

## Soviet Law and Political Religion

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### I INTRODUCTION

At the beginning of the 1950s my PhD supervisor was a doctoral candidate at the Kharkov Law Institute, where he was preparing to defend his doctoral dissertation on Soviet law. His work “Soviet legislation” addressed purely legal issues like the nature of Soviet laws, the interlinks between law and legislation, and the hierarchy of legal acts in the Soviet Union. Just as his department recommended that his dissertation be defended before a special council responsible for conferring his degree, Joseph Stalin issued an article, “Marxism and the Problems of Linguistics.” Even though Stalin’s article had little to do with my supervisor’s dissertation, his department immediately ceased preparing for his defense and returned his dissertation so that he could consider the conclusions of Stalin’s opus. Their reactions were not reflections on the quality of his dissertation, or even the doubtless, outstanding scientific significance of Stalin’s works (even if he did write them himself). Rather, they believed no research could justifiably be complete without quotes from the Soviet chief’s most recent works, or from Marx, Engels, and Lenin for that matter – all of which were used in debates as final arguments, the truth that needed no elaboration or defense, in the same way that medieval theologians used to cite the Bible, Church Fathers, or Aristotle.

Around the same time, my supervisor’s own supervisor and the head of his department had a habit of restricting his lectures to only enrolled students. If he spotted an unfamiliar person, he would leave the classroom out of a reasonable fear of being misunderstood. In Soviet times he did not write a word, but his academic views lived on in the memories and academic works of his students. It was precisely the terror felt by those living under totalitarianism: fear that discussing or lecturing on certain topics, such as the Law of the Twelve Tables or types of legal rules, might put the speaker under suspicion of contradicting Marx or Lenin, even though these men never wrote on the same issues. This understanding reminds me of an older fear of crossing a thin and twisted line that separates theology from heresy.

One can easily detect religious language in Soviet legal texts, namely, in constitutional acts. The USSR’s Constitution of 1924 opens with Apocalyptic imagery: the

world has been broken into two camps – a socialist kingdom of good where peace, freedom, and equality reign supreme, and a capitalist hell where inequality, slavery, pogroms, and chauvinism rule. Religious rhetoric runs through other Soviet constitutional texts, as well. In the 1919 Constitution of the Ukrainian Socialistic Soviet Republic, an individual's duty to work is supported with an almost direct quote from St. Paul: "He who does not work, neither shall he eat."

Soviet philosophy of law was grounded on Lenin's interpretations of Marxism, ideas that had an almost sacramental character through the assumed infallibility of their authors whose correctness was predetermined in the absence of scientific or any other kind of criticism. Several key conceptions (for example, the messianic role of the state and politicization of law) were implied from Lenin's version of Marxism and influenced Soviet law on both philosophical and practical levels, including the Soviet understanding of legality and human rights.

This chapter explores religious features of Soviet law and argues that the source of this religiosity was not internally legal, but was political and implied from Soviet totalitarianism,<sup>1</sup> which can be described as a form of political religion. This conception suggests that totalitarian regimes (re)produce a religious means of grounding and implementing their own power over society. Moreover, at the core of totalitarian political power, there always lies an overarching goal, in pursuit of which the state frees itself from any legal restrictions. Thus, the conception of political religion is a suitable intellectual tool for studying certain aspects of Soviet law because it unpacks the concepts and principles of Soviet Law more fully than traditional analytical approaches.

This does not mean that Soviet law or totalitarian law in general cannot be considered according to the usual dichotomy, "law – arbitrariness," as was

<sup>1</sup> I do not explore here whether democratic legal systems have similar religious features. My intuition is that they do. Robin West writes about the faith that Americans have in their Constitution (Robin West, R. (2016). "Law's Emotions." *Rich. J. L. & Pub. Int.* 19, 344–45). Otfried Höffe suggests that human rights – the key element of liberal political and legal systems – constitute a modern civil religion: (S. Gosepath and G. Lohman (eds.) (2008). *Filosofiya prav liudyny* [Philosophy of Human Rights] (pp. 32). Kyiv: Nika-Centre Publishing House). They play the same role that the Christian claim regarding man being made in the image of God once did. Human beings differ from all other beings because they have rights. The contemporary mainstream Western discourse of human rights is a discourse of the moral grounds of rights, their scope, their balance with other values, and the limits of government interference, but it is not a discourse about whether they exist. To frame the question in that way would be absurd. Individual rights are taken as a given, as almost an object of confidence. The same confidence is palpable in the American Declaration of Independence, when it refers to the "self-evident" truth of "inalienable Rights," or the Treaty on European Union that was "inspired" by the universal value of "the inviolable and inalienable rights of the human person." And the same is true for the solemn language of democratic constitutions and inaugural oaths of democratically elected presidents (the Bible can sometimes be found nearby), in the almost eschatological narrative of the history of human rights (from the darkness of rightlessness to the light of equal rights for all), in the cultish character of those who fought for human rights (Martin Luther King, Nelson Mandela), and in the victims of glaring violations of rights (Emmet Till).

done by Gustav Radbruch,<sup>2</sup> H. L. A. Hart,<sup>3</sup> Harold Berman,<sup>4</sup> or Dennis Lloyd (with different conclusions).<sup>5</sup> But traditional approaches do not adequately illuminate the nature of Soviet law. G. W. Paton wrote that Soviet law was “a sword for the executive and not a shield for the private citizen,”<sup>6</sup> that is to say, that Soviet law was the arbitrariness of the state. Soviet law, however, could be a shield, at least for politically loyal individuals in civil, family, and labor relationships or even in some relations with public power, and could be a sword in any legal situations against political dissidents, persons, or social group suspected of disloyalty. A political-religion perspective helps to demonstrate and explore this ambiguity.

Finally, two reservations should be made with respect to the scope and focus of my research. First, applying the political-religion conception presupposes a broad meaning of religion, which cannot be reduced to historical religions and faith traditions. When I argue that some features or elements of the Soviet legal system were religious by their nature or some doctrines and ideas beyond Soviet law were religiously justified, I do not try to argue that religions as social institutions in any way presuppose or support totalitarian political systems per se. I only mean that totalitarian political regimes are inclined to sacralize their power and employ religious tools in order to sustain themselves. This usually has some influence on the legal systems of totalitarian countries. This chapter should not be considered as a Voltaire-like critique of religion.

Second, in this chapter I explore only state-made law and pay almost no attention to informal regulation that may sometimes, especially in private-law issues, replace formal legal rules.<sup>7</sup> While law is not limited to state-made law, I limit my commentary because political religion influenced mostly the Soviet formal legal system, including legislation, court practices and legal doctrines developed by legal scholars and taught in law schools. At the same time, comparative research of formal and informal normative regulation in the Soviet Union,<sup>8</sup> can add a lot to our understanding of how legal and public-power institutions function in totalitarian political regimes.

<sup>2</sup> Radbruch, G. (2006). “Statutory Lawlessness and Supra-statutory Law.” *Oxford Journal of Legal Studies* 26(1), 1–11.

<sup>3</sup> Hart, H. L. A. (2012). *Concept of Law* (3rd ed., pp. 210–12). Oxford: Oxford University Press; Hart, H. L. A. (1957). “Separation of Law and Morals.” *Har. L. Rev.* 71, 616–18.

<sup>4</sup> Berman, H. J. (1958). “Soviet Law and Government.” *Mod. L. Rev.* 21(19), 22; Berman, H. J. (1955). “Soviet Justice and Soviet Tyranny.” *Colum. L. Rev.* 55, 805–06.

<sup>5</sup> Lloyd D. (1976). *The Idea of Law* (pp. 204). London: Penguin Books.

<sup>6</sup> Paton, G. W. (1946–47). “Soviet Legal Theory.” *Res Judicatae* 3, 62.

<sup>7</sup> See, e.g., Ellickson, R. (1991). *Law without Order: How Neighbors Settle Disputes*. Cambridge, MA: Harvard University Press.

<sup>8</sup> See, e.g., Leacock, E. B. (1972) “Introduction and Notes.” In F. Engels *The Origin of the Family, Private Property, and the State: in the Light of the Researches of Lewis H. Morgan*. New York, NY: International Publishers.

## II THE SOVIET POLITICAL REGIME AS POLITICAL RELIGION

The history of politics can easily be written as the history of politics and religion. Many perennial political questions have been answered religiously. For example, questions including whether the state or kingdom differs from a band of robbers (even if the only actual difference has always been whether the robbers were roving or stationary), why the state must be obeyed, and why it has the right to use force, have found answers in the divine status of ancient monarchs, St. Paul's pronouncements about all authorities being established by God,<sup>9</sup> the status of the monarch as head of the Church, the medieval doctrine of the divine right of the king and corresponding myths, symbols, and rituals, and so on. Religion includes political power in a metapolitical context of what Leo Strauss once called "imaginary perfection,"<sup>10</sup> and ties it to the transcendent forces and otherworldly aims animating human life, that is, the City of God, salvation, or heaven.

Religion and religiously sanctioned law thereby normativizes relations between man and the political order. If the monarch is one of the gods or the son of god or Heaven, or the government is of God, then the power of the government appears to be a part of the eternal divine order and should itself observe God's commands rather than acting arbitrarily. The fear and powerlessness which man felt towards the sovereign reflect the sovereign's corresponding fear and powerlessness towards the might of gods and the duty to rule according to divine prescriptions, where the ruler and ruled share a perspective of responsibility before God. Things on the ground, of course, were more complicated, appealing to sources of political legitimacy as well as to a monarch's own perception of his divinely determined power – regarding the former, a certain political form would imply divinely legitimated rule, where the religious legitimation of government power became intertwined with elements of political representation (for example, Roman Republic), and regarding the latter, we would do well to consider the numerous denunciations of Old Testament prophets against unjust monarchs or corrupt judges.

The secularization of politics and law changes this pattern. Secularization significantly reduced religious dimension of the political discourse. Politics becomes exclusively or mostly an inner-worldly matter. Recalling a historical study by Christopher Hill, Jeffrey Stout points out that already in the middle of the seventeenth century, citations to scripture in the English Parliament provoked laughter, reflecting the decline of the Bible's public discursive authority.<sup>11</sup> Likewise, the divine right of kings did not prevent the High Court of Justice established by Parliament from sending Charles I to the gallows.

<sup>9</sup> Rom. 13:1

<sup>10</sup> Strauss, L. (1989). "Three Waves of Modernity." In *Introduction to Political Philosophy* (pp. 86). Detroit, MI: Wayne State University Press.

<sup>11</sup> Stout, J. (2004). *Democracy and Tradition* (pp. 94–95). Princeton, NJ: Princeton University Press.

Despite increasing secularization, faith and a religious way of arguing for power, symbolism, and rituals did not completely disappear from politics. Emilio Gentile writes that in the modern period there occurs a transition from the sacralization of political power to the sacralization of the political system.<sup>12</sup> In other words, politics itself acquires the rhetoric of religion, distinct only in that the content, according to Eric Voegelin's categories, no longer transcends the world but becomes immanent to it.<sup>13</sup> Belief, commitment, and practice shifted direction to the things of this world – homeland, humanity, class, race, and the relation between ruler and ruled, who are either charmed (Georg Simmel) or frightened (Eric Fromm) by the ruler. Gentile talks about two forms of this secular religion: civil religion and political religion. He writes:

Civil religion is the conceptual category that contains the forms of sacralization of a political system that guarantee a plurality of ideas, free competition in the exercise of power, and the ability of the governed to dismiss their governments through peaceful and constitutional methods. . . . Political religion is the sacralization of a political system founded on an unchallengeable monopoly of power, ideological monism, and the obligatory and unconditional subordination of the individual and the collectivity to its code of commandments.<sup>14</sup>

The totalitarian state pretends to be more than a form of government – it sees itself as the ruler of history, the creator of a new society or socioeconomic formation, the source of world revolution, the protector of race or nation, the keeper of an identity that is under threat. This sacred mission justifies the government's monopoly on political and economic power, its total control over society, and any arbitrariness because, as totalitarians often claim, these bring about the stated ultimate end. In this sense, any real totalitarian state is a mix of fear and prospective happiness, or “paradise on this side of the grave,”<sup>15</sup> where fear of an omnipotent and omniscient machine of unbounded power is compensated for by an officially sanctioned expectation for future happiness: communist class-less society or the Thousand Year Reich.

Here I do not separately discuss the question of whether political religions appear to copy or make a travesty of traditional religion.<sup>16</sup> It seems to me that the aims of totalitarianism, such as totalitarian monopolization of power and control over society and individuals, their behavior, and consciousness, pushes this political system toward a wide (and perhaps twisted) employment and reproduction of secularized religious patterns and concepts. For totalitarian regimes, religion

<sup>12</sup> Gentile, E. (2006). *Politics as Religion*. (G. Staunton Trans., pp. XIV). Princeton, NJ: Princeton University Press.

<sup>13</sup> Voegelin, E. (1986). *Political Religions* (DiNapoli & Easterly Trans., pp. 14). Lewiston, NY: Mellen Press.

<sup>14</sup> Gentile, *Politics as Religion*, *supra* note 12, p. XV.

<sup>15</sup> Schumpeter, J. A. (2006). *Capitalism, Socialism and Democracy* (pp. 6). Oxford: Routledge.

<sup>16</sup> Baehr, P. (2010). *Hannah Arendt, Totalitarianism and the Social Sciences*. Stanford, CA: Stanford University Press; Gregor, A. J. (2012). *Totalitarianism and Political Religion: An Intellectual History*. Stanford, CA: Stanford University Press; J. Augustejn, P. Dassen and M. Janse (eds.). (2013). *Political Religion beyond Totalitarianism*. New York: Palgrave-Macmillan.

appears to be a suitable method for achieving these aims<sup>17</sup>. Even still, certain islets of ideology-free political and legal institutions, like contracts in civil law, appear to be an exception. We can examine the Soviet political regime as a form of political religion, including its official communist ideology and supported cults, myths, symbols, practices, and public institutions, on which Lenin and his party of Bolsheviks monopolized and sustained their power.

The Leninist and Stalinist interpretation of Marxism constituted the basis of Soviet communism. Marx's teaching about the inevitable proletariat revolution and the construction of a communist class-less and government-less society is a combination of a scientific knowledge and a prophecy of the last who shall become the first, of the City of God on Earth. This is worth dwelling on because such an interpretation of class struggle takes matters beyond the limits of politics and economics. The liberation of the proletariat along with the whole of humanity becomes a question of the battle of good and evil, of ridding injustice from this world,<sup>18</sup> and not simply a response to political obstructions and an unjust distribution of economic resources. Therefore, it should come as no surprise that Marxism, as Bjarne Melkevik writes,<sup>19</sup> quickly became the object of a cultish and almost religious devotion of those who, believing in the Communist Manifesto, waited and, by their actions, catalyzed the creation of a communist "association in which the free development of each is the condition of the free development of all."<sup>20</sup>

Lenin's interpretation of Marxism intensified this religious component in three key ways by appropriating Marx's teachings to his own political goals. First, Lenin rejected any interpretation of Marxism that offered to minimize class struggle and make use of the evolutionary path without revolution.

Second, citing Marx and Engels, Lenin established that the transition from capitalist society into communism requires one additional step. Revolution does not do away with government but instead replaces bourgeois government with a transitional, proletariat government, which will begin to dissolve or to "wither away" with the disappearance of class contradictions.<sup>21</sup> The dictatorship of the proletariat (specifically, Lenin and his party's dictatorship)<sup>22</sup> is therefore the only

<sup>17</sup> In "Terrorism and Communism" Leon Trotsky wondered how to make the bourgeoisie obey if the proletariat state had no "future [transcendent] penalties" and "priests' hell" (Trotsky, L. (1961). *Terrorism and Communism. A Reply to Karl Kautsky* (M. Shachtman Trans., pp. 22). Ann Arbor, MI: The University of Michigan Press). For him the answer was terror. However, terror would not be effective and a political order would not be stable without ideology that engaged most of the population.

<sup>18</sup> Baehr, Hannah Arendt, *supra* note 16, p. 93.

<sup>19</sup> Melkevik, B. (2010), *Marxisme et Philosophie de Droit : le Cas Pasukanis* (pp. 7). Paris: Buenos Books International.

<sup>20</sup> K. Marx and F. Engels (1985). *The Communist Manifesto* (pp. 105). London: Penguin Books.

<sup>21</sup> Lenin, V. (1932). *State and Revolution* (pp. 15–16). New York: International Publishers.

<sup>22</sup> Lenin exclaimed in a letter to the People's Commissar for Justice, Dmitry Kursky: "The State is us, us, deliberate workers, us, communists." Lenin, V. (1970). *Polnoe sobranie sochineniy* [Complete works] (5th ed., Vol. 44. pp. 397). Moscow: Izdatel'stvo politicheskoy literatury.

path to building communism. Lenin underlined that the exploiters can be defeated in one stroke but cannot be destroyed in one stroke,<sup>23</sup> because after the revolution the proletariat dictatorship should preserve itself and be strong enough for battle with the bourgeoisie and its sympathizers. Stalin added concerns about growing class struggle during the transition to communism and the impossibility of dissolving the state while being surrounded by capitalist countries; these concerns demanded an even more powerful state that would be prepared for battle against enemies from within and from without.<sup>24</sup> As a result, even the officially sanctioned death of the state became a question of the distant future. After breaking through resistance from the class of exploiters, the USSR was proclaimed to be for all people and appeared as the necessary facilitator of society, even all of humanity in a new class-less world, where according to Lenin, each could “receive from society, without any control over the labor of the individual citizen, any quantity of truffles, automobiles, pianos, etc.”<sup>25</sup> This messianic role allowed the state to justify any actions in relation to the society and to each individual.

Third, like many religions have throughout their history,<sup>26</sup> Lenin’s version of Marxism refused to entertain any criticism. The texts of Marx, Engels, Lenin, and Stalin (during his rule) became official dogma, whereas all other versions of Marxism were declared to be perversions or slander. Lenin began a tradition of interpretation according to which verifying Marx and Engels’s conclusions appeared an absurd task. The trouble was that there were internal contradictions in Marx’s works, as is almost unavoidable whenever all of a thinker’s works, including even his or her letters, are accepted as a single whole.

Soviet ideologists overcame internal contradictions in Marxism-Leninism like the internal contradictions in the Bible. Like medieval scholastics, Lenin and his followers juggled quotations in order to resolve conflicts of interpretation and showed that the problem was not with the contradictions but with misunderstanding “correct” revolutionary Marxism – correctly understanding was a symbol of faith open only to Bolsheviks and no one else.<sup>27</sup> Lenin devoted his main theoretical work,

<sup>23</sup> Lenin, V. (1952). *The Proletarian Revolution and the Renegade Kautsky* (pp. 48). Moscow: Foreign Languages Publishing House.

<sup>24</sup> Stalin, J. (1942). *Leninism: Selected Writings* (pp. 98). New York: International Publishers. Accordingly, Andrey Vyshinsky argued that the State could only dissolve when all countries became socialist (Vyshinsky, A. (1948). *Issues of Theory of State and Law* (pp. 227). Moscow: State Publishing of Law Literature; Vyshinsky, A. (1948). *The Teachings of Lenin and Stalin on Proletarian Revolution and the State* (A. Rothstein, trans., pp.116–17). London: Soviet News. The irony was that when Engels wrote about strengthening public power during the growth of class contradictions within the state, he meant the bourgeois state, not the state where the proletariat revolution succeeded (Leacock, Introduction, *supra* note 8, p. 230).

<sup>25</sup> Marx and Engels, *The Communist Manifesto*, *supra* note 20, p. 80.

<sup>26</sup> Cf. Saint Paul’s phrase “for there must be also heresies among you” (1 Cor. 11:19) with Medieval practices of persecution of heretics.

<sup>27</sup> For example, Lenin wrote that when Marx had spoken about the “future statehood of communist society,” he did not contradict the basic view of communism as a stateless society (Lenin, *State and Revolution*, *supra* note 21, p. 84).

“State and Revolution,” to “resuscitate the real teaching of Marx on the state” and rid it of “opportunistic distortion.”<sup>28</sup> The word “distortion” is revealing. This is the rhetoric of battling heresy, not of “scientific” discussion. As Joseph Schumpeter wrote about Marxism generally, for an orthodox Marxist, as for any orthodox believer, an opponent is not merely in error but in sin.<sup>29</sup>

In this sense, the absence of any political rights in the Soviet system is completely logical. In liberal political systems the critics of the state occupy the same moral position as supporters of the state. But if politics becomes religion, then political rights (the freedom of association for critics of the state, a multi-party system, etc.) encroach on an exclusively true political order, just as religious liberty encroaches on the exclusive truth of a state religion. Critics of the state are then seen as guilty of the same sin as heretics or atheists. Carl Schmitt was completely frank in one of his works of the Nazi period: “Now [after the coming to power of the Nazis] there is no equality but rather an absence of discrimination between the enemy of the state and its friend, between a comrade of the people and a stranger.”<sup>30</sup>

Contradictions between official ideology and reality were overcome by way of what Hannah Arendt called the totalitarian “contempt for factuality.”<sup>31</sup> All actions of the regime that contradicted its own ideology or officially stated aims were considered unreal, nonexistent. In this way, there were no workers obligated to labor in slavery-like conditions in Soviet plants and factories because Lenin’s workers were the “vanguard” of working people and masters of the universe,<sup>32</sup> who “will scarcely allow anyone to trifle them.”<sup>33</sup> Thus, there was no actual Supreme Council of the USSR – a caricature of Parliament without any actual influence, where deputies were always voting for drafts worked out by the bureaucracy beforehand – because Marx criticized bourgeois democracy for the arbitrariness of its executive power and the lack of parliamentary control over it,<sup>34</sup> and because Marx called the parliamentary regime the regime of unrest that lived by discussion and thrived in conflict.<sup>35</sup>

<sup>28</sup> *Id.*, p. 6–7.

<sup>29</sup> Berlin, I. (1957). “The Silence in Russian Culture.” *Foreign Affairs* 36(1), 5.

<sup>30</sup> Schmitt, C. (2001). *State, Movement, People: the Triadic Structure of the Political Unity. The Question of Legality*. (S. Draghic ed. and trans., pp. 4). Corvallis, OR: Plutarch Press. This observation is worth considering insofar as it shows a rhetorical similarity between criticism of political sin (being an enemy of the state) and religious criticism of individual rights, for which many religions use the objection of “difference” to arguments about equality and discrimination. The exclusion of women from certain kinds of professions or activities does not appear to be discriminatory because men and women are legally equal, but different and have different social roles.

<sup>31</sup> Power, S. (2004). “Introduction.” In H. Arendt, *Origins of Totalitarianism* (pp. 590). New York: Schocken Books.

<sup>32</sup> Lenin, *The Proletarian Revolution*, *supra* note 23, p. 39.

<sup>33</sup> Lenin, *State and Revolution*, *supra* note 21, p. 85.

<sup>34</sup> Fine, B. (2002). *Democracy and the Rule of Law: Marx’s Critique of the Legal Form* (pp. 112). Caldwell, NJ: Blackburn Press.

<sup>35</sup> Marx K. (1996). “The Eighteenth Brumaire of Louis Bonaparte” (pp. 71). In T. Carver (ed. And trans.) *Marx: Later Political Writings*. Cambridge: Cambridge University Press.



The messianic role of the state in forming a new society of Soviet people and in moving toward communism was supplemented by the teaching that developed Marxism-Leninism in all spheres of social life, even the most unexpected. The religious nature of Soviet communism presumed and demanded a capacity to create a complete picture of the world in which all the primary questions of human life would find answers. "Marxism will be able to do everything," assures a character in Andrei Platonov's dystopian novel *The Foundation Pit*. This teaching could be applied everywhere from science to sex: Marxism-Leninism could go so far as to teach how, in fact, genetic mutation happens or that one could only enter into sexual relations with partners of the same social class.

The institutional dimension of Soviet political religion comprised not only the state but also the Party and mass state-funded associations of young people, artists, writers, and so on. Membership in these movements, just like belonging to a state religion in many nonsecular states, was not just a way of immersing the population in official ideology from the moment one first stepped foot outside the family into kindergarten or primary school; it was also a way of determining privileges or, what was more common, it was a condition of nondiscrimination.

As with traditional religions, Soviet political religion had its own mythology, its own cults and anti-cults, rituals, and "holy" places. These applications legitimized the political regime and intensified the population's loyalty and controllability. Further, the mythology amplified the supposedly scientific foundation of the Soviet system and reinforced the emotional scaffolding required to support official activities; but above all, it instilled in people's minds that picture of the world which was most useful for a totalitarian regime. All the while communism battled traditional religion, which it perceived as an ideological and political contestant for authority and power. We can deduce that traditional religion presented such a threat from Marx's emotional determination of religion as "the opium of the people"<sup>36</sup> and the "mystification" from which one's conscience needs to be freed,<sup>37</sup> or from Lenin's comparison of believing in God to a necrophilia.<sup>38</sup>

On an ideological level, as David Walsh writes, "the presence of a divine Creator jeopardized the whole project of human self-salvation through revolutionary action,"<sup>39</sup> while on a political level, churches and religious communities presented, as Hannah Arendt said, the natural "objective enemy"<sup>40</sup> meaning part of the class of

<sup>36</sup> Marx, K. (1970). *Critique of Hegel's 'Philosophy of Right'*. (Jolin & O'Malley Trans., J. O'Malley ed., pp. 131) Cambridge: Cambridge University Press.

<sup>37</sup> Marx, K. (1996). "Critique of the Gotha Programme" (pp. 225). In T. Carver (ed. and trans.) *Marx: Later Political Writings*. Cambridge: Cambridge University Press.

<sup>38</sup> Lenin, V. (1969). *On Religion* (pp. 39). Moscow: Progress Publishers.

<sup>39</sup> Walsh, D. (1995). *After Ideology: Recovering the Spiritual Foundations of Freedom* (2nd ed., pp. 122). Washington, DC: Catholic University of America Press. Walsh provides evidence from Marx demonstrating that Marx viewed religion as an ideological opponent or competitor rather than an element alien to his worldview.

<sup>40</sup> Power, Introduction, *supra* note 31, p. 11.

exploiters or an element of the government machine. Soviet official atheism solves both of these problems. It allows the government, as Walter Lippmann put it, to appropriate for itself the functions and prerogatives of God.<sup>41</sup> Besides that, communist atheism serves to justify the act of rejecting one's freedom of conscience in the interest of the Communist Party's (or really, the state's) war against religion, interpreted as a war for freeing believers from "incorrect" convictions that, as one Soviet scholar argued, stand in the way of their happiness.<sup>42</sup>

The dogmas, teachings, and practices of the Soviet political regime impacted the normative systems of Soviet society. There never were a set of morals that expressed purely class struggle. Communist morality in the USSR was more accurately a mix of commitment to communist ends, patriotism, universally shared human values, and the rules of cohabitation. The same can be said of Soviet law. Although it was of course impacted by the teachings of Marxism-Leninism and bolstered by the nature of the Soviet state, Soviet law was not completely severed from its past and even shared a number of traits with Western law. In this sense, the USSR legal system was reminiscent of the legal system of a nonsecular country, where religious law could compete with local customs or secular laws and could even dominate over them without being able to completely supersede them.

### III THE SYMBOL OF FAITH IN SOVIET LAW<sup>43</sup>

The symbol of faith in Soviet law is a set of ideas or dogmas that exhibit the influence of Soviet political religion on Soviet law. These ideas concern the nature of Soviet law, its role in society and in the movement toward communism, how law interacts with politics and the State, and its relationship with bourgeois law.

Marxism-Leninism considers law to be a part of the superstructure above the economic base, that is, above the relationship of production and exchange. The first section of the Communist Manifesto begins with the claim that the history of all hitherto existing societies has been the history of class struggle.<sup>44</sup> Where the means of production generate a surplus for exchange, there exist classes and class struggle. The economically dominant class, which owns the means of production and appropriates the surpluses, strengthens its dominance over other classes by way of political and legal institutions. Law, therefore, entrenches formal inequality among people of different classes. In this sense, the bourgeois state and its law institutionalize the dominance of the bourgeoisie as the ruling class over the proletariat and similarly oppressed social groups.<sup>45</sup>

<sup>41</sup> Lippmann, W. (1989). *Public Philosophy* (pp. 83). New Jersey: Transaction Publishers

<sup>42</sup> Mchedlov, M. (1982). *Religiya i sovremennost'* [Religion and the Present] (pp. 243). Moscow: Gospolitizdat.

<sup>43</sup> Karl Marx used the similar term "articles of faith" as a set of political ideas that are above criticism in his Letter to W. Bracke (Available at: [www.marxists.org/archive/marx/works/1875/letters/75\\_05\\_05.htm](http://www.marxists.org/archive/marx/works/1875/letters/75_05_05.htm)).

<sup>44</sup> Marx and Engels, *The Communist Manifesto*, *supra* note 20, p. 79.

<sup>45</sup> *Id.*, pp. 92–93.

The socialist revolution consists in the formerly oppressed proletariat, along with their collaborators, forcefully taking power into their own hands and installing a dictatorship of the proletariat that governs in the interests of working-class people. After crushing the resistance from the class of exploiters, particularly after establishing public ownership of the means of production, the state becomes an all-people's government. Law in this state likewise appears to be for all people, meaning that it serves the interests of all people rather than of specific classes. This, as Lenin once said, is "bourgeois law without the bourgeoisie" or, in other words, law that strengthens formal equality, but does not entrench class oppression. Lenin wrote that as the first step of communism, the socialist state maintains formal equality in the distribution of products of consumption insofar as equal amounts of labor ensure equal wages (the principle "from each according to his ability to each according to his work"). Therefore, the bourgeois legal principle of formal equality is used as a means of destroying classes, and the socialist state's legal system became "bourgeois law without [the class dominance of] the bourgeoisie."<sup>46</sup> The contents of the law as well as politics, religion, or art are determined by the nature of economic relations and class struggle in a particular historical period. Rembrandt's paintings or Dickens's novels, medieval *droit coutimier* and the formal equality of bourgeois law, elections and human rights, God and marriage, all express the economic conditions of life in a given society and its class contradictions. When economic order changes, so too does the ideological form of that society's understanding and expression.

What does this mean for law?

First, law is a victim of history. From this perspective, when we reach the communist end of history, law as an instrument of coercion will wither away. It follows that the destiny and fate of Soviet lawyers was to witness the withering of that to which they had dedicated their professional lives, and by their actions to draw nearer the death of law.

Second, if law is determined by economics, its independent influence on social development is very limited. The legal form is necessary for substantiating the new economic order. It serves as a tool for nationalizing the property of capitalists, for the pursuit of class enemies, and for strengthening the position of the Communist Party. Nevertheless, law on its own cannot change the existing economic order, changes in the economic structure of society must precede changes in legal structure.

Moreover, if the most important existential question concerns changing the economic order, then for the sake of building a society without class contradictions, the state can use any element of the superstructure as an ideological weapon in the struggle of good (the socialist state on its way to communism) versus evil (the capitalist system). This struggle does not determine the content of any law, administrative act, judicial decision, or lecture at any law school, not to mention books or films, but it does mean that there was always the possibility their content could be so

<sup>46</sup> Lenin, *State and Revolution*, *supra* note 21, p. 82.

determined. If the state needed it, then law and the courts (as well as textbooks of Roman law, children's cartoons, or even Shakespeare's plays) could be mobilized in defense of the political system. Paul Ricoeur writes:

Once it is assumed that these [juridical, political, religious, and cultural] spheres have no autonomy, then the Stalinist state is possible. The argument is that since the economic basis is sound and since all the other spheres are merely reflexes, shadows, or echoes, then we are allowed to manipulate the latter spheres in order to improve the economic basis.<sup>47</sup>

At least as applied to law, this state is as Stalinist as it is Leninist. Lenin proclaimed that the interests of the revolution are higher than the formal rights of a democratically elected, representative body.<sup>48</sup> In other words, if the revolution demands it, or, if Lenin believes that the revolution demands it, then legal procedures can be neglected. In his letter to Dmitry Kursky, Lenin directly insisted on fast, expedient, revolution-based show trials against political enemies of the Soviet government. He emphasized the role of Party influence on judges and members of the revolutionary tribunal for the achievement of this end.<sup>49</sup> In this demand for political violence against enemies, sanctified by court decisions, it is easy to see Stalin's upcoming show trials against enemies of the people as the new role of legal form in installing a socialist world. From the perspective of political religion, the legal form is valuable insofar as it lines up with the avowed or actual goals of the Soviet political regime, above all ensuring loyalty to the government and its politics. For that reason, several times in his letter Lenin emphasized the role of his party in "improving" the work of judges and officials.<sup>50</sup> He meant that law should be primarily influenced by state aims, that legal principles such as the presumption of innocence or due process are less significant than political expediency. The aims and needs of political religion are higher than legal principles, and when it is expedient to do so, law serves as one of the methods of achieving a political goal.

Third, as part of the preliminary stage preceding the onset of communism, the epoch of socialism is characterized by its own socialist law, which is radically different from bourgeois law. Even dressed in clothes of human rights or democracy, bourgeois law always exhibits class coercion and inequality, while socialist law always exhibits exactly the opposite. Lenin wrote: "Take the fundamental laws of modern states, take their administration, take the right of assembly, freedom of the press, or 'equality of all citizens before the law,' and you will see at every step evidence of the hypocrisy of bourgeois democracy."<sup>51</sup>

<sup>47</sup> Ricoeur, P. (1986). *Lectures on Ideology and Utopia* (G. H. Taylor ed., pp. 155). New York: Columbia University Press.

<sup>48</sup> Lenin, *The Proletarian Revolution*, *supra* note 23, p. 75.

<sup>49</sup> Lenin, *Polnoe sobranie*, *supra* note 22, p. 396–97.

<sup>50</sup> *Id.*, p. 397.

<sup>51</sup> Lenin, *The Proletarian Revolution*, *supra* note 23, p. 34.

This framing allows Soviet legal science to look at bourgeois law in the same way that Vladimir Mayakovsky looked at the New York bourgeoisie in the poem “Broadway”:

I am in ecstasy from the city of New York.  
But I will not take the cap from my head.  
The Soviets have their own pride:  
on the bourgeoisie we look from above.<sup>52</sup>

From this perspective, in bourgeois law there is not, nor could there be, guarantees of “real” human rights or “real” justice; instead there are only legal norms, procedures, and institutions, through which capitalists ensure their political dominance and the bondage of exploited classes.

Support for this assertion of Soviet legal scholars was found in Arendt’s “contempt for factuality,” an alternative world of past, present, and future law, often quite distant from how things actually were. In 1938, when Stalin’s terror reached their peak, a famous Soviet scholar of criminal procedure still portrayed the Soviet judiciary as independent and obedient only to the law.<sup>53</sup> In the same year, Andrey Vyshinsky explained the need to establish individual fault in every concrete crime despite being aware of the practice of punishing family members of enemies of the people.<sup>54</sup> In a different work, Vyshinsky concluded that the principle distinction of Soviet constitutionalism is the actuality of constitutional rights and the actual ability to use them; in contrast he said that bourgeois constitutional law is an artful perversion of reality, proclaiming rights that cannot be realized.<sup>55</sup> In reality, as a rule, everything was exactly the opposite – Soviet constitutions declared the right of members of the Soviet federation to secession, but in fact, the legal mechanism of secession was never established.

#### IV THEOLOGY OF SOVIET LAW

Here I explore how the theology of Soviet law developed its symbol of faith by way of four interrelated doctrinal problems: (1) the “death” of law; (2) the correlation of socialist and bourgeois law; (3) the links between law and politics; and (4) the economic nature of law (the base–superstructure problem). The term “theology” is, of course, relative. I use it to show that in the studies of Soviet lawyers there was no clear-cut distinction between philosophy of law and religious interpretations of Marxism-Leninism. Samuel I. Shuman compared Soviet philosophy with

<sup>52</sup> Translated by Carlotta Chenoweth.

<sup>53</sup> Strogovich, M. (1939). *Priroda Sovetskogo ugolovnogo processa I printsip sostyazatelnosti* [Nature of Soviet Criminal Procedure and Principle of Adversary] (pp. 39). Moscow: Law Press of People’s Commissariat of Justice of the USSR.

<sup>54</sup> Vyshinsky, A. (1938). *Sudebnie rechi* [Trial speeches] (pp. 109). Moscow: Uridicheskoye izdatel’stvo NKJu SSSR.

<sup>55</sup> Vyshinsky, *Issues of Theory of State and Law*, *supra* note 24, p. 133.

a “theological exegesis rather than anything likely to be identified as the professional product of people like Plato, Kant or Hume.”<sup>56</sup> The theology of Soviet law nevertheless also pursued quite practical aims of the totalitarian political regime: the centralization of power, maximum interference with all aspects of social life, control over society, and the loyalty of the population and its obedience.

The “death” of law is, perhaps, the simplest point in the symbol of faith. According to Marxism-Leninism, as law does not exist without the coercive power of the state, both must wither away together after the high phase of communism has come. But class struggle demands more state power to defend the achievements of the Russian Revolution rather than less power through withering away. Because “withering away” means gradual weakening of law rather than immediate disappearance, Soviet jurisprudence turned suddenly from expecting withering away as an actual future development of law to withering away as a process just beyond the horizon of events.

Prominent Soviet legal scholar, Evgeny Pashukanis suggested that law would pass away after private property was liquidated and a planned economy was established. As Bjarne Melkevik pointed out, for Pashukanis, the withering away of law must follow the withering of market society, but not due to a voluntary political decision or any ideological discourse.<sup>57</sup> However, in later works, Pashukanis provided an important qualification. If he first spoke about the withering away and gradual dissolution of law during the transition to communism, then later, leaning on Marx’s and Lenin’s conception of bourgeois law without the bourgeoisie, Pashukanis wrote about Soviet law as “the legacy of a bourgeois epoch that was to outlive the bourgeoisie”: law would exist while there was a relation of equivalency between labor and wage,<sup>58</sup> and, as a consequence, material inequality of individuals. Similar thought that law would wither away only after full material equality within society was reached was articulated by Pyotr Stuchka<sup>59</sup> and Mikhail Reysner. The latter noted that a “formula that provides unequal treatment of unequal people will kill law.”<sup>60</sup> The discussion was summarized by Andrey Vyshinsky in a very illustrative way:

Law will wither away only when people will have gotten so accustomed to following the main rules of community life that they will follow them without any coercive force. Before that, however, total control, strong labor and community discipline, and total subordination of the whole work of the new society to a really democratic state is still needed.<sup>61</sup>

<sup>56</sup> Shuman, S. I. (1959). “Soviet Legality as Revealed by Soviet Jurisprudence.” *Wayne L. Rev.* 5, 213.

<sup>57</sup> Melkevik, *Marxisme et Philosophie de Droit*, *supra* note 19, p. 48.

<sup>58</sup> Pashukanis, E. (1980). *Izbrannie proizvedeniya po obschey teorii prava I gosudarstva* [Collected Works on General Theory of Law and State] (pp. 50, 55). Moscow: Nauka Press.

<sup>59</sup> Stuchka, P. (1932). *Revolyutsionnaya Rol Prava i Gosudarstva* [Revolutionary Role of Law and State] (pp. 102). Moscow: Soviet Legislation Press.

<sup>60</sup> Reysner, M. (1925). *Pravo, Nashe Pravo, Chuzhoe Pravo, Obschee Pravo* [Law, Our Law, Foreign Law, Common Law] (pp. 259). Leningrad; Moscow: Gosudarstvennoye izdatel'stvo.

<sup>61</sup> Vyshinsky, *Issues of Theory of State and Law*, *supra* note 24, p. 44.

That was the end of the discussion. After Vyshinsky, the withering away of law was never discussed seriously in Soviet legal jurisprudence. Predictably, the utopia in which absolutely everyone follows absolutely all of society's rules, in which all are ready to work to the extreme in order to receive an equal number of Lenin's "truffles, cars, and pianos," failed to materialize, unlike the second part of Vyshinsky's observation regarding total control and subordination.

The idea of "bourgeois law without the bourgeoisie" was also employed to compare socialist and bourgeois law. Any law expresses the will of the ruling class and is to be supported coercively by the state. Stuchka wrote that socialist law was transitional; it accompanied the transition from capitalism to communism.<sup>62</sup> It was the law of a class and it was coercive, but it was law of a special kind. Socialist law does not serve as a means by which the minority oppresses the majority. Rather, socialist law embodies the unified will of the proletariat and serves the interests of all working people. Though it was still the law of formal equality and material inequality, Vyshinsky argued that Soviet law did include some elements of material equality: the social ownership of the means of production, an equally available social right to education, healthcare, pensions, social support for large families, etc.<sup>63</sup> Vyshinsky emphasized that all these benefits were granted by "the Soviet power" and "the Soviet state."<sup>64</sup> Hence, the state acted as manager and de facto owner of public wealth and distributor of social goods, which only strengthened the paternalistic relationship with society so favorable for a totalitarian regime.

Relations between law and politics, the third point under discussion, were an intrinsic part of Soviet discourse on the nature of law and its validity. During the 1920s and early 1930s, there were competing versions of the Marxist approach to law in Soviet jurisprudence, including Pashukanis's "the commodity exchange theory of law," where primary elements of law are legal relations of commodity exchange between autonomous and formally equal subjects;<sup>65</sup> Stuchka's law as a system of social relations that expresses the will of the ruling class and are enforced by its organized power (that is, usually by the state);<sup>66</sup> Yakov Magaziner's law as a system of obligatory rules that are established and protected by the state but created by society itself and shaped in concrete administrative or judicial decisions;<sup>67</sup> and Mikhail Reisner's theory of class intuitive law, a combination of the class approach and Leon Petrażycki's psychological theory.<sup>68</sup>

<sup>62</sup> Stuchka, P. (1964). *Izbrannie proizvedeniia po marksistsko-leninskoy teorii prava* [Selected Works on Marxism-Leninism Theory of Law] (pp. 102). Riga: Latvian State Press.

<sup>63</sup> Vyshinsky, Y. *Issues of Theory of State and Law*, *supra* note 24, p. 43.

<sup>64</sup> *Id.*

<sup>65</sup> Pashukanis, *Izbrannie proizvedeniya po obschey teorii prava I gosudarstva*, *supra* note 58, p. 78, 113.

<sup>66</sup> Stuchka, *Revolutsionnaya Rol Prava i Gosudarstva*, *supra* note 59, p. 9.

<sup>67</sup> Magaziner, Y. (2006). *Izbrannie raboty po obschey teorii prava* [Selected Works on General Theory of Law] (pp. 68–70). Saint Peterburg: Yuridichesky Center Press.

<sup>68</sup> Reysner, *Pravo, Nashe Pravo, Chuzhoe Pravo, Obscheye Pravo*, *supra* note 60, p. 117, 130.

These theories seem to be more sociological (or some combination of sociological approaches and legal positivism). The validity of law is connected not only with the establishment of laws by a certain legal authority, but also with its real action within society. Sociological theories of law conflict with the logic of a totalitarian system that is not ready to recognize and accept any permanent restrictions on its lawmaking power or right to influence and change society using legal means. The prospect of finding law in real administrative and court practices, but not in legislative acts, seems tempting, of course; public officials and judges could thereby manipulate laws for the will of the state or the party. But in giving too much discrete power to small cogs in the machine, it contradicts the totalitarian aim of concentrating and centralizing power. Instead of following the will of the highest authority, these channels would create their own legal regulation and rely on their legal conscience rather than on the laws they professionally apply.

Moreover, pluralistic debate about the nature of law was hardly compatible with the totalitarian system. Disagreement and confrontation of ideas were discouraged; differences of opinion, philosophical schools, factions, or parties would be harmful for social cohesion and loyalty to the state. Isaiah Berlin argued that this was why after Stalin gathered strength, he stopped all ideological debates and announced the victory of this or that (randomly chosen) school.<sup>69</sup> Andrey Vyshinsky unified the variety of approaches to law in the late 1930s.<sup>70</sup> He defined law as follows:

Law is a system of rules of behavior expressing the will of the ruling class and it is established by the legislator, as well as by the customs and rules of community life sanctioned by the state, the application of which is guaranteed by the state coercively in order to protect, to strengthen, and to develop social relations and orders that are beneficial and favorable for the ruling class.<sup>71</sup>

For Vyshinsky, legal rules always express the will of the ruling class and are always established or sanctioned by the state. Thus, the will of the ruling class cannot be articulated against the Soviet state – the first state in the world where the proletariat revolution has won and social justice has been done. Moreover, due to its messianic mission, the state understands this will better than the ruling class itself. For that reason the state is authorized to establish not only rules that express the actual will of the ruling class, but also anything that will be favorable for the proletariat and all working people in the future (“in order . . . to develop social relations”). Thus,

<sup>69</sup> Berlin, “The Silence in Russian Culture,” *supra* note 29, p. 13.

<sup>70</sup> These debates literally ended: Stuchka and Reisner died. As to Reisner, whose daughter was close to Leon Trotsky, there is little doubt about his fate if he would have lived to see the Great Terror. Pashukanis and some of his followers were shot as “enemies of people.” What is remarkable here is that the tragic end of Pashukanis’ life was not mentioned in the volume of his works published in the USSR in the 1980s, although it was an open secret, even abroad. Lon L. Fuller mentioned this fact in a paper from 1948 (Fuller, L. L. (1949). “Pashukanis and Vyshinsky: A Study in Development of Marxian Legal Theory.” *Mich. L. Rev.* 47, 1159).

<sup>71</sup> Vyshinsky, *Issues of Theory of State and Law*, *supra* note 24, p. 83.



Vyshinsky's theory presupposes no institutions or procedures capable of, to borrow Radbruch's terminology, "supra-statutory law" against "statutory lawlessness." Some Soviet lawyers argued that because there was no antagonism between the state and individuals in Soviet society, there were also no disputes between the state and private persons and, consequently, that there was no need for judicial review of administrative acts (individual acts are meant here, but judicial review of normative acts seems to be even more absurd in this regard).<sup>72</sup>

Such a combination of the legislative will of the state and the will of the ruling class that is exclusively expressed by the state, is the way to argue the core principle of the Soviet law: the so-called "socialist legality" that is strict observance of legal rules (norms of the law) by all persons and entities except the state itself, which, due to its political aims and with reference to the will of people and the benefits for the ruling class, is able to deviate from these rules, ignoring or arbitrarily changing them. The state acts here as an oracle of class will and the exclusive lawmaker – an almighty "legal God." This God makes his "covenant"<sup>73</sup> with the chosen Soviet people, the only people that has jumped to a new socialist grade of social development. This God requires obedience to "commandments" in order to reach perfection or transition to communism. It is the communist aim, rather than any legal construction, that commands the mutual loyalty of the State and the people.<sup>74</sup> The state punishes those who deviate from commandments, both to those who violate legal rules and those who express political disloyalty.<sup>75</sup> In the covenant, the state itself is not limited by rules or principles, for it is guided by its messianic aim.

This does not mean that the state always exercised its power arbitrarily and the application of legal rules is always uncertain. Soviet law could protect individuals against the state when the state allowed it. For example, an employee dismissed unfairly could be reinstated after filing a lawsuit or making a claim to a competent state body or even appealing to the local chapter of the Communist Party. Yet an employee fired for a political joke or a student dismissed from university for involvement with the dissident movement had no chance of an effective remedy regardless of the formal reason for dismissal. At any moment the state could ignore any legal procedure, rule, or principle when it came to individuals or social or ethnic groups that qualified as "traitors," "enemies of the people," or "dissidents" because

<sup>72</sup> Abramov, S. N. (1947). "V sovetском prave ne mozhет byt' administrativnogo iska." [There Cannot Be Administrative Lawsuits in Soviet Law] *Socialist Legality* 3, 48; Studenikina, M. S. (1974). *Gosudarstvennii Kontrol v Sphere Upravleniya* [State Control in the Sphere of Governance]. Moscow: Uridicheskaya literatura.

<sup>73</sup> cf. Gen. 17:2.

<sup>74</sup> Just as mutual loyalty of the Nazi state and people is founded on ethnic identity, as indicated by Carl Schmitt (Schmitt, *State, Movement, People*, *supra* note 30, p. 48).

<sup>75</sup> Throughout Soviet history, expression of political disloyalty, such as anti-Soviet propaganda and intentionally false statements about the Soviet state, remained a formal crime according to Soviet criminal law.

political aims weighed more heavily than any rules or principles. This is precisely when law becomes terror.

Vyshinsky's approach prevailed until Stalin's death and was later condemned and partly rejected by post-Stalin Soviet legal science. Subsequently, some Soviet philosophers and legal theorists continued their commitment to the base–superstructure dichotomy, to class theory, coerciveness, and normativity as core features of law, but they also tried to work out less statist conceptions of law, including a focus on judicial process. For example, they sought strict and unconditional observance of legal procedures by state bodies and public servants, and to their definitions of law they added legal relations, legal conscience, and subjective rights and responsibilities, along with legal rules.

In the late 1970s, the most prestigious Soviet law journal, “Soviet State and Law,” organized a series of debates on how law was to be understood. All scholars participating in the event cited Marx, Engels, Lenin, Leonid Brezhnev, and decrees of the latest Congress of the Communist Party. None were prevented from defending rather different concepts and characteristics of law: law as legislation, law as state will, law as something broader than positive law, distinctions between societal law and official law, etc. Although these debates were presented as returning to or revisiting a “correct” Marxism, it is hard to imagine that the participants were converted Marxists. Like the Bible in the English Parliament of the seventeenth century, in the late USSR legal ruminations on the withering away of law could only provoke a smile. Scholars instead sought out a compromise between their views on law and the symbol of faith in Soviet law that they could not ignore. For instance, Leningrad University's Lev Yavich wrote that law not only subordinated individuals to the means of production but also was a way of enabling their creativity.<sup>76</sup> For Yavich, law was most certainly determined by society's economic system and class relations, but it also guaranteed a certain amount of individual freedom, even in terms of feudal or bourgeois law. This methodological trick, as well as the relevant increase of the importance of law and legal regulation within the Soviet state, demonstrated the gradual ideological weakening of soviet political religion in the legal arena.

Olympiad Ioffe, one of the participants in the “Soviet State and Law” debates and a brilliant Soviet specialist in civil law and Roman law, was deprived of his professorship in the early 1980s for permitting his daughter to immigrate to Israel. After that Ioffe was compelled to immigrate to the United States where he found work at several American universities. His works from this time demonstrate an adequate assessment of Soviet jurisprudence that is free from repetition of Marxist-Leninist dogmas,<sup>77</sup> including those he relied upon in the debates. The same seems to be true for most of the other participants in that discussion. After the dissolution of the

<sup>76</sup> Yavich, L. (1985). *Suschnost Prava* [The Essence of Law] (pp. 10). Leningrad: Leningrad University Press.

<sup>77</sup> Ioffe, O. (1985). *Soviet Law and Soviet Reality*. Dordrecht; Boston: Kluwer Academic Publishers.

USSR in 1991, some of them became natural-law philosophers, others legal positivists and legal sociologists. Most ideas of Soviet law (withering away of law, class approach, “base–superstructure”) never again played an important role in their research.

## V INFLUENCE WITHIN THE LEGAL SYSTEM

Now I show how the ideas that derived from Soviet law’s symbol of faith worked in practice. This is not easy to do within the parameters of a single section in this chapter. Nevertheless, to that end I will look at four phenomena in Soviet law – uniqueness, publicness, politicization, and socialist legality – to clarify how and to what extent each of these phenomena influenced the legal system of the Soviet Union.

*Uniqueness.* Soviet law was considered radically different from the law of bourgeois (capitalist) states. Historically, Soviet law differed from Russian Imperial Law, and Soviet Law was geographically removed from Western law. Western comparativists employed the term “socialist legal family”<sup>78</sup> to distinguish Soviet law and the legal systems of other socialist countries that emerged after World War II from civil law and common law.

Political uniqueness was necessary for criticizing Western law and legal values. *Rechtsstaat* was called “a mirage that came to replace religious ideology.”<sup>79</sup> The rule of law was stigmatized as a cult,<sup>80</sup> and human rights were considered to be rights for the rich. Meanwhile, Soviet legal science offered the doctrine of a “truly” lawful state, for in the Soviet conception of socialist democracy, even a peasant from a remote village could be elected to the highest legislative body and could formally work as a deputy, all judges were elected by representative bodies (formally elected as well), and human rights derived from the “social nature” of human beings,<sup>81</sup> that is, from their affiliation with and loyalty to a socialist political and economic order.

Yet the uniqueness of Soviet law, both in its historical and geographical dimensions, was relative. Although for Lenin everyone could be a judge,<sup>82</sup> the Soviet government promptly turned toward written, codified law created by professionals for application by professional servants and lawyers. In this sense, Soviet law had features similar to both the law of the late Russian Empire<sup>83</sup> and the law of Continental European states. Private law contained many legal institutions

<sup>78</sup> K. Zweigert and H. Kötz (1987). *Introduction to Comparative Law* (2nd ed., Vol. 2, T. Weir trans.). Oxford: Clarendon.

<sup>79</sup> Pashukanis, *Izbrannye proizvedeniya po obschey teorii prava I gosudarstva*, *supra* note 58, p. 131.

<sup>80</sup> Tumanov, V. (1971). *Burzhuaznaya pravovaya ideologiya. K kritike ucheniy o prave* [Bourgeois Legal Ideology. Critique of Theories of Law] (pp. 68). Moscow: Nauka.

<sup>81</sup> *Id.*, p. 346.

<sup>82</sup> P. Beirne & A. Hunt (1990). “Law and the Constitution of Soviet Society: The Case of Comrade Lenin” (pp. 74). In P. Beirne (e.) *Revolution in Law: Contribution to the Development of Soviet Legal Theory (1917–1938)*. Armonk, NY: M. E. Sharpe, INC.

<sup>83</sup> Nikolay Timasheff wrote: “It is more than Soviet law; it is Russian law, grounded in Russian history” (Timasheff, N. (1950). “Is Soviet Law a Challenge to American Law?” *Fordham L. Rev.* 19, 182).

resembling those found in capitalist legal systems (e.g., contract of sale, which, Stuchka argued, would never be socialist; damages; the mutual rights and responsibilities of spouses; etc.). Ioffe provided a number of examples of Roman law's influence on Soviet law,<sup>84</sup> thereby establishing even more links between the socialist and civil-law families.

Some rules, procedures, and doctrines of Soviet law were unique due to the features of Soviet political religion. I explore some of them in the context of publicness and the politicization of Soviet law and socialist legality.

The *publicness* of Soviet law means extreme expansion of public-law regulation in the Soviet legal system, as well as in every totalitarian system. Totalitarian regimes tend to centralize power and to interfere greatly in the private space; limiting civil society and family life enables the regime to centralize and exert its power over society. Lenin wrote, "We recognize nothing private; for us everything in the economic field is public law."<sup>85</sup> Soviet lawyers therefore dismissed the civil-law distinction between public and private law.

In constitutional and administrative law, publicness determines the characteristics of centralization, which in the Soviet case meant three things: the strict subordination of lower state and Communist Party bodies to higher ones; the fakeness of Soviet federalism; and the denial of any separation of powers; disproportionate state interference with family, labor, and civil-law relations. For example, all economic relations with the state involved related to administrative, but not civil, law. It is worth contrasting the concept of "personal" property, as applied to the means of consumption, with the almost completely banned "private" property as applied to the means of production – under this construction one could buy a car for his or her personal, noncommercial needs but could not buy a harvester to harvest crop for selling. In labor law, the state ultimately limited the terms of labor contracts that employers and employees were free to negotiate, including remuneration, schedule, specific requirements, and incentives, etc., because work itself was a duty, not an individual right. Those who were able to work but did not might be prosecuted. Publicness of law also meant that state interests took priority over private interests. Thus, for example, the theft of state property was punished more severely than the theft of private property.

*Politicization*, that is, the dominance of politics, over law, had a variety of expressions. First, both the law and the state officially defended communist ideology. Article 6 of the Soviet Constitution of 1977 described the teachings of Marxism-Leninism as the basis for social development and characterized the Communist Party as the "ruling and directing force of Soviet society." One is tempted to think of the Party as a Marxist "church." But rather than a separate institution, the Party was part of an enormous state machine, especially after Stalin's "cleansing." It had no

<sup>84</sup> Ioffe, O. (1982). *Soviet Law and Roman Law*, *B.U. L. Rev.* 62, 701.

<sup>85</sup> Lenin, *Polnoe sobranie*, *supra* note 22, p. 396.

interests of its own separate from those of the state. Article 6 is dedicated, then, not to the Party's role as a political institution, but to the defense of Soviet communism by public power and legislation and to compelling popular loyalty to this ideology and its institutional embodiment, the Soviet state.

Second, politics and state interests may be excluded from ordinary legal regulation. Under Stalin, legislative provisions and legal procedures sanctified terror against political opponents, certain social and ethnic groups, and the whole of society. For this purpose, criminal codes and special decrees established an extremely wide and uncertain *corpus delicti* of political crimes, such as participation in anti-Soviet organizations. For this purpose, criminal codes and special decrees established an extremely wide and vague *corpus delicti* of political crimes, such as participation in anti-Soviet organizations, though none of that was enough, and some of Stalin's potential or real opponents and "objective enemies" were simply murdered. After Stalin's death, the state continued to persecute dissidents. Trials against politically disloyal persons were a light version of Stalin's show trials. Still, though they did not presuppose the accused's active self-incrimination, the judge, prosecutor, advocate, and accused all knew the outcome ahead of time even in these post-Stalin trials. Beyond politically motivated imprisonment, other legal tools of oppressing dissidents were exercised, including dismissal, internal and external exile, revocation of citizenship, and forced treatment in psychiatric medical institutions for nonexistent illnesses. The state selected punishments based on political reasons rather than legal provisions.

Politics was significant not only when dealing with political opponents of the state; politics could also be a reason for violating *res judicata* or giving ex post facto effect to criminal law in nonpolitical cases. In the early 1960s, a highly publicized trial began in Moscow against people accused of illegal commercial activity and trading currency (the infamous Rokotov-Faibishenko case). The convicted offenders were sentenced to the maximum imprisonment of eight years, but under pressure from the Soviet chief, Nikita Khrushchev, the Presidium of the USSR Supreme Council enacted two decrees that increased the maximum sentence to fifteen years and, later, to the death penalty. Afterwards, the court reviewed the case, applied new decrees ex post facto, and sentenced the defendants to death.

*Socialist legality.* Strictly speaking, Soviet law did not begin with the idea of obedience to state-made laws, but rather with a revolutionary legal conscience of state officials and lawyers. After the immediate cancellation of all legal acts of the Russian Empire, Pyotr Stuchka, who was a legal theorist, a People's Commissar for Justice, and head of the Supreme Court of the USSR, advised judges to be guided by their class consciousness when hearing cases.<sup>86</sup> Following Stuchka's advice, judges and officials should resolve individual cases according to the Party's consideration of

<sup>86</sup> Stuchka, P. (1924). *Klassovoe Gosudarstvo i Grazhdanskoe Pravo* [Class State and Civil Law] (pp. 10). Moscow: Krasny Pechatnik.

what is good or bad for the proletariat revolution and for Soviet power. In a more purified form, this would be Orwell's world of total legal uncertainty, a world without any strict or predictable procedures or terms, as well as without any written laws.

As I wrote above, legal regulation based on class consciousness would appear to be attractive and convenient for a totalitarian system. A legal system of this kind, however, disseminates power among a great number of officials and judges who make law every day. (And these are different "laws," so to speak, because the lawmakers' legal consciousness could not be identical, therefore giving rise to what Herbert Hart called the "plurality of [legal] systems".<sup>87</sup>) Officials and judges all become authoritative lawmakers, which contradicts the totalitarian centralization of power. In response, the Soviet government issued a huge number of decrees, instructions, and orders strictly limiting the arbitrary power of its officials and bodies in order to regulate state actors but leave space for situations when the state may be interested in maintaining legal uncertainty. The regime's aim was not to give officials unlimited discretion, but to allow them to ignore legal rules while prosecuting political opponents or using the forced labor of imprisoned persons so that, if or when it was needed, the state could punish those officials for arbitrariness.

The main difference between socialist legality and legality as an element of the Western rule of law doctrine is that, in the latter case, legality should be interpreted in the light of other principles (human rights, legal certainty, due process etc.) that ensure the quality of laws, secure their appropriate application, and subordinate the state to law. Socialist legality subordinates the individual to state laws and decrees, leaving the state itself to follow legal provisions at its discretion, according to whether or not the interests of the ruling class or the whole Soviet people, that is, the interests of the state, demand that it deviate from these provisions. Following laws became its own objective without any justification by stronger principles (human rights, for example). Under this guiding principle, it only makes sense that the USSR considered all legal acts performed during the Nazi occupation of its territory as void, even though it would have been more reasonable not to nullify all marriages or real estate contracts but to consider every case separately.

Socialist legality ultimately limits the number of cases where individuals are permitted to lawfully deviate from legal rules. In particular, Soviet criminal law prohibited self-defense if there was a chance of running away or calling the police for help. This might mean that if you were attacked by someone in a dark alley, you could not defend yourself if you were a professional runner or if there was a chance that a police officer was around the corner. In civil law, legislation always prevailed over contracts. Thus, socialist legality served as a tool of state control over both society and individuals and established total dependence on the state even in the private space.

<sup>87</sup> Hart, *Concept of Law*, *supra* note 3, p. 25.

## VI CONCLUSION

Vyshinsky and I happened to be separated by one generation of jurists; we were only a handshake apart. I began this chapter with a story about my PhD supervisor, who as a graduate student participated in a conference where Vyshinsky was a keynote speaker and who wrote his dissertation at a time when Vyshinsky's legal thought was settled dogma.

Today, the constitutions of all the Post-Soviet states are filled to the brim with provisions regarding the rule of law and the government's accountability to individuals. In each of these constitutions we can find a solid catalogue of human rights and all of the usual principles that usually accompany a stable democracy – separation of powers, constitutional and judicial review, due process, and so on. Yet a number of very different political regimes operate on the basis of these (rhetorically similar) constitutions, ranging from the severe autocracies in Central Asia to the Baltic democracies in the European Union.

To be sure, this state of affairs arises from various economic, political, and social causes. What interests me is the levity with which post-Soviet societies approach their constitutions, treating their own, relatively recent, founding political and legal documents as if they were mere declarations or as if they were mandatory, though not especially practical, attributes of all independent states.

Precisely this attitude indicates that the primary element of the Soviet legal tradition was the politicization of law; law's subordination to politics survives in Post-Soviet societies. If, after the collapse of the USSR, all viable political goals as well as support from Western countries called for the adoption of liberal constitutions, then why not do so? But if a liberal attitude with regard to morality, or the fundamental, or due process, does not answer our social needs or to our societal aims or traditions, then why not ignore them?

A proper farewell to Soviet law tradition will only come about when law acquires a value independent of politics, that is, when law is no longer subordinated to politics. This can be conceived as a movement away from a theology to a philosophy of law. I am not calling for a "legal enlightenment," that is, the liberation of a legal system from irrational grounds. Like all values, legal values, especially human rights, always carry an emotional commitment. In contrast, law must no longer be regarded as just a means of carrying out political decisions and as the subject of political manipulation.

Only then can we expect a break with Soviet political religion, which allowed for the certain exercise of legal rules only to the extent that the state found them useful in carrying out its designated function of moving society ever closer to a brave new world.