxist legal theory as a provisional means of regulation until the enemies of the working class were defeated and a classless society emerged. Then the law would fade away as redundant, but, until that moment, the law should be tolerated and pragmatically utilized under the ideological supervision of the Communist (Bolshevik) Party. It goes without saying that this attitude did not imply any respect for the law: it could be disregarded whenever necessary for a higher cause (attainment

133 Rett R. Ludwikowski, “Socialist Legal Theory in the Post-Pashukanis Era”, 10(2) *Boston College International and Comparative Law Review* (1987), 323–342.

134 Cercel, *op.cit.* note 36, 51.

of communism or preservation of sovereignty).¹³⁵ The logical conclusion from this theoretical posture implies that rights are not generally perceived as binding in virtue of their intrinsic meaning in an epistemic community (as preconditions of civilized interaction), but only insofar as they are commanded and supported by the state, or if their observance is consistent with the priorities of state policies.

It remains to be discussed whether post-Soviet Russia (and other countries in the region) can go beyond this theoretical impasse, as adopting new laws and constitutions is not enough to change mindsets. The analysis undertaken above leads to the conclusion that the old legal mentality still holds sway among lawyers, although this conclusion should not be understood in black-and-white terms: there are non-conformist lawyers who may re-evaluate the Russian legal system from alternative standpoints. But so far, Russian legal theory and legal scholarship in general have done too little to catch up to the level of discussions taking place in the world and eventually to become a moral authority that could, through public debates, provide constraints against incompetent, excessive legislation and flawed court practices. Such a revision of the legal system and unveiling its intrinsic rationality to restore the genuine value of rights was the major message of *Vekhi* a century ago, and this task is likely to remain something that contemporary Russian lawyers need to deal with. Revisiting established theoretical ideas could be one of the main steps in this direction.

With this purpose in mind, in the next chapter, we will examine the conception of Chief Justice of the RF Constitutional Court, Valerii Zorkin, to reveal the methodological and philosophical premises of their works. These premises hinge on the theoretical constructions of Russian jurisprudence, developed in pre-revolutionary legal philosophy and, also, in Soviet legal scholarship. It is revealing to study these premises against the backdrop of Western legal conceptions to which Chief Justice Zorkin attempt to adjust Russian intellectual tradition. Despite their arduous efforts, this attempt fails. This failure only reveals the methodological distinctiveness between the premises in question and the relevant Western conceptions (the economic analysis of law and human rights doctrine, respectively). This confirms our thesis that any ideological changes in Russian law—involving

135 As an example, we can cite Art.1 of the 1922 RSFSR Civil Code:

“Civil rights are protected by the law except in situations in which these rights are utilized contrary to their social and economic purpose.” Art.5 of the 1964 RSFSR Civil Code made this even more explicit: “Civil rights are protected by law, except in instances in which they are exercised in contradiction to their purpose in a socialist society in the period of the building of communism. In exercising their rights and performing their obligations, citizens and organizations must observe the law, and must respect the rules of socialist communal living and the moral principles of a society which is building communism.”

See *Civil Code of the Russian Soviet Federated Socialist Republic* (Univ. of Michigan Law School, Ann Arbor, MI, 1965, Whitmore Gray and Raymond Stults, transl.).

an adaptation of Western conceptions without revisiting the main methodological schemes and theoretical tools of legal thinking—will be only decorative. Such changes will not touch upon the substance of Russian law and, quite likely, will end up in controversies, as the divergence of the starting methodological points sooner or later will come to the surface.