UNIVERSITÀ
DEGLI STUDI
FIRENZE

Thesis submitted for assessment with a view to obtaining the degree
of Doctor of Political and Social Sciences in
Theory and history of law - Theory and history of human rights

CICLE XXVIII

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HISTORY OF SOVIET LEGAL DOCTRINE AND ITS IMPACT ON MODERN HUMAN RIGHTS PRACTICES IN RUSSIA

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Florence, 2012/2016

Acknowledgements

First and foremost I would like to thank my supervisor, Prof.Paolo Cappellini. This thesis would have been impossible without his support and mentoring. Even after several years of working with him, I am constantly surprised by his amazing intelligence, dedication and boundless energy. I have infinite gratitude for his advice and support.

I truly appreciate the input I have received from the academic and administrative staff of the University of Florence, their genuine friendliness and help to overcome any difficulty I encountered. Their support has made my time in Florence enjoyable and truly life-changing.

Many thanks to many researchers and my colleagues for the stimulating environment, in which it was a pleasure to learn and grow. I wish to thank my friends for their care and our thought provoking conversations.

I gratefully acknowledge the funding resources which made my Ph.D. work possible. I was funded by the Italian Ministry of Foreign Affairs in 2012 and furthermore, I was honored to receive a scholarship from the University of Florence.

I am grateful to the staff of all the archives and libraries where I have pursued my research for helping and assisting me in many different ways during collection of the material.

Lastly, and most importantly I wish to thank my parents for all their unconditional love and encouragement. To them I dedicate this thesis.

Ringraziamenti

Innanzitutto vorrei ringraziare il mio relatore, prof. Paolo Cappellini, senza il cui sostegno il mio lavoro non sarebbe stato possibile. Ancora adesso, dopo vari anni di lavoro al suo fianco, resto sempre sorpresa dalla sua intelligenza sopraffina, dalla sua dedizione e dalla sua instancabile energia. Gli sono infinitamente grata per i suoi consigli e il suo sostegno.

Sono molto grata al personale accademico e amministrativo dell'Università di Firenze per l'attenzione, per la disponibilità e per il supporto ricevuti. Il loro sostegno ha reso la mia esperienza di ricerca piacevole e significativa per il mio percorso formativo. Rivolgo un sentito ringraziamento anche ai miei colleghi, ricercatori e dottorandi, per l'atmosfera stimolante per la mia crescita e per il mio studio. Ringrazio inoltre i miei tanti amici per la loro premura nei miei confronti e per le conversazioni che ho avuto con loro, dalle quale sono nate molte idee.

Ringrazio infinitamente l'Università di Firenze e il Ministero degli affari Esteri Italiano per il loro sostegno finanziario, senza la quale la mia ricerca di dottorato non sarebbe stata possibile.

Voglio rivolgere un sentito ringraziamento anche al personale degli archivi e delle biblioteche che ho frequentato in questi anni, per l'assistenza ricevuta durante la ricerca.

Infine, il ringraziamento più sentito è rivolto ai miei genitori, per il loro affetto, amore e appoggio. A loro dedico questa tesi.

Abstract

The present research provides an outline of the history of human rights in Soviet legal doctrine in order to show the impact of main trends in its historical development on contemporary legal thinking in Russia. The research is pursued using primary sources that focus on the concepts and evolution of the ideas held by Soviet lawyers, namely - the conception of "proletarian" law of D.Kursky, the "socialistic" concept of human rights of S. Kechekyan, E. Lukasheva and V. Chikvadze who studied the phenomenon of the claim on the formation of a new type of special Soviet law and other. The study aims to fill the gap in international legal scholarship, contributing by the research on Soviet academics whose scientific tradition is only found in Russian-language texts. This present work is conducted using a historiographical method, which is aimed at uncovering the continuities between the past and the present and is based on the premise that history is an inevitable element in order to grasp the essence of modern Russian legal thinking.

Contents

Introduction

"Where, after all, do universal human rights begin? In small places, close to home — so close and so small that they cannot be seen on any map of the world. Yet they are the world of the individual person: the neighborhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world."

Eleanor Roosevelt[1]

My life experiences and the environment in which I grew up stimulated my desire to pursue human rights and my curiosity for history of law in post-communist countries. Due to my father's job in the military, my family was required to move around quite a bit. I myself was born in Berlin and have spent the majority of my life in Moscow, but my experiences and travels have taught me a respect for different cultures and ways of living.

[1] Chair of the committee created by the United Nations Commission on Human Rights to draft the Universal Declaration of Human Rights, at the presentation of IN YOUR HANDS: A Guide for Community Action for the Tenth Anniversary of the Universal Declaration of Human Rights, United Nations, New York, 27 March 1958 cited from "Human rights indicators: a guide to measurement and implementation", United Nations, New York and Geneva, 2012, p.9

My family left Germany on the day that the Berlin wall fell. It was only when I was older that I was able to understand the real significance of this event, and grasp the importance of the changes which happened after the collapse of the USSR. These events, as well as the political transitions of Russia in the 1990's allowed me to take notice of the significant impact that different state transitions which could happen overnight, much like what happened in Moscow, can have for the people living within the state.

The present research is focused on the development of human rights in Soviet legal doctrine in order to demonstrate the correlation between past trends and contemporary human rights practices in Russia. There is scarce material in international scholarship on the development of Soviet legal history, and even less which is written from strictly positivist position; rather it is usually presented showing a strong bond between ideology and politics without clear separation. H.Kelsen made a critical positivist analysis of the Soviet legal doctrine in The Communist Theory of Law, where he provides a critique of mainstream Soviet legal scholars, namely A.Vyshinksy, E.Pashukanis, P.Stuchka, M.Reisner, M.Strogovich, S.Golunsky. The translation of texts from the same Soviet lawyers is provided by J. Hazard in Soviet legal philosophy, which was a part of post-World War II US scholarship on the Soviet Union characterized by W. E. Butler as a 'know thine enemy' syndrome: "to comprehend how he lives, to facilitate means of understanding and communication so as to avoid miscalculation, to identify and clarify opposed positions and values".[2]

In Gentle Civilizer of Nations M.Koskenniemi highlights one of the wide spread problems in historiographical legal study – that attention is normally only paid to "what the great masters of the discipline thought and did".[3] But it is also paramount to study the work of other, less famous scholars of USSR who had an impact on the development of the legal doctrine in order to grasp the complete picture of legal formation in the Soviet Union. The greatest difficulty for international scholarship is the heritage left by less

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[2] BUTLER W. E., 'International Law and the Comparative Method', in W. E. Butler (ed.), International Law in Comparative Perspective (Alpen aan den Rijn: Sijthoff, 1980) 25–40 at 31, cited from MALKSOO L. "Russian approaches to International law", Oxford University Press, 2015, p.7

[3] KOSKENNIEMI M., "Gentle civilizer of nations: The Rise and Fall of international law 1870-1960", Cambridge University Press, Cambridge, 2001

famous Soviet lawyers that have not been translated from Russian and thus their impact is largely unknown. Many notice that dozens of socialist experts are known only as names[4]. Using the advantage of being a native Russian speaker, my research is done using primary sources that focuses on the concepts and evolution in the ideas held by Soviet lawyers, whose scientific tradition is only found in Russian-language texts.

The soviet socialistic legal system was based on the doctrine of Marx and Engels which is not a pure legal study. Instead, there were only two possible sources available which could form the basis of an established legal system: Soviet political government and scientific socialist scholars. Neither body acted independently of the other and faced great difficulty interpreting classical Marxian texts and creating a basis for legal study. Even though both bodies sought to "adapt itself submissively to every change of Soviet government"[5] legal doctrine equally played a significant role in the formation of state institutions and practice.

The time frame of my research on Soviet legal doctrine is from the initial formation of the Soviet judicial system, dating from the October Revolution of 1917, till the collapse of USSR in in 1991. The early period before 1922-1923 is characterized by extreme "judicial fluidity" and the use of old legislation of the Russian Empire in the absence of relevant Bolshevik laws. The year 1922 marked the end of transition from Imperial Russian legislation to that of the Soviet Republic, since the new reality required a new approach and interpretation of Marxist thought from legal scholars so as to adapt to the necessities of the new state and build the foundations of Soviet legal doctrine. Research during the early period of Soviet legal formation is presented by analyzing the work of Soviet lawyers who created the very foundations of Soviet legal scholarship – D.Kursky, N.Krylenko, M.Kozlovsky, I.Razumovsky, each of whom gave different, contrasting hypotheses concerning the dialectical nature of law and Marxian doctrine. The result is clearly demonstrated by careful study of J. Stalin's policy. Evgeny Pashukanis' naïve optimism about accomplishing all of Marx's predictions was criticized and all of his scientific views

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[4] See for example, LUDWIKOWSKI R. "Socialist legal theory in post-Pashukanis era", Boston College International Law Review: Volume 8 Issue 2, 1987, p.323

[5] KELSEN H. "The communist theory of law", Frederick A.Praeger Publishing House, New York, 1955

regarding the law and predictions on withering it away, he was claimed "traitor and wrecker" and repressed. Conversely, the Soviet General Procurator A.J. Vyshinsky, who became also the director of Soviet Academy of Sciences Institute of State and Law, took a new line in the development of Soviet legal doctrine: that the state established law with the sole function of being an expression of state will through sanctions and coercion. A. Vyshinsky played the role of "explorer" of Stalin's will in pursuance of this course in the legal scholarship. It is interesting to note that during this period alternative legal theories still existed which I will cover in my research. For example, a psychological theory of law by L. Petrajitsky (and his progenies A. Lunacharsky and D. Dembsky) influenced the development of Soviet scholarship heavily. This theory was criticized by V.Sergeevich and it was further adopted by M. Reiser, who altered it on "Marxian foundations" (see for example, M.Reisner "Теория Л.И.Петражицкого, марксизм и социальная идеология" [Theory of L.I. Petrajutsky, Marxism and social ideology]). The theory of "octroyed rights" is another alternative theory which was formulated by A. Malitsky, who saw the rights of individuals as a privilege granted them by the state. Under this premise, the existence of obligations which an individual is eligible for together with the rights and freedom they receive are laid out. This theory was roundly criticized by both L. Kaganovich, who opposed it by using the provisions of Marx and Lenin, and by D. Kursky, who insisted on a dictatorship of the proletariat. It is worth paying attention to another phenomenon during the 1950-1960s – legal debates about redefining of law. The initial definition which was formulated by A.J.Vyshinsky was claimed "narrow normative" and alternative definitions were formulated by V. Nersesyants, S.Kechekyan, A.Vasiliev, V.Mamutov and L.Yavich. During Brezhnev's period, prominent scholars from the State Academy of Sciences Institute of State and Law persisted in the fight for "socialistic" human rights seeing them as a new type of law, notably E. Lukasheva, V. Chikvadze and A. Stalgevich. An alternative approach called civilism was offered by V. Nersesyantz, which under-lined the uniqueness of Russian civilization and its subsequent relationship with the law. Also, research on Soviet international law from the position of eventual contribution to the international law of a global community offers an interesting conclusion. As Bowring

claims, "the Soviet theory and practice of international law, if it is the subject of any consideration at all, is usually dismissed as a purely historical example of an extreme species of positivism, and of contemporary interest. Most often it is ignored. For example, in his essay "*What should international lawyers learn from Karl Marx?*"[6] Martti Koskenniemi does not mention Soviet international law at all."[7] Bill Bowing takes a different position and seeks to argue that Soviet international law, notwithstanding of all its contradictions, has created some of the most important notions and principles of contemporary international law which are of continuing relevance. Namely, the right to self-determination of public international law.[8] Right to self-determination was an important issue for Marxian doctrine, since it prescribed the gradual advance of socialism in the world and right to self-determination in international law of was that legal category which could promote the process of communist revolutions further.

The first part of the present research is dedicated to the history of the development of the Soviet legal doctrine of human rights. Hans Kelsen in his *Communist theory of law and state* highlights two main stages of development in Soviet legal doctrine and periodizes the relationship between socialism and law: the first period "when law and socialism were still treated as compatible" and the second period after 1936-1937 "after the idea of incompatibility had been openly abandoned".[9]

Another system of periodization is mentioned by Professor Hazard in *Soviet legal Philosophy*[10], and it distinguishes the development of Soviet legal theory into the three parts – "the Early period 1918-1928, the Middle Period 1929-1937 (the climax of Marxian theory) and the period of the retreat to the bourgeois positions and establishment of the

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[6] KOSKENNIEMI M. "What international lawyers should learn from Karl Marx?", " from "International law on the left", S.Marks (ed.), Cambridge University press, 2008, p.30

[7] BOWRING B. "Positivism versus self-determination: the contradictions of Soviet international law" from "International law on the left", S.Marks (ed.), Cambridge University press, 2008, p. 133

[8] Ibidem, p.134

[9] KELSEN H. "The communist theory of law", Frederick A.Praeger Publishing House, New York, 1955, p.89

[10] HAZARD J., "Soviet legal philosophy", Harvard University Press, Cambridge, 1951

New Base from 1938". Soviet lawyer Krasavchikov O.A.[11] provided periodization which complements and explains these main stages: the first period of formation refers to 1917-1922, just after the revolution of 1917, when the young Soviet state tried to adapt theoretical Marxist doctrine to develop the legal system. The period of primary development took place in 1923-1936 which could mainly be characterized as "double oriented", referring to the two main objectives of the Soviet legal system at the time: 1) the struggle against bourgeois harmful influence on the Western system of law and the old heritage; 2) the development of the Soviet (socialistic) conception of law. The period between 1936 and 1956 was a time of stabilization, when the main provisions of a Marxism-Leninism conception expressed in Soviet laws and regulations were exercised by the functioning of the Soviet regime. The period after 1956 Krasavchikov called a "period of further development of Soviet doctrine", meaning that the legal thinking had already created the main tendencies and patterns and its development was following strict frames established in the earlier periods. Periodization illustrates the main tendencies in the development of Soviet civil law and could be applied to the whole formation of the Soviet doctrine and formation of all spheres of law because it reflects the main stages of the development of Soviet legal thought.[12] For the objectives of the present research the development of the Soviet legal doctrine is presented in chronological order compatible with the systems of periodization mentioned above, but not strictly following them. This is due to the belief that the best way to uncover the main argument of the present research is to provide insight into the Soviet legal doctrine by not only following the development of the doctrine, but by also gaining an understanding of how it can raise the self-awareness of Russian lawyers today.

My argument is based on the premise that "things do not *mean* (the material world does not convey meaning); rather, people construct the meaning of things, using the sign

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[11] KRASAVCHIKOV O.A. «Советская наука гражданского права (понятие, предмет, состав и система)» [Soviet science of civil law (definition, object, content and system)], Publishing house of Sverdlovsk Law Institute, Sverdlovsk, 1961, p.46

[12] IOFFE O.S. "Избранные труды по гражданскому праву: из истории цивилистической мысли. Гражданское правоотношение. Критика теории «хозяйственного права»" [Selected works on civil law: from the history of civil thought. Civil legal relationship. Critics on the theory of "economic law"], Publishing house "Statut", Moscow, 2009
Electronic source in Russian language: http://civil.consultant.ru/elib/books/3/, accessed on 28.08.2015

system (predominantly, but not exclusively linguistic)"[13]. These concepts could therefore be understood differently since there are always people involved who construct their meaning. It is also noticed that certain concepts are used differently by Russian scholars. Estonian scholar Lauri Mälksoo in his recent monograph *Russian Approaches to International Law,* asks: "…perhaps in the West not enough attention had been paid to what officially "Russia" had meant by "international law" and what ideas and attitudes lay behind this discourse in Russia"[14]. He highlights in his study the drastic differences in the understanding of international law by Russian and Western scholars. The claim that all rights are universal was also strongly contested by M. Koskenniemi[15]. While it is easy to agree that "rights are a product of Western culture and history and their principal propagandists have been Western organizations, activists and academics"[16] and see Russian human rights as a part of the Western tradition, still "the domestic discursive contest of human rights is inevitable."[17] Russian scholars themselves claim a specific notion and "Russian idea" of human rights, which cannot be simply discarded. Moreover, as Koskenniemi claims, there is not a method which "allows the lawyer to set aside her "politics", her subjective fears and passions". Also, in order to grasp the reality of functioning human rights in Russia we need to see the "conditioned intent of the speaker – with reference to the historical, economic and social reality within which the speaker is situated."[18]

A key illustration of the perceptive differences between the West and Russia can be seen in the way each viewed legislation in the Soviet Union. John Quigley[19] wrote earnestly from the West that the rule of law in USSR was progressive and guaranteed more rights to

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[13] MILLIKEN J., "The study of discourse in International Relations: A critique of research and methods", 5 European Journal of International Relations (1999), 225-254, at 229

[14] MÄLKSOO L. "Russian approaches to International law", Oxford University Press, 2015, Introduction

[15] See e.g., KOSKENNIEMI M. "Human rights, politics and love" from "The politics of International law", Hart Publishing, USA, 2011, p.153

[16] Ibid, p.162

[17] PRECLIK P. "Culture re-introduced: contestation of human rights in contemporary Russia", volume "Russia and European human rights law: the rise of civilizational argument" edited by Lauri Mälksoo, Brill Nijhoff publishing house, Leiden-Boston, 2014, p. 45

[18] JOUANNET E. "Koskenniemi: A Critical Introduction" in KOSKENNIEMI M., from "The politics of International law", Hart Publishing, USA, 2011

[19] QUINGLEY J. "Soviet legal innovation and the law of the Western world", Cambridge university press, 2012

Soviet citizens than even those in Europe enjoyed. Nonetheless, the plaudits notwithstanding, it is true that liberal legislation was also aimed at people outside the Soviet Union and served the strategic purpose of bolstering the international image of it and the communist project at large, whereas in reality the rights that were promised and championed from abroad could not be exercised by Soviet citizens. Furthermore, the legislation was aimed at future generations to secure the conditions for the future continuation of communism.[20] Generously proclaimed, the rights were seen as "targets" and expectations rather than real guarantees.[21] In my research I get to the heart of the reasons for this - ideological, legal and how legal practice functioned – which meant the exercising of certain rights was not completely possible and the violations of other guarantees somehow could not be contested.[22] In many cases internal legislation was itself contradicted by Constitutional provisions which failed to allow for the exercising of existing rights, and, in other cases internal instructions and closed departmental decrees (which were not published or made public) prescribed how some practices should be carried out, in both cases making it possible, instead of following the Constitution, that the success of Soviet politics was held hostage to its short and long-term aims. The Soviet population was able to grasp the drastic mismatch between the proclamations made by the

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[20] TOWE E. Thomas "Fundamental rights in the Soviet Union: a comparative approach", University of Pennsylvania law review, Vol.115-125, 1967, p.77

[21] BELAVUSAU U. "The Emerging Concepts of Social Rights in Belarus, Ukraine and Russia", Prague Yearbook of Comparative Law – 2010, pp. 137-157, 2011, p.156

[22] Such reasons vary for different categories of rights. For example, the freedom of manifestation guaranteed by article 50 of Soviet Constitution of 1936 didn't exist, since any non-communist demonstration was qualified as "anti-Soviet" and prescribed imprisonment due to the art.70 of Criminal Code of USSR ("Anti-Soviet propaganda"). So, freedom of religion (guaranteed by the same art.50 of Constitution 1936 with further development of its provisions in resolution of Congress of People's Deputies of RSFSR from 1 January of 1929 (with amendments from 23.06.1975) "About religious associations") wasn't possible to exercise, since one of the method to influence on the religious groups was taking away children from religious families, since bringing up in religious traditions contradicted Soviet ideology which prescribed "communist education" to all young people which began at an early age. This principle which became the legal base for taking away children from religious families was embodied in article 52 of the Soviet Code on matrimony and family: "parents should bring up their children according to the moral code of the communist".

Soviet government and the reality they faced. In this case it could be said that it is insufficient to make a purely legal reading of the argument and use only textual approach to studying Soviet legal doctrine[23].

The second part of the current research examines a critical period after the collapse of the USSR with special attention paid to the construction of a new state order. This made it possible to see the origins of the legal concepts which were adopted during the construction of a new democratic state. By following the development of legal approaches in Russia in the first part of the research, we gain a holistic picture as to its particularities in the second. This in turn makes the understanding of the Russian concept of human right clearer for practitioners such as Lauri Mälksoo who anticipated this necessity relating to domestic and international law by stating that "it should not become a danger of creating a parallel world of abstract theorizing".[24] The main argument is based on the analysis of how Soviet legal doctrine historically has been construed in order to inspect the main trends of its development which influenced modern ideas of law and the perception of Western legal concepts on human rights in Russia.

In my research I bring to the fore the following questions: are there any historical patterns on human rights from USSR to the present day and how do they influence modern Russia? What was the attitude to justice and law in the Soviet period and do the historical roots influence modern Russian legal thinking? The main argument is uncovered through history as a fundamental part of the analysis.

In his seminal work *Gentle Civilizer of Nations*, M.Koskenniemi reinterpreted historiography and applied it to international law to provide an approach of where theory and the history of the discipline allow us to establish the links between the past and the

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[23] Description of two orthodox methods in study of history of thought is given by SKINNER Q. in "Meaning and understanding in the history of ideas", "History and Theory", Blackwell Publishing for Wesleyan University, Vol.8, No.1 (1969), pp.3-53. The first method prescribes necessity of studying the contest of "religious, political and economic factors" in order to grasp the meaning of any text, and the second one insists on autonomy of the text itself which could provide itself the understanding of its own meaning. The author of the present paper uses the first contextual method.

[24] MÄLKSOO L. "Russian approaches to International law", Oxford University Press, 2015, p.25

present situation of human rights norms. By also using comparative analysis of concepts applied to human rights and how they are understood in the West and in modern Russia, I show the continuity between Soviet past and modern Russia in the way they are practiced.

A historiographical approach, defined as a method which uses historical evidence in constructing and formulating scientific theories[25], is common also for the Italian academic tradition in studies of history of legal thought (see for example, fundamental study of E. Rotelli and P. Schiera on comparative development of the state "*Lo stato moderno*" [The Modern State])[26], and is used as the methodology for the present study. My affiliation to the University of Florence and Center of studies of history of modern legal thought [Centro studi per la storia del pensiero giuridico moderno][27], and especially supervision of Prof.Cappellini, provided me with the captivation by the Italian historiographical scholarship with philosophical understanding of the research on history of legal ideas which deepened the analysis of the formation of Soviet legal doctrine. As Mannoni claims, the fundamental part of the analysis of historical research of legal thought is doctrine, but it is not sufficient for the complete analysis if it is complemented with research on how law itself was practiced:

"And then, the history of legal doctrine is necessary, but it is not sufficient. Reconstruction of the doctrine is obligatory but insufficient to provide the whole picture of what really happening without the contribution of the community of diplomats, lawyers, statists, police and millions of other subjects, a part of academic community, such as pacifists, religious activists, humanitarian movements... history of legal thinking must be a

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25 FUAT FIRAT A. (1987),"Historiography, Scientific Method, and Exceptional Historical Events", in NA - Advances in Consumer Research Volume 14, eds. Melanie Wallendorf and Paul Anderson, Provo, UT : Association for Consumer Research, Pages: 435-438.

26 ROTELLI E., SCHIERA P. on comparative development of the state "Lo stato moderno" [Modern State], Publishing house "Il Mulino", Bologna, 1974, part 1 "Dal medioevo all'eta moderna' [From Medieval to the modern epoch], chapter of Theodor Mayer "I fondamenti dello Stato modern Tedesco nell'alto Medioevo" [Fundamentals of modern German state in the late Medieval epoch], pp.21-490, CRIFO G. "Civis", Editori Laterza publishing house, 2005, Bari, chapter 2 "Prospettiva storiografica" [Historiographical perspective] pp.9-21, HINTZE O. "Stato e societa" [State and society], Publishing house Zanichelli, Bologna, 1980, and others.

27 Center of studies of history of modern legal thought [Centro studi per la storia del pensiero giuridico moderno] is a research center which is active for more than 40 years at the University of Florence. It was founded with the initiative of Paolo Grossi in 1971 as a research center for a wide range of topics, first of all interdisciplinary. http://www.centropgm.unifi.it

stoppage and not a rushing movement; the debates must cause contribution to the understanding but not just an academic discussion of the practice. This means to reconstruct the life of the institutes, look at the contests, and make expertise in this subject from political history and international relations as well."[28]

But there is another danger in such an approach. Social legal studies could mix law with politics. This tendency is described by Paolo Grossi as one of the main dangers of legal research. In *Ritorno al diritto* he claims that a crisis of law happened due to the political influence on it:

"In modernity, in general there is a strong bond, and it must be admitted the necessary one, between power and law, because power, knowing about the enormous force which is law, intends to control it completely. This bond penetrates to the origins of law as well, which reflects in its autonomy the choices of power, and its defects."[29]

Grossi divides the terms of norm and legality, highlighting the formal character of legality: "The terminological change couldn't be repeated enough – that is from the legal norm to the legal order – this is not just a nominal problem, but it becomes a change of legal thinking. Legal norms could be expressed in a legality just with one condition: if a legal norm efficiently respects the values and interests of certain determined society, if there are eyes and ears of the state attentively directed to the people, ready to percept what comes from there." [30] This division of terms is extremely important for the historiographical study of Russian legal thinking since legal norms in periods of Soviet ruling were deprived of the high principles of legality in favor of Marxian principles of doctrine. Especially in analyzing and uncovering the main argument of the present research – what Russians really mean under the legal notion of human rights.

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[28] MANNONI S. "Da Vienna a Monaco (1814-1938). Ordine europeo e diritto internazionale", G.Giappichelli Editore, Torino, 2014, p.6
[29] GROSSI P. "Ritorno al Diritto" [Back to the Law], Publishing house Editori Laterza, Bari, 2015, p.5
[30] Ibidem, p.35

Introduzione

"Dove, nonostante tutto, iniziano i diritti umani universali? Nei posti piccoli, vicino casa — così vicini e cosi piccoli che non possono essere visti nella mappa del mondo. Allo stesso tempo sono il mondo individuale di una persona: nei posti dove vive; nella scuola o il liceo che lui frequenta; nella fattoria, fabbrica oppure nell'ufficio dove lui lavora. Sono i posti dove ogni uomo, donna e bambino, cerca la giustizia paritaria, una dignità paritaria senza discriminazione. Se questi diritti non hanno senso lì, non avranno senso da nessuna altra parte. Senza un movimento concertato dell'esercizio dei nostri diritti nei luoghi a noi più familiari, più vicini a casa nostra, non avremo il progresso nella sua accezione più ampia e crescente."

Eleanor Roosevelt[31]

Le esperienze della mia vita e l'ambiente in cui sono cresciuta hanno stimolato il mio desiderio di perseguire i diritti umani e di appagare la mia curiosità circa la storia giuridica dei paesi europei del post-comunismo. Visto il lavoro di mio padre come militare,

[31] Il membro del comitato fondato dalla Commissione su diritti umani delle Nazione Unite per elaborazione della bozza Della Dichiarazione Universale dei diritti del'uomo. Dalla presentazione NEI TUOI MANI: la guida per la comune azione per il decesimo anniversario della Dichiarazione dei diritti dell'uomo, Nazione Unite, New York, 27 Marzo 1958 citato da "Human rights indicators: a guide to measurement and implementation"[Indicatori dei diritti umani: la guida per determinazione e implicazione], Nazione Unite, New York and Geneva, 2012, p.9.

la mia famiglia ha dovuto viaggiare molto. Io sono nata a Berlino, ma ho trascorso la maggior parte della mia vita a Mosca. Le mie esperienze mi hanno insegnato a rispettare diverse culture e modi di vivere. La mia famiglia ha lasciato la Germania il giorno in cui il muro di Berlino è caduto. Solo quando sono diventata più grande ho potuto comprendere il vero significato di quell'evento e capire l'importanza dei cambiamenti storici e politici seguiti alla caduta dell' Unione Sovietica. Quegli eventi, insieme alle transizione politiche avvenute in Russia nell'ultimo decennio del Novecento, mi hanno fatto riflettere e ragionare sull'influenza della storia politica e nazionale di un paese nella vita concreta delle persone. Tutto potrebbe accadere in una notte qualunque, ma molto di più fu quel che avvenne a Mosca in quegli anni, un turbine di mutamenti che ha avuto un forte impatto sulla vita di ogni persona.

La presente ricerca è dedicata allo studio della storia dello sviluppo dei diritti umani nella dottrina giuridica dell'Unione Sovietica ed ha lo scopo di dimostrare la correlazione tra gli orientamenti passati e le pratiche contemporanee vigenti in Russia.

La storia della dottrina giuridica dell'Unione Sovietica manca di contributi di marca internazionale, ed ancor meno sono gli apporti che si hanno dai giuristi positivisti, poiché solitamente difettano di una chiara divisione tra aspetto politico e ideologico. Un'analisi positivista, critica della dottrina giuridica dell'Unione Sovietica, è presentata da Hans Kelsen nella Sua *Communist Theory of Law*, dove viene stesa una critica ai principali giuristi sovietici: A.J. Vyshinksy, E.B. Pashukanis, P.I. Stuchka, M.A. Reisner, M.S. Strogovich, S.A. Golunsky.

Anche le traduzioni dei testi degli stessi giuristi sovietici effettuate da John Hazard nel *Soviet legal philosophy,* farà parte della ricerca della dottrina americana sul diritto dell'Unione Sovietica dopo la Seconda Guerra Mondiale. Significativo di questo, poi, riassumibile nel dogma di William E. Butler - '*Conosci il tuo nemico*": "per capire come lui

vive, per migliorare le tue capacità di comprensione e comunicazione, cosi per evitare gli errori, per identificare e chiarire le posizioni contrarie e i valori".[32]

Nel *Gentle Civilizer of Nations,* M. Koskenniemi descrive uno dei problemi più comuni nello studio storiografico, ossia il fatto che l'attenzione è sempre stata data solamente a "quello che i grandi maestri della disciplina pensavano oppure facevano".[33] Viceversa, è di moltissima importanza studiare anche le idee degli studiosi meno noti dell'Unione Sovietica, che pure hanno avuto tanta influenza sullo sviluppo della dottrina giuridica, aiutandoci ad avere un quadro completo della formazione giuridica dell'Unione Sovietica. La più grande difficoltà per lo studio internazionale dell'eredità giuridica dell' Unione Sovietica è legata al fatto che le loro opere non sono state tradotte dalla lingua russa, e pertanto il loro lavoro resta per la maggior parte sconosciuto. Per questo, la ricerca che si presenta, ha la possibilità di colmare un'importante lacuna.

La mia ricerca è basata su fonti primarie che descrivono i concetti e l'evoluzione delle idee dei giuristi sovietici, una tradizione tecnica e scientifica di cui può essere trovata testimonianza solamente nei testi in russo.

Il sistema giuridico socialista si è basato sulla dottrina di Marx e Engels della quale non si è fatto un puro studio giuridico, ma una concreta attuazione del funzionamento della società (il materialismo storico). Sono esistite nel tempo due possibili fonti di formazione circa la base del sistema giuridico russo: il governo politico sovietico e il lavoro degli studiosi socialisti. La dottrina era come ha notato Hans Kelsen "concorde in tutta umiltà ad ogni cambiamento del governo sovietico"[34], però nonostante questo aveva un ruolo significativo nella formazione delle istituzioni politiche e pratiche. Nessuna delle due fonti ha funzionato indipendente, perché entrambe hanno trovato difficoltà nell'interpretazione

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[32]BUTLER W. E., 'International Law and the Comparative Method', in W. E. Butler (ed.), International Law in Comparative Perspective (Alpen aan den Rijn: Sijthoff, 1980) 25–40 at 31, citato da MÄLKSOO L. "Russian approaches to International law", Oxford University Press, 2015, p.7

[33] KOSKENNIEMI M. "Gentle civilizer of nations: The Rise and Fall of international law 1870-1960", Cambridge University Press, Cambridge, 2001

[34] KELSEN H. "The communist theory of law"[La teoria comunista del diritto], Frederick A.Praeger Publishing House, New York, 1955

dei testi classici di Marx, e non sono riuscite a costruire solide basi per affrontare uno studio giuridico.

Il dies a quo della mia ricerca inizia dai fondamenti della formazione della dottrina giuridica dell'Unione Sovietica, dalla data della Rivoluzione di Ottobre 1917 fino alla caduta dell'Unione Sovietica nel 1991. Il periodo prima del biennio 1922-1923 è caratterizzato da una "fluidità giuridica" e dall'uso della vecchia legislazione dell'Impero Russo, in assenza di leggi rilevanti dei Bolscevichi. L'anno 1922 ha significato la fine del periodo di transizione dalla legislazione Russa Imperiale a quello dell'Unione Sovietica Repubblicana, perché la nuova realtà richiedeva nuovi approcci e interpretazioni del pensiero di Marx per adottarlo alle necessità del neonato governo e creare le fondamenta di una nuova dottrina giuridica sovietica.

La ricerca intorno al primo periodo di formazione della dottrina giuridica è presentata attraverso l'analisi del lavoro dei giuristi sovietici che hanno creato i fondamenti dello Studio Giuridico Sovietico: D.Kursky, N. Krylenko, M. Kozlovsky, I.Razumovsky; ognuno di loro ha sviluppato teorie giuridiche diverse e alle volte contrastanti riguardo la dottrina Marxista e la tematica giuridica. Il risultato può essere chiaramente dimostrato dallo studio meticoloso della politica di Stalin.

"L'otttimismo naif" di Evgeny Pashukanis riguardo l'attuazione di tutte le previsioni di Marx è stato criticato severamente insieme ai suoi concetti scientifici riguardo al diritto e le profezie sul diritto morente; non a caso egli era chiamato "traditore della patria" e veniva per questo emarginato. Al contrario, il procuratore generale A.J. Vyshinsky, diventato il direttore dell'Accademia Sovietica delle Scienze Istituto di Stato e Diritto, ha segnato la linea nuova dello sviluppo della dottrina giuridica sovietica: lo stato ha bisogno del diritto con uno solo obiettivo, cioè per renderlo espressione della volontà dello Stato tramite le sanzioni e la costrizione. A.J. Vyshinsky ha avuto, perciò, un ruolo di "rivelatore della volontà di Stalin" nel corso della formazione dello studio del diritto. Sarà molto interessante, così, scoprire che esistevano molteplici teorie giuridiche alternative in quel periodo. Per esempio, la teoria psicologica del diritto di L. Petrajitsky (e i suoi allievi A. Lunacharsky e D. Dembsky) ha molto influenzato lo sviluppo dello studio sovietico del diritto. Questa teoria è stata criticata moltissimo da V.Sergeevich e successivamente M. Reiser ha inserito questa teoria nella "fondazione Marxiana" (guarda per esempio,

M.Reisner "Теория Л.И.Петражицкого, марксизм и социальная идеология" [La teoria di L.I. Petrajutsky, Marxism ideologia sociale]). La teoria dei diritti *octroyé* è un' altra teoria alternativa formulata dallo studioso sovietico A. Malitsky, che ha visto i diritti delle persone come un privilegio donato a loro dallo Stato. Da questo punto di vista lui ha spiegato che insieme ai diritti e alle libertà che lo stato garantisce, fornisce anche obblighi. Questo concetto è stato criticato da L. Kaganovich, che ha deciso di contrastare la teoria delle previsioni di Marx e Lenin, una teoria criticata anche da D.Kursky, che ha insistito sulla necessità sia della dittatura che del proletariato. Molto interessante da analizzare è anche un altro fenomeno degli gli anni 1950-1960: i dibattiti giuridici sull' elaborazione della definizione del diritto.

La definizione del diritto era stata formulata da A. Vyshinsky ed era stata chiamata "normativismo conciso", le definizione alternative erano formulate da V. Nersesyants, S.Kechekyan, A.Vasiliev, V.Mamutov e L.Yavich. Durante il periodo di Brezhnev, i studiosi dall' Accademia delle Scienze e dell' Istituto dello stato e diritto, E. Lukasheva, V. Chikvadze and A. Stalgevich hanno portato avanti una teoria dei diritti socialistici. Un approccio alternativo chiamato "civilismo" è stato invece sostenuto da V. Nersesyantz che ha sottolineato il carattere unico della civilizzazione russa e la relazione speciale attraverso il diritto per questo motivo.

La ricerca sul diritto internazionale sovietico riguardo il contributo dell'Unione Sovietico sul diritto internazionale della comunità globale porta a delle conclusioni interessanti. Come Bowring scrive "La teoria Sovietica del diritto e la pratica del diritto internazionale, se trattate in una ricerca, vengono spesso viste come l'esempio puro storico del positivismo estremo, senza nessun interesse giuridico contemporaneo. Molto spesso questa tema è semplicemente ignorata. Per esempio, nel saggio *"What should international lawyers learn from Karl Marx?"*[35] Martti Koskenniemi non nomina il diritto internazionale Sovietico." [36] Bill Bowing prende una posizione diversa e dimostra che il diritto internazionale dell' Unione Sovietica, nonostante tutte le sue contraddizioni, ha creato

[35] KOSKENNIEMI M. "What international lawyers should learn from Karl Marx?" in "International law on the left", S.Marks (ed.), Cambridge University press, 2008, p.30
[36] BOWRING B. "Positivism versus self-determination: the contradictions of Soviet international law" in "International law on the left", S.Marks (ed.), Cambridge University press, 2008, p. 133

diverse nozioni e principi sul diritto internazionale contemporaneo che tuttora appaiono rilevanti. Il più importante di questi era il diritto di autodeterminazione nell'ambito del diritto internazionale pubblico. [37] Il diritto di autodeterminazione era una nozione significativa per la dottrina Marxista, perché ha prescritto lo sviluppo graduale del socialismo nel mondo e ha introdotto il diritto di autodeterminazione nel diritto internazionale come categoria giuridica per aiutare i paesi coinvolti nel processo delle rivoluzioni comuniste.

Durante il periodo di Brezhnev, famosi giuristi dell'Accademia Statale delle Scienze dell'Istituto dello Stato e Diritto insistevano nella sfida di concettualizzare i diritti umani socialisti; si tratta di E. Lukasheva, V. Chikvadze e V. Kudrjavtsev. Un approccio alternativo, chiamato civilismo, è stato offerto da V. Nersesyantz, che ha sottolineato l'unicità della civilizzazione russa e la sua peculiare relazione attraverso il diritto. In altri termini ciò significa che i diritti umani in Russia hanno avuto una propria origine e un proprio sviluppo, basati su un variegato approccio culturale.

La prima parte della presente ricerca è dedicata alla storia dello sviluppo dei diritti umani in Unione Sovietica. Hans Kelsen nel *Communist theory of law and state* ha sottolineato due periodi di sviluppo della dottrina Sovietica del diritto, prendendo come criterio di questo periodizzazione la relazione tra socialismo e diritto: "quando il diritto e socialismo erano percepiti come compatibili" e un altro secondo periodo – dopo il 1936-1937 - quando l'idea di compatibilità era pubblicamente abbandonata".[38]

Un altro sistema di periodizzazione veniva elaborato dal Professor Hazard nel *Soviet legal Philosophy*[39] che ha distinto la teoria Sovietica del diritto in tre parti – "il periodo precoce 1918-1928, il mezzo periodo1929-1937 (climax della teoria Marxiana) e il periodo di eliminazione delle posizioni della borghesia e fondazione della Nuova Base dal 1938".

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[37]Ibidem, p.134
[38] KELSEN H. "The communist theory of law", Frederick A.Praeger Publishing House, New York, 1955, p.89
[39] HAZARD J., "Soviet legal philosophy", Harvard University Press, Cambridge, 1951

Un giurista Sovietico, Krasavchikov O.A.,[40] il sistema menzionato sopra e suddivide i periodi più importanti in questo modo: il primo periodo si riferisce al 1917-1922, subito dopo la rivoluzione del 1917, quando il giovane Stato Sovietico ha cercato di adottare la dottrina Marxista per un nuovo sistema giuridico. Il periodo successivo, che va dal 1923 al 1936 è caratterizzato da un "doppio orientato", nel senso che la formazione giuridica dell'Unione Sovietica era influenzata da un duplice orientamento: uno era riferito alla battaglia contro l'influenza della borghesia e al suo sistema giuridico Occidentale, mentre l'altro si riferisce all'elaborazione del concetto Sovietico (socialistico) del diritto Il periodo che va dal 1936 al 1956 è stato il periodo di maggiore stabilizzazione delle disposizioni Marxiste-Leniniste, perché le posizioni teoriche sono state concretamente applicate al regime sovietico. Invece, il periodo successivo al 1956, è stato chiamato da Krasavchikov "il periodo di sviluppo della dottrina sovietica", nel senso che mentre nei periodi precedenti era stata creata l'ossatura del pensiero giuridico, ora questo ha continuato a svilupparsi nell'assetto pratico. Tale sistema di periodizzazione ci aiuta a vedere la tendenza e i periodi di maggiore sviluppo nella formazione della dottrina Sovietica.[41] Per gli scopi della presente ricerca, la parte storica della tesi è presentata cronologicamente e compatibilmente ai sistemi di periodizzazione descritti sopra, però non coincide strettamente con nessuno di essi. Il modo migliore per illustrare l'argomento principale della ricerca è non solo spiegare lo sviluppo della dottrina Sovietica del diritto, ma far luce sull'influenza della dottrina sovietica sul pensiero giuridico moderno russo.

Il mio lavoro concorda con l'affermazione secondo cui "le cose da sole non producono *significato* (il mondo materiale non stabilisce il suo senso), piuttosto sono le persone che costruiscono il senso delle cose usando diversi sistemi di segni (più spesso, ma

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[40] KRASAVCHIKOV O.A. «Советская наука гражданского права (понятие, предмет, состав и система)» [Soviet science of civil law (definition, object, content and system)], Publishing house of Sverdlovsk Law Institute, Sverdlovsk, 1961, p.46

[41] IOFFEO.S. "Избранные труды по гражданскому праву: из истории цивилистической мысли. Гражданское правоотношение. Критика теории «хозяйственного права»" [Selected works on civil law: from the history of civil thought. Legal civil relationship. Critics on the theory of "economic law"], Publishing house "Statut", Moscow, 2009
Electronic source in Russian language: http://civil.consultant.ru/elib/books/3/, accessed on 28.08.2015

non solamente, linguistici)".[42] Questi concetti possono essere interpretati diversamente perché sono sempre le persone a dare il significato alle cose. E' stato già notato che vari concetti sono stati studiati diversamente dagli studiosi russi. Il Professore Estone Lauri Mälksoo nella sua monografia recente *Russian Approaches to International Law,* chiede: "…probabilmente in Occidente non è stata data sufficiente attenzione a ciò che in Russia ufficialmente è stato proclamato usando il termine "diritto internazionale" e quali idee ed approcci stiano, realmente, dietro a questo discorso in Russia?"[43]. Lui sottolinea nella sua ricerca le differenze enormi tra la comprensione del diritto internazionale da parte degli studiosi russi ed occidentali.

Il principio secondo cui i diritti siano universali è stato fortemente contestato da M. Koskenniemi[44]. I diritti umani, come li vediamo adesso, sono "il prodotto della cultura Occidentale e i loro propagandisti principali sono organizzazioni Occidentali, attivisti e accademici Occidentali"[45], così possiamo vedere la Russia come parte di questa tradizione europea, ma allo stesso tempo "un contestuale discorso domestico intorno ai diritti umani è inevitabile."[46] Gli studiosi russi parlano della specifica concezione russa e di una "*l'idea russa*" dei diritti umani, che non può essere più ignorata. Più che altro, come Koskenniemi insiste, non esiste un metodo che "permette al giurista di mettere da parte la sua "politica", i suoi timori soggettivi e le sue passioni". Per questo, per capire la realtà funzionante dei diritti umani in Russia, dobbiamo vedere quale sia "l'intenzione contestuale di colui che afferma o nega tali diritti, con particolare riguardo alla sua realtà storica, economica e sociale."[47]

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[42] MILLIKEN J., "The study of discourse in International Relations: A critique of research and methods" [Lo studio del discorso in relazioni internaizonali: la critica nella ricerca e metodo], 5 European Journal of International Relations (1999), 225-254, at 229.
[43]MÄLKSOO L. "Russian approaches to International law"[Approcci russi al diritto internazionale], Oxford University Press, 2015, Introduction
[44] KOSKENNIEMI M. "Human rights, politics and love"[Diritti umani, politica e amore] from "The politics of International law", Hart Publishing, USA, 2011, p.153
[45] Ibidem, p.162
[46] PRECLIK P. "Culture re-introduced: contestation of human rights in contemporary Russia"[Re-introduzione della cultura: contestazione dei diritti umani nella Russia moderna], volume "Russia and European human rights law: the rise of civilizational argument" ed. Lauri Mälksoo, Brill Nijhoff publishing house, Leiden-Boston, 2014, p. 45
[47]JOUANNET E. "Koskenniemi: A Critical Introduction"[Koskenniemi: introduzione critica] in KOSKENNIEMI M.,"The politics of International law", Hart Publishing, USA, 2011

Un'illustrazione chiarissima della prospettiva della diversità tra l'Occidente e la Russia può essere osservata secondo il punto di vista della legislazione nell' Unione Sovietica. John Quigley[48] ha scritto dal punto di vista dello studioso occidentale riguardo alla legislazione dell'Unione Sovietica. Ha parlato di una legislazione progressista, atteso che le norme costituzionali russe hanno garantito tanti diritti che, per esempio, i proletari europei non avevano. Tuttavia è da riferire che la legislazione, apparentemente libera, in realtà era scritta per le persone non appartenenti all'Unione Sovietica e aveva lo scopo strategico di formare un'opinione pubblica internazionale favorevole al comunismo. In realtà l'intenzione era di non garantire pienamente l'applicazione di questi diritti ai cittadini sovietici. Inoltre è giusto dire che tale legislazione era stata scritta per le generazioni future, per permettere le condizioni di sviluppo del comunismo.[49]Generosamente proclamati, i diritti erano visti come un orientamento oppure come un obiettivo futuro e non come delle reali garanzie.[50] Nella mia ricerca seguirò il centro dei motivi di questo fenomeno– motivi ideologici, legali e pratici – per dare risposta alla domanda: come è stato possibile, anche dal punto di vista giuridico, che i diritti violati non potessero essere realizzati e che la loro violazione non potesse essere contestata.[51]In molti casi la legislazione interna era contraria alla Costituzione e non permetteva di realizzare molti diritti ufficialmente garantiti; in altri casi, esistevano "le ordinanze chiuse" (le quale non erano pubblicate e accessibili al

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[48] QUINGLEY J. "Soviet legal innovation and the law of the Western world" [Innovazione giudirica sovietica e legislazione del'Occidente], Cambridge university press, 2012

[49] TOWE E. Thomas "Fundamental rights in the Soviet Union: a comparative approach" [Diritti fondamentali nell'Unione Sovietica: aproccio compratistico], University of Pennsylvania law review, Vol.115-125, 1967, p.77

[50]BELAVUSAU U. "The Emerging Concepts of Social Rights in Belarus, Ukraine and Russia"[Sviluppo dei concetti dei diritti sociali in Belarussia, Ukraina e Russia], Prague Yearbook of Comparative Law – 2010, pp. 137-157, 2011, on p.156

[51] Questi motivi variano per diverse categorie di diritti. Per esempio, la liberta di manifestazione garantita dall'art 50 della Costituzione Sovietica del 1936 non esisteva perche' qualsiasi dimostrazione non comunista era interpretata come anti-sovietica e come reato, per il quale era prescritta la pena in prigione ex art.70 del codice penale dell'USSR ("Anti-Soviet propaganda"). Anche, la liberta di religione (garantita della stessa articolo art.50 della Costituzione del 1936 con ampio sviluppo delle disposizioni in risoluzione di Congresso degli Deputati Nazionali di RSFSR dal 1 Gennaio 1929 (con cambiamenti dal 23.06.1975) "Sulle associazioni religiose") non era possibile realizzare perche ci fosse un metodo che permetteva di influenzare i gruppi religiosi – il governo ha portato via i bambini dalle famiglie che praticavano la religione. L'Ideologia sovietica prevedeva educazione comunista per tutti minori. Questo principio era formulato nell'articolo 52 del Codice Sovietico della Famiglia e d era diventato la base legale per portare I bambini via nella casa statale di famiglia: *"i genitori devono educare i suoi bambini con il codice morale del comunista"*.

pubblico) le quali circolavano nei dipartimenti e nelle altre istituzioni di governo dettando il concreto modo di eseguire le diverse pratiche. Molto spesso queste ordinanze chiuse erano il motivo per cui la pratica si mostrava diversa da quella stabilita dalla legge. La popolazione dell'Unione Sovietica era capace di vedere la differenza tra la realtà e le proclamazioni del governo Sovietico. In questo caso, chiaramente, si può vedere che è insufficiente fare una pura lettura giuridica dell'argomento e che non si può usare solo un approccio testuale nello studio della dottrina sovietica. [52]

La seconda parte della presente ricerca analizza il periodo critico seguito alla caduta dell'Unione Sovietica, con un'attenzione speciale al processo di costruzione del nuovo ordinamento. In ciò è possibile vedere le origine dei concetti giuridici che sono stati adottati durante la costruzione del nuovo stato democratico. Seguendo lo sviluppo degli approcci legali in Russia nella prima parte della ricerca, potremo vedere un quadro ampio delle sue peculiarità (nella seconda parte). Questo a sua volta determinerà una comprensione pratica più chiara dei concetti di diritti umani così come ha evidenziato Lauri Mälksoo, che riferendosi al diritto nazionale ed a quello internazionale, ha affermato che "questo non dovrebbe creare la pericolosità di produrre il mondo parallelo delle teorie astratte"[53].

Nella mia ricerca mi pongo le seguenti domande: come le tradizioni storiche sui diritti umani dell'Unione Sovietica hanno influenzato la situazione nella Russia moderna? Quale era l'atteggiamento verso la giustizia e il diritto nel periodo Sovietico? Le radici storiche hanno influenzato il modo di pensare del diritto moderno? L'argomento principale viene presentato tramite storia come la parte fondamentale dell'analisi.

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[52]Tale descrizione dei due approcci ortodossi dello studio della storia del pensiero e' stato fatto da SKINNER Q. in "Meaning and understanding in the history of ideas" [Significato e comprensione nella storia del pensiero], "History and Theory", Blackwell Publishing for Wesleyan University, Vol.8, No.1 (1969), pp.3-53. Il primo approccio descrive la necessita di studiare il contesto della religione, della politica e della economia per capire il senso di qualsiasi testo, l'altro approccio invece dice che il testo da solo può provvedere al suo significato. L'autore del presente lavoro segue il primo approccio del metodo contestuale.

[53]MÄLKSOO L. "Russian approaches to International law"[Approcci russi al diritto internazionale], Oxford University Press, 2015, p.25

Nel suo lavoro rivoluzionario *Gentle Civilizer of Nations*, M. Koskenniemi ha reinterpretato la storiografia e ha applicato questo metodo allo studio del diritto internazionale; ha attuato un approccio in cui la teoria e la storia della disciplina permettessero di costruire collegamenti tra il passato e il presente della storia dei diritti umani. Usando l'analisi comparatistica sui concetti applicati ai diritti umani, per come sono interpretati nel mondo occidentale e particolarmente in quello russo, la ricerca stabilisce una continuità tra Unione Sovietica e Russia moderna, continuità apprezzabile anche nel cammino della conquista dei diritti umani.

L'approccio storiografico è un metodo che usa l'evidenza storica per costruire e formulare le teorie scientifiche[54]; è una metodologia molto comune nella tradizione accademica italiana per lo studio della storia del pensiero giuridico (guarda per esempio, lo studio fondamentale di E. Rotelli e P. Schiera sullo sviluppo comparatistico dello stato, "Lo stato moderno")[55]; questo approccio storiografico è usato come metodologia principale della presente ricerca. La mia affiliazione all'Università di Firenze e al Centro studi per la storia del pensiero giuridico moderno, e il tutorato presso il Prof. Cappellini, mi hanno portato ad approfondire la ricerca storica della dottrina Sovietica del diritto, tramite lo studio storiografico della tradizione Italiana, fornendo alla ricerca una giusta base storico-filosofica. Come Mannoni scrive, la dottrina è la parte fondamentale dell'analisi storica del pensiero giuridico, però non è sufficiente per un' analisi completa e per una ricerca su come il diritto è stato progressivamente costruito:

"Eppure la storia delle Dottrine giuridiche per quanto necessaria, non è affatto sufficiente. La ricostruzione dottrinale è tanto indispensabile quanto inadeguata a fornire da sola un quadro a tutto tondo di un'esperienza giuridica che annovera nella sua comunità

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[54] FUAT FIRAT A. (1987), "Historiography, Scientific Method, and Exceptional Historical Events"[Storiografia, metodo scientifico e eventi storici eccezionali], in NA - Advances in Consumer Research Volume 14, eds. Melanie Wallendorf and Paul Anderson, Provo, UT: Association for Consumer Research, Pages: 435-438.

[55] ROTELLI E. e SCHIERA P. "Lo stato moderno", "Il Mulino", Bologna, 1974, parte 1 "Dal medioevo all'eta moderna", Theodor Mayer "I fondamenti dello Stato modern Tedesco nell'alto Medioevo", pp.21-490, CRIFO G. "Civis", Editori Laterza publishing house, 2005, Bari, capitolo 2 "Prospettiva storiografica", pp.9-21, HINTZE O. "Stato e societa", Publishing house Zanichelli, Bologna, 1980, e altri.

epistemica diplomatici, giuridici, statisti, militari, e una miriade di altri soggetti oltre agli accademici professionali, come i pacifisti, gli attivisti religiosi, i movimenti umanitari... la storia delle dottrine giuridiche deve essere una posta e non una scorciatoia; un arricchimento e non un alibi per sottrarsi allo sforzo di andare oltre i dibattiti rarefatti degli accademici il cui impatto sulla prassi non è stato spesso all'altezza della intensità della loro passione intellettuale. Il che significa ricostruire la vita degli istituti e delle istituzioni, guardare ai contesti facendosi forte della grande varietà conquistata in questa materia dalla storia politica e delle relazioni internazionali."[56]

Però, c'è un pericolo in questo approccio: i studi legali e sociali possono confondere il diritto con la politica. Questa tendenza è descritta come un pericolo da Paolo Grossi che, nel Ritorno al diritto esprime la visione secondo cui la crisi del diritto è dovuta alla commistione tra diritto e politica:

"Nella modernità', insomma, si ha un vicolo strettissimo, addirittura necessario, fra potere politico e il diritto, perché il potere, consapevole della formidabile forza coesiva del cemento giuridico, intende controllarlo completamente. Questo vincolo non può non ripercuotersi anche nelle orditure stesse del diritto, che, leso nella sua autonomia e riflettendo ormai le scelte del potere, ne riflette anche le miserie."[57]

Grossi divide i termini legalità e norma, sottolineando il carattere formale della legalità: "Non si ripeterà mai abbastanza che il cambio terminologico – ossia da norma a ordinamento – non è un problema meramente nomenclatorio, ma si incarna in un cambio di mentalità giuridica. Il diritto può attuarsi concretamente in ordinamento soltanto a una condizione: che, nell'effettività, si facciano i conti con valori ed interessi circolanti in una determinata società, che si abbiano occhi e orecchi attenti verso il basso, pronti a un adeguamento in relazione a quanto in basso avviene."[58]Questa distinzione di termini è di grande importanza per lo studio storiografico del pensiero giuridico russo, visto che le norme legali nei periodi di governo Sovietico erano deprivate dai principi fondamentali di

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[56] MANNONI S. "Da Vienna a Monaco (1814-1938). Ordine europeo e diritto internazionale", G.Giappichelli Editore, Torino, 2014, p.6
[57]GROSSI P. "Ritorno al Diritto" [Back to the Law], Publishing house Editori Laterza, Bari, 2011, p.5
[58]Ibidem, p.35

legalità in favore dei principi della dottrina Marxista. Soprattutto nell'analisi dell'argomento principale di questa ricerca, si arriverà a delineare, a scoprire cosa i russi in realtà intendessero per la nozione diritti umani.

Glossary (abbreviations):

CPSU – Communist Party of the Soviet Union (Коммунистическая партия Советского Союза)

KGB – State Security Committee (Комитет государственной безопасности)

RSFSR – The Russian Soviet Federative Socialistic Republics

SSR – Soviet Socialistic Republic

Perestroika – reforms and new ideology, aimed on restructuring of political and economic system of USSR. The complex of the reforms was developed upon the request of the General Secretary of CPSU V.Andropov, and carried out by M.Gorbachev during 1986-1991.

GULAG – The supreme agency of correctional labor camps, the government authority which administered the forced labor camps' system from the 1930s until the 1950s during the Stalin's era.

Part 1

Formalism of the Soviet legal doctrine of human rights (1922-1991)

"We couldn't be put out from our position by demagogical claims and sobbing that we can't limit human's freedom and human rights. No, we can, if this freedom is used to harm social welfare and interests of all people"[59]

A.J. Vyshinsky, 9 December 1948

1. The transitional period 1917-1923 and revolutionary justice

1.1. Revolutionary conscience as foundation of the Soviet judiciary

On the day of the October Revolution on 25 October 1917 rebels seized the Winter Palace in Saint-Petersburg and hoisted upon it their flags. Ordinance №1, issued on the same day and signed by Vladimir Lenin, formally legislated the status of a main state

[59] VYSHINSKY A.J. "Из речи в дискуссии по голосовании о принятии Декларации о правах человека" [From the speech about discussion on voting for the adoption of the Declaration about rights of the person], p.367-378, from «Вопросы международного права и международной политики» [Issues of international law and international politics], collection of speeches, State publishing house of legal literature, 1951, p.371

body - the Soviet Commission of the Peoples' Deputies, and delegated to it the power due to the insurrection of workers, peasants and soldiers. The Ordinance №1 followed the Decree on Peace and the Decree on Land, which mentioned the establishment of the revolutionary court. A further development of judicial power was enunciated by the Decree on Courts from 5 December 1917, issued by the new main state organ – the Soviet Commission of the Peoples' Deputies.

Since new state established its power on the immense territory, it faced all the realities that the former Russian Empire suffered – namely famine due to problems with the supply of provisions, danger of a new war against weakened after the revolution state, counter revolutionary movements inside the country, internal political fighting. The measures of a new power were mostly reactive aimed at survival and holding on to power in the hard times ahead. Very soon idealistic expectations about establishing a ruling power of the working class according to Marxist doctrine, as opposed to the style of the old monarchy, resulted in inconsistency and the need for laws and legislative provisions. Such measures showed their inevitable necessity but the new Soviet power suffered from a lack of resources to formulate a new doctrine of law and form a state which could manage to operate in this new reality. There was a lack of any gradual or profound study of the problems that necessity of a new legislation created.

On 4 May 1918 the first dispositions about the courts were made by Temporary Government. It was prescribed that together with the judges two People's assessors should be elected for the same period – those two candidates were not obliged to have any educational qualification. As the first Soviet Procurator D.Kursky claimed in his speech in 1918:

"Proletariat and the poorest peasants, having combatted for the political power, should ruin all legal superstructure of bourgeois state, and courts as well. Now the decision making process should depend on workers and the poorest peasants elected as People's assessors. Those People's assessors should be constantly renewed, and by their present connect the court with Soviet citizens – workers and poorest peasants. Only that type of court could be called the People's court in a true sense. Peoples assessors, directly connected with the masses of Soviet workers, in their decisions and ordinances will reveal those legal positions which correspond to the interests of the working class. In those cases

where the courts were only professional judges without People's assessors (and those deviations happened in some districts), there is no place for the revolutionary creativeness, the court becomes inert and bourgeois offering ready formulas from the old Codes."[60]

Revolutionary "creativeness" in decision making was welcomed, for instance, p.18 of the "Ordinance about temporary revolutionary courts in the Novgorodskaya region"[61] of 1917, prescribed that: "the person which is admitted to be guilty is prescribed to the punishment which the court decides. The Court shouldn't limit itself with any existing legislative prescriptions, as a non-obligatory source it may use Criminal Code and Code on punishments [of Russian Empire]". Such a formula very soon showed its ineffectiveness, non-professional judges without any educational qualifications were not able to face all the complexities of the post-revolutionary situation. In Moscow for example, from March to August 1917 in comparison to the same period in 1916, the composition of criminal acts increased in the following way: the quantity of murders increased to 1075.0% (from 8 to 86), robberies to 1196.9% (from 27 to 323), thefts to 546.5% (from 3618 to 19773).[62]

The decision was made during the first few years of Soviet rule to proclaim the old laws of the Russian Empire valid, with the proviso that they did not contravene with the decrees of Soviet power and revolutionary consciousness. This provision was set forth in the first acts of the new Soviet power. The Decree on Courts p.5 stated that:

"Courts sustain the decisions in the name of Russian Republic, and are guided in its decisions by the laws of the previous deposed government only because they are not canceled yet, and if they do not contradict the revolutionary consciousness and the revolutionary sense of justice.

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[60] KURSKY D.V. "Избранные статьи и речи" [Selected articles and speeches], Publishing house of Ministry of Justice of USSR, Moscow, 1948, p.14-15

[61] "Положение о временных революционных судах Новгородской губернии" [The ordinance about temporary revolutionary courts of Novgorodskaya region], 30 December 1917, cited from Kursky D.V. "Избранные статьи и речи" [Selected articles and speeches], Publishing house of Ministry of Justice of USSR, Moscow, 1948, p.17

[62] Central State Archive of the October Revolution, F.393, Op.6.7.124, page 17, cited from Abramovsky A.A. "Становление института Советского суда на Урале в 1917-1918 годах (на примере Оренбургской губернии)" [Formation of the Soviet courts in the Urals in 1917-198 (the case of Orenbug region)], Journal "Vestnik of Chelyabinsk state Univesity", Issue 1, volume 4, 2004, p.29

Note. All laws must be considered repealed which contradict decrees of the Central Executive Committee of the Soviet workers', soldiers' and peasants' deputies and workers' and peasants' government; as well as provisions of the political program of the Russian Social-Democratic party and parties of socialist-revolutionaries."[63]

As such the competence to determine which laws of the previous regime contradicted the decrees of the Executive Central Soviet Committee fell to the judges of the revolutionary courts.

An affirmation in a legal act such as "all laws must be considered repealed which contradict decrees of Central Executive Committee of the Soviet workers', soldiers' and peasants' deputies.." in the above mentioned decree does not in itself abolish any law. That is such a provisional legal norm does not delineate which legislation is to be abolished. It merely designates the authority for decision-making about abolishing legal norms, and also determines criteria for such abolition[64].

The judge constituted the state organ that was authorized to determine which norms should be abolished, and the main criterion for the application of laws is the lack of contravention of revolutionary consciousness. While they were given very broad discretion with respect to judicial authority, the Soviet government nonetheless never aimed at institutionalizing the independence of judges, granting more power to the state organs administered the judicial authority. By this mechanism, judicial power always expressed itself as a direct arm of the state.[65]

Three weeks after the proclamation of Soviet power and the October Revolution the Decree on Courts stabilized the provisions made by the Soviet legal doctrine – undercutting the division of state powers and linking state organs for the sake of the

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63 "Decree on Courts the Soviet of the Peoples' Deputies of RSFSR" from 24 November 1917, "Decrees of Soviet power", Publishing house of the state political literature, Moscow, 1957

64 COSSUTA Marco, "Fra giustizia ed arbitrio. Il principio di legalita nell'esperienza giuridica sovietica" [Between jutice and lawlessness. The principle of legality in the experience of Soviet justice], "Quaderni fiorentini XXXVI", Publishing House Dott.A.Giuffre Editore, Milano, 2007, p.1091

65 SCHLESINGER R. "La teoria del diritto nell'Unione Sovietica" [The theory of the law in the Soviet Union], Einaudi Publishing House, Torino, 1952, p.14

political interests of proletariat.[66] By the second Decree on Courts, dating from 30 November 1917, which provided descriptions of how judges should apply laws, the judge's revolutionary consciousness constructed as a source of law:

"The People's Courts apply the Decrees of the government of workers and peasants. In cases of lack of necessary norm of law or its incompleteness, judges must be led by their socialist legal consciousness".[67]

This was very convenient for the new power – any decision could be justified by the revolutionary consciousness of the judges and the conditions for the dependence of power became a political instrument of control. D.Kursky in his speech in 1918 stated that:

"[…] revolutionary consciousness, which is the primary source for the decision making in the court, could provide the only one correct conclusion: that court is free and unlimited in choosing the punishment which depends on the crime and other circumstances, and it is not possible to tell beforehand if the transgressor will be sentenced for more than two years or not, it is possible just for some categories of crimes such as premeditated murder, robbery or gangsterism."[68]

At the same time being holders of unlimited power, based only on the revolutionary conciseness, the judges were not independent and didn't possess any guarantees, which were claimed to be bourgeois and non-functional for Soviet society:

"It is a crucial necessity to quicken the process of social transformations on the communist foundations dictated by the necessity of exceptional executive authority for its officials, but at the same time exceptional absolutism of their power requests possibility of termination of their status at any moment. […] So, the termination of the status of any official this is not only the norm of dictatorship of proletariat, this is an essential part of the notion of the dictatorship of the proletariat.[…] There is no ordinance or decree which will

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[66] COSSUTA Marco, "Fra giustizia ed arbitrio. Il principio di legalita nell'esperienza giuridica sovietica" [Between jutice and lawlessness. The principle of legality in the experience of Soviet justice], "Quaderni fiorentini XXXVI", Publishing House Dott.A.Giuffre Editore, Milano, 2007, p.1093

[67] "Decree on Courts the Soviet of the Peoples' Deputies of RSFSR №2" from 30 November 1917, "Decrees of Soviet power", Publishing house of the state political literature, Moscow, 1957

[68] KURSKY D.V. "Избранные статьи и речи" [Selected articles and speeches], Publishing house of Ministry of Justice of USSR, Moscow, 1948, p.30

specify the motives for such termination of the status: for any reason and any official could be terminated by its authority this has its source logically from the structure of soviet power."[69]

For this reasons the initial formation of the Soviet judicial system, dating from the October revolution before 1922-1923 was characterized by extreme "judicial fluidity", triggered by a lack of precise legal procedural norms. This led to creative law-making with a strong orientation towards the contingent political situation on the part of judges. Another feature of Soviet legal doctrine notable already from the same period of its very inception was a strong orientation toward the defense of the new political order. This made the creation of new Soviet legislation as a weapon against counter-revolutionary elements possible.[70]

1.2. Deprivation of rights in the Soviet Constitution of 1918

New Soviet power tried to protect its status fighting against counter-revolutionary elements. One of the methods of such fighting became the revolutionary courts and another, the adoption of new law, aimed mainly to strengthen the positions of Bolsheviks. These measures showed their necessity since the number of counter-revolutionary crimes were rising: from the 7,000 decisions made by the People's Courts in Moscow, 4,000 were in favor of indictment, and more than 50% of them were crimes concerning the transgression of the ruling order or Soviet decrees, so more than the half of the crimes were aimed at Soviet social order. So, we can see that criminal People's Courts played a significant revolutionary role.[71]

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[69] Ibidem, p.38

[70] COSSUTA Marco, "Fra giustizia ed arbitrio. Il principio di legalita nell'esperienza giuridica sovietica" [Between jutice and lawlessness. The principle of legality in the experience of Soviet justice], "Quaderni fiorentini XXXVI", Publishing House Dott.A.Giuffre Editore, Milano, 2007, p.1096

[71] KURSKY D.V. "Избранные статьи и речи" [Selected articles and speeches], Publishing house of Ministry of Justice of USSR, Moscow, 1948, p.43

Article 9 of the first Soviet Constitution of 1918 proclaimed the dictatorship of the proletarian class:

"The main objective of the constitution of the Russian Socialist Federative Soviet Republic, designed for the present transitional period, is to establish the dictatorship of the urban and rural proletariat and the poorest peasantry in the form of a powerful All-Russia Soviet Government, with a view to completely suppressing the bourgeoisie, abolishing exploitation of man by man, and establishing socialism, under which there will be neither division into classes nor state power."[72]

Law itself began to take the form of an instrument in the fight to defend the new political power of the Bolsheviks against all social classes with the exception of workers and peasants. This was exercised by establishing such discriminatory laws that countered even potentially counter-revolutionary elements in a bond together with the creation of an ideology and political orientation. Article 7 of the new Constitution of 1918 proclaims the inevitable abolition of all anti-Soviet elements, or those which might be potentially counter-revolutionary:

"The Third All-Russia Congress of Soviets holds that now, in the hour of the people's resolute struggle against the exploiters, there should be no room for exploiters in any governmental agency. Power must belong fully and exclusively to the working people and their plenipotentiary representatives - the Soviets of Workers', Soldiers' and Peasants' Deputies." [73]

Following this ideological arrangement rights and freedoms guaranteed by the Soviet Constitution were legally proclaimed but not for all Soviet citizens, there were exceptions. Article 23 of the Constitution 1918 foresees that:

"Guided by the interests of the working class as a whole, the Russian Socialist Federative Soviet Republic deprives individuals and groups of rights, which they utilize to the detriment of the socialist revolution."

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[72]"The Criminal Code of RSFSRS adopted on 26 May 1922 by the IX session of Supreme Central Executive Committee, published in "Compilation of status of RSFSR №1" from 1922

[73] Constitution of RSFSR adopted by the Fifth All-Russia Congress of Soviets 10 July 1918

These legal provisions were in accordance with Engels' theory which considered the state as an expression of the fact that society is hopelessly enmeshed in class contradictions; "so that these opposed classes with antagonistic economic interests did not devour one another and society in hopeless struggle, for this a power became necessary, a power seemingly standing above society, a power which moderated the conflict, and held it within the limits of 'order'. And this power arising from society but placing itself above it, and more and more alienating itself from it, is the state."[74] In this explanation there is one passage revealed later when Engels specifies the meaning of the state speaking of the fact that state power naturally evolves in the hands of the strongest class, "which, with the help of the state, becomes the politically dominant class".

Article 65 of the Constitution of 1918 listed those social classes, which were undesired by Soviet government and deprived by the legal guarantees:

"The right to elect and to be elected is denied to the following persons, even if they belong to one of the categories listed above:

Persons who employ hired labour for profit;

Persons living on unearned income, such as interest on capital, profits from enterprises, receipts from property, etc.;

Private traders and commercial middle-men;

Monks and ministers of religion;

Employees and agents of the former police, the special corps of gendarmerie and the secret political police department, as well as members of the former imperial family;

Persons declared insane by legal proceeding, as well as persons in ward;

Persons condemned for pecuniary and infamous crimes to terms established by law or by a court decision."

Included within this article of the 1918 Constitution is a definition of socially dangerous elements, rendering as it was stated above, highly subjective the application of the law on "judges socialistic consciousness". Thus in a kind of defensive reaction, the state

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[74] ENGELS F., The Origin of the Family, Private Property and the State (1884)

began to use the law mainly in defense of the social relations proclaimed by the socialist state.

This tendency continued in the adjudication of criminal law. The Criminal Code of 1922, Article 6, provides the following definition of crime:

"Crime is considered to be any dangerous act or act of omission that threatens the fundamentals of the Soviet state and legal order, established by the workers' and peasants' government for the transition period towards establishment of communism."

Notably, the above cited definition of crime does not engage whatsoever with the moral nature of criminality and is concerned exclusively with for the Soviet legal and state order.

As well article 8 of the Criminal Code of 1922 includes a provision that:

"Punishment and other measures of social impact are taken for the following purposes: a) general prevention of crimes committed by the transgressor, as well as by other unstable social elements; b) to adapt the transgressor to conditions of common social living by correctional labour; c) to disable the transgressor from committing further crimes."

This provision reveals yet again the principle of combatting social danger for the Soviet state order: in this instance both by the transgressor "as well as by other unstable social elements". Thus punishment rests solely on the risk a given act for the state and its legal order, and is unrelated to any danger intrinsic to the criminal act itself.

Article 24 of the Soviet Criminal Code mandated preliminary investigation of the personality of transgressor:

"With regard to instituting penalties, the judge should evaluate the character of the transgressor as well as the crime committed.

Toward this goal, the judge will ascertain the conditions under which the crime was committed, and consider the personality of the transgressor, his motives and lifestyle. Moreover, the degree to which the crime itself breaches the social order and fundamentals of social security should be determined."

Article 27 of the Criminal Code of RSFSR evaluated punishment in accordance with counter-revolutionary criminal intent:

"With regard to instituting penalties, the Criminal Code distinguishes two categories of crimes: a) those aimed against the power established by the workers and peasants' new legal and social order, or crimes determined to be the most dangerous according to the present Criminal Code, whose minimum penalty cannot be diminished; and b) all other crimes, for which the present Code provides the highest penalty."

Hence, the severity of punishment was also continent on the personality of the transgressor and his potential risk to the Soviet state if he had further reasons for committing of crimes, or if he was relevant to the workers' social class or the bourgeois one, which would have made him more dangerous. Background checks, in accordance with article 24 of the Criminal Code, afforded a judge the possibility of calibrating the level of punishment against an evaluation of the transgressor's danger to the Soviet state. This feature is also highlighted by legal doctrine, but it is seen by them as an orientation toward the collective good as against the egoistic and individualistic approach of bourgeois law.[75]

The year 1922 marked the end of transition period from Imperial Russian legislation to that of the Soviet Republic by the adoption of the new Soviet Penal Code of 1922 and proclamation of the judicial reform of 1923, which led further individualization of the new Soviet legislation and adoption of other fundamental legal acts. Before 1922 in cases of absence of new legislation, the proclamation of the possibility to use that part of the pre-revolutionary legislation was inevitable, and legislation based on the socialistic legal consciousness of the judges and a non-subversion of the decrees of Soviet power very well followed the aim of strengthening of the new power in a weakened state after the revolution.

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[75] COSSUTA Marco, "Formalismo Sovietico delle teorie giuridiche di Vyshinskij, Stucka e Pasukanis" [Soviet formalism of the legal theories of Vyshinskij, Stucka e Pasukanis], Publishing house Edizione Scientifiche Italiane, Rome, 1992, p.1126

2. Stalin's era of juridical formalism (1923-1953)

2.1. Does a communist society need law?

Consequent to the development of the Soviet state after the end of the transition period in 1922 Soviet legislation required restructuring. By that time the necessity of new legislation became obvious, and reality proved that elaboration of new Soviet legislation is inevitable. The Constitution of 1924[76] established new Soviet institutions of power: article 37 of the Constitution established the Council of People's Commissars which exercised the general management of the affairs of the Russian Socialist Federative Soviet Republic. This state organ was represented in every Soviet republic (article 67 of the Constitution). Article 37 also established the Supreme Court, and granted it competence to monitor revolutionary legislation throughout the Soviet Union. Article 46 established the role of the General Procurator, who was not only entitled to prosecute crimes in the Court, but also to provide his opinion on any question put forward by the Court.

Alongside the institutionalization of governmental organ and bodies, it became apparent that interpretation and adaptation of the Marxian ideology for the new state was required. The soviet socialistic legal system was based on the doctrine of Marx and Engels which doesn't represent a pure legal study. Instead, there were only two possible sources available which could form the basis of an established legal system: Soviet political government and scientific socialist scholars. So, for both, this was the greatest difficulty in interpreting classical Marxian texts which didn't contain the direct prescriptions on how the state and legislation should be organized.

Soviet legal scholars had a very complicated position vis-a-vis the law in general, since classical Marxian theory treated the law as a weapon in the struggle of socialism against capitalism, and held that the state, and indeed, the law itself, should eventually wither away. Moreover, key to Marxian theory was the division of society into two social classes: workers and capitalists (bourgeois), with antagonistic interests:

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[76] Constitution of RSFSR adopted on II All-Russia Congress of Soviets 31 January 1924

"The history of all hitherto existing society is the history of class struggles.[…] every form of society has been based, as we have already seen, on the antagonism of oppressing and oppressed classes."[77]

Law itself was considered as an instrument of oppression of one social class by another, and state as a form established by the law exists for the same reason:

"The state together with its law is the coercive machinery for the maintenance of exploitation of one class by the other, an instrument of the class exploiters which, through the state and its law becomes the politically dominated class. The state is the power established for the purpose of keeping the conflict between the dominant and the dominated class "within the bounds of order" (Fridrich Engels, Der Ursprung der Familie, des Privateigetuns und des Staates", Internationale Bibliotkek, Stuttgart, 1920, p.177 et seq) This "order" is the law, which – according to this view- although something different from the state, is in essential connection with the state. The state is "normally the state of the most powerful economically ruling class, which by its means becomes also the politically ruling class, and thus aquires new means of holding down and exploiting the oppressed class."[78]

In 1917 V.I.Lenin's work *State and Revolution* was published, which is considered the basic and first work on Soviet legal theory. In this seminal manuscript Lenin laid the foundation for the interpretation of key issues on Marxian doctrine which became the base for future scholars and an inevitable part of the study of historical materialism. Due to the significance of that contribution the whole concept took Lenin's name - the communists of Soviet Union already followed the teaching of what they called Marxism-Leninism. The fundamental theoretical assertion in *State and Revolution* on law and state was developed by Lenin in order to execute the prime task - "to re-establish what Marx really thought on the subject of the state". So, following the Marx's theory, Lenin admits that:

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[77] ENGELS F., MARX K., "Manifesto of the Communist Party", Marx/Engels Selected Works, Volume One, Progress Publishers, Moscow, USSR, 1969 (first Published: February 1848), pp. 98-137

[78] KELSEN H. "The communist theory of law", Frederick A.Praeger Publishing House, New York, 1955, chapter I "The Marx-Engels Theory of state and law"

"…the state is a product and a manifestation of the irreconcilability of class antagonisms. The state arises where, when and insofar as class antagonism objectively cannot be reconciled. And, conversely, the existence of the state proves that the class antagonisms are irreconcilable.[…] According to Marx, the state is an organ of class rule, an organ for the oppression of one class by another; it is the creation of "order", which legalizes and perpetuates this oppression by moderating the conflict between classes."[79]

The state was constructed in Marxian theory as an instrument in the "oppression of one class over another", so too was the law viewed. It was Lenin who developed the thesis that law would not wither away with the overthrowing the bourgeois state. In his *State and Revolution* Lenin argued that "the bourgeois state could be abolished only by revolution; the socialist state, in contrast, would wither away in a process of gradual transformation. The process of creating a collective, socialist mentality was not to be rapid, however, and this fact would necessarily slow down the process of withering away of the state." [80] The state machinery of social control and law had to exist in the transition period. It was, however, the machinery of control over individuals, not over classes, which was to disappear gradually.

According to Lenin, the process of withering away of state will create the situation when a substantial part of private law will be incorporated into public law. After the revolution, bourgeois law would begin gradually to wither away as long as economic progress was developing.[81] This made possible future contributions on law and legislation from other scholars which due to the Lenin's statement wasn't considered any more "counter-revolutionary". But still the definition of law wasn't accepted wholly or without suspicion.

Anyway, here the fundamental issue was resolved: the law in Soviet Union will exist due to the necessities of the state. Another notion after this, which created much

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[79] LENIN V.I., "The State and Revolution", Collected Works, Volume 25, part I: The State: A Product of the Irreconcilability of Class Antagonisms, Publishing house of political literature, Moscow, 1965
[80] LUDWIKOWSKI R. "Socialist legal theory in post-Pashukanis era", Boston College International Law Review: Volume 8 Issue 2, 1987, p.326
[81] Ibidem,p. 326

disappointment – what form of law will it be? The result of this dilemma could be grasped by careful study of Stalin's policy.

2.2. Interpretations of Marxism-Leninism in the 1930s

Evgeny Bronislavovich Pashukanis, a prominent representative of Soviet legal theory, whose juridical mentor was another Soviet legal scholar Piotr Stuchka, also like many other soviet lawyers interpreted Marxian theory, and due to his orthodox strict following to the Marxian doctrine without curving to the political will, Pashukanis is called "the only Soviet Marxist legal philosopher who has achieved significant scholarly recognition outside of the USSR"[82]. One of his major works *The General Theory of Law and Marxism*[83] was first published in Moscow in 1924 and subsequently translated into French, German, Japanese, Serbo-Croat and English. At the very beginning of the communist revolution Pashukanis was among many Bolsheviks who combatted the state due to the orthodox Marxism believing that the withering away of legal and political institutions will happen immediately after the victory of the revolution. Expectations were based on creation of a new revolutionary consciousness of justice which should be developed by revolutionary jurists and should replace the formal bourgeois legal heritage. The belief that law itself is necessary for any society was labeled a feature of "legal fetishism" which Marx criticized strongly.[84] Here we see a strong contradiction of Pashukanis writings with the position which Lenin claimed about the necessity of law during the transitional period of gradual transformation of the society to socialism. But formally, Pashukanis was right in claiming that after bourgeois law there isn't any possible existence of any other kind of law (for instance socialistic law) since this statement repeated Marxian communist doctrine

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[82] Ibidem, p.273-301

[83] PASHUKANIS E.B. "The General Theory of Law and Marxism" (3rd edition), Publishing house of Communist Academy, Moscow , 1929

[84] LUDWIKOWSKI R. "Socialist legal theory in post-Pashukanis era", Boston College International Law Review: Volume 8 Issue 2, 1987, 323

perfectly. Predicting the future Marx admitted that law will remain in the first stage of communist society, but highlighted that it would be bourgeois law.

Pashukanis was one of the Soviet legal scholars who had naïve optimism about the realization of all Marx's predictions about a future communist society. He was criticized and repressed for his scientific views in association of all law with bourgeois law and predictions on it withering away. In early 1937, Pashukanis was avowed as a "traitor and wrecker" and soon afterwards he was arrested and liquidated at Stalin's order. His mentor Piotr Stuchka had the same destiny: political critics of his scientific views and then repression.

Soon afterwards, the Soviet General Procurator A.J.Vyshinsky, who also becomes a director of Soviet Academy of Sciences Institute of State and Law, held a new line in the development of Soviet legal doctrine: that state establishes law with the sole function of being an expression of state will through sanctions and coercion. A.J.Vyshinsky further developed this view, stating that*:*

"The dictatorship of the proletariat is a power unlimited without any law, but creating its own law and using it – it punishes those who violate the stabilized political order. The dictatorship can't stand the anarchy and disorder, in the contrary, it strictly follows the laws and principles established in the Fundamental Law of the proletarian State – in the Soviet Constitution"[85]

That was a drastic turnaround from the legally nihilist character which defined the beginning of Soviet legal development before 1922 and resulted in legal idealism when the law became a weapon for managing the rebels of the counter-revolutionaries inside the country and the remaining defeated bourgeoisie, as well as external attacks from the capitalist world.

Toward making law more applicable to the political interests and the expression of state power, P.Stuchka in "The revolutionary function of Soviet state and law" states that:

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[85] VYSHINSKY A.J., "Вопросы теории государства и права" [Issues of theory of state and law], State publishing house of legal literature, Moscow, 1949

"we don't need stable laws, almost, we need Constitution which should give us the possibility to change the laws in twenty-four hours."[86]

Due to the main political course in the development of legal doctrine introduced by Vyshinsky, Stalinist theorists broke with traditions; "they were less creative in juridical theories but more practical concerning political reality"[87]. Hans Kelsen acknowledged this phenomenon when he wrote that, "Soviet legal theory adapts itself submissively to every change of the Soviet government."[88]

Ludwikowski R. highlights that while Pashukanis' tried to interpret Marxism was connected in an assumption that the young Soviet state would follow the predictions of the fathers of scientific communism, the Stalinist theorists faced the necessity of adopting Marxism to the changing conditions of socialist life. He states that after the revolution nobody from the fathers of Soviet communist doctrine had any idea of how a new society should be legally organized and how the new state should function: "They learned that Lenin's generation of revolutionaries knew how to subvert, destroy, and change, but had little knowledge of how to build or create, or introduce more advanced institutions, better economic techniques, or improved agricultural methods. Lenin's generation of revolutionaries did not know how to adopt the Marxist concept of state and law to a new reality. For them, Marxism served as a sacred guide to be followed almost blindly".[89] The thesis that socialism created a new, higher form of the legal superstructure was emphasized by Vyshinsky and never challenged in the Soviet theory of law. In textbooks of socialist jurisprudence, authors still emphasized that "it is the socialist state and law which replaced the bourgeois state and law and which is going to wither away."[90]

It is interesting to see the development of the some key issues of the theory of communism due to the political course of Soviet state. As Ludwikowki made a radical

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[86] STUCHKA P., "Избранные произведения по марксистско-ленинской теории права" [Selected writings on Marxian-Lenin's theory of law], Latvian State publishing house, Riga, 1964
[87] LUDWIKOWSKI R. "Socialist legal theory in post-Pashukanis era", Boston College International Law Review: Volume 8 Issue 2, 1987, p.324
[88] KELSEN H., "The communist theory of law", Praeger publishing house, New York, 1955
[89] LUDWIKOWSKI R. "Socialist legal theory in post-Pashukanis era", Boston College International Law Review: Volume 8 Issue 2, 1987, p.327
[90] Ibidem, p.328

conclusion of non-correlation of Soviet system to the scientific Marxian theory: "being a Marxist, Pashukanis did not fit into Stalin's system because this system was Marxism in name only."[91]

2.3. Special features of the Soviet legal scholarship

The increasing institutionalization of state organs and the systematization of Soviet legislation rendered the division of state powers largely insignificant. Critically too, this institutionalization and systemization made the communist political party the axis around which all social and state organs functioned. Here we see another marked feature of the Soviet legal system: while it guaranteed rights and freedom for Soviet citizens, the communist political party ruled over all state institutions. So, article 126 of the Constitution of 1936[92]:

"In conformity with the interests of the working people, and in order to develop the organizational initiative and political activity of the masses of the people, citizens of the U.S.S.R. are ensured the right to unite in public organizations--trade unions, cooperative associations, youth organizations,' sport and defense organizations, cultural, technical and scientific societies; and the most active and politically most conscious citizens in the ranks of the working class and other sections of the working people unite in the Communist Party of the Soviet Union (Bolsheviks), which is the vanguard of the working people in their struggle to strengthen and develop the socialist system and is the leading core of all organizations of the working people, both public and state."

The role of the communist party, which failed to evaluate the role of laws formed the phenomena, was described by Thomas E.Towe:

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[91] Ibidem, p.328
[92] Constitution of RSFSR, adopted on VIII All-Russia Congress of Soviets 5 December 1936

"The Soviet Constitution guarantees, any of the same fundamental rights as are guaranteed in the Constitution of the United States, plus several others as well. Indeed, these rights are described in detail and appear on their face to be safe guarded more emphatically in the Soviet Constitution. However, the mere existence of constitutional provisions for fundamental rights does not necessarily guarantee that those rights will be protected. Western scholars often point to discrepancies between rhetorical phrases in the Soviet Constitution and actual practices in the area of fundamental rights."[93]

Initially, the struggle was to obtain political power against the bourgeoisie, the old ruling social class; after this was achieved came the complicated work of consolidating the new state apparatus. Managing the rebels of the counter-revolutionaries inside the country and the remaining defeated bourgeoisie, as well as external attacks from the capitalist world, formed the conditions in which the new legislative Soviet system was developed. To overcome those risks to Soviet power, the young, dominant class needed a new instrument, one that was very flexible and could be modified easily in the face of exigencies. Thus, legal norms that could be revised quickly on an ad hoc basis became an integral feature of the Soviet law.[94] The liquidity of law and its formal character does not imply the state establishing rules, but, rather, the expression of already existing social relationships between state and society, with modifications to the law-taking place whenever political needs arise.[95]

Extremely "liquid" judicial norms matched organically well the conception of the law as an instrument of fight against all risks for new state, rather than establishing the rights and guarantees for individuals. Moreover, political "course" the individual protection wasn't considered as a priority. As Soviet Professor Malitsky has stated:

"The capitalist law is based upon the abstract "natural rights" of an individual; it places the individual in the center of the world, surrounds him with a cult and therefore

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93 TOWE E. Thomas "Fundamental rights in the Soviet Union: a comparative approach", University of Pennsylvania law review, Vol.115-125, 1967, p.1251

94 COSSUTA Marco, "Formalismo Sovietico delle teorie giuridiche di Vyshinskij, Stucka e Pasukanis" [Soviet formalism of the legal theories of Vyshinskij, Stucka e Pasukanis], Publishing house Edizione Scientifiche Italiane, Rome, 1992, p.186

95 Ibidem, p.127-136

establishes limits to the State […] However, the proletarian State sets the limits not to itself but to its citizens. A collective body called the State, rather than the individual citizen, is at the center of the proletarian law."[96]

The emphasis of Soviet legal scholars was based on thesis of collectivity which established that only collectively by all citizens is possible to provide the interests for individuals.

The definition of law introduced by A.J. Vyshinsky and finally formulated and adopted in the First Congress of Soviet lawyers:

"Law is a system of rules of behavior, expressing the will of ruling class and formulated in legislative order, through the customs and rules of common living, sanctioned by the state power, and exercising of which are forced by the coercive power of the state for the purposes of protection, strengthening and development of the social relations which are favorable for the ruling class".[97]

As could clearly be seen, Vyshinsky's attitude to law as a system of rules of behaviour (or "norms") towards state, correlation of state and law, their functions and aims were absolutely different from the normativism as it was defined by Kelsen or normativism described by Duguit. Since Vyshisky called "norms" as any subjective and even arbitrary acts of power, we can talk about "potestarism" rather "normativism."[98] Nonetheless, this definition of law in Soviet literature was called "normative", and later in 50-60s "narrow normative".

As Vyshinky himself admitted: "Our definition of law doesn't have anything in common with normativism. Since normativism is based on absolutely the wrong perception of law as "social solidarity" (Duguit), as norm (Kelsen), which concludes the content of law, without connection to the social relations, which in reality determines the

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[96] TOWE E. Thomas "Fundamental rights in the Soviet Union: a comparative approach", University of Pennsylvania law review, Vol.115-125, 1967, p.1264

[97] VYSHINSKY A.J. "Основные задачи науки советского социалистического права" [Main objectives of the Soviet science of socialist law] from "Вопросы теории государства и права" [Issues of theory of state and law], State publishing house of legal literature, 1949, p.10

[98] NERSESYANTS V.S. "Общая теория государства и права" [General theory of state and law], Publishing house INFRA-M, Moscow, 1999, p.170

content of law. The biggest mistake of normativity is that they giving definition to law as totality of norms are limited with this, trying to interpret the norms as something confined what could be understood only through itself."[99]

It is interesting to note that in this vision, the law is introduced through the will of the dominant class as an instrument of oppression in strong correlation with Lenin's interpretation of Marxian doctrine. The definition denote a single main objective – "to follow, sanction and develop social relations and social system advantageous and beneficial for the dominant class". In that sense Soviet lawyers bound the definition of law to legal norms and obligations – in contrast to the bourgeois conception of law, which subsumed a moral component and the supreme idea of justice as a supreme legislative principle.[100] The Soviet definition mentions only the legally concretized will of the dominant class.

This legal construction became possible by the segregation of social classes who could exercise the rights derived from most of the legal guarantees in Article 65 of the Constitution of 1918, cited above (1.2. Deprivation of rights in the Soviet Constitution of 1918). Such restrictions were considered necessary to prevent counter-revolutionary movements. Only in Stalin's Constitution of 1936 were such restrictions absent, as it was proclaimed that "the toiler's class was eliminated" and only the new proletariat class existed in the Soviet state. Soviet legal scholars, as against Western ones, have seen no contradiction in institutionalizing certain rights, with some social categories unable to exercise them.

As Hans Kelsen writes about this Vyshinky's definition of law:

"this definition however , applies only to the law of society divided into two classes, a dominant and a dominated class, and that means – according to the economic

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[99] VYSHINSKY A.J. "Основные задачи науки советского социалистического права" [Main objectives of the Soviet science of socialist law] from "Вопросы теории государства и права" [Issues of theory of state and law], State publishing house of legal literature, 1949, p.38

[100] COSSUTA Marco, "Formalismo Sovietico delle teorie giuridiche di Vyshinskij, Stucka e Pasukanis" [Soviet formalism of the legal theories of Vyshinskij, Stucka e Pasukanis], Publishing house Edizione Scientifiche Italiane, Rome, 1992, p.99

interpretation of society – an exploiting and exploited class. But that was no longer the status of Soviet society."[101]

As Stalin announced on 25 November 1936 in his speech to the VIII Congress of Soviets of USSR:

"Due to significant changes happened in the economy of the USSR [Stalin is referring to the period in which NEP ended and the five-year plan began], the structure of the classes of our society has changed […] All the oppressing classes have been liquidated. The workers' class remained, the peasants' class remained, the intellectuals remained. But it would be wrong to claim that those classes were not exposed to changes; that they remain the same as in the epoch of capitalism. […] The proletariat is the class that used to be oppressed by the capitalists. But nowadays here we have liquidated the capitalist class. […] There no longer exist a capitalist class that can oppress the proletariat. […] Is it possible, then to call our working class – "proletariat"? It is clear that it is not.[…] This means that the proletariat of the USSR has been transformed into completely new class – the working class of the USSR, which has destroyed the economic capitalist system, which has established the socialistic property as an instrument of production and which rules Soviet society in the communist way. […] What do they mean – all that changes? On the one hand, the boundary disappears between workers' and peasants' classes disappears, as well as between those classes and intellectuals, and also the old exclusivity of the classes disappears. This implies that the distance between these social groups continually diminishes. On the other hand, the social contradictions between those groups disappear. The disappearance of social contradictions also implies the elimination of political contradictions between them."[102]

As Hans Kelsen argues that the definition of law as a will of dominant class just became meaningless with this Stalin's proclamation since the toilers class due was identified

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[101] KELSEN H., "The communist theory of law", Praeger publishing house, New York, 1955, p.130
[102] STALIN I. "On the project of the Constitution of the USSR. Report to the VIII Congress of Soviet of USSR on 25 March 1936" in COSSUTTA M. "Formalismo Sovietico delle teorie giuridiche di Vyshinskij, Stucka e Pashukanis" [Soviet formalism of the legal theories of Vyshinskij, Stucka e Pasukanis], Publishing house Edizione Scientifiche Italiane, Rome, 1992, p.106

with the whole society. It was not the only one, but one of the logical contradictions of Soviet legal doctrine.[103]

2.4. Development of the Soviet legal education as a reflection of the state policy

It is interesting to see the parallel in general attitude to the law of Soviet government with the development of legal education. Together with the general trend of first total refutation law which was replaced with gradual understanding that law is necessary for the functioning of the state and the beginning of the construction of system but on the Marxian doctrine towards legal idealism – the same path could be observed on the development of legal education.

Just after the October revolution of 1917 there were no drastic changes to legal education in first few years. In a report from Moscow State University it is written: "Both 1917 as well as 1918 passed for law faculty in atmosphere of pre-revolutionary mode […] Revolution didn't influence somehow on the professorship staff or educational plans […] Major part of the university entrants were from non-proletariat social classes […]"[104]. Changes in legal higher education started in 1919, when by Decree of the Council of People's Deputies of RSFSR «О некоторых изменениях в составе и устройстве государственных ученых и высших учебных заведений» [About several changes in system and structure of state scientific and highest institutions] issued on 1 October 1918 was prescribed to all professors who had more 10 ten years length of working experience in a certain institution and more than 15 years of total working experience to pass the qualification exam, which main purpose was to check the "revolutionary consciousness"

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[103] KELSEN H., "The communist theory of law", Praeger publishing house, New York, 1955, p.129-131

[104] SHEBANOV A.M., "Юридические высшие учебные заведения" [Highest legal institutions], Moscow publishing house, 1963, p.36, cited from OLEYNIK I.I., OLEYNIK O.Y., "Становление системы подготовки юридических кадров в Советской России" [Foundation of the system of professional formation of legal personnel in Soviet Russia], Journal "Вестник ИГЭУ", Publishing house of The V.I.Lenin Ivanovsky State Energetic University, volume 2, 2005

(i.e. loyalty to new Bolshevik's power) of the professorship. Major part of the professors did not pass it and were fired.[105] Many legal faculties were closed in Universities and Institutes of higher education all over the country.

Further changes in legal higher education were determined by the nihilist approach common to the whole legal system. By the Decree of Council of People's Deputies in March of 1919 all legal faculties and institutions were abolished. On this basis, new faculties of social studies were established. Statues of Faculties of social sciences prescribed that: "All students, regardless of their specialization during first two years study the disciplines which will focus on general social education […], from the third year of education the faculty will be divided into three departments: economic, legal-political, historic…"[106]. On legal-political department were courses of history of law and state, evolution of political and legal thought, public law of Soviet Republic, social law, criminal sociology and politics, worker's law, history of international relations and international law.[107]

In August 1924 by the Decree of Council of People's Deputies of RSFSR "About transformation of the system of institutions of higher education",[108] the faculties of social sciences were transformed in legal faculties of Soviet law. Restoration of legal faculties coincided with the tendency in formation of Soviet legal doctrine. After grasping the necessity of legislation in 1922 and later years happened the first Soviet codification (in

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105 OLEYNIK I.I., OLEYNIK O.Y., "Становление системы подготовки юридических кадров в Советской России" [Foundation of the system of professional formation of legal personnel in Soviet Russia], Journal "Вестник ИГЭУ", Publishing house of The V.I.Lenin Ivanovsky State Energetic University, volume 2, 2005

106 SHADRIN N.V. «Теоретическая юриспруденция и юридическое образование в первые годы Советской власти» [Theoretical jurisprudence and legal education in first years of Soviet power], Journal "Vestinik" of Chelyabinsk State University, 2012, № 27, p.281, cited from DORSKAYA A.A. "Развитие юридического образования как составляющая российских правовых реформ: историко-правовой анализ" [Development of the legal education as a part of Russian state reforms: historic and legal analysis], All-Russia scientific and practical journal "Justice", 2013, Issue 1

107 ZIPUNNIKOVA N.N. "Институты Советского права в «конвейерной ленте» правового образования: в продолжение разговора о реформе подготовки юристов в начале 1930-х гг." [Institutes of Soviet law in "conveyor belt" of legal education: in continuation of the discourse about the reform of legal education in the beginning of 1930s], Russian legal journal, publishing house of Ural State Legal Academy, Ekaterinburg, 2013, issue 3, p.182

108 Decree of Council of People's Deputies of RSFSR "Об изменениях сети высших учебных заведений" [About transformation of the system of institutions of higher education], from 08.08.1924, published in "СУ РСФСР"[Collection of Ordinances of RSFSR], 1924, N 68, p. 680

1922 were adopted Labour, Civil, Criminal Codes and Code on Lands, in 1923 were adopted Criminal Procedure Code and Civil Procedure Code, in 1926 new Criminal Code and Family Code).

Gradual activity on elimination of higher legal education brought its results. Even after restoration of legal faculties the number of student as well as people with higher legal education was insufficiently law. For the purposes of rapid legal training for prosecutors and judges Ministry of Justice opened legal courses of short duration, but this didn't save the situation. Figures which provide J.Hazard: "In the whole country in 1937 there were only eight juridical institutes at Moscow, Leningrad, Saratov, Kazan, Sverdlovsk, Karkhov, Minsk and Tashkent, and three law faculties at Tiflis, Erivan and Baku. The total number of students permitted to matriculate in all these institutions providing a four-year course was set by law at 1,490 in 1935."[109]

Due to the materials of population census in 1939 workers in legal sphere who had higher legal education were 2,4 thousands – which is 11,6% from the total number, secondary special legal education (who finished special legal courses) were only 3,6 thousands – which is 48% from the total number of legal workers. From 1,000 judges and prosecutors only 117 had higher legal education. In 1939 only 10% of prosecutors and examining magistrate had higher legal education. [110]

On 16 July 1938 the All-Soviet Union was held on issues of science of Soviet law and state, where a serious critics on the activity of legal scientific institutions during 20s and 30s was made. A.J.Vyshinsky in his speech told the delegates that the distribution of theories of withering away of law and state and making equal of law as bourgeois law (with was the critics of Pashukanis described above since it was him who elaborated the theory

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109 HAZARD J. "Legal education in Soviet Union", 1938, cited form RAZI M.G. "Legal education and the role of the lawyer in the Soviet Union and the Countries of Eastern Europe", California law review, Volume 48 Issue 5, p.781

110 OLEYNIK I.I., OLEYNIK O.Y., "Становление системы подготовки юридических кадров в Советской России" [Foundation of the system of professional formation of legal personnel in Soviet Russia], Journal "Вестник ИГЭУ", Publishing house of The V.I.Lenin Ivanovsky State Energetic University, volume 2, 2005, p.4

withering away of law and state as strict following to Marxian doctrine). Vyshinsky told, that:

"all that delirium couldn't not to strike significantly the activity of government legal bodies in general […] someone elaborated rotten theories about withering away of law, state and justice, that legal education isn't needed, that we could manage not only without Roman law, but without Soviet law as well, which that someone wanted to bury. We dispersed our specialists: we lost old ones and didn't grow up new ones."[111]

[111] VYSHINSKY A.J. "Основные задачи науки советского социалистического права" [Main objectives of the Soviet science of socialist law] from "Вопросы теории государства и права" [Issues of theory of state and law], State publishing house of legal literature, Moscow, 1949 p. 65-85

3. Further development of the legal doctrine in the 1930s: formation of the new Soviet law

3.1. The conception of "proletarian law" of D.Kursky

However, even full of contradictions with Marxian theory, first Lenin's statement about necessity of law, and then the whole political course, created a base for development of different conceptions of law which formed Soviet legal doctrine. As Nersesyants describes this variety of legal concepts, writing that all of them were under common Marxism-Leninism approach to law and this all their differences they had some features in common – justification of dictatorship and its dictatorial norms. Refusing bourgeois law, all concepts of law of that period refuse the sense of law as legality, adding to this notion anti-legal dispositions of proletarian-communist dictatorship.[112]

M.Kozlovsky, Bolshevik and People's Commissar of Justice, after revolution of 1917 wrote:

"Transition period from capitalism to socialism, happening for the first time in the world after October revolution in Russia, creates in process of socialistic revolution special, unprecedented law, it is not law in its authentic meaning (the system of suppression of minority by majority), but proletarian law, which is still law, but in meaning as an instrument of suppression of opposition of minorities by the working class."[113]

Though this conception of "proletarian law" contradicted to the Marxian predictions about residual after the revolution bourgeois law during first stages of

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[112] NERSESYANTS V.S. "Общая теория государства и права" [General theory of state and law], Publishing house INFRA-M, Moscow, 1999, p.155

[113] KOZLOVSKY M. "Пролетарская революция и уголовное право" [Proletarian revolution and criminal law], Journal "Пролетарская революция и право" [Proletarian revolution and law], Publishing house of Institute of state and law of Soviet Academy of Science, Moscow, №1, 1918, p.24, cited from Nersesyants V.S. "Общая теория государства и права" [General theory of state and law], Publishing house INFRA-M, Moscow, 1999

socialism, Marxian theorists were likely to highlight the unity of proletarian class approach to law and state of Soviet legal theory and Marxian theory, rather than its contradictions.[114]

Concepts of "proletarian law" were further developed by Dmitry Kursky, the first Soviet General Prosecutor. According to Kursky, proletarian law was system of norms which expressed interests and power of the whole proletarian class, which became possible in conditions of dictatorship of proletariat:

"Dictatorship of proletariat could acknowledge the interests only of its class in general, the true representative of such dictatorship is the whole class – they are workers and poorest peasants, organized in the Communist Party; individual, moreover official representative is always performer, even if he has a lot of authority."[115]

That is why, Kursky claimed, that law should reflect the interests of the whole class and there is no place for the rights of individuals. He insisted that in proletarian law couldn't exist norms *Habeas Corpus* or any other legal prescriptions of individual rights. Conception of Kursky had a lot of from "revolutionary law" since abolishing *Habeas Corpus* norms he explained by the necessity of fighting against counter-revolutionary elements. And norms, protecting individual rights could limit proletariat in the fight for its interests.[116]

Also, Kursky saw one of the main objectives of his conception in abolishing of all bourgeois norms:

"Abolishing of all bourgeois legal norms is the only guarantee of justice for proletariat in cities and countryside and the poorest peasants, who made a great objective expressed in their dictatorship: total suppression of bourgeoisie, abolition of human exploitation and construction of socialism."[117]

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[114] NERSESYANTS V.S. "Общая теория государства и права" [General theory of state and law], Publishing house INFRA-M, Moscow, 1999, p.155
[115] KURSKY D.V. "Избранные статьи и речи" [Selected articles and speeches], Publishing house of Ministry of Justice of USSR, Moscow, 1948, p.38
[116] Ibidem, p.40
[117] Inibem, p. 42

Kursky called his conception a "proletarian communist law" which could be seen as a revolutionary type of legal theory, which also largely reflected the further tendency in Soviet legal scholarship – the elaboration of the existence of special new type of Soviet law totally different from the bourgeois legal order.

Any effort to reconcile Marxian thought with the legal project must confront the condition that Marxian theory proposes the establishment of a dictatorship of the proletariat, which is a power of ruling class unlimited with prescriptions and frames. With such a foundation, when Marxian theory in its deep essence prescribes withering away law and state and sees them only as a transitional necessity for a limited period of time, elaboration of somehow consistent and logical legal theories wasn't possible. As many other heritage of Soviet lawyers, concept of proletarian law is an attempt to use some general notions for Soviet realities. The fact that legality and law in classical scientific meaning is something different from what Soviet scholars called "law", they explained by appearance of new type of Soviet law and agreed with the difference in notions and definitions.

As in could be seen in further development of Soviet legal scholarship, it lacked consistency since changes in political situation required changes in all spheres of law, and theoretical inclinations were supposed to follow that political changes.

In that period of the development of Soviet law, a part of ideological and political influence, research and study of law was dedicated to the aim of overcoming it, which was in accordance with the prescriptions of Marxian doctrine.

3.2. The "socialistic" conception of human rights of S.Kechekyan, E.Lukasheva and V.Chikvadze

Conception of "socialistic law" was a logical continuation of legal theories of non-bourgeois, post-revolutionary, qualitatively new (proletarian, soviet) law. [118] On the congresses of CPSU already from the 1930s was proclaimed the necessity of elimination of remaining features of capitalism for total victory of socialism. With further years, the entry of USSR into the socialism was confirmed.

S.F.Kechekyan describing the main special features of socialistic law, explained that since socialistic legal relations have as its foundation socialistic property for the means of production and socialistic system of economy, all principles of socialistic law first of all reflect the principle of socialism "from each according to his ability, to each according to his work".[119]

Socialistic concept of law put bigger attention to the human rights norms and guarantees in comparison as it was before. As Tumanov said, "one of the main features of socialistic law is that the role of law is increased."[120]

As every Soviet legal concept on re-interpretation of Marxian theory, and this time, the essence of human rights in socialistic society was seen from the dispositions of Marxian heritage. Lukashova E.A. and Chikvadze V.M. in their book "Socialistic concept of human rights" wrote:

"Marxism-Leninism is deeply humane theory, based on the idea about individual as the highest value. K.Marx and F.Engels saw this connection between construction of communism with creation of the conditions for free development of every member of the

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[118] NERSESYANTS V.S. "Общая теория государства и права" [General theory of state and law], Publishing house INFRA-M, Moscow, 1999, p.170

[119] KECHEKYAN S.F. "Правоотношения в социалистическом обществе" [Legal relations in the socialistic society], Publishing house of the Academy of Science of USSR, Moscow, 1958, p. 44

[120] «Круглый стол «Советского государства и права» [Symposium of "Soviet state and law"], Periodical journal "Советское государство и право" [Soviet state and law], Publishing house "Наука" [Science], Volume 7, 1979, p.59

society. Marxism-Leninism doesn't see a person a tool for the development of the state. […] In socialistic society an individual is a purpose of the whole social development: this is the main objective of social progress, development of the state, law, and democracy."[121]

Kechekyan made an important provision for the socialistic conception of law that human rights exist only in terms of "collectivity":

"If seeing the legal relations in capitalistic society we can limit ourselves by the definitions of physical personalities and juridical entities, than making a characterization of legal relations in socialistic society we should uncover the concrete features of subjective law, existing in certain legal relations.

It doesn't mean that socialistic law doesn't have human rights and rights of the citizens, which have individuals in their civil position. But in many cases property and non-property rights of the individuals are determined by certain special features in the socialistic society. A lot of types of legal relations are determined by the membership in agricultural cooperatives, and many of them are determined by the official positions of individuals on state service or social organizations, the character of their work in the industrial sector etc.

In socialistic law there is a very important role of collective legal subjects. This subjects act as holders of truly common interests, while at the same time under judicial entities of capitalistic countries is hidden private interests of certain capitalists, who try to present their private entrepreneurship in a collective form.

Rights provided in socialistic legal relations and obligations of individuals in those relations, serve not only to the interests of the parties of those legal relations, but to the interests of the whole socialistic society. They couldn't be expression of arbitrariness of certain individuals, they are not expression of their will separately divided from the whole society to which they belong. The will of the parties in the legal relations is the will of

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121 LUKASHEVA E.A., CHIKVADZE V.M. «Социалистическая концепция прав человека» [Socialistic conception of human rights], Publishing house of Institute of state and law of Academy of Sciences of USSR, Moscow 1986, p.49

individuals who are bonded by the relations of collaboration and mutual help, who are moving towards to the common aims together."[122]

Lukasheva and Chikvadze continue the thesis about collectivity and common social interests of socialistic law re-interpreting classics of Marxism-Leninism to give the foundation to the theory of socialistic rights of individuals:

"Declaration of the rights of working class and exploited people[123], which was adopted after the first socialistic revolution in the world, bond rights and obligations of individuals not with the abstract individuals, but with concrete social classes. Such attitude doesn't mean underestimation of person, as bourgeois and capitalistic political ideology tries to present it, but just confirms thesis that freedom and rights of every working person could be expressed only through the social class to which he belongs. […]

Following his humane approach, Lenin sees individual as a part of society. Since in all his expressions person express himself due to the influence of the society. Marxian literature was always highlighted the connection of individual and society. Since the abilities of the individual could be expressed only if there are favorable social conditions for it."[124]

A.K.Stalgevich describing the essence and special features of socialistic law, in his article "Some questions about theory of socialistic legal relations" provided complete list of characteristics of the socialistic legal relations which reflect the essence of socialistic legal concept. According to Stalgevich, socialistic legal relations:

> "1) are based on material conditions of socialistic society, conditioned by socialistic social order, socialistic system of economy and socialistic property for the means of production;

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122 KECHEKYAN S.F. "Правоотношения в социалистическом обществе" [Legal relations in the socialistic society], Publishing house of the Academy of Science of USSR, Moscow, 1958, p. 44-46

123 The project of "Декларации прав трудящихся и эксплуатируемого народа" [Declaration of rights of working and exploited people] was written by V.Lenin in January 1918.

124 LUKASHEVA E.A., CHIKVADZE V.M. «Социалистическая концепция прав человека» [Socialistic conception of human rights], Publishing house of Institute of state and law of Academy of Sciences of USSR, Moscow 1986, p.51

2) are maintained and developed by Soviet socialistic state under supervision of Communist Party;

3) comply with the norms of socialistic law, which is expressed in laws and other legal acts, which provides the state will of working class […];

4) contain the rights and common obligations of individuals stabilized and protected by Soviet state, those individuals are subjects of legal relations - Soviet citizens, Soviet state, Soviet state organizations, and Soviet social organizations of workers;

[…] 7) serve as a way for exercising Soviet laws and other legal acts for strengthening of Soviet legal order, politics of communist party and Soviet state in the interests of people and great aim of achievement of communism"[125]

The conception of socialistic law was prevailing in Soviet scholarship since it was universal framework for all other types of legal thought. Formulated in the 1930s, at the same time with the proclamations of CPSU about near achievement of socialism, the theory of socialist law was evaluated and transformed by many lawyers and stayed one of the mainstream wide-spread theories till the collapse of Soviet state.

[125] STALGEVICH A.K. "Некоторые вопросы теории социалистических правоотношений" [Some questions about theory of socialistic legal relations], Journal "Советское государство и право" [Soviet state and law], Publishing house of Institute of State and Law of Russian Academy of Science, Moscow, 1951, №3,p.33

4. The essence of human rights in the psychological theory of L.Petrazhitsky

4.1. The psychological concept of law by L. Petrazhitsky

The concept of law from the position of social classes view was developed by Soviet lawyer Mikhail Reisner. He began the elaboration of his legal concept before revolution of 1917 and further continued in the Soviet period. His legal concept was mainly based on the psychological theory of L.Petrazhitsky.

Initially the psychological theory of law was developed by Leon Petrazhitsky before the revolution of 1917 and very much influenced the development of legal doctrine further in the Soviet period. But not only Reisner based his conception on achievements of Petrazhitsky, A.Lunacharsky, D.Dembsky and other Soviet scholars were also influenced by his outstanding theory of psychological understanding of law.

In his main work *Theory of law and state in correlation with the theory of morality,* L.Petrazhitsky provided detailed analysis of the essence of law describing different legal concepts, namely "state concept of law" and "coercion legal concept".

About the first group concepts, he says that the most frequent, but at the same time improper, notion of law "as norms of coercion, which are declared and protected by the stated (or norms which are originated from the state)"[126] He highlights that the weak part of that definition is that it correlates only with the state laws and not with the law in general, excluding for example international law and legal customs which are created by people and not by the state. He explains, that theories which adopt criteria of distinguishing of law from not-law by recognition of legal norms by the state, and not their creation by the state, are much better. He writes, that such theories "embrace at least even

[126] PETRAZHITSKY L.I. "Теория государства и права в связи с теорией нравственности" [Theory of state and law in correlation with theory of morality], San-Petersburg ,1909, reprinted in 2000 by publishing house "Лань"[Lan], San-Petersburg, p. 214

those norms which are not created by the state, but are recognized by it (by the state) as legal norms, so those theories contain all official legal norms".[127]

Petrazhitsky claimed, that even this elaborated definition of law can't be approved, since from declaring that law is only the norms recognized by the state, there appears the logical conclusion that existence of international law should be denied because certain states may decide not to recognize the norms of international law or recognize only part of them, so, according to this definition in this case, they will lose their legal character. Another disadvantage of this definition is that it includes *definitio per idem* - that "certain category "x" should be defined through the reference to "x"". This means that defining law as norm recognized by the state includes the notion "state" in itself. And "state" means already existence of complicated system of legal norms, and scientific definition of state requires scientific definition of law. Following this definition we find ourselves in logic *circulus* without an exit.[128]

Another logical contradiction of law as norms recognized by the state, according to Petrazhitsky, is that state may recognize not only legal norms, but other rules of behavior for example religion. Certain laws and codes contain some dispositions which don't have a strict legal meaning; they express moral and other dispositions about behavior. So, according to Petrazhitsky the theory of state recognition of law doesn't have a criteria of distinguishing the legal norms from other rules of behavior included in laws and other legal acts.[129] Petrazhitsky stated that:

"Incorporating into the definition of law the attitude to it from the state and orientating on this attitude, science goes down the wrong path […] connecting law to the state science deprives itself from rich and educational material – those legal acts which happened outside the state, without any connection to it and before it appeared, and makes its mental outlook narrow, we can say, makes it bureaucratic and formal."[130]

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[127] Ibidem, p.215
[128] Ibidem, p.216
[129] Ibidem, p.217
[130] Ibidem, p.217

Defining the second category of theories (coercion theories) which presumes law as system of obligatory norms which are maintained with state coercion, Petrazhitsky wrote that norms of law are connected to the feature of coercion, the power of coercion and law are seen as phenomenon which consists of two parts: norms and coercion.[131] The essence of this connection of law and coercion is that any person who doesn't follow the legal norms could be and more often must be subjected to coercive measures. In case a legal norm isn't respected there is another legal norm (sanction), which prescribes the state bodies to apply (due their own initiative or due to the request of interested party) coercion. This coercion represents not only obligatory exercising the legal norm which is not respected but also punishment for the transgressor or other disadvantageous consequences for him.[132]

Criticizing this category of legal concepts, Petrazhitsky wrote that these notions contained the same *definition per idem* since they all provided a definition of law through the definition of state and coercion. Another contradiction he saw in applying this definition to international law: the contradiction is that many norms of international law don't have apparat of coercion. Also, many legal norms which prescribe the obligations of Monarch can't be exercised since the inviolability of the personality of Monarch. He highlights mistakes of logical construction of coercive theories since it is widely recognized the legal character of international law as well as norms of about Monarch's duties.[133]

Through the critics of existing legal concepts Petrazhitsky makes a conclusion of mistaken statement of connection of law with the state. Form this presupposing he elaborates his own theory which he called psychological. He explains that:

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131 SHUTEMOVA T.V. "О критике Л.И.Петражицким теорий права" [About L.I.Petrazhitsky's critics of legal theories], Journal «Вектор науки» [Vector of science], publishing house of Togliatti State University, Togliatti (Russia), 2010, p.235

132 Ibidem, 236

133 PETRAZHITSKY L.I. "Теория государства и права в связи с теорией нравственности" [Theory of state and law in correlation with theory of morality], San-Petersburg, 1909, reprinted in 2000 by publishing house "Лань"[Lan], San-Petersburg, p.218-232

"Specific nature of law, morality, esthetics, and their differences form each other and from other emotions is mainly situated not in the area of intellectual, but in the area of emotional, impulsive in the sense of its content."[134]

Petrazhitsky insists that law as well as rules on which functions society expresses itself from the human phycology, from different impulses and emotions which produces the psyche of individuals. He says, that "law as a phenomenon is those ethical impulses and emotions which have attributive character."[135]

Petrazhitsky also claims that legal science doesn't have a correct definition of what the law is and in elaboration of the definition he sees a very important objective for legal science. And giving his notion of law Petrazhitsky highlights drastic differences between his view and traditional understanding of positive law:

"Psychological definition law doesn't have anything in common with what is usually lawyers determine as law […] Lawyers mistakenly percept as real law norms, dispositions and prohibitions […] Form completely another point of view – from refutation of what usually lawyers tend to think as real law – we tend to seek for phenomenon as special class of complicated emotionally-intellectual psychological processes, on which is based our definition of law as well as the whole study of psychological theory."[136]

From the point of view of his theory Petrazhitsky says that it doesn't make sense to divide law on positive or intuitive, since intuitive law being primary law and base for all other legal structures doesn't need to be recognized by the state, since it doesn't determine its nature:

"It is not important if as we seen before the division of law on positive and intuitive, if certain norms, obligations and rights are based on someone's dispositions,

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134 Ibidem, p. 83
135 Ibidem, p.84
136 Ibidem, p. 85-86

national customs or other normative facts, because we talk about which are alien to such attributions and are based solely on imperative emotions".[137]

From his psychological definition of law Petrazhitsky elaborates his theory of law and morality where he claims that law has regulative function which in fact influences the behavior of individuals, and morality being less demanding phenomenon acts as an orientation for the behavior.[138]

An advantage of his theory is Petrazhitsky claims that it embraces a much bigger circle of social relations rather than positive law in its ordinary meaning, he also claims that his intuitive law explains the rules which construct deviation groups which are not connected to the state dispositions – and gives example of internal rules of criminals, pirates inside the criminal societies.[139]

4.2. The critics of L.Petrzhitsky's theory: D.Dembsky, V.Sergeevich and M.Reisner

As soon as Petrazhitsky's theory appeared it faced a lot of criticism from the scientific community. Before the revolution in 1910, V. Sergeevich, a historian and theorist of law, criticized Petrazhitsky's statement about the method of understanding the law, since the basis for law was seen in psychological impulses of individual, Petrazhitsky claimed that: "[…] proper and unique method of observation should be recognized the method of self-observing and introspection" [140]. Since Petrazhitsky's theory was based on the

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137 Ibidem, p. 86

138 POSNOV I.V. "Соотношение права и морали в психологической теории Л.И.Петражицкого" [Correlation of law and morality in psychological theory of L.I.Petrazhitsky], Journal Vestnik Moscow State Technological University, Moscow, №9, 2006, p.104

139 PETRAZHITSKY L.I. "Теория государства и права в связи с теорией нравственности" [Theory of state and law in correlation with theory of morality], San-Petersburg ,1909, reprinted in 2000 by publishing house "Лань"[Lan], San-Petersburg, p.123

140 SERGEEVICH V.I. «Мой ответ г.Петражицкому» [My answer to Petrazhitsky], Journal of Ministry of Justice, Senat's publishing house, San-Petersburg, 1910, p. 4

subjective psychological attitude of individual vis-a-vis the law, it was logically expected that the choice of the method for this theory would be introspection. Sergeevich wrote:

"Until now we thought, that positive law appears from the customs, laws and other outside sources of law, - what about natural or philosophic law, its sources – isn't law or code of laws, it is something different, and various philosophical schools understand differently this sources of natural law. Our philosopher [L.Petrazhitsky] claims that the only source of any law and any obligations of individual is his own conciseness: any other law for him is imaginary; it is optical illusion and nothing more. If so, than, certainly, the only method of studying law is introspection. Here the author is absolutely logic: he doesn't just claims that the only method is introspection, he couldn't say anything else since it is absolutely logic. And if so, than the theory of Petrazhitsky doesn't foresee anything about positive law, since the law and legislation doesn't situate in our consciousness and according to the theory of the author it is not law, claiming positive law as law will be a contradiction to the author's views."[141]

After the revolution the impact of Petrazhitsky's theory, as far as criticism is concerned, didn't waver. Soviet scholars criticized it or adapted it from the position of Marxian theory.

After the revolution was adopted the Decree on Courts, which stated that in cases of lack of necessary norm of law or its incompleteness, judges must be led by their socialist legal consciousness. [142] Explaining the concept of socialist legal consciousness, A.Lunacharsky based his position on Petrazhitsky's psychological theory. Lunacharsky stated that:

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[141] Ibidem, p. 6

[142] "Decree on Courts the Soviet of the Peoples' Deputies of RSFSR" from 24 November 1917, "Decrees of Soviet power", Publishing house of the state political literature, Moscow, 1957

"Every social class creates its own law when it applies its power, when it creates social world in the image and likeness of itself – what means according to its fundamental class interests and certain existing conditions."[143]

Dembsky D. was among the first scholars who made an attempt to explain the theory of Petrazhitsky from the Marxian position, as he himself wrote:

"I intend to provide further program of construction or study about Law and Morality from the point of view of doctrine of Historical Materialism, we will take as beginning point Petrazhitsky's study of Law and Morality for two reasons. First, is that this theory is the biggest contribution to the science of philosophy of law for a decade, and it couldn't be ignored by any researcher. The second reason is that there is proof that Petrazhitsky's basis is very different from ours and needs to be improved."[144]

In the first part of his writing "*Philosophy of Law and Morality of prof.L.I.Petrazhitsky. Law and Morality from the view of historical materialism*" Dembsky provides certain critiques about the definitions which Petrazhitsky gave for the notions of law, morality, ethics and some specifications about method, but more interesting is the second part "*Law and morality from the point of view of historical materialism*" where we can observe first attempts of elaboration of the theory of Petrazhitsky towards political communist ideology. Dembsky takes famous Marxian thesis as precondition for further elaboration of his views:

"In social life people enter in different relations which don't depend on their will – they are industrial relations, which are conditioned by the stage of development of their industrial forces. Systems of those industrial relations create the economic structure of the society, the real basis, on which the legal and political superstructure is constructed, and to which confirms certain forms of social consciousness. The way of production of economic goods conditions social, political and spiritual life. It is not the consciousness of people which determines their being, opposite; the social being determines their consciousness.

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143 LUNARCHARSKY A. "Революция и суд" [Revolution and Court], Journal "Правда" [Truth], Publishing house "Печатный двор" [Pechatny dvor], San-Petersburg, 1917

144 DEMBSKY D. "Философия права и нравственности проф.Л.И.Петражицкого. Право и нравственность с точки зрения исторического материализма" [Philosophy of Law and Morality of prof.L.I.Petrazhitsky. Law and Morality from the view of historical materialism], Publishing house B.Benguis, Harkov, 1910, p. 6

On the well known stage of development of economic industrial forces enter in contradiction with existing economic relations, or using legal terms property relations, within the limits of which they functioned before. From the form of development of economic forces this relations became its fetters. Here the social revolution happens.

With the change of economic base, more or less quickly, modifies the whole superstructure of social, political, philosophical relations under it […]"[145]

Dembsky insists that this Marxian formula of social living could be applied to the theory of Law and Morality in order to explain regularity and patterns in its development[146]:

"Bearer of the social power, with natural historic necessity, becomes always the class organizer, the class which plays organizational role in certain given industrial distributive system. Distributing the common sources of society, the ruling class (class-organizer), dictates its own "morality" to other classes of the society, strengthening by this and developing favouring to it social relations. The essence of this "morality", reflecting and expressing living (industrial-distributive) conditions of class-organizer, comes in further growing contradictions with "morality" of other social classes, which reflects significantly different living conditions of this classes, and by it determining the behavior of individuals of that social classes. In this processes the Law is born and consciousness for creation of social labour process." [147]

Dembsky explains that not the whole morality of ruling class becomes law, but only part of it, that part which is necessary as a foundation for the system of production and distribution, which is presented by that social class. He writes also that coercion is a necessary feature of law, since the new ruling class formed inside the old society and growing and developing faces a lot of opposition.[148]

If Dembsky tried to explain law and morality from the view of historical materialism and gave it a new communist vision, M.Reiser significantly modified

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[145] Ibidem, p.46-47
[146] Ibidem, p. 48
[147] Ibidem, p. 59
[148] Ibidem, p. 60

Petrazhitsky's theory and saw his main achievement in giving to the theory "Marxian foundation". Just after the October revolution he was among Bolsheviks who claimed that revolutionary legal consciousness of proletariat could become law necessary for proletariat as intuitive law of that social class[149]:

"I refashioned Petrazhitsky's doctrine concerning intuitive law in the sense that I put it upon a Marxist foundation, and thereby obtained not intuitive law in general (which could here and there furnish individual forms adapted to certain social conditions) but the most genuine class law which was worked out in the form of intuitive law (in the ranks of the oppressed and exploited mass) independently of any official framework whatsoever; and it is for the reason alone that we were able subsequently to utilize "revolutionary legal consciousness of the proletariat" as the foundation of the activity of our revolutionary justice, which at the beginning was without any positive norms whatsoever".[150]

Marxian statements about class law interpreted in a sense that every social class (not only ruling class but oppressed class as well) creates its real and existing intuitive law due to its psychology and social position of that class. Already under capitalism, according to Reisner, there is not only bourgeois law, but also proletarian and peasant's law. So not all law is soiled with "exploiting aims". Reisner says, that every "general" law in any society is a compromise between different types of class law existing in certain society. The only difference according to Reisner is that under capitalism the ruling position had a class law of bourgeoisie, and during Soviet period – proletarian law.[151]

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149 KELSEN H. "The communist theory of law", Frederick A.Praeger Publishing House, New York, 1955, p. 78

150 REISNER M.A. "The Theory of Petrazhitsky: Marxism and social ideology", 1925, cited from KELSEN H. "The communist theory of law", Frederick A.Praeger Publishing House, New York, 1955, p.78

151 NERSESYANTS V.S. "Общая теория государства и права" [General theory of state and law], Publishing house INFRA-M, Moscow, 1999, p.166

5. Alternative conceptions of law in the Soviet doctrine the 1920-1930s

5.1. The A.Malitsky's theory of "octroyed" rights and critics of L.Kaganovich

During the 1920s different Soviet scholars elaborated legal concepts which were based on interpretation of Marxism. I.Razumovsky was one of a few orthodox Marxists who insisted on strictly following the Marxian doctrine, his position was very close to the study of Pashukanis with some differences in the approaches. Razumovsky, as well as Pashukanis, adopted Marxian statement about socialistic critics of the bourgeois general theory of law. Razumovsky associated law with bourgeois law and predicted its withering away, since in withering away of law he saw the "*death of bourgeois law as ideology*" which will be replaced by communist stage of the development of the society, when "social behavior will be organized by the conscious system rules based on correlation with material conditions of production." Predicting elimination of law, Razumovsky still insisted on the necessity of research and studying of law for correct understanding of historical development and for the development of theory of historical materialism in general. He said that: "issues of law and its correlation with economic structure of the society, which is the foundation point for further theoretical constructions of Marx, this is the main issues of Marxian sociology which confirm also necessity of dialectical methodology."[152]

Not all legal concepts of the 1920s were conservatively based and followed from the Marxian doctrine. A very creative and unusual interpretation was elaborated by A.Malitsky in his work "Soviet Constitution". Malitsky was adherent to the dictatorship of the proletariat, and the rights of Soviet citizens he saw as octroyed privilege to them from the part of the state in return for fulfilment of obligations. He saw the Soviet Union as a lawful state from the feature that activity of all governmental bodies is prescribed by the law, he said: "subordination of all governmental bodies to the rule of law is called "legal

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[152] RAZUMOVSKY I., "Problems of Marxian theory of law", Publishing house of Communist Academy, Moscow, 1925, p.3 cited from Nersesyants V.S. "Общая теория государства и права" [General theory of state and law], Publishing house INFRA-M, Moscow, 1999, p. 168

regime" and the state itself, functioning in the legal regime is called "lawful state", here we can admit that Soviet republic is a lawful state which functions according to its laws."[153] To correlate the notion of dictatorship of proletariat with the lawful state, Malitsky explains, what he means under the definition of "lawful state":

"We should not miss the notion of "lawful state" where all governmental bodies function according to the laws of the state, with theory of lawful state, when state itself limited with the law for the sake of rights and freedoms of individuals and taking it as an orientation in his law-making activity, since the law as something under the state is just a protection of interests capitalists: this is individualism of bourgeois law"[154]

Formulating his definition of law, Malitsky tends to follow the theory of class law: "Law is such system of social relations, which is set up by the ruling class to protect its own class interests and guarded by the organized common force of the whole class. Law as a regime […] is expressed in certain rules of behavior […] – legal norms. System of legal norms is positive law, which is always the law of ruling class."[155]

Malitsky continues such a legalistic view of law claiming that it is the state that creates law, as well as defines the rights, freedoms and obligations of individuals. Following this logic, Malitsky made a conclusion, that since the state defines the rights of individuals, it is not correct to see individual who sacrifices a part of his rights to the state in turn for safety and order. In opposite, it is state that "octroyes" rights and freedoms to the individual but with a reservation, that individual should exercise his rights for the interests of the whole society and for the sake of development of "industrial forces". Explaining his theory of "octroyed" rights, Malitsky stated:

"Individuals get their rights not because of the fact of being born humans, but from the state, from the ruling class, in interests of society, to keep carrying out their obligations which they have as part of the society, as members of the process of industrialization and distribution. […] In the Soviet Republic civil rights as well as public

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[153] MALITSKY A. "Советская Конституция" [Soviet constitution], publishing house of People's Commissariat of Justice of Ukrainian SSR, Kharkov, 1925, pages 27-28
[154] Ibidem, p. 46
[155] Ibidem, p. 5

rights should be seen as a way of the citizen carrying out his social obligations, his official functions. This means that rights which the individual possess is not his freedom, but his social duty. Rights as duty – this is a main difference of view of socialism on the subjective rights of the individuals from the bourgeois doctrine of the West. Since citizens are given rights by the state, as well as frames of their freedom, the bourgeois statement: "Everything, what is not prohibited by the law, is allowed" should be replaced by opposite view: "Only those things which are allowed are permitted by the law" since the bearer of the rights and source of them is not from individual but the state".[156]

Continuing his theory of dictatorship of the proletariat and "octroyed rights" Malitsky states that during socialism the legislative and executive branches of power in the activity of governmental bodies will be merged since management of the state reunite with the legislative bodies.[157]

The theory of Malitsky was criticized by his colleagues; the most harsh criticism was expressed by L.Kaganovich, a communist party leader and one of the closest associates of J.Stalin. It should be noted that Kaganovich's interpretation of Marxism was more correct and corresponded much more to the Marxian legacy than Malitsky's scholarship.

In his article "*12 years of constructing of the Soviet state*" Kaganovich claimed that many scholars still use bourgeois methodology. As an example, he claimed that Malitsky in the analysis of Soviet Constitution uses only legal bourgeois methods. Malitsky stated that due to the Soviet Constitution, the state itself and government organ function due to the rule of law. Kaganovich criticized Malitsky's approach, citing Lenin who explained the essence of a dictatorship which is founded on the unlimited force and not on law:

"We refuse the notion of legalistic state even for bourgeois state. As Marxists, we assume, that bourgeois state covered with the form of law, democracy and formal equality, is in its sense the bourgeois dictatorship. Notion of "legalistic state" is invented by bourgeois scientists to cover the nature of bourgeois state. […] We should remember Lenin's words who said that dictatorship of proletariat is a force based on power and not

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[156] Ibidem, p. 49
[157] Ibidem, p. 35

law.[…]In the brochure "Proletarian revolution and regenerate Kautsky" Lenin wrote: "Revolutionary dictatorship is a power based on violence of working class against bourgeoisie which is not limited with any law. "[158]

Interpreting the dictatorship of the working class as the main force unlimited by law, Kaganovich admitted that law still exists. About law and legal order Kaganovich wrote:

"Of course it doesn't exempt law. We have laws. Our laws determine functions and area of activity of certain governmental bodies. But our laws are determined by revolutionary necessities at every exact moment."[159]

Lazar Kaganovich also highlighted the necessity to abolish all forms of bourgeois law and orient to the dictatorship of working class. His position was very close to the works of D.Kursky, and both of them followed the predictions of Marx and Lenin.

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158 KAGANOVICH L. "Двенадцать лет строительства Советского государства" [12 years of construction of Soviet state], Journal "Soviet state and revolution of law", Publishing house of Communist Academy, Moscow, 1930, Issue №1, p.9
159 Ibidem, p.9

6. Soviet international law

6.1 Is it possible to build socialism in one country alone?

Engel's answer to the question "Will it be possible for this revolution to take place in one country alone?" is "no" as follows:

"By creating the world market, big industry has already brought all the peoples of the Earth, and especially the civilized peoples, into such close relation with one another that none is independent of what happens to the others.

[…] the communist revolution will not merely be a national phenomenon but must take place simultaneously in all civilized countries – that is to say, at least in England, America, France, and Germany.

It will develop in each of these countries more or less rapidly, according as one country or the other has a more developed industry, greater wealth, a more significant mass of productive forces. Hence, it will go slowest and will meet most obstacles in Germany, most rapidly and with the fewest difficulties in England.

> […] It is a universal revolution and will, accordingly, have a universal range."[160]

This conception was adopted and further developed in Soviet legal doctrine. A. Woods and T. Grant in their work "*Lenin and Trotsky—What They Really Stood For*"[161] cite how Stalin summed up Lenin's views on the building of socialism published in his *Foundations of Leninism*[162] from February 1924:

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160 ENGELS F. «Принципы коммунизма» [Principles of communism], Selected Works, Volume One, Progress Publishers, Moscow, 1969, p. 81-97 (first Published: 1914, Eduard Bernstein in the German Social Democratic Party's Vorwärts!)

161 GRANT T., WOODS A., "Lenin and Trotsky – what they really stood for", Publishing house "Wellred books", London, 2000 (first edition 1968), chapter 8

162 STALIN J. «Основы Ленинизма» [Foundations of Leninism] – part of the collection of Stalin's lectures and speeches «Вопросы Ленинизма» [Issues of Leninism], State political publishing house, Moscow, 1930

"The overthrow of the power of the bourgeoisie and the establishment of a proletarian government in one country does not yet guarantee the complete victory of socialism. The main task of socialism - the organization of socialist production - remains ahead. Can this task be accomplished; can the final victory of socialism in one country be attained, without the joint efforts of the proletariat of several advanced countries? No, this is impossible. To overthrow the bourgeoisie the efforts of one country are sufficient - the history of our revolution bears this out. For the final victory of Socialism, for the organization of socialist production, the efforts of one country, particularly of such a peasant country as Russia, are insufficient. For this the efforts of the proletarians of several advanced countries are necessary…Such, on the whole, are the characteristic features of the Leninist theory of the proletarian revolution."

That view on the Leninist theory of the proletarian revolution has been proclaimed official and has been repeated in speeches, articles *etc.* and hasn't been put into any doubt from 1905 till 1926[163]. This view provided a very honest perspective of the future of the Soviet Union – without socialist revolutions in the West any possible peaceful "co-existence" between socialism with capitalism would be impossible and new imperialist world wars would be inevitable. The necessity of revolutions in the West was described as a

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[163] See for example, Trotsky in 1906 wrote: "without the direct state support of the European proletariat the working class of Russia cannot convert its temporary domination into a lasting socialist dictatorship. Of this there cannot be any doubt…Left to its own resources the working class of Russia will inevitably be crushed by the counter-revolution the moment the peasantry turns its back on it." Trotsky followed the same view as Lenin had, who wrote in 1905: "The proletariat is already struggling to preserve the democratic conquests for the sake of the socialist revolution. This struggle would be almost hopeless for the Russian proletariat alone, and its defeat would be inevitable…if the European socialist proletariat did not come to the help of the Russian proletariat…At that stage the liberal bourgeoisie and the well-to-do (plus a part of the middle peasantry) will organize a counter revolution. The Russian proletariat plus the European proletariat will organize the revolution. In these circumstances the Russian proletariat may win a second victory. The cause is then not lost. The second victory will be the socialist revolution in Europe. The European workers will show us 'how it is done'." (cited from GRANT T. and WOODS A., "Lenin and Trotsky – what they really stood for", Publishing house "Wellred books", London, 2000 (first edition 1968), chapter 8)

problem of "external relations of our country, i.e., the problem of completely ensuring our country against the dangers of military intervention and restoration" and "danger of restoration of capitalism".

With the adoption of the new Constitution of 1936[164] the question about the possibility of the existence socialism in one country without the World proletarian revolution was put in doubt since the new Constitution of 1936 by the idea of its founder represented the full socio-economic and political restructuring of Soviet society and victory of socialism. The Constitution in article 1 proclaimed that "*The Union of Soviet Socialist Republics is a socialist state of workers and peasants",* which fully realized the principle "is that of socialism: "From each according to his ability, to each according to his needs"(article 12). Article 4 described the economy of USSR as already socialistic:

"The socialist system of economy and the socialist ownership of the means and instruments of production firmly established as a result of the abolition of the capitalist system of economy, the abrogation of private ownership of the means and instruments of production and the abolition of the exploitation of man by man, constitute' the economic foundation of the U.S.S.R."

It that sense the new Constitution already proclaiming the existence of socialism in the USSR raised the question about the possibility of the existence of socialism in one country without the support of European proletariat again. The view on that political question was formed through the letter of the comrade Ivanov to comrade Stalin published in communist newspaper "Pravda" which contained the ideological response in accordance with the origins of Marxian theory of proletarian revolution:

"IVANOV TO STALIN
Dear Comrade Stalin,
I earnestly request you to explain the following question : In the local districts here and even in the Regional Committee of the Young Communist League, a

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164 Constitution of USSR adopted by the Extraordinary Eighth Congress of Soviets of USSR on December 5, 1936

two-fold conception prevails about the final victory of socialism in our country, i.e., the first group of contradictions is confused with the second.

In your works on the destiny of Socialism in the U.S.S.R. you speak of two groups of contradictions - internal and external.

As for the first group of contradictions, we have, of course, solved them - within the country Socialism is victorious.

I would like to have your answer about the second group of contradictions, i.e., those between the land of Socialism and capitalism.

[…] Please, Comrade Stalin, will you explain whether we have the final victory of Socialism yet or not. […]

(Signed) I. Ivanov.

January 18, 1938.

STALIN TO IVANOV

[…]Undoubtedly the question of the victory of Socialism in one country, in this case our country, has two different sides.

The first side of the question of the victory of Socialism in our country embraces the problem of the mutual relations between classes in our country. This concerns the sphere of internal relations. […] For, during this period, we succeeded in liquidating our bourgeoisie, in establishing fraternal collaboration with our peasantry and in building, in the main, Socialist society, notwithstanding the fact that the Socialist revolution has not yet been victorious in other countries.[…]

The second side of the question of the victory of Socialism in our country embraces the problem of the mutual relations between our country and other countries, capitalist countries; the problem of the mutual relations between the working class of our country and the bourgeoisie of other countries. This concerns the sphere of external, international relations.

Can the victorious Socialism of one country, which is encircled by many strong capitalist countries, regard itself as being fully guaranteed against the danger of military invasion, and hence, against attempts to restore capitalism in our country? […]

Leninism answers these problems in the negative. Leninism teaches that "the final victory of Socialism, in the sense of full guarantee against the restoration of bourgeois relations, is possible only on an international scale" […]This is what Lenin says on this score :

"We are living not merely in a State but in a system of States, and it is inconceivable that the Soviet Republic should continue to coexist for a long period side by side with imperialist States. Ultimately one or other must conquer. Meanwhile, a number of terrible clashes between the Soviet Republic and the bourgeois States is inevitable. This means that if the proletariat, as the ruling class, wants to and will rule, it must prove this also by military organization." (Collected Works, Vol. 24. P. 122.) And further, "We are surrounded by people, classes and governments which openly express their hatred for us. We must remember that we are at all times but a hair's breadth from invasion." (Collected Works, Vol. 27. P. 117.) This is said sharply and strongly but honestly and truthfully without embellishment as Lenin was able to speak.

[…] The second problem can be solved only by combining the serious efforts of the international proletariat with the still more serious efforts of the whole of our Soviet people. […] The whole of our people must be kept in a state of mobilization and preparedness in the face of the danger of a military attack, so that no "accident" and no tricks on the part of our external enemies may take us by surprise . . . […] I would like unpleasant things like capitalist encirclement, the danger of military attack, the danger of the restoration of capitalism, etc., to be things of the past. Unfortunately, however, these unpleasant things still exist.

(Signed) J. Stalin.

February 12, 1938"[165]

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[165] Published at newspaper «Правда» [Pravda] on 5th March 1938, in English available at "Marxists Internet Archive" on https://www.marxists.org/reference/archive/stalin/works/1938/01/18.htm , accessed on 18.08.2015

Soviet state put itself to the hostile position toward the global community of states highlighting the danger of capitalist encirclement. It was one of the instruments of state propaganda – mobilizing public energy was much easier in terms of holistic capitalist invasion. Moreover, state officials always claimed that the world is divided into two camps which constantly fight with each other – one is "imperialist and anti-democratic" led by United States, and the "democratic and anti-imperialist" led by USSR.[166] The necessity to survive in circle of hostile imperialist and anti-democratic forces caused elaboration of the concept of "peaceful coexistence". As Freeman states, that initially that concept was elaborated as a "shield for the weak nation" to defend itself, and as he notices, that very little remained form this principle in international Soviet politics after World War II when Soviet expansion became a doctrine of active strength rather than peaceful coexistence with other nations.[167]

6.2. Contradictions in Soviet international law

Bill Bowring, specialist in human right and Russian law, founder of European Human Rights Advocacy Center (EHRAC)[168], claims that "the Soviet theory and practice of international law, if it is the subject of any consideration at all, is usually dismissed as a purely historical example of an extreme species of positivism, and of contemporary interest. Most often it is ignored. For example, in his essay *"What should international lawyers*

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166 BOWRING B. "Positivism versus self-determination: the contradictions of Soviet international law" from "International law on the left", S.Marks (ed.), Cambridge University press, 2008, p. 159

167 FREEMAN A. "Some aspects of Soviet influence on international law", American Journal of International law, 1968, volume 62, p.713

168 The European Human Rights Advocacy Centre (EHRAC) is a research center which assists non-governmental organizations (NGOs) and lawyers in Russia, the South Caucasus and Ukraine in taking cases to the European Court of Human Rights. Affiliated to Middlesex University of London (GB).

learn from Karl Marx?"[169] Martti Koskenniemi does not mention Soviet international law at all."[170]

Bill Bowing takes a different position and seeks to argue that Soviet international law, notwithstanding of all its contradictions, has created some of the most important notions and principles of contemporary international law which are of continuing relevance. Namely, the right to self-determination of public international law.[171]

Right to self-determination was an important issue for Marxian doctrine, since it prescribed the gradual advance of socialism in the world and right to self-determination in international law was that legal category which could promote further that process in case of communist revolutions. The right to self-determination was a core question in early 1913 Stalin's work, which he wrote under Lenin's instruction, "Marxism and the national question."[172] Stalin wrote, that "[…] Russian Marxists cannot dispense with the right of nations to self-determination. Thus, the right of self-determination is an essential element in the solution of the national question." He stated that:

"The only correct solution is regional autonomy, autonomy for such crystallized units as Poland, Lithuania, the Ukraine, the Caucasus, etc. The advantage of regional autonomy consists, first of all, in the fact that it does not deal with a fiction of territory, but it defines population inhabiting a certain territory. Next, it does not divide people according to nations, it does not strengthen national barriers; on the contrary, it breaks down these barriers and unites the population in such a manner as to open the way for division of a different kind, division according to classes. Finally; it makes it possible to utilize the natural wealth of the region and to develop its productive forces in the best possible way without awaiting the decisions of a common center – functions which are not inherent features of cultural-national autonomy."

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169 KOSKENNIEMI M. "What international lawyers should learn from Karl Marx?", " from "International law on the left", S.Marks (ed., Cambridge University press, 2008, p.30

170 BOWRING B. "Positivism versus self-determination: the contradictions of Soviet international law" from "International law on the left", S.Marks (ed.), Cambridge University press, 2008, p. 133

171 Ibidem, p.134

172 STALIN J.V. "Marxism and the National Question" , first published at Prosveshcheniye, Moscow, 1913, available at https://www.marxists.org/reference/archive/stalin/works/1913/03.htm, accessed on 23.08.2015

In December 1913 Lenin himself wrote on right to nations to self-determination in "The Cadets and "The right of Nations to Self-Determination"[173] which was followed with further works on the same issue, where he profoundly explained right of people to self-determination:

"The Russian proletariat cannot march at the head of the people towards a victorious democratic revolution (which is its immediate task), or fight alongside its brothers, the proletarians of Europe, for a socialist revolution, without immediately demanding, fully and "rückhaltlos" (unreservedly), for all nations oppressed by tsarism, the freedom to secede from Russia. This we demand, not independently of our revolutionary struggle for socialism, but because this struggle will remain a hollow phrase if it is not linked up with a revolutionary approach to all questions of democracy, including the national question. We demand freedom of self-determination, i.e., independence, i.e., freedom of secession for the oppressed nations, not because we have dreamt of splitting up the country economically, or of the ideal of small states, but, on the contrary, because we want large states and the closer unity and even fusion of nations, only on a truly democratic, truly internationalist basis, which is inconceivable without the freedom to secede. Just as Marx, in 1869, demanded the separation of Ireland, not for a split between Ireland and Britain, but for a subsequent free union between them, not so as to secure "justice for Ireland", but in the interests of the revolutionary struggle of the British proletariat, we in the same way consider the refusal of Russian socialists to demand freedom of self-determination for nations, in the sense we have indicated above, to be a direct betrayal of democracy, internationalism and socialism."[174]

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[173] LENIN V.I. "The Cadets and "The right of Nations to Self-Determination", first published at newspaper Proletarskaya Pravda No. 4, December 11, 1913, available at https://www.marxists.org/archive/lenin/works/1913/dec/11.htm, accessed on 23.08.2015

[174] LENIN V.I. "The Revolutionary Proletariat and the Right of Nations to Self-Determination", written in German not earlier than October 16 (29), 1915, First published in 1927 in Lenin Miscellany VI. Published according to the translation from the German made by N. K. Krupskaya, with corrections by V. I. Lenin, available at https://www.marxists.org/archive/lenin/works/1915/oct/16.htm, accessed on 24.08.2015

They weren't only scientific proclamations; Lenin used the right to self-determination as a principle of practice within former Russia Empire after the Revolution of 1917. In Decree on peace 1917 stated:

"If any nation whatsoever is forcibly retained within the borders of a given state, if, in spite of its expressed desire — no matter whether expressed in the press, at public meetings, in the decisions of parties, or in protests and uprisings against national oppression — is not accorded the right to decide the forms of its state existence by a free vote, taken after the complete evacuation of the [aggressive] troops of the incorporating or, generally, of the stronger nation and without the least pressure being brought to bear, such incorporation is annexation, i.e., seizure and violence.

The government considers it the greatest of crimes against humanity to continue this war over the issue of how to divide among the strong and rich nations the weak nationalities they have conquered, and solemnly announces its determination immediately to sign terms of peace to stop this war on the terms indicated, which are equally just for all nationalities without exception."[175]

As B.Bowring claims, citing Russian scholar of international law Igor Blishenko:

"[…] in the 1968, the year, that the USSR crushed the "Czech Spring", Lenin's Decree on peace of 26 October 1917, for the first time extended the principle of the right of self-determination to all peoples.[…] On 4 (17) December 1917 the Soviet government recognized the right to self-determination of Ukraine. In response to the request of the Finnish government, the Soviet of People's Commissars on 18 (31) December 1917 was resolved to go to the Central Executive Committee with a proposal to recognize Finland's independence. […] By a Decree of 29 December 1917 (11 January 1918) the right of the people of "Turkish Armenia" to self-determination was recognized. In answer to the

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[175] Decree on peace adopted on Second All-Russia Congress of Soviets of Workers' and Soldiers' Deputies on 26 October 1917, available on https://www.marxists.org/archive/lenin/works/1917/oct/25-26/26b.htm, accessed on 24.08.2015

request from the government of Soviet Estland, on 7 December 1918 Lenin signed a Decree on recognition of the independence of Estonia, Latvia e Lithuania"[176]

This gradual conformity with the principle of self-determination was clearly seen not only in domestic Bolshevik's policy, but also in international relations. Soviet Delegation was an active participant during the drafting of UN Charter and offered amendments to the Article 2(1) which refers to "respect for the principles of equal rights and self-determination of peoples…"[177] Bowring insists, citing A.Cassese, that the initial draft of the UN Charter which laid the basis for the future text of the Convention didn't contain any reference to self-determination – the discussion about whether the principles of self-determination should be included to the Charter or not appeared after the UN Conference on International Organization in San Francisco (in 1945) – at the insistence of the USSR. The Soviet Delegation "campaigned for establishment of practically unlimited right to self-determination of colonial and dependent countries and peoples."[178]

The period, when UN Charter was drafted 1945- 1948, European Empires began to break up, and the USSR was an active supporter of decolonization. The Marxian predictions of world proletarian revolution required the principle of self-determination as a necessary condition for the establishment of socialism in the whole world. As Soviet international legal scholar Tunkin claimed that very liberal amendment proposed to the UN General Assembly was rejected under the pressure of colonial power that is why the principle of self-determination does not included in UDHR, that amendment was following:

"Each people and each nation has the right to national self-determination. A state which has responsibility for the administration of self-determining territories, including

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[176] BOWRING B. "Positivism versus self-determination: the contradictions of Soviet international law" from "International law on the left", S.Marks (ed.), Cambridge University press, 2008,p.144-145
[177] Ibidem, p.158
[178] Ibidem, p.160

colonies, must ensure the realization of that right, guided by the principles and goals of the United Nations in relation to the peoples of such territories."[179]

As Freeman notices, "national liberalization of course, is an attractive euphemism, cloaked as anti-colonialism, for any Communist uprising against an established non-Socialist regime.[…] real objective was patently to obtain "imprimatur" of international community for distorted principle which is designed to facilitate assistance to Communist movement throughout the world."[180] That became a key issue which formed a cognitive framework of Soviet international world view. As Allison stated, "the universal objective of world proletarian revolution, which vindicated and could be advanced by forceful means, might be viewed as a basic justice-based challenge to international order".[181]

6.3. Solipsism and imperialism of Soviet Union in international relations

Another feature of Soviet understanding of international law is unconditional and unquestionable primacy of domestic legal order stabilized by the Communist party to anything imposed from the outside. As Alwyn Freeman called that as "the most extreme form of positivism":

"The most extreme form of positivism… The Soviet brand is much more restricted, much narrower, and is, in sum. A rejection of a great portion of international legal principles… Soviet positivism has been distinguished by the exclusion of customary practice as a source of international obligations. It views international law as embracing

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[179] TUNKIN G., "Lenin's principles of Equal rights", p.69, cited from BOWRING B. "Positivism versus self-determination: the contradictions of Soviet international law" from "International law on the left", S.Marks (ed.), Cambridge University press, 2008

[180] FREEMAN A. "Some aspects of Soviet influence on international law", American Journal of International law, 1968, volume 62, p.721

[181] ALLISON R. "Russia, the West and military intervention", Oxford University Press, 2013, p.28

only those principles to which states have expressly consented through international agreement or have otherwise manifested their acquiescence."[182]

That means that Soviet perception required restriction of the sources, and "extreme positive", or even formal approach to international legal issues. As Freeman states, "the positivist element provides protection for Soviet interests against anti-Socialist principles of international law which might inhibit actions proscribed by existing legal norms", it is a "double-edge approach being defensive and offensive in character"[183]

Martti Koskenniemi describing such hermetic absolutism as a position of a state toward international obligations cited Hans Kelsen[184], who held that such a "monist position with the primacy of the national legal order […] is both solipsistic and imperialistic […]. Solipsistic in the sense of capable of seeing nothing else than one's own legal system; imperialistic because everything taking place in the world is judged from its perspective."[185]

That monist hermeneutic position was necessary for ideological indoctrination and made the interpretation of any outside opinion possible which didn't correspond to the official position of Soviet Union as holistic and anti-democratic, aimed at oppressing the proletarian class. A.Vyshinsky claimed that the adoption of UN Declaration of human rights is just an instrument to hide the unhuman conditions of life in capitalist countries, he also was sure that all amendments which were proposed by Soviet delegation were rejected just because they were offered by a communist state.[186] A.Vyshinky on the General Assembly highlighted the problems which according to him would make a Universal Declaration of human rights extremely formal document which wouldn't have any real impact since it doesn't prescribe any executive and coercive measure and have only

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182 FREEMAN A. "Some aspects of Soviet influence on international law", American Journal of International law, 1968, volume 62, p.713
183 Ibidem, p.714
184 KELSEN H., Das Problem der Souveränität und die Theorie des Völkerrechts (2nd edn. Tübingen, Mohr, 1928)
185 KOSKENNIEMI M. "International law: Between Fragmentation and Constitutionalism", Canberra, 27 November 2006, available on http://www.helsinki.fi/eci/Publications/Koskenniemi/MCanberra-06c.pdf , accessed on 15.08.2015
186 VYSHINSKY A.J. «Вопросы международного права и международной политики» [Issues of international law and international politics], collection of speeches, State publishing house of legal literature, 1951

declarative character. Also, Vyshinky claimed that amendments which specify obligations of the state towards the realization of proclaimed rights were needed. For instance, Vyshinky stood for modification of article 3 of UDHR: "Everyone has the right to life, liberty and security of person." He believed that it should be reformulated and obligation of the state to assure protection of every person from illegal infringements, and assure condition that no one will suffer from hunger or from danger of death of depletion. Other amendments were offered for an article 23 which contained the obligation of state to pay for the medical and social insurance of workers to make it possible for them to use and execute their rights for social provision. Otherwise, he said, every guarantee will remain just written on paper. That drastic difference between extremely democratic proclamations on international assembly with the internal situation in Soviet Union described human rights activist Kovalev, he characterized it like a system of legal thinking which is based on:

> "- Instrumentalist approach which means that human rights and freedoms of individuals are important for the realization of higher values such as "common wealth, interests of people"
>
> - Principle of refutation of the autonomy of law and self-sufficiency of its principles and institutions; […]
>
> - Categorical disagreement with the position that absence of legal foundation could be an obstacle for limitation or prohibition of "harmful for the society" ideologies and social movements;
>
> - Primacy of "positive law" which are easier interpreted in accordance with the interests of the state, rather than from the point of view of civil and political rights of individuals. Consequence of such approach became complete submission of the idea of law and practice of law-execution to the aims of "state expediency""[187]

[187] KOVALEV S. "СССР и принятие Всеобщей Декларации прав человека" [USSR and adoption of the Universal Declaration of human rights], from "Russian bulletin of human rights", Publishing house of Institute of human rights, Moscow, 1999, Volume 11

7. Human rights abuses in the Khrushchev's era

7.1. The origin of protests

As a general tendency it could be seen that Marxian theory of socialist law was adapted constantly to the realities of the Soviet state and political situation. The luck of determined legal base shaped a system in which ideology played an inevitable role in state functioning. It served as a tool of political manipulation in almost all spheres – economic, social, political, and legal. As Hans Kelsen affirmed:

"In spite of Marxian postulate of an anti-ideological science, the Soviet theory of law has an outspoken ideological character. That means that its presentation of the positive law, especially of the law of non-communist states and international law, is not objective in a scientific sense but essentially determined by the political interests of the Soviet government. In this respect the Soviet theory employs certain conceptual devices which, although produced by bourgeois jurisprudence, are denounced as ideological and radically rejected by a science of law freely developed in non-communist states."[188]

The state used ideological indoctrination obtained to mobilize public energy by political and ideological socialization thus shaping social forms and encouraging involvement into the political system. This system helped the Soviet regime to control the thoughts as well as actions of the Soviet citizens. The declining of the respect to the communist authorities began in Khrushchev's era when ideological directives showed its partiality.

Khrushchev's politics of repressions chose concrete aims which gave Soviet citizens the orientation of justified behavior. People were able to predict which behavior will be acceptable and which will be claimed illegal. Repressions and prosecutions on ideological base were still diffused, but the predictability of it created the subjective feeling of more freedom.

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[188] KELSEN H., "The communist theory of law", Praeger publishing house, New York, 1955, p. 193

An era of de-Stalinization in the early Khrushchev years should be characterized with a slow accumulation of protest which was revealed by declining the communist utopianism and respect for the ruling authorities while at the same time being extremely loyal to the Marxist-Leninist outlook. In place of mass-terror and repressions of Stalin's years, authorities choose more rationalized means of social control. Khrushchev period represents a time of a great political change and social variance, appearance of "dissent" – political, religious, nationalist.

As Ludwikowski R. described the process of declining towards the communist ideology and its drastic consequences for the society in general:

"For a while, ideology served to slow the process of moral corruption in socialist societies. The blind belief in Marxist-Leninist dogmas prevented the Soviet people from thinking independently. As ideological values began to lose authority, there was a drastic decline in public morality and in respect for law. Ideological decay corrupted a generation of party members. They came to understand that coercion is useful not to protect ideological values but to protect their own privileges. The devaluation of ideology has had an equally demoralizing effect on the rest of society. Workers began to realize that a double standard of morality means one morality for the party elite and another for nonparty people and ordinary party members. This realization became a major detriment to the system of public property, the central characteristic of communism. The ordinary citizen argues that, if the state doctrine is only a facade, then public property, sanctified by the ideology, belongs to no one. Hence the seizure of public property (in fact, no one's property) has nothing to do with theft. It is prohibited by law but not stamped by public morality. To be more precise, there are two public moralities, one official and the other private. The collapse of public morality contributed explicitly to significant problems in the Soviet economy: low labor discipline, neglect of equipment, absenteeism, bribery, unproductive work, lack of interest in quality output, to name only a few. The society created unofficial techniques of social compensation, methods of competition for benefits available only in backstage struggles, and means of circumventing the pretended social equality. The system created not only a black market and corruption, but also unofficial

channels through which many decisions are made and the law is avoided. A "double morality," in fact, is linked with the "double life" of the whole society."[189]

In the Soviet Union there was monopoly of information controlled by the authorities' and that accounted for the de facto isolation of the Soviet people and how they remained unconscious and naïve about the events in the world and the reality of the USSR. Soviet young people were significantly surprised when they saw that even students from People's Democracies such as Poland and East Germany invariably had considerably better clothes than they did[190]. There were however also more substantial facts which caused the communist ideology to lose credibility among Soviet citizens.

In discussing the need for drafting and enacting a new constitution of 1936, P. S. Romashkin has stated:

"The chapter on the basic rights and duties of citizens requires serious elaboration, taking into account the successes and achievements of recent years and especially such great prospects for the building of communism as ensuring the working people of the U.S.S.R. in the next few years the highest living standards in the world and creating the most favorable conditions for the creative development of each member of society. It should stress that the Soviet people, who have already won for themselves a seven- and six-hour working day, are moving towards the shortest working day in the world ...."[191]

So in accordance with the proclamations, Article 119 of the Soviet Constitution stated: "The right to rest is ensured by the reduction of the working day to seven hours for the overwhelming majority of the workers." This statement appears to be a statement of achievements. Actually, a reduction in the duration of the working day wasn't achieved in the Soviet Union and the present proclamation remained without any factual support. A

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189 LUDWIKOWSKI R. "Socialist legal theory in post-Pashukanis era", Boston College International Law Review: Volume 8 Issue 2, 1987, p.341

190 SCHAKOVSKY Z., The Privilege Was Mine, London: Jonathon Cape, 1959, p. 166 in Hornsby R. "Political protest and dissent in the Khrushchev era", a thesis submitted to the University of Birmingham for the degree of Doctor of Philosophy, Centre for Russian and East European studies European Research Institute, University of Birmingham, December 2008, p.177

191 ROMASHKIN P.S., Problems of the Development of the State and Law in the Draft Program of the CPSU, transl. in 1 Soviet Law & Government, No. 1, p. 3, at 8 (1962)

similar situation occurred with the rights of Soviet citizens proclaimed in the chapter on fundamental rights of the Constitution of 1936, they are: political rights which included freedom of speech and press, the freedom of assembly, the freedom of street processions and demonstrations, the freedom to unite in public organizations and societies of working people, the electoral rights, the equality of citizens and the freedom of conscience; socio-economic rights which include the right to work, the right to rest and leisure, the right to maintenance in old age and in sickness or disability, the right to personal property and the right of collective farm households to have their holdings. Also, the 1936 Constitution guaranteed the right to education; the personal rights which include the inviolability of the person from unreasonable arrests, the inviolability of the homes of citizens and the privacy of correspondence. As Ted Grant commented on it:

"Of course in words it was very democratic. The only thing prohibited in Russia would have been an attempt to exercise the rights declared in the Constitution and enshrined in its clauses. The right to vote for the person of one's choice, free speech and press, freedom of the individual and all other freedoms were established on paper. But they went side by side with one of the bloodiest purges, or one-sided civil wars in the history of man. Practically the whole of the Bolshevik leadership which carried out the revolution was murdered. Hundreds of thousands and even millions of workers and peasants were drafted forcibly to Siberia to work as slave labour".[192]

Towe E. distinguishes between three different state groups to which the chapter on fundamental rights of Constitution of 1936 was aimed. First, since the Constitution was published in Soviet newspapers, it obviously had a purpose to convince the people of the Soviet Union themselves that their rights were being protected as the citizens of any other country. Second group, as distinguished by Towe E., that the Constitution was aimed at people outside the Soviet Union. The third group, to which the Constitution was aimed

[192] GRANT T., "Meaning of Russia's new Constitution", Socialist Fight, vol. 4 no. 4 (May 1962), available at https://www.marxists.org/archive/grant/1962/05/constitution.htm, accessed on 15.09.2015

are the future generations for the conditions which should come with the achievement of communism.[193]

As R.Hornsby stated:

"For years state propaganda had told of inhuman conditions endured by workers in the West, a factor that had ameliorated the many privations endured by the Soviet people to some extent, but by the Khrushchev era it was an increasingly obvious lie of major proportions.[…] Growing contact with the outside world, therefore, had a two-pronged impact in this respect: it showed that people had more goods elsewhere and that the Soviet regime had persistently deceived its people."[194]

The beginning of the Khrushchev's era began with a protest and criticism of the authorities that had not been seen for many years, perhaps since the establishment of Soviet state and civil war. Among the reasons for the protest were also the consequences of Khrushchev's secret speech.

"Stalin acted not through persuasion, explanation and patient cooperation with people, but by imposing his concepts and demanding absolute submission to his opinion. Whoever opposed these concepts or tried to prove his [own] viewpoint and the correctness of his [own] position was doomed to removal from the leadership collective and to subsequent moral and physical annihilation. This was especially true during the period following the 17th Party Congress, when many prominent Party leaders and rank-and-file Party workers, honest and dedicated to the cause of Communism, fell victims to Stalin's despotism.[…]

Stalin originated the concept "enemy of the people." This term automatically made it unnecessary that the ideological errors of a man or men engaged in a controversy be proven. It made possible the use of the cruelest repressions, violating all norms of revolutionary legality, against anyone who in any way

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193 TOWE E. Thomas "Fundamental rights in the Soviet Union: a comparative approach", University of Pennsylvania law review, Vol.115-125, 1967, p.77

194 HORNSBY R. "Political protest and dissent in the Khrushchev era", a thesis submitted to the University of Birmingham for the degree of Doctor of Philosophy, Centre for Russian and East European studies European Research Institute, University of Birmingham, December 2008

disagreed with Stalin, against those who were only suspected of hostile intent, against those who had bad reputations. The concept "enemy of the people" actually eliminated the possibility of any kind of ideological fight or the making of one's views known on this or that issue, even [issues] of a practical nature. On the whole, the only proof of guilt actually used, against all norms of current legal science, was the "confession" of the accused himself. As subsequent probing has proven, "confessions" were acquired through physical pressures against the accused. This led to glaring violations of revolutionary legality and to the fact that many entirely innocent individuals – [persons] who in the past had defended the Party line – became victims.

We must assert that, in regard to those persons who in their time had opposed the Party line, there were often no sufficiently serious reasons for their physical annihilation. The formula "enemy of the people" was specifically introduced for the purpose of physically annihilating such individuals."[195]

Stalin's death and further secret speech were the turning points to slow liberalization. The most denominated desire among most of the protest movements didn't aim for revolution but for better living standards. Soviet patriotism and belief in the communist and revolutionary ideals remained strong among Soviet citizens. For the most part, these were not idealistic and proved political criticisms but protests in anger because of the hardships of living in the USSR.[196]

As could be seen, the major part of the political prisoners Khrushchev's era, about 57% were condemned for the anti-Soviet conversations, without any organized anti-Soviet activity, but still voicing strong criticism against the Soviet government. 3% were "anti-soviets" – naive people who didn't see anything wrong with expressing their dissent directly by signing or writing letters or claims to the Soviet officials. 7.7 % were sentenced

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195 Speech of N.Khrushchev, delivered at the Twentieth Congress of the CPSU February 24-25 1956, Nikita Khrushchev Reference Archive (Sub Archive of Soviet Government Documents), available on: https://www.marxists.org/archive/khrushchevhchev/1956/02/24.htm

196 HORNSBY R. "Political protest and dissent in the Khrushchev era", a thesis submitted to the University of Birmingham for the degree of Doctor of Philosophy, Centre for Russian and East European studies European Research Institute, University of Birmingham, December 2008, p.35

for being in possession of anti-Soviet literature. And only 31% were sentenced for the making and spreading of anti-Soviet leaflets. It was the only group of conscious protests. [197] Due to the information from archives from the KGB, during the period from 1957-1980 for anti-Soviet agitation and propaganda and other anti-Soviet activity 8124 people were sentenced in total. The precise statistical data about the indictments for every year is presented in the Table 1.

Table 1. Statistical data about indictment for anti-Soviet agitation and propaganda (art.70 of Criminal Code of RSFSR) and spreading false information which compromise the Soviet social order (art.190 of Criminal Code of RSFSR) during 1956-1987[198]

Period	Indictments on art.70 of Criminal Code of RSFSR	Indictments on art.190 of Criminal Code of RSFSR	Both articles	Average quantity of indictments for year
1956-1960	*4676*	-	*4676*	*935,2*
1961-1965	*1072*	-	*1072*	*214,4*
1966-1970	*295*	*384*	*697*	*135,8*
1971-1975	*276*	*527*	*803*	*160,6*
1976-1980	*62*	*285*	*347*	*69,4*
1981-1985	*150*	*390*	*540*	*108*
1986-1987	*11*	*17*	*28*	*14*
Total	*6543*	*1609*	*8152*	*254,8*

[197] KOZLOV V. and MIRONENKO S. «Крамола: инакомыслие в России при Хрущеве и Брежневе 1953-1972» [Kramola: Dissent thinking under Khrushchev and Brezhnev 1953-1972], "Materik" Publishing house, Moscow 2005, p.40-41
[198] Ibidem, 36

There is very interesting statistical data about the quantity of repressions during 1956-1960; it shows that for these years the quantity of the indictments was highest. The myth about liberal communist and Khrushchev's "thaw" should be studied. For the majority of people Khrushchev' repressions were faced with the amusement, but still during that period the state power made a lot of harsh repressions for political crimes.[199]

Statistics for imprisonment for anti-Soviet crimes showed that those who protested the most was the social class which was according to the government the most reliable, i.e. workers. In 1957 workers were responsible for 50% of all transgressors for political crimes. Official employees and peasants during that period showed more social tranquility.[200]

During Stalin's era holding just several books or articles classified as belonging to so-called "enemies of the people" were sufficient for harsh condemnation. Under Khrushchev legal requirements for inquest were more strict, as recognition of guilt of the defendant wasn't considered the main proof was imprisonment, which caused a lot of arbitrariness. Sometimes people were tortured or browbeaten in order to make that recognition. Inquest now required obligatory examination of all available proof such as witnesses, written and material evidences, expertise *etc.*

Khrushchev's measures were more liberal, partially because it was much more efficient not to sentence ideological transgressors to prison for insignificant breaches rather than risk creating serious ideological fighters after being repressed or jailed. [201] The Order of Supreme Court[202] made it possible using so-called "Prophylactic means" for the fights with ideological transgressors – governmental organs were authorized to call citizens for conversations and threaten them in case of their wrongful behavior. It was more effective – the fear of punishment caused more loyal behavior:

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[199] Ibidem, 39
[200] Ibidem, p. 39
[201] Ibidem, p.24
[202] Order of Supreme Soviet of USSR "О применении органами государственной безопасности предостережения в качестве меры профилактического воздействия" [About implementing of admonition as a means of prophylactic influence] from 25.12.1972 №3707-VIII

"Political transgressors (the most dangerous), even if they were kept in prison separately, had all chances to pass the "school of revolutionists", make connections, share experience etc. As the result after release from prison, a person, who get there being romantic and naïve fighter for justice and "truth socialism", could become experienced underground activist, whose anti-state behavior got additional motivation due to the personal offence and living a social outcast."[203]

A very important objective of such prophylactical measures was bolstering the image of socialism in world. In 1957 Khrushchev claimed that "in the Soviet Union there are no political prisoners, protests against socialism could only be done by those who are insane."[204]

7.2. The legal basis for the criminal prosecution of dissidents

In October 1960 instead of the old Criminal Code of 1926 by Supreme Council of RSFSR, a new Criminal Code of RSFSR was adopted[205], which contained more than 40 articles with components of crime somehow applicable for any anti-Soviet activity of dissidence (such as art. 64 "Parricide", art.70 "Anti-Soviet agitation and propaganda", art.72 "Organizational activity aimed for commitment serious state crimes or membership in anti-Soviet organization", art.69 "Sabotage", art. 65 "Espionage" and others).[206]

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[203] KOZLOV V. and MIRONENKO S. «Крамола: инакомыслие в России при Хрущеве и Брежневе 1953-1972» [Kramola: Dissent thinking under Khrushchev and Brezhnev 1953-1972], "Materik" Publishing house, Moscow 2005, p.34

[204] Ibidem, p.35

[205] Criminal Code of RSFSR, adopted by Supreme Council of RSFSR 27.10.1960, published in «Ведомости ВС РСФСР» [Vedomosti of Supreme Council of RSFSR], 1960, №40, p.591

[206] Hereinafter are examined the norms of Criminal Code of RSFSR of 1960. Another 14 Soviet Republics consisting of USSR adopted their own Criminal Codes. Due to the fact that all the Soviet Republics' Code were adopted based on the Law of USSR from 25.12.1958 «Об утверждении основ уголовного законодательства Союза ССР и союзных республик» [About approval of fundamentals of criminal legislation of Soviet SSR and soviet republics] published in "Ведомости ВС

Article 70 "Anti-Soviet agitation and propaganda" of the above mentioned code was the most common use for the cases of dissidence. It contemplated sanctions of incarceration from a period of 6 months to 7 years or deportation from two to five years for the first offence; and from 3 to 10 years of incarceration for reoffenders or people with criminal record for specially dangerous crimes.[207] The components of crime were any agitation or propaganda made in any form aimed at the disruption or weakening of Soviet power or spreading for the above mentioned purposes calumny information discrediting soviet state order, or any literature containing the same information.

For the purposes of declaring the dissidence activists insane article 58 of the Criminal Code of RSFSR was adopted that contemplated that "towards people, who committed socially dangerous acts in a state of mental insanity which doesn't permit to control or realize the behavior, or towards those who became mentally ill before the judicial judgment or during imprisonment, the court could apply the following compulsory medical measures: hospitalization in ordinary psychiatric hospitals, hospitalization in psychiatric hospitals of special type"[208].

Compulsory hospitalization was a very convenient way for the state to isolate dissent activist without a trial. Also, giving a positive diagnosis to mentally ill people, the Soviet state discredited the information about human rights violations which dissent activists tried to translate to the West.

In 1961, the Ministry of health confirmed a concordat with the Ministry of Internal affairs and General Prosecutor's Office which adopted the "Instruction for urgent

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CCCP"[Vedomosti of Supreme Council of USSR], 1959, N 1, p. 6, the text of all Codes are similar for the purposes of identity of socialistic legislation. For the purposes of the present research, examination of norms Criminal Code of RSFSR could be seen as examination of Soviet criminal legislation due its conformity with other Soviet Republics.

[207] Article 70, Criminal Code of RSFSR, adopted by Supreme Council of RSFSR 27.10.1960, published in «Ведомости ВС РСФСР» [Vedomosti of Supreme Council of RSFSR], 1960, №40, p.591

[208] Article 58, Criminal Code of RSFSR, adopted by Supreme Council of RSFSR 27.10.1960, published in «Ведомости ВС РСФСР» [Vedomosti of Supreme Council of RSFSR], 1960, №40, p.591

hospitalization of mentally ill people who represent social danger"[209]. Due to this prescription it was possible to detain and to excoriate the emergency hospitalization of any person whose behavior was potentially dangerous to society. Instruction prescribed the possibility of detaining the person without their consent or that of their parents, tutors or any other representative (Article 1 of the "Instruction for urgent hospitalization of mentally ill people who represent social danger").

State organs of internal affairs (or "militzia") were obliged to assist the medical employees for emergency hospitalization of mentally ill people representing social danger in cases of their resistance, aggressive behavior or attempts to escape, or in cases of resistance from hospitalization from the side of parents, tutors or other people. (Article 5 of the "Instruction for urgent hospitalization of mentally ill people who represent social danger") It was prescribed that during three days after the emergence from hospitalization that the patient will be observed by the commission for determination of diagnosis and further medical treatment.

In 1967 the Ministry of healthcare agreed with the Supreme Council, General Prosecutor's Office and Ministry of internal Affairs, adopted a new instruction, "About the procedure of forced medical treatment towards mentally ill people committed socially dangerous acts"[210]. New instruction prescribed strict documentary legalization (medical assignment, procedure and terms of the examination by the commission), but contained the same reasons and procedure of the detainment for the emergency hospitalization.

Some of the symptoms incorporated into Soviet diagnostic criteria for mild ("sluggish") schizophrenia and, in part, for moderate (paranoid) schizophrenia are not accepted as evidence of psychopathology under international diagnostic criteria[211]. Specific

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[209] «Инструкция по неотложной госпитализации психически больных, представляющих общественную опасность» [Instruction for emergency hospitalization of mentally ill people representing social danger], adopted 10.10.1961 by Ministry of healthcare of USSR by order №4-14-32

[210] "Инструкция о порядке применения принудительного лечения и других мер медицинского характера в отношении психически больных, совершивших общественно опасные деяния" [Instruction about the procedure of forced medical treatment towards mentally ill people committed socially dangerous acts], adopted 14.02.1967 by Ministry of healthcare of USSR

[211] BONNIE Richard J. "Online Journal of the American Academy of Psychiatry and Law", №30 March 2002, p.136-144, available on: http://www.jaapl.org/

idiosyncratic examples identified in the inter-views included diagnosing individuals demonstrating for political causes as having a "delusion of reformism" or "heightened sense of self-esteem" to support a diagnosis of schizophrenia. "Sluggish" schizophrenia could happen to patients "whose mental disease goes with their social growth, ability to study (also in higher education establishments), performance of complicated professions such as engineer, architecture etc.." Consequences of "sluggish" schizophrenia were desire to resign from the communist party, attempts to reach foreign embassies for asking political asylum[212], or disagreement with Soviet interpretation of Marxism and "groping after truth"[213]. Any type of behavior which didn't coincide with soviet legal order was interpreted as deviant, and as consequence – inadequate.

Dissident and Nobel Prize winner for peace Andrey Sakharov writes in his memoirs that some people were sent to psychiatric experts after claims to the General Prosecutor's Office or Supreme Council of USSR and for attempts in trying to exercise their rights to use official mechanisms of the Soviet state[214]. This fact was confirmed by different sources: «In Moscow… almost 12 people a day are arrested only from the waiting chamber of Supreme Council of USSR, also about 2-3 people a day who tried to reach any foreign embassy, some from other places or just from the street. The half of the arrested is hospitalized by force».[215]

The judicial system was seen not as a separate power but as part of common "law-enforcement machine", which was connected with common aims with other law-enforcement authorities, such as Ministry of Home Affairs, the Prosecutor's Office, and State Security Service. The main aim of all of these authorities was fighting crime and the role of the court in this chain of "common fight" was to legally finish the process of punishment of criminals. That role of the justice was officially proclaimed in Soviet

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212 PODRABINEK Alexandr "Punitive medicine", "Khronica press" publishing house, New York, 1979, p.78
213 Ibidem, p.104-105
214 SAKHAROV A.D. «Воспоминания» [Memoirs], Publishing house "Время" [Time], Moscow, 2006, p.323
215 ALEKSEEVA L., ZUBAREV D., KUZOVKIN G. "Документы Московской Хельсинской группы 1976-1982" [Documents of Moscow Helsinki Group 1976-1982], Publishing house of Moscow Helsinki Group, Moscow, 2006, Document №8, p.84

doctrine. The Chairman of Justice of the Council of People's Deputies, Krylenko N.V., stated that, "correct and corresponding to the proletariat interests' functioning of the court and judicial system could be guaranteed only if there is systematic and daily managing of it on the part of directing authority on every case which takes place."[216] The Judiciary was not considered to be independent- on state level it was just "an instrument of the state"[217].

The majority of laws had a serious disadvantage – they didn't have a mechanism of realization of norms and guarantees. Almost all laws of that epoch, especially this concerning environmental protection, national education, protection of the historical and cultural monuments, human rights and freedoms, had very abstract formulations and weren't sanctioned if violated.

Citizens of the Soviet Union couldn't use the most important Constitutional rights and guarantees because during a significant period there weren't any adopted laws regulating the procedure of realization of the freedom of expression, freedom of the press, freedom of manifestation *etc.* For this reason a lot of very important state guarantees existed only in declaration but without the real instruments for their realization.

Such a situation lasted since the Stalin's epoch and even after his death in 1953. During 1930-1950 even Labour Code and Provision of the courts weren't open to public access even though they were of great importance for the everyday life of citizens. The main part of the legal acts were not designed for public use, they were sent instead through the administrative channels in a very detached way.

Priority of the regulations from the Party and other communist legal acts made the codification of official laws more difficult. During the period of the NEP (New Economic Policy) a very successful first attempt of codification was made, during only two years (1922-1923) seven codes were created: Criminal, Labour Code, Land Code, Criminal Procedure Code, Civil Procedure and Code of the laws about Forests and in 1927 "Systemized collection of the laws of RSFSR" was published.

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[216] KRYLENKO N.V., «К реформе действующей судебной системы» [To the reform of modern judicial system], Daily Soviet Justice, №5, 1922, p.4-5

[217] KRYLENKO N.V., «Судоустройство РСФСР» [Judiciary of RSFSR], Moscow Legal NKU Publishing House, 1923, p.458

8. Unknown ideological transgressors in the Soviet Union

8.1. The complexities of research on political crimes

Initially historical researchers were limited to the stories of dissidents and their narrow circle of Soviet ideological fighters. That is natural since a lot of sources on dissent were published (even in foreign literature about their activity) and files on other ideological transgressors were kept in the closed archives during Khrushchev's and Brezhnev's era, which were declassified only after 1991. Due to the Decree of the President of Russian Federation from 23 June 1992 «О снятии ограничительных грифов с законодательных и иных актов, служивших основанием для массовых репрессий и посягательств на права человека» [About removal restriction stamps from legislative and other acts, which created a foundation for mass repressions and violations of human rights] the major part of the documents dedicated to the human rights abuses in Soviet Union became available for the research in 1992. That caused a wave of publications of the type of "sensational journalism", more systemized research appeared much later.

Clearly, in the Soviet period an academic study of dissent wasn't possible and instead there was anti-dissident propaganda [218]. After the collapse of USSR in 1991 there was a rise of the interest in the dissent and violations of human rights in the USSR, but publications were more likely to be sensationalist journalism rather than academic research since there was a lack of access to any kind of archived sources (declassification of the archives began later).

Scholarly works of a very high standard, embracing a strong combination of archival materials of primary and secondary sources, are produced by the enthusiasts working in Memorial [219]. Works written by Russian historians of Memorial such as V.Kozlov, A.Pyzhikov, G.Kuzovkin, E.Zubkova, B.Firsov deserved well-known

[218] See, for example: YAKOVLEV N.N. «ЦРУ против России» [CIA target: USSR]. Published by «Правда» [Pravda], Moscow, 1983

[219] Memorial is a historical society founded in 1989 which main objective was to conserve the memory of the victims of the political repressions in the Soviet Union. Nowadays is one of the biggest human rights organizations in Russia.

recognition for particularly high levels of quality and precise character due to the wide use of the archival and documentary sources. In their study they highlight two types of sources – "dissent centralized", which are based solely on the activity of dissent activists, and other archival researcher, which provide the whole picture variegated ideological transgressors.

To the first group of "dissent centralized" researches they attribute an "encyclopedia" of dissent life in Soviet Union by Ludmila Alekseeva (born in 1927) - who was a dissent activist and one of the founders of the oldest human rights organization Moscow Helsinki Group in 1976. Nowadays L.Alekseeva is a member of Presidential Council on development of civil society and human rights.

The work written in 1987 "Soviet dissent: contemporary movements for national religious and human rights"[220] gives a detailed overview of different struggles and dissent movements that existed within USSR. Another section of sources of the same group are the personal memoirs, notably of such Soviet dissents as Andrey Sakharov[221], Aleksandr Solzhenitsyn and Vladimir Bukovsky[222]. The memoirs are mostly focused on Brezhnev era and contain the less wide-ranging subject rather than academic sources, but being written with passion and very personal involvement in the issues on which the dissents protested or campaigned – memoirs give a clear inside view and understanding of the events occurred.[223]

Another group of the sources based on scientific archival research: it could be attributed materials from the "Documents of Moscow Helsinki Group for the period of

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[220] ALEKSEEVA Ludmila "Soviet Dissent: Contemporary Movements for National, Religious and Human Rights", Connecticut: Wesleyan University Press, 1987

[221] SAKHAROV A.D. «Воспоминания» [Memoirs], Publishing house "Время" [Time], Moscow, 2006

[222] BUKOVSKY V. «И возвращается ветер» [To build a castle: my life as a dissenter], Publishing house «Захаров» [Zakharov], Moscow, 2007

[223] An interesting fact that numerous memoirs of dissenters were published in English language in the West during 1970s and 1980s and were published for the first time in Russian recently (These include V.Bukovsky «И возвращается ветер» [To build a castle: my life as a dissenter], Moscow, 2007, Zakharov publishing house, L. Alekseeva and P.Goldberg "Поколение оттепели" [Thaw generation], Moscow 2006, Zakharov publishing house and others).

1976 – 1982" compiled by D.I.Zubarev, G.V.Kuzovkin[224]. The book details the evidence of the violations of human rights which were addressed to the Moscow Helsinki Group[225] by the Soviet citizens with investigations and confirmation of the violations. Making this distinction of sources, Kozlov and Mironenko wrote:

"In the total disregard we can find the individual anti-governmental statements of "ordinary people" during the epoch of Khrushchev. And if liberal and social-democratic claims of intellectuals from Moscow and Leningrad [San-Petersburg] were somehow distributed to the West, the modern historical scientists couldn't say anything about attacks on Khrushchev from Stalin's position[226] , nationalistic underground movements in Russia and Soviet republics, fascist organizations of young activists. Also, the phenomenon of increasing national wide-spread hostility to Khrushchev isn't studied enough during the first part of 1960s (the events happened in Novocherkessk in 1962[227] are not the only evidence, which became a symbol of national dissatisfaction, it doesn't reflect other forms of national protest, including for example terroristic threads addressing to the losing his popularity leader)"[228]

Protest against state and its power remains largely unknown, and the major part of ordinary people's protest, happened in private life of Soviet citizens is not studied. There is a part of "social and cultural reality of Russia" which is totally unknown:

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224 "Документы Московской Хельсинской группы за период с 1976 - 1982" [Documents of Moscow Helsinki Group for the period of 1976 – 1982] compiled by D.I.Zubarev, G.V.Kuzovkin, Moscow, Publishing house of Moscow Helsinki Group, 2006

225 Moscow Helsinki Group – the oldest human rights organization in Russia, founded on 12 May 1976 it proclaimed its main purpose to promote the execution the rights and guarantees proclaimed of the Final Act of the Conference on Security and Cooperation in Europe (Helsinki Final Act) signed by the Soviet Union in 1975

226 After the famous Khrushchev's speech on denouncing Stalin on 20th Congress of CPSU in 1956, was seen by many Soviet citizens as heresy. People, brought up with the attitude to Stalin as a father of nation, refused agree with the new line of Khrushchev on denouncing the cult of Stalin. It caused mass protests, information about which was hidden in the archives of KGB.

227 On 1-2 June of 1962 in Novocherkessk more than 5000 citizens of the town demonstrated against the Khrushchev. Firstly, strike began on local factory and later was supported by other citizens. The event are called nowadays "Novocherkessk shooting" since due to the official data during the dispersal 26 people were killed and more than 80 seriously wounded. Other participants were sentenced with further rehabilitation in 1996.

228 KOZLOV V. and MIRONENKO S. «Крамола: инакомыслие в России при Хрущеве и Брежневе 1953-1972» [Kramola: Dissent thinking under Khrushchev and Brezhnev 1953-1972], "Materik" Publishing house, Moscow 2005, page 12

"At the same time the protests of simple people is almost not studied. Social-psychological portrait of anti-Soviet activist is unclear and fuzzy, it is diffused in the abreaction of "population", its oppositional behavior, tactics, way of expression, ideological orientations and life path almost unknown to the modern historians, as it was unknown to the Soviet intelligence of post-Stalin's era this usually tongue-tied critics of the regime, sometimes intentional and goal-seeking, but more often spontaneous and situational.

Those people didn't wrote their memoirs and they didn't create myths about themselves, they didn't emigrate to the West and didn't write, and actually couldn't write, their stories. They came out from the people and after their sentence for their protest, diffused in the masses, or died somewhere obscurely in prisons and colonies. But they were the absolute major part of criminally persecuted people for anti-Soviet agitation and propaganda during 1950-1980s"[229]

8.2. Indictments and criminal prosecution in the early Khrushchev's period (1953-1960)

As stated above, a lot of dissent and protest behavior remained unknown, since protest expressed in a private life by ordinary people – workers, teachers, students, remained documented only in judicial decisions and inquest or procurators' reports. Though more interesting is to see that documented facts of protest since they reflect more the life of the epoch and character of political mood and attitude to the state and justice in the masses.

Looking through procurators' reports in the unclassified archives, it could be seen that usually protest was expressed by single people, and more interesting they were claimed and criticized by society who stood for the political order and protected it. As can clearly be seen in the case of a student in the 7th grade of school, Larisa Ogorinskaya. At the funeral meeting at her school because of the death of Stalin, the girl said "it serves him

[229] Ibidem, p. 17

right" for which she was beaten by her classmates. The punishment on behalf of the state was even more harsh – 10 years of prison. Such protection of social order was a huge merit of ideological education, and as one of the prisoners wrote in his claim, the whole atmosphere in the Soviet Union:

"All my conscious life passed when the First Secretary of Central Committee was Stalin. All achievements during peaceful periods and wartime, all works of art, ideological education was connected with the name of Stalin. I can admit that it wasn't only with me. When Stalin was dead I saw tears in many people's eyes. That tears were real, and not for effect."[230]

The case of Larisa Ogorinskaya is one of numerous occasions of how soviet citizens stood for the ideological inviolability of the state and how regime fought against the lightest forms of political disagreement. From the report of the executive Prosecutor from the department for specific cases of the Office of General Prosecutor of USSR from 28 May 1953, case of Ogorinskaya L.M.:

> "Regional Lvovsky Court 31 March 1953 sentenced Ogorinskaya Larisa Mikhailovna, born in 1953, non-party member, Jewish, student of 7th grade of school, according to the art. 58-10 of part 1of Criminal Code of Ukrainian SSR for 10 year of imprisonment and correctional labour works.
>
> Ogorinskaya L.M. was drawn to criminal responsibility for the fact that being a student of 7th grade of school №50 of the town of Lvov, 6 March 1953 during the funeral meeting of the students of the school expressed her hostile views because of the death of one of the leaders of the Communist Party and Soviet Union.
>
> Supreme Court of Ukrainian SSR due to the cassation appeal revised the case and issued the order from 22 April 1953 to leave without amendments in force the decision of the Regional Lvovsky Court form 31 March 1953.

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230 General Archive of Russian Federation, F. P-8131, OP.36, Case 1173, page 7, cited from Kozlov V. and Mironenko S. «Крамола: инакомыслие в России при Хрущеве и Брежневе 1953-1972» [Kramola: Dissent thinking under Khrushchev and Brezhnev 1953-1972], "Materik" Publishing house, Moscow 2005

[…] Ogorinskaya really during the funeral meeting on 6th March 1953 due the fact of the death of one of the leaders of Soviet Union expressed hostile views which were the following:

Making a speech at the funeral meeting the student of school №50 told:

"Comrade Stalin gave us a happy childhood, even if we live in the orphan's home, they provide us clothes and teach us." And then, he added that "death of comrade Stalin is a huge loss for the Soviet people. Comrade Stalin dead today at 9.50 AM"

During that speech, standing among other students in the room, Ogorinskaya said: "It serves him right!"[…]

Testimony of Gukov Vladimir:

"[…] Student Ogorinskaya said smiling "it serves him right". Me, Maksimenko, Isaev, Gladkih have heard it and we were indignant at this. When she was going out from the meeting Gladkih beat her for those words, and when she turned to the studying room I beat her as well."

During the interrogation on 13 March 1953 Ogorinskaya said:

"I felt anti-Soviet influence because of the conversations of my parents: my stepfather and my mother, who are anti-Soviet by their character.

My stepfather, he is not my biological father, Ogorenko Mikhail, sometimes comes back from work and tells my mother that all the ruling posts aren't given to the Russians and Ukrainians, but Jews are taking the ruling positions.

He blamed government for this." […]

Ogorinskaya refused to tell her confession in court, explaining that she did it because everybody was saying that she is guilty. […]

Due to the above-stated:

The case is studied in a proper way since all evidence of the anti-Soviet claims of Ogorinskaya are proven.

For the evaluation of the public danger of Ogorinskaya the case should be addressed to the head office." [231]

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[231] General Archive of Russian Federation, F.P-8131.OP31, Case 37877, pages 15-21, cited from Kozlov V. and Mironenko S. «Крамола: инакомыслие в России при Хрущеве и Брежневе 1953-1972»

Ogorinskaya was released from prison on 17th June 1953 due to the amnesty of 27 March 1953[232]. Very often in Russian histories the amnesties were connected to the change of political leader, in the case of the amnesty of 1953 in was also the change of the political course. After Khrushchev's speech against of the cult of personality of Stalin, political criticism of an ex-leader wasn't seen any more as a crime. That is why the wave of releases from prison affected mainly those who was sentenced for anti-Stalin's protests (and not anti-Soviet in general).

Another case of the guardianship of the society could be seen in the case of Katrich L.I. From the report of the Prosecutor's assistant on special cases of Lvovskaya Oblast from 15 October 1953 on the case of Katrish L.I.:

"[…] Katrich Lia Isakovna, born in 1918, Jewish nationality, with middle education, place of birth is Odessa, unemployed, lived temporarily in the city of Lvov, 12.04.1953 was arrested and claimed for criminal responsibility in according to the art.54.10 of part 1 of Criminal Code of Ukrainian SSR […]

Transgression for the criminal responsibility of Lia Isakovna Katrich was the fact that during funeral days on 8 and 9 of March 1953, being in the telephone central office in the city of Lvov, made anti-Soviet expressions about the death of one of the leaders of Soviet Union.

Anti-Soviet expressions of Katrich L.I. about Communist Party and Soviet leaders were proved by the testimonies during the court proceeding […]

Testimony Shipilov Aleksey Petrovich […] said:

"8 of March 1953 about 16.30 I was in the central telephone station of the city of Lvov where my wife works Shipilova Tatyana Semenovna. I saw as Katrich Lia Isakovna came to my wife and seeing a funeral ribbon on her, asked with a grin and ironical smile: "Are you in a mourning today?" I was shocked and indignant by such behavior of Katrich and asked her: "Doesn't the mourning

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[Kramola: Dissent thinking under Khrushchev and Brezhnev 1953-1972], "Materik" Publishing house, Moscow 2005

232 Decree of Presidium of Central Committee of CPSU from 27 March 1953 "Об амнистии"[About Amnesty]

concern you as well?" Katrich didn't answer and went away. […] Me, being a citizen of Soviet Union, and being hurt by our loss, took measures to impede Katrich L.I.[…]"

Testimony Andreeva Vera Vladimirovna said:

"[...] In the morning on 9 March 1953 about 8.30 Katrich Lia Isakovna came to the central telephone station and ordered for a telephone call the town Proskutov, after that the employee who took the order from Katrich was changed for Shipilova. I heard that Katrich said something bad to Shipilova and came to ask about the quarrel. When I came, Katrich said to both of us: "I wish you to be in the mourning all your life and in tears for Stalin.."[…]

Due to that facts and testimonies Court of Lvovskaya Oblast made twice the decision for the indictment of Katrich in making anti-Soviet claims about the death of the leader of Soviet Union and Communist Party. Katrich Lia Isakovna didn't admit herself to being guilty, she explained it by saying that she didn't have normal relations with testimonies and they said in the court against her to harm her.

Supreme Court of Ukrainian SSR during the proceeding in cassation found controversies in the testimony evidences and claim the case as unproved.

In according with the above-state I make a conclusion that Katrich Lia Isakovna was called to criminal account and claimed guilty soundly by the decision of the Court of Lvovskaya Oblast according to the articles 54-10 part 1 Ukrainian SSR.[…]"[233]

Another evidence of the fight of the state against ideological transgressors is the case of the teacher of history in Chita, who expressed her political views to her students. From the report of vice-Prosecutor of the Chita Oblast on special cases from 29 May 1953 on case Kzakova G.A.:

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[233] General Archive of Russian Federation F.P-8131 Op.31, Case 40510, pages 3-6, cited form Kozlov V. and Mironenko S. «Крамола: инакомыслие в России при Хрущеве и Брежневе 1953-1972» [Kramola: Dissent thinking under Khrushchev and Brezhnev 1953-1972], "Materik" Publishing house, Moscow 2005

"Kazakova Galina Alfonsovna, born in 1923, place of birth Shimanovskaya, Amurskaya Oblast, Russian nationality, citizen of USSR, from the family of government official, member of VLKSM [All-Soviet Lenin's Communist Union of Youth], with higher pedagogical education, before arrest worked as a teacher of history in the school №4 of the city Chita.

By the Court of the city of Chita Kazakova admitted guilty the fact that being a teacher she made an anti-Soviet propaganda between her students.

7 March 1953 during the lesson she said calumny against the leaders of Communist Party and Soviet government, expression against them anti-Soviet speeches.

20 April 1953 Court of Chitinskaya Oblast sentenced Kazakova to 10 years in prison and 3 years of deprivation (limiting) of rights.

Judicial board on criminal cases of Supreme Court RSFSR on 12 May 1953 left the decision in force and complaint of Kazakova without compliance.

In the letter to the Secretary of Central Committee of Communist Party Khrushchev N.S. father of imprisoned Kazakova A.I. claimed the crime of a daughter an incident. Him, his daughter and his wife due to their past didn't have any indictments, and he highlights the fact of being the member of Communist Party since 1924. […]

Form the material of the case is evident that the proceeding couldn't be terminated since Kazakova committed a very serious crime.

Being a teacher, Kazakova made calumniate propaganda between students. So, 7 March 1953 during the history lesson in the grade 9 "A" Kazakova made an expression of calumny against leaders of Soviet Union and Central Committee of Communist Party. The same day after the lessons in the pioneer's room in the presence of students Pahomova, Tyrymova, Mikhailovsky, and Shtein, - Kazakova spread the calumniate expressions.

The guilt of Kazakova is proved by her own confession and by testimonies Tyrymova E.N., Pahomova G.S., Zhukovskaya A.S., Kotova A.A. and Mikhailovskaya N.S. The student of the 9th grade of school in the court's proceeding testified the evidence:

"Kazakova G.A. is a teacher of history at our school, and 7 March 1953 on the history lesson after the meeting Kazakova answered on the questions of

the student and told: that when Lenin was alive, Stalin had imperceptible position.

About diplomats, Kazakova told that they are people, whose words doesn't correspond their actions, making mistake that these are the diplomats of capitalist countries. […]

We asked, why Allilueva [the wife of Stalin] died early? She answered that she was poisoned under the special order as enemy of people since she tried to compromise Stalin.

Kazakova told us, that being in exile, Stalin had several wives and children." […]

According to the stated above and art. 428 of Code of Criminal Procedure, to admit to be correct the decision form 20 April 1953 of the Court of Chitimskaya Olblast and reasonable the punishment for Kazakova Galina Alfonsovna, and to leave the complaint of Kazakov Alfons Iosifovich without compliance."[234]

Anti-Soviet conversations were also a very common crime (about 20% from total number of cases for political crimes) for imprisonment. Another interesting feature of the reaction of the state on the private forms of protest was that talking against Soviet power even in a drunken state was considered as a crime. In case of Basov Boris, such drunken conversation about politics resulted in 10 years imprisonment (but with further ahead release due to the amnesty). From report of the General Prosecutor's assistant[235] of Krasnoyarsky Kray on special issues from 4th June 1953 on case Basov B.A.[236]:

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234 General Archive of Russian Federation, F.P-8131, Op.31, Case 38002, pages 24-26 cited from Kozlov V. and Mironenko S. «Крамола: инакомыслие в России при Хрущеве и Брежневе 1953-1972» [Kramola: Dissent thinking under Khrushchev and Brezhnev 1953-1972], "Materik" Publishing house, Moscow 2005

235 Due to the ordinance of General Prosecutor of USSR №85 from 1 August 1956 "О порядке рассмотрение органами прокуратуры дел о государственных преступлениях" [About the procedure of examination by the Office of General Prosecutor of the cases about crimes against state], the state officials from Office of General Procurator controlled all the proceedings on crimes against state

236 Original document from General Archive of Russian Federation, №Р-8131, [Оп.31 Д.38248] pages 5-6 cited from Kozlov V. and Mironenko S. «Крамола: инакомыслие в России при Хрущеве и Брежневе 1953-1972» [Kramola: Dissent thinking under Khrushchev and Brezhnev 1953-1972], "Materik" Publishing house, Moscow 2005, p.91

"By the decision of the Krasnoyarsk's district Court form 11 April 1953 due articles 58-10 part 1 Criminal Code of RSFSR Basov Boris Aleksandrovich, born in 1939, literate (educated), not member of the party, without previous convictions, before being arrested worked as radiologist in district hospital of Krasnoyarsk city, is sentenced to 10 years in prison and 3 years of deprivation (limiting) of rights.

With the decision of Judicial board on criminal cases of Supreme Court of RSFSR from 28 April of 1953 the decision of Krasnoyarsk's district Court from 11 April 1953 retained in force.

Krasnoyark's district Court acknowledged that Basov is guilty in committing the following: on 5th March 1953 Basov, being not in a sober state, in the shop in the presence of other citizens Stepanenko and Muraviev told anti-Soviet calumny toward one of the leaders of Communist Party and Soviet government.

During indictment, Basov didn't admit his guilt explaining that he was drunk and didn't remember anything. […]

During the interrogation in the judicial process, a witness Stepanenko indicate: "On 5th March 1953 I met Muraviev at the market and we went from there to the shop (larek). Basov entered at the same shop. I didn't know Basov and never met him before. One of the visitors of the shop began speaking about state of health of one of the leaders of Communist Party and Soviet government[237], to which Basov answered: "Let him die, there are

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[237] That is interesting phenomenon, by the Decree of Judicial Board on criminal cases of Supreme Court of RSFSR (1959) prescribing "inadmissibility of statement in the text of the judicial decisions authentic anti-Soviet expressions." (Original Document from General Archive of Russian Federation, P-8131, ОП 31, Д.86071а page 11 cited from KOZLOV V. and MIRONENKO S. «Крамола: инакомыслие в России при Хрущеве и Брежневе 1953-1972» [Kramola: Dissent thinking under Khrushchev and Brezhnev 1953-1972], "Materik" Publishing house, Moscow 2005, page 24). Before that decree the rules of the fixation of the entry of judgement required writing the anti-Soviet claims of defendant in

scores of people to take up his position". Someone answered: "There are scores of people but not as him, millions of people will cry if he dies". Basov answered: "Millions of people won't cry, they will be happy". All visitors were indignant at Basov, and me with Muraviev inhibited him" […]

In his claim, Basov specified, that there were many visitors in the shop that day when he was drunk, and not all of them were interrogated. Basov insisted that he didn't make any anti-Soviet claims.

According to the stated above, due to the absence of foundations for the protest, I insist to refuse to Basov Boris Aleksandrovich on judicial revision of his case…" [238]

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conjunctive mood – "defendant claims allegedly that there is no democracy in USSR". Later, it was prohibited even call the surname of communist leader who was criticized (as it can see above in the document). Firstly, that censorship was required only for public document such as judicial decisions, but than, it was also spread to the internal instructions and reports. After 1960-1970 under Brezhnev it was prescribed to avoid to specify somehow the dissent expressions, and even in judicial decisions it was restricted to the description as "anti-Soviet" claim, "reformist", "politically dangerous" (KOZLOV V. and MIRONENKO S. «Крамола: инакомыслие в России при Хрущеве и Брежневе 1953-1972» [Kramola: Dissent thinking under Khrushchev and Brezhnev 1953-1972], "Materik" Publishing house, Moscow 2005, p.25).

[238] By the decision of Judicial board on criminal cases of Supreme Court of USSR from 2 March 1955, the sentence of Krasnoyarsky district Court from 11 April 1955 and decision of Judicial board on criminal cases of Supreme Court of USSR from 28 April 1953 towards Basov B.A. were altered and punishment was diminished to the 5 years of prison. According to the articles 1 and 6 of the Decree from 27 March 1953 "On amnesty" B.A.Basov was released from punishment and expunged from the conviction.

9. Soviet legal thought in the 1950-1960s

9.1. Redefining of law: S.Kechekyan, A.Stalgevich and L.Yavich

During the 1950s the process of "redefining of law" began. The initial definition which was formulated by A.J.Vyshinsky was claimed "narrow normative", even if in the strict scientific sense it wasn't normative in the meaning of Kelsen – the strict and precise following of the norm. Vyshinsky authenticated the law with the legal norm; Vyshisnky's definition was closer to "potestarism" since it confirmed the absolute power of the communist party. Vyshinsky himself agreed with that difference in defining the "normativism" concerning his definition. His definition was criticized for reduction of the meaning of the law to the legal norms:

"Law is a system of rules of behavior, expressing the will of the ruling class and formulated in legislative order, through the customs and rules of common living, sanctioned by the state power, and exercising of which are forced by the coercive power of the state for the purposes of protection, strengthening and development of the social relations which are favorable to the ruling class".[239]

So, beginning from the 1950s new phenomena in legal scholarship appeared, some lawyers begin oppose narrow normativism of Vyshinsky alternative concepts. S.F.Kechekyan and A.A.Piontkovsky interpreted law as unity of legal norm and legal relations, others such as A.K.Stalgevich and J.F.Mikolenko as unity of legal norms, legal relations and legal consciousness. So, all alternative theories added additional elements to the definition of Vyshisnky.

As V.S.Nersesyants described this hew branch of Soviet legal scholarship:

"Correlation of freedom, law and legislation isn't studied enough in our literature. During the 1920-30s due to the analysis of the problems of the essence of law and general

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[239] VYSHINSKY A.J. "Основные задачи науки советского социалистического права" [Main objectives of the Soviet science of socialist law] from "Вопросы теории государства и права" [Issues of theory of state and law], State publishing house of legal literature, 1949, p.10

definition of law, some aspects of correlation of law and legislation were highlighted. But in later years this problematic issue was forgotten by Soviet researchers, the definition of law adopted in the 1930s in fact was interpreting law as legislation. Different Soviet and foreign scientists criticized this definition numerous times. Even considering all differences of their positions, the followers of "wide approach" see the main defect of present definition of law which is prevailing in literature, in its "narrow" normative character. For overcoming of this defect S.F.Kechekyan and A.A.Piontkovksy offer to include into the notion of law also legal relations, J.F.Mikolenko suggests adding to the law apart of legal relations also research of legal consciousness, L.S.Yavich offers to study in terms of law subjective law. These and other similar suggestions are caused by the interests of further development of the socialistic theory of the strengthening of the guarantees of rights and freedoms of individuals and widening of the methodological range of legal science."[240]

One of the prominent scholars who opened the discussion towards the wide-normative approach by uniting norms with legal relations was professor of legal faculty of Moscow State University – Stepan Kechekyan. He wrote a profound work on theory of state and law "Legal relations in socialistic society", where he started explaining correlation and difference between legal relations and legal norms.

He stated that, "since law is determined by economics, the law couldn't be established arbitrarily by the state. This is an illusion that law is based only on the will of the state"[241]. Kechekyan used the same approach for legal relations. Taking as the base classical Marxian statement about political economy, Kechekyan wrote that "legal relations are rooted into the material conditions of the life of society."[242] Logically from these statements Kechekyan highlighted dependence of legal relations from industrial relations, but with the necessity not to authenticate them.

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[240] «Круглый стол «Советского государства и права» [Symposium of "Soviet state and law"], Periodical journal "Советское государство и право" [Soviet state and law], Publishing house "Наука" [Science], Volume 7, July 1979, p.72

[241] KECHEKYAN S.F. "Правоотношения в социалистическом обществе" [Legal relations in the socialistic society], Publishing house of the Academy of Science of USSR, Moscow, 1958, p.8

[242] Ibidem, p.7

Insisting on "wide" approach towards the definition of law, Kechekyan stated, that law insist of two elements, legal norms and legal relations themselves:

"Law is the legalized position of ruling class for the expression its will. System of social relations which corresponds to the interests of the ruling class and its will is expressed in the legal norms. This system of social relations is formed: a) by adopting legal norms, b) in the result of exercising of rights and obligations of individuals and organizations, which are prescribed by the legal norms. Through this process of influence of legal norm on the social life we can observe law itself and the regulating function of law."[243]

Explaining his concept, Kechekyan stated close interaction and interdependence of norms and legal relations: "Since law is a complicated phenomenon, defining law as a system of norms we mean not only some dispositions prescribing obligatory behavior, but the dispositions which are functioning, we mean that legal norms shape certain legal obligations for citizens and certain permissions for them, and we mean that legal norms are embodied in certain legal relations"[244]

And from this statement Kechekyan logically makes a declaration about the unity of legal norms and legal relations:

"Legal norms and legal relations form in unity, that is why it won't be correct to divide them metaphysically. Also, attempts to see the norms as something secondary, deriving from the social relations, will be groundless, and to see legal relations as something independent as make many bourgeois lawyers is inadmissible."[245]

Kechekyan admits that sometimes legal relations could anticipate the adoption of adequate legislations if those relations are relatively new for the certain type of the society:

"Disposition about the unity of law and legal relations formulated above and correct for the already shaped and stabilized the system of law, must be seriously mended

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[243] Ibidem, p. 8
[244] Ibidem, p. 34
[245] Ibidem, p.19-20

towards the period of foundation and initial appearance of the law of new type. A new type of law couldn't at once embrace all spheres of social life. Legal relations very often go ahead of norms of law. Legal character of those social relations in situation of absence of relevant legal norms uses legal consciousness of individuals of ruling class."[246]

But still confirming that legal relations sometimes pass ahead of legal norms, Kechekyan criticized the position of other legal scholar A.K.Stalgevich about the priority of legal relations under state's legislation.

Stalgevich claims that: "Legal relations is one of the form of expressing the economic relations and they are mediated by legal norms."[247]

In his article *"Some questions on theory of socialistic legal relations"* A.K.Stalgevich elaborates his statement about priority of legal relation under the state legislation. It was based on statement of classical Marxian approach that material conditions of industrial production form the basis of the society, and then follows the superstructure which is based on material relations. Stalgevich explains:

"State, exercising its politics expressed in legal norms, through the legal relations direct and organize certain frames for holding the desire social order, the governmental bodies, social organizations, government official and citizens, and makes an active influence on the development of society in the interests of the ruling class. From the studying of classics of Marxism-Leninism one can make a conclusion that legal relations are relation of the superstrate (it means ideological), which are determined by the material relations, which correlate with the legal norms, and that material relations between individual who have common rights and obligations are taken to the consideration by the state for the creation of relevant legal norms."[248]

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[246] Ibidem, p.7
[247] STALGEVICH A.K. "Некоторые вопросы теории социалистических правоотношений" [Some questions about theory of socialistic legal relations], Journal "Советское государство и право" [Soviet state and law], Publishing house of Institute of State and Law of Russian Academy of Science, Moscow, 1951, №3,p.24
[248] Ibidem, p. 25

Kechekyan criticized this position of Stalgevich for the lack of a connection between socialistic legal relations with legal norms:

"Legal relations are determined by socialistic basis [material conditions of life of the society] and just correspond to the legal norms; - Stalgevich doesn't see any connection between legal relations and norms of socialistic law."[249]

Kechekyan claims that Stalgevich's main mistake is that his definition of legal relations doesn't reflect their character and relations of the superstructure of society. Uniting legal relations with material industrial relations of society, he presents them as relations of basis, which is not correct. Since legal relations are always ideological and secondary, this means that they always belong to the superstructure.[250] Kechekyan says that Stalgevich's concept would be proved if legal relations would go ahead of normative legislation, but he sees that foundational statement of Stalgevich as being totally wrong.

Nonetheless, critics of Stalgevich and other conceptions, Kechekyan admits other approaches of "widening" of narrow normativism, when he states that:

"Law is a complicated phenomenon. It consist in some cases from the legal norms and legal obligations determined by that legal norms, in other cases – it consists from legal norms and legal rtelations, or sometimes – it consist from legal norms, legal obligations and legal relations."[251]

Another legal scholar Yavich L.S. also stood up for the wide normative approach, he interpreted law not only as unity of norms and legal relations, and added a third element – ideology and legal consciousness. He insisted on the necessity of the ideological element as a part of legal system:

"It is not correct to the think that turning to the legal consciousness […] is arbitrary. During revolutionary periods the foundation of new economic formations in condition when the system of new objective law and legislation isn't formulated yet, legal

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[249] KECHEKYAN S.F. "Правоотношения в социалистическом обществе" [Legal relations in the socialistic society], Publishing house of the Academy of Science of USSR, Moscow, 1958, p. 16-17
[250] Ibidem, p. 18
[251] Ibidem, p. 31-32

consciousness and legal act based on it, creating some legal obligations or rights, or creating legal relations, could anticipate legal norms with a great benefit for social progress and strengthening of new type of legal order, sometimes creating a path for a new legislation."[252]

Yavich formulates his definition of law, highlighting the role of legal consciousness:

"Law is materially determined and formulated in legislation will of ruling class (and all people during the socialism), which is expressed directly not only through the state decrees and ordinances, but establishing rights for individuals and their legal relations are objectively determined and this objective conditions are reflected in legal consciousness. Adding the formula of essence of the law to the definition of the law creates the philosophical level of definition."[253]

Yavich highlights universality and innovation of his concept and elaborated definition of law:

"For this general definition of law it is significant that it is applicable for any state or epoch, without dependence of the development of the juridical form or specialties of existing process of law-making, positioning of certain types of sources of law. The double dependence of law from the objective condition highlights, that legal order couldn't be separated from the ability of ruling power correctly reflect the needs of industrial production, exchange and existence of the society itself (to manage common needs of the society and guarantee certain rights for its members). This above formulated definition could be the initial starting point for the research on increasing role of the human factor in the development of legal relations and analysis of significance of law in developing of human personality, in making further guarantees for the ruling class and all people (under socialism)."[254]

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[252] YAVICH L.S., "Общая теория права" [General theory of law], Publishing house of Leningrad State University, 1976, Leningrad, p. 57
[253] Ibidem, p. 110
[254] YAVICH L.S., "Общая теория права" [General theory of law], Publishing house of Leningrad State University, 1976, Leningrad, p. 110

9.2. Symposium on normativism at the Institute of state and law

This gradual development of alternative legal concepts which tried to widen the mainstream definition of law lead to the situation that widened the perception of law which became prevalent in legal scholarship in 1970-1980s. It was very clearly apparent on the debates "About understanding of Soviet law" organized by leading periodical journal "Soviet state and law" in 1979. On these debates the major part of the participants-leading scholars and researchers -criticized the previous definition of law of 1938 and stood up for alternative conceptions. Also during that symposium the possibility of existence of different theories and definitions of law was discussed.

Professor Institute of State and Law of Russian Academy of Science Piskotin M.I. criticized particularly the narrow normative approach caused by the definition of Vyshinsky. He stated that current understanding and research on law failed to pay sufficient attention to the relationships between citizen and the state. He stated that also not enough attention in the literature is paid to the research of correlation of legislation and law. That law as a phenomenon is much wider than decrees and ordinances of the government. Law includes also customs, legal and political principles which form relations in the society, and other factors which legal science doesn't note if follows the old approach of normativism and understanding of law as legal norms.[255]

On the symposium, outstanding legal scholar V.A.Tumanov stated the necessity of elaboration of alternative definitions of law:

"There is no scholar among Soviet scientists who would deny the positive character of traditional definition of law. In many cases this is a very successful and functioning definition, which highlights the peculiarities of law, correctly orient law executive activity and very convenient in pedagogical terms. But with all that, it [this definition] has its weak points, which is especially seen when this definition is presented as unique and the only one

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[255] «Круглый стол «Советского государства и права» [Symposium of "Soviet state and law"], Periodical journal "Советское государство и право" [Soviet state and law], Publishing house "Наука" [Science], Volume 7, July 1979, p.56

which is correct. Perhaps, the existence of one and correct definition of law shouldn't be an obstacle for other definitions. It seems, for instance, that the definition of law which P.Stuchka elaborated might still be relevant. But a definition of law which is very convenient for legal activity won't satisfy philosopher, sociologist, or specialist on ethics. Soviet philosophers very correctly highlight the impossibility to limit themselves to only one description. For the practical purposes Soviet science always aimed for standardized definition of legal categories, which are used in the legal norms. But this practical method, aimed for standardized application of legal norms, shouldn't suppress activity of legal research as social and world outlook science."[256]

He also commented on the debated between narrow and wide normative approach:

"This is not only a debate about notions and definitions, in reality this is discussion about "understanding" of law. We uncover the issue about understanding of law, about widening of the horizons of our idea about law and legal performance in socialistic society. In mainstream legal literature prevail presentation of law with the legal norm as a central element. The situation when from 4 volumes of "Marxian theory of law" two volumes are dedicated to legal norms is not acceptable. The process of law-making and creation of legal norms and notions isn't presented at all, and there is not enough attention given to the law executive stage – the real legal relations in society. This approach from the legal norm caused the situation when even legal principles are seen as consequences of norms, and not in opposite – as something which determine the normative content."[257]

Towards wide approach instead of narrow normative one performed almost all participants of that symposium. A.M.Vasilyev told: "The concrete notion of law is based on the whole sum of the knowledge about it, when law is presented in connection with economics, politics, morals, when it is seen in historical perspective and modern patterns, analyzed in its own features and from the point of view of the influence on the society […] In the concrete notion of law all its parts and demonstrations should be balanced. And this

[256] Ibidem, p. 58
[257] Ibidem, p. 58

notion should be formulated by a general theory of law"[258] At the same time Vasilyev highlights possible difficulties of wide approach, associating law with social norms with make problematic of withering it away under socialism. The same apprehension expresses V.K.Babaev, professor of Superior School of Ministry of Internal affairs, when he claims necessity to distinguish law from other elements of superstructure of the society.[259]

V.K.Mamutov, professor of Institute of industry and economics of Academy of Sciences of USSR states that "it is important to distinguish notions of different branches of law and institutes of law or legislation from classification of norms due to legal or technical features", for this reasons, and also strengthening the "wide" normative approach, he offers "to elaborate classification of norms without mixture of it with the system of law".[260]

V.S.Nersesyants formulated the sense of "wide" normative approach stating that "Law is shaped by society, by the whole system of social relations, and it is not discovered by legal norms."[261]

In conclusion to the description of legal research during the 1950-80s, the elaboration of wide-approach in Soviet legal studies became a very prominent and positive event. Confirmation of necessity of different definitions of law from philosophical, ethic, sociological and social points became positive and fruitful for elaboration of different thought, which were not framed any more with one mainstream determining concept. The critics of the Vyshinsky's definition of 1938 ruined the monopoly of official understanding of law and monolithic unity of legal science.

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[258] Ibidem, p. 59-60
[259] «Круглый стол «Советского государства и права» [Symposium of "Soviet state and law"], Periodical journal "Советское государство и право" [Soviet state and law], Publishing house "Наука" [Science], Volume 8, 1979, p.59
[260] Ibidem, p.70
[261] Ibidem, p.71

10. Brezhnev's era: a deadlock or non-Marxian development?

10.1. Do human rights exist in the Soviet Union?

Soviet leaders used ideology to support the regime in many ways – state propaganda told of terrible and inhumane conditions of the workers in the West and democracy and wealth of the Soviet people. Soviet citizens had very faulty image through the filter of official propaganda about what was happening in the outside world.

Moreover, the Soviet state did not allow its population access to information. In the Soviet Union authorities' enjoyed a monopoly over information which left Soviet people largely isolated, unconscious and increasingly naïve about current and world affairs. Soviet young people were significantly surprised when they saw that even students from People's Democracies such as Poland and East Germany invariably had considerably better clothes than they did.[262] There were, however, far more substantial facts which contributed to the loss in faith in communist ideology amongst Soviet citizens.

The Soviet population was able to grasp the drastic mismatching between the proclamations made by the Soviet government and the reality they faced. One of the myths for the support of the regime and the positive image of the West was extremely liberal legislation and a wide range of legal guarantees for rights and freedoms, which in fact did not exist. In addition to the internal legal guarantees, the Soviet Union signed Universal Declaration of human rights of 1948, adopting to pledge itself "to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms"[263] and Final Act of the Conference on Security and

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[262] SCHAKOVSKY Z., The Privilege Was Mine, London: Jonathon Cape, 1959, p. 166 in Hornsby R. "Political protest and dissent in the Khrushchev era", a thesis submitted to the University of Birmingham for the degree of Doctor of Philosophy, Centre for Russian and East European studies European Research Institute, University of Birmingham, December 2008, p.177

[263] Preamble of "Universal Declaration of Human rights", adopted by the UN General Assembly on 10 December 1948

Cooperation in Europe in Helsinki in 1975. In theory Soviet citizens possessed wide range of human rights with international criteria of its execution.

Universal Declaration of Human rights guarantees everyone has the right to leave any country, including his own, and to return to his country[264]. But Soviet legislation contradicted this provision – prescribing as a crime of parricide "escape outside the Soviet Union abroad and refusal to return"[265]. In case of the escape abroad without conscious intention to harm the Soviet regime, the act didn't qualify as a parricide but as "unlawful crossing of the state border"[266]. In fact, Soviet Courts blamed all people who crossed the border in creating a threat to state security – almost all male population of Soviet Union did military service in the army and Soviet Court acknowledged them to obsess a military secrets which couldn't be passed abroad, if it was a woman who organized an escape abroad, Soviet Court recognized her to obsess important military secrets which she got to know from her husband or son (or neighbor) who did military service[267]. The International Covenant on Civil and Political Rights premises that "everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence…The above-mentioned rights shall not be subject to any restrictions except those which are provided by law…"[268]. In the Soviet Union the law on emigration didn't exist (or any restrictions for it), so refusal to leave the country was very often made in oral form or without legislative motivation[269].

Article 50 of the Soviet Constitution proclaims that:

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[264] Part 2 Article 13, "Universal Declaration of Human rights", adopted by the UN General Assembly on 10 December 1948

[265] Article 54, Criminal Code of RSFSR adopted by the Supreme Soviet of the USSR on October 27, 1960

[266] Article 83, Criminal Code of RSFSR adopted by the Supreme Soviet of the USSR on October 27, 1960

[267] PODRABINEK Alexandr "Punitive medicine", "Khronica press" publishing house, New York, 1979, p.36

[268] Article 12 of the International Covenant on Civil and Political Rights adopted by the United Nations General Assembly on 16 December 1966

[269] "Документы Московской Хельсинской группы за период с 1976 - 1982" [Documents of Moscow Helsinki Group for the period of 1976 – 1982] compiled by D.I.Zubarev, G.V.Kuzovkin, Moscow, Publishing house of Moscow Helsinki Group, 2006, Document №5: repressions against religious families, p.95

"in accordance with the interests of the people and in order to strengthen and develop the socialist system, citizens of the USSR are guaranteed freedom of speech, of the press, and of assembly, meetings, street processions and demonstrations".

Nevertheless, despite freedom of speech being guaranteed, one of the most frequent reasons for political repressions were "anti-soviet conversations" – as it is cited by V.Kozlov and S.Mironenko in "Kramola: dissent-activity under Khrushchev and Brezhnev in 1953-1982" more than 20% of Prosecutor's indictments were based on art.70 of Criminal Code of RSFSR "anti-Soviet propaganda". It was the most usual accusation over all of the Soviet Union period with only some difference through the epochs – in epoch of Stalin and Khrushchev people were sentenced even for private conversation, commonly even said in a drunken state, in Brezhnev's era otherwise people were sentenced only for public criticism of the regime.[270]

Many people accused under art.70 were conscious about criticizing the Soviet regime, but there were also numerous cases when accused people weren't protesting against regime – just commenting on politics, international relations or life conditions (complaining high prices, impossibility to get accommodation, poor life conditions, deficit in the shops). Very often people were emotionally touched by some collision – being fired form the work or even divorce and complaining and accusing everything including the Soviet regime.[271] In such cases victims tried to rehabilitate themselves sending letters to Soviet authorities with explanations of their behavior and their biographies stating their loyalty to Soviet power.

Reading the documents about conviction of dissidents for critics of the regime might highlight one curious feature – that ideological motives for the convictions played an important but not dominant role in sentencing of the dissidents[272]. On sentences of conviction are not only for anti-communist statements, but also expressions about Marxism which didn't correspond to the official ideological line were punished, as they

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[270] KOZLOV V. and MIRONENKO S. «Крамола: инакомыслие в России при Хрущеве и Брежневе 1953-1972» [Kramola: Dissent thinking under Khrushchev and Brezhnev 1953-1972], "Materik" Publishing house, Moscow 2005, p.100-101
[271] Ibidem, p. 101
[272] Ibidem, p.9

were anti-communist. V.Kozlov and S.Mironenko made a conclusion that such repressions were organized not for creating the ideological discipline, but mostly for making people think "under the prescriptions of Central Committee".[273]

Exercise of political freedoms guaranteed by the Soviet Constitution was ensured by putting public buildings, streets and squares at the disposal of the working people and their organizations, by broad dissemination of information, and by the opportunity to use the press, television, and radio. But in fact any demonstration which wasn't sanctioned by the government and didn't have a purpose to support communism were dissolved and their participants arrested for hooliganism.[274]

Article 50 of the Constitution of RSFSR guarantees freedom of conscience, that: "the right to profess or not to profess any religion, and to conduct religious worship or atheistic propaganda"[275] .

Further development of the Constitutional provisions were developed in resolution of Congress of People's Deputies of RSFSR from 1 January of 1929 (with amendments from 23.06.1975) "About religious associations"[276]. Soviet doctrine stated that religious confession couldn't create any obstacle for exercising any other rights or freedoms[277]. Further guarantees provided article 142 of Criminal Code of RSFSR which considered a violation any on the basis of the confession of religion, such facts as firing from work or from University or Institution for conducting a religious worship was considered a crime[278].

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273 Ibidem, p.9

274 See, for example Documents №106, 184, 221 from "Документы Московской Хельсинской группы за период с 1976 - 1982" [Documents of Moscow Helsinki Group for the period of 1976 – 1982] compiled by D.I.Zubarev, G.V.Kuzovkin, Moscow, Publishing house of Moscow Helsinki Group, 2006

275 Article 50, Constitution of USSR adopted at the Seventh (Special) Session of the Supreme Soviet of the USSR, ninth Convocation, on October 7, 1977

276 Resolution of Congress of People's Deputies of RSFR from 1 January of 1929 (with amendments from 23.06.1975) "About religious associations", published at «Ведомости Верховного Совета РСФСР» [Vedomosti of the Supreme Soviet of RSFSR], 1975, №27, p.572

277 LUKASHEVA E.A., CHIKVADZE V.M. «Социалистическая концепция прав человека» [Socialistic conception of human rights], Publishing house of Institute of state and law of Academy of Sciences of USSR, Moscow 1986, p.116

278 Article 142, Criminal Code of RSFSR adopted by the Supreme Soviet of the USSR on October 27, 1960

One can find numerous evidences on violations of religious confession – very common practice during Soviet period was taking children away from religious families. Official Soviet ideology prescribed "communist education" to all young people which began in an early age. This principle was embodied in the article 52 of the Soviet Code about matrimony and family: "parents should bring up their children according to the moral code of the communist". Article 59 of the same Code stated that:

"Parental rights could be devastated by the file to the court from Public Prosecutor or Governmental or public organization in case if parents make a bad influence on their children by their amoral or anti-social behavior"[279].

The above mentioned legislative norms created a legal base for taking children away from religious families.[280] In such cases the decisions were supported by the principle that interests' of the state and society in general are more important than private interests or rights of individuals.[281]

Inviolability of the person was guaranteed by the article 54 of The Constitution – "no one may be arrested except by a court decision or on the warrant of a procurator." So, article 126 of Criminal Code develops this provision by prescribing criminal responsibility for unlawful arrest of the person. The inviolability of the person violated by possibility of the KGB to take people for prophylactic "talks" which aimed to "warn" a dissent activists about anti-Soviet activity, and numerous secret internal instructions of KGB prescribing measures against anti-Soviet activists.[282] The Order of Supreme Soviet of USSR "О применении органами государственной безопасности предостережения в качестве меры профилактического воздействия" [About implementing of admonition as a means

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279 Articles 52, 59 of "Кодекс о браке и семье РСФСР" [Code on matrimony and family of RSFSR] adopted by Supreme Council of RSFSR on 30.07.1969, published at "Ведомости ВС РСФСР" [Vedomosti of Supreme Council of RSFSR], Moscow, 1969, №32

280 "Документы Московской Хельсинской группы за период с 1976 - 1982" [Documents of Moscow Helsinki Group for the period of 1976 – 1982] compiled by D.I.Zubarev, G.V.Kuzovkin, Moscow, Publishing house of Moscow Helsinki Group, 2006, Document №5: repressions against religious families, p.57

281 Ibidem, p.69

282 Order of Supreme Soviet of USSR "О применении органами государственной безопасности предостережения в качестве меры профилактического воздействия" [About implementing of admonition as a means of prophylactic influence] from 25.12.1972 №3707-VIII

of prophylactic influence] from 25.12.1972 №3707-VIII which laid foundation for such preventive measures wasn't published and circulated as internal instruction of state security organs, what violated the Constitutional provisions.

Private rights and freedoms, such as the privacy of citizens, and of their correspondence, telephone conversations, and telegraphic communications were protected by law[283]. As well as political rights and freedoms, Soviet Constitution contained a large range of different political guarantees of development of "socialistic democracy": which included the right to submit proposals to state bodies and public organizations for improving their activity, and to criticize shortcomings in their work (article 49 of the Constitution of USSR). This political right to take part in governmental decision making process, to make claims for governmental decisions were seen by the Soviet doctrine as an inviolable guarantee of the socialistic democracy and whole system of human rights[284]. Nevertheless, the persecution for criticism was legally prohibited; dissent activists were subjected to judicial and extrajudicial persecution.

"[Repressive measures] were personally aimed against people who were involved in spread of independent information… This showed a desire of the government to stop the delivery of information to the West and cut the channels inside the USSR. Also, such activists were organizing the system of help and dotation to the political prisoners and their families"[285].

The privacy of the telephone conversations was violated by Special Order of Committee of Ministers from 31 august 1972, which prohibits any use of telephone communications in purpose which contradict the state's interest and public order[286]. In practice it meant disconnection of the telephone after several telephone talks with foreign

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283 Article 56, Constitution of USSR adopted at the Seventh (Special) Session of the Supreme Soviet of the USSR, ninth Convocation, on October 7, 1977

284 LUKASHEVA E.A., CHIKVADZE V.M. «Социалистическая концепция прав человека» [Socialistic conception of human rights], Publishing house of Institute of state and law of Academy of Sciences of USSR, Moscow 1986, p.117

285 "Документы Московской Хельсинской группы за период с 1976 - 1982" [Documents of Moscow Helsinki Group for the period of 1976 – 1982] compiled by D.I.Zubarev, G.V.Kuzovkin, Moscow, Publishing house of Moscow Helsinki Group, 2006, p.15

286 Special order of the Committee of Ministers of USSR "In addition to the article 74 to the Statue of the means of communication" №655 from 31.08.1972

subscribers with translating any information contradicting the official state propaganda. Usually the telephone was disconnected for 6 months with further warning not to use it for calls abroad, but in many cases it was disconnected forever with handling the telephone number over another subscriber.[287]

As could be seen, in Brezhnev's era there were very liberal and progressive guarantees of human rights and freedoms in internal legislation as well as signing the international human rights declarations. But as described by the famous Russian proverb - "severity of Russian laws is compensated with the optionality of its execution"[288]. One can see examples of violations of existing laws for the reasons of public communist interests and prevailing of the states' interests under the private rights and freedoms.

10.2. The dissident movement

The idea of challenging the authorities by taking responsibility for defending the state's laws against violation from the state itself was firstly formulated by dissent activists and mathematician Aleksandr Esenin-Volpin. He firmly stated ideas that the legalist approach is much more effective and better than violent revolution. Together with other dissent-activists in 1965 Volpin organizes in the center of Moscow the "Demonstration of *glasnost* (transparency)", which was the first public protest in after-war Soviet Union. The "Demonstration of *glasnost"* was organized in support of Andrei Siniavskii and Iulii Daniel – two poets who were arrested for publishing anti-Soviet pieces, and hold its main demand to make the judicial proceeding against them public. Volpin was an author of "Civil appeal" which aimed to attract participants:

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[287] "Документы Московской Хельсинской группы за период с 1976 - 1982" [Documents of Moscow Helsinki Group for the period of 1976 – 1982] compiled by D.I.Zubarev, G.V.Kuzovkin, Moscow, Publishing house of Moscow Helsinki Group, 2006, p.28

[288] Citation is referred to the authorship to M.E.Saltikov-Shedrin (Russian writer, 1826-1889) or alternatively to P.I.Poletika (official of Ministry of Foreign Affairs of Russian Empire, 1778-1849) in different sources.

"Several months ago the organs of KGB arrested two citizens: writers A.Siniavski and I.Daniel. In this case we have a reasonable doubt about the violation of the law about publicity of legal proceedings. It is obvious, that behind "the closed doors" any violations of law are possible, and that the breach of the law about glasnost (publicity) (art.3 of the Constitution of USSR and art.18 of Criminal Procedure Code of RSFSR) is serious violation itself. It is unbelievable, that the art of the writer could harm somehow state security.

In the past, violations of the state caused deaths and arrests to the millions of Soviet citizens. Bloody past asks us to be vigilant in the present. It is easier to sacrifice one day of rest than to suffer up-stopped tyranny for many years. […]"[289]

A.Volpin was arrested on the "Demonstration for *glasnost"* and took directly to the KGB for interrogation.

Nevertheless the arrest of Volpin, his legal ideas were wide-spread among Russian dissent intelligentsia. As Bukovsky put it: "So let us defend our laws from being encroached upon by the authorities. We are on the side of the law. They are against it."[290] Bukovsky liked the idea of public expression of the protest because believed that the law is on their side, moreover such way permitted to inform larger quantity of people about violations.

In 1976 the Moscow Helsinki group was founded– nowadays the oldest existing human rights organization in Russia. Initially, its main purpose was to monitor the Soviet Union's compliance with the Final Act of the Conference on Security and Cooperation in Europe signed in Helsinki in 1975, embodying A.Esenin-Volpin's idea about legal approach in flight with violations. Ludmila Alekseeva (one of the founders of the organization who is the present head of it) recalled the conversation with Volpin:

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289 GINSBURG A. "Белая книга: Сб. документов по делу А. Синявского и Ю. Даниэля" [White paper: collection of the documents on case of A.Siniavskii and I.Daniel], Moscow, "Posev" publishing house, 1967 / Сост. А. Гинзбург. Франкфурт/М.: Посев, 1967

290 BOOBBYER P., "Vladimir Bukovsky and Soviet Communism", "Slavonic and East European review" published by University of Kent, UK, vol.87, No.3, 2009, pp.452-487

"He would explain to anyone who cared to listen a simple but unfamiliar idea: all laws ought to be understood in exactly the way they are written and not as they are interpreted by the government and the government ought to fulfil those laws to the letter."[291]

For the Soviet reality such affirmations seemed fantastic. As the historian N.Berdiaev stated in an earlier era, "the greatest paradox in the destiny of Russian state and the revolution is that liberal ideas, ideas of law as well as of social reforming, appeared to be utopian in Russia".[292]

It should be noted that dissent activity of intelligentsia who shared legal approach was public. Or it was a protest by writing letters in support of the victims of the regime, or public demonstrations. Since there were also a popular phenomenon of writing anonymous letters and leaflets condemning Soviet regime and its violations.[293]

The number of dissent activists wasn't high at all. V.Bukovsky in his memoirs cited different reasons which caused the passivity against state violation – repressions which were as a punishment for every type of the expressions of the protest which made one to look for family's interests. Another reason to avoid an expression of protest was the wide-spread belief that protest could achieve nothing other than to incite trouble and that the only way to change the system is from within and that is necessary first to show the loyalty.[294]

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[291] ALEKSEEVA Ludmila "Soviet Dissent: Contemporary Movements for National, Religious and Human Rights", Connecticut: Wesleyan University Press, 1987, p.276

[292] BERDIAEV N. "Истоки и смысл русского коммунизма" [Origins and sense of Russian Communism], "Nauka" Publishinng house, Moscow, 1990, chapter V

[293] KOZLOV V. and MIRONENKO S. «Крамола: инакомыслие в России при Хрущеве и Брежневе 1953-1972» [Kramola: Dissent thinking under Khrushchev and Brezhnev 1953-1972], "Materik" Publishing house, Moscow 2005, p.224

[294] BUKOVSKY V. «И возвращается ветер» [To build a castle: my life as a dissenter], Pulishing house «Захаров» [Zakharov], Moscow, 2007, p.62

Part 2

From Communism to the Western standards of human rights

1. The model of democratic reconstruction in post-Soviet countries

1.1. The triumph of Western liberalism

Perestroika and the political course of M.Gorbachev in the years before the collapse of USSR (1985-1991) showed an inevitable tendency in the weakening of communism. The end of the Cold War and communism losing its positions meant that the world was bipolar no more. The Western model of capitalism remained absolute since there was no more another force to oppose it. This made the claim about the "triumph of Western liberalism" as the last remaining global ideology possible:

"The passing of Marxism-Leninism first from China and then from Soviet Union will mean its death as living ideology of world historical significance. For while there may be isolated true believers left in places like Managua, Pyongyang, or Cambridge, Massachusetts, the fact that there is not a single large state in which it is a going concern undermines completely its pretensions to being in the vanguard of human history. And the

death of this ideology means the growing "Common Marketization" of international relations, and the diminution of the likelihood of large-scale conflict between states."[295]

The most extreme interpretation was extended by Francis Fukuyama explaining that "the triumph idea is evident first of all in the total exhaustion of viable alternatives to Western liberalism."[296] He expressed the view that the conflict between rival ideologies is over, that "the universalization of Western liberal democracy as the final form of human government." Though, this view was criticized broadly, many moderate evaluation of the end of global ideological opposition agreed that it was a matter of time before post-communist countries will construct democracies following the Western model. [297] Fukuyama, insisting on his triumphalist idea explained:

"Marx […] asserted that liberal society contained a fundamental contradiction that could not be resolved within its contest, that between capital and labour, and this contradiction has constituted the chief accusation against liberalism ever since. But surely, the class issue has been successfully resolved in the West […] the egalitarianism of modern America represents the essential achievement of the class society envisioned by Marx."[298]

Still the Western capitalist model is full of its own contradictions and there is no perfection that can be found in Western democracies in terms of the respect for human rights. Mutua Makao responds to this claim, the fact that human rights are violated in liberal democracies just confirms that fact that "human rights and democracy are both works in progress":

"The fact that human rights are violated in liberal democracies […] does not distinguish the human rights corpus from the ideology of Western liberalism; rather, it emphasizes the contradictions and imperfections of liberalism. In other words, the elusive

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[295] FUKUYAMA F. "The end of history?", The National Interest, No. 16 (Summer 1989), p.3-18, on p.18
[296] Ibidem, p.3
[297] GRAY J. "Post-totalitarianism, Civil Society, and the Limits of Western Model" in "The reemergence of Civil Society in Eastern Europe and the Soviet Union" Zbigniew Rau (ed.), Westview press, Oxford, 1991, p.145
[298] FUKUYAMA F. "The end of history?", The National Interest, No. 16 (Summer 1989), p.3-18, on p.9

state of perfection in which human rights are fully respected and realized tells us, among other things, that both human rights and democracy are works in progress. They are projects that are essentially infinite, open-ended, and highly experimental in nature."[299]

And still, could we claim peremptory that after the dissolution of the Soviet Union and overthrowing of communist ideology, post-Soviet countries adopted the Western model of liberalism and construction of democracy in conditions of the absence of any other relevant ideological alternative? Is it correct to claim that after the end of the Cold War and bipolar global political opposition, democratic reconstruction of post-communist countries proved the "triumph of the Western model"?

Karl Klare criticized that view about the triumph of Western liberalism as the one and only remained global ideology. After the dissolution of the Soviet Union and the end of the Cold War, the Western model of capitalism strengthened its position but still, the claim about its absolutism couldn't be taken without doubts. Klare wrote that it is mistaken to claim that "1989 reflects the definitive triumph of liberalism in politics and capitalism in economics which presumably may now be packed and transplanted, like McDonald's franchise, to Prague, Budapest and Warsaw."[300]

The first reason for Karl Klare's criticism of the "triumphalist view" on the Western concepts was the existence of that discursive domestic contest which made all new democracies different due to the special economic and political condition found in each of them:

"While it is true that many Eastern Europeans are eager to inaugurate western, capitalist types of regime, the new democracies are by no means are limited to look alike. Political ideals and economic models emanating from the West profoundly influenced the

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[299] MUTUA M. "The ideology of human rights", Virginia Journal of International Law Association, 1996, p.593

[300] KLARE K.E. "Legal theory and democratic reconstruction: reflections on 1989", U.B.C. Law Review, Vancouver, 1991, p.70

revolution of 1989. Still, there are grassroots, homegrown affairs, and the erstwhile revolutionaries may once again do their own thing in fashioning new institutions."[301]

New democracies in post-communist countries faced such an enormous variety of complex problems that it is evidently problematic to claim a mere legal transplant of other juridical constructions which copies a foreign legal concept.

Another reason to contest the triumph of the Western model is that "there is no single form of eastern liberal democracy to be exported eastwards."[302] Klare wrote that "it might make sense to regard American-style, free-wheeling capitalism and Swedish social democracy as exemplars of the "same" system at some very general level of analysis, but not for the practical purposes that people care about."[303]

It is problematic just claim that a foreign legal model could be transplanted as a "franchise" to post-Soviet countries due to the historical, ideological, economic contest since legal transplants always require contextual study. A domestic discursive contest about any legal transplant is still inevitable.

1.2. The Western pedigree of the UN Declaration of human rights

The claim about the triumph of Western liberalism refers the whole corpus of human rights and democratic traditions coming out of the West which diffused globally.

Mutua W. Makao in his *Ideology of human rights* argues that rights are the product of Western culture since its main promoters have always been Western elements – whether they were academic, activists or human rights organizations. Though rights are usually presented as non-ideological, this claim was broadly contested. It is hard to deny the

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[301] Ibidem
[302] Ibidem
[303] Ibidem

influence of political deliberation on the human rights corpus. As Mutua W. Makao wrote, human rights are not only a set of normative principles and provisions, they also concern routine politics and political choices. He takes the premise that human rights and liberal democracy are both Western products, which seems to be different, but in reality is a unity, since one is a universalized notion of the other:

"…human rights represent the attempt diffusion and further development at the international level of the liberal political tradition. These processes have contributed to the reexamination and reconstruction of liberalism, and have in some respects refined and added to the liberal tradition. It seems to be true historically that for political movements and ideologies, from nationalism to free enterprise and beyond, totems and myths are necessary to remove them from their earthly moorings. For liberal democracy that totem appears today to be the human rights corpus, the moralized expression of a political ideology. Although the concept of human right is not unique to European societies, […] the specific philosophy on which the current "universal" and "official" human rights corpus is based is essentially European."[304]

One of the arguments which Mutua W. Makao uses in support of his claim about the European roots of both liberalism and human rights is that the major part of the elements, which formulated the corpus of human rights, was European. After the World War II, the United Nations promoted the basis for further construction of the international human rights. The International Bill of Human Rights, which consists of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights with its two Optional Protocols and the International Covenant on Economic, Social and Cultural Rights formulated that the basic platform and human rights core – a fact which tends to be admitted.

As was remarked, the West imposed its philosophy of human rights on the rest of the world as result of its leading role in the United Nations. Nonetheless, of the large quantity of members of the UN Human rights Commission or the Third Committee of the

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[304] MUTUA M. "The ideology of human rights", Virginia Journal of International Law Association, 1996, p.593

General Assembly, only a small number of them were amongst the primary drafters. While drafting the Universal Declaration, the persons from Human rights commission responsible for the preparation of draft were mainly from Western Europe or Europeans educated in the West. Virginia Leary, with reference to Verdoodt, lists Renè Cassin of France, John P.Humphrey of Canada, Eleanor Roosevelt of the United States, Hernan Santa Cruz of Chile, Charles Malik of Lebanon, P.C.Chang of China, and Fernand Dehousse of Belgium as the primary drafters of the UN Declaration of Human rights. Furthermore, Leary analysis the ideological background of every person from the list:

"[…] three of the principle drafters came from the Americas, two from Europe, and two from Asia. All, however, had received their education mainly in Western Universities. Chang and Malik, the only non-Westerners in the group, were educated at Clark College and Columbia University in the United States and the American University of Beirut and Harvard University, respectively. Malik had taught at Harvard. Both made clear their Western-philosophical orientation in various points in the drafting of the declaration. At one point Malik urged inclusion in one of the articles of the declaration of the phrase, inspired by the U.S. Declaration of Independence, that each person is "endowed by the Creator with unalienable rights." The proposal was rejected. Chang referred on various occasions, with approval to eighteenth century Western philosophical theories as a source of declaration.

The initial draft of the Declaration prepared by John Humphrey drew from proposed declarations submitted by a number of Western organizations and individuals, particularly from the Western hemisphere. Most of these declarations followed closely the French Declaration of the Rights of the Man and of the Citizen or the U.S. Bill of Rights, although the Latin American declarations included references to economic and social rights. […] Renè Cassin of France is frequently cited as the author of Declaration. […] it

was the first session of the Drafting Committee, led by Cassin, that the declaration received its Western character."[305]

Antonio Cassese analyzing the quality of rights, which were included into the text of the Declaration, wrote about their Western origin:

"More space and importance are allotted to civil and political rights than to economic, social and cultural rights and no mention at all is made of the rights of peoples (the right of self-determination is completely absent). The position taken with regard to colonized peoples, partially or completely denied their right to freedom, is purely formal. The existence of dependent peoples is not ignored: the preamble states that the Universal Declaration is to be observed "both among the peoples of member States and among the peoples of territories under their jurisdiction". Moreover, article 2(2) lays down that "no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust or non-self-governing or under any other limitation sovereignty.

However, these remain entirely formal and abstract pronouncements because the particular economic, political and social circumstances of dependent countries were not taken into account by giving specific instructions to anything about economic inequalities between States, or consider the fact that full freedom to their citizens and in any case will not be in a position to guarantee certain basic economic and social rights, such as the right to work, to education, to suitable housing, etc."[306]

Answering the question about how the West succeeded in imposing its "philosophy" of human rights, Cassese highlighted the fact that socialist countries were in minority in the UN, and also were unable to formulate and work out a common, clear strategy for lobbying their position against the West. While Third World countries were associated with Latin American countries with a "Western outlook", the socialist countries

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[305] LEARY V. "The effect of Western perspectives on International Human Rights" in "Human Rights in Africa: Cross-Cultural Perspectives" Di An-naim, Abdullahi, Francis M. Deng (eds.), The Brookings institution, Washington D.C., 1990, p.20-21

[306] CASSESE A. "The General Assembly: Historical perspective 1945-1989" in "The United Nations and human rights. A critical appraisal" Alston P. (ed.), Oxford, 1992, p.31

merely failed to stand up to the Western powers due to the luck of authority. This lack of authority extended to even influential Western delegates as Eleonore Roosevelt and René Cassin. Here, Cassese comes to the conclusion that the view of human rights expressed in the Declaration is Western.[307]

This pro-Western orientation of the Declaration was largely disputed in international society problematizing the mere existence of such an international treaty which fails to fully reflect the interests and cultural positions of all UN members. As Alston has posited:

"It is sometimes suggested that the doctrines of human rights as embodied in the Universal Declaration of Human rights may not be relevant to societies with a non-Western cultural tradition or a socialist ideology. In its extreme form such approach would thoroughly undermine the existing system of the international protection of human rights and create "free of all" situation in which each dictator and each military junta, as well as each democratically elected but embattled government, could design its own bill of rights to suit not only local traditions but also its own self-interest"[308]

But though, it is evident that the basic content of human right which is was formulated in the UN Declaration than transferred to the domestic laws as a standard of human rights. Many countries share that common "core" of human rights, which is called "universal" and deeply rooted to the Western democratic tradition.

1.3. The ideology of human rights

Despite clear Western roots, the Universal Declaration once it was adopted in 1948 truly achieved global and universal status. Even though the Declaration did not contain fully other approaches to human rights other than a Western approach, it became a corner

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[307] Ibidem, p.32
[308] ALSTON P. "The United Nations and human rights. A critical appraisal" Alston P. (ed.), Oxford, 1992, p.65

stone for the global promotion of human rights and standard for drafting domestic laws in nation states.

But not only the UN Declaration of human rights became a promoter of Western values due to its drafters being overwhelmingly "Western". On number of cases Makao shows that the founding fathers and major ideological inspiratory activists of the largest INGOs – they all were Westerners who had an interest in promoting human rights in their domestic discourse.[309]

International INGOs became a "prime engine of growth" in the human rights movement. The majority of them based in the West and attempt to promote human rights globally. For example, the organization Human Rights Watch deals with human rights violations in the U.S., but the focus of their activity is the human rights "problems" or "abuses" in other countries.[310] As Makao explicated:

"The boards of the European-based INGOs, the ICJ and AI, tend to differ, somewhat, from American INGOs, although they too are dominated by Westerners, Western-trained academics, professionals, and policymakers, or non-Westerners whose worldview is predominantly West-ern. Thus, even these Asians and Africans--who, though non-White, nevertheless "think White" or "European"-- champion, usually uncritically, the universalization of the human rights corpus and liberal democracy. In 1994, for example, the seven members of the executive committee of the ICJ included a German, an Australian, a Brazilian (a Westerner), and four establishment figures from India, Ghana, Sri Lanka, and Jordan."[311]

Another proof supporting the Western origins of human rights is that liberal regime which promotes human rights and democratic values is derived from institutions and governmental bodies which were developed over centuries in Europe.[312] This reason of common European history and development of core institutions of democracy and human

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[309]MUTUA M. "The ideology of human rights", Virginia Journal of International Law Association, 1996, p.613
[310] Ibidem
[311] Ibidem
[312] Ibidem, p.604

rights highlighted Koskenniemi. He wrote that this historical heritage of traditions helps to interpret and exercise human rights in a certain manner since they are understood commonly and were shaped in the common space:

"Despite their coherence, and the difficulty to justify them, human rights have functioned reasonably well in Western societies because they have been embedded in Western ways of life in the same ways as, for example, wearing a tie or shaking hands when meeting. That we in the West feel rights important and are able to interpret them broadly similar ways in function of our common history, perhaps a result of our imagining our societies as moral communities – but certainly not any ability we have of grasping the meaning of human "dignity" or "sacredness" in some authentic pre-social sense."[313]

Despite the common roots of the main concepts, every culture contributed to the national context of human rights implications. As Schwats put it:

"Every culture will have its distinct ways of formulating and supporting of human rights. Every society can learn from other societies more effective ways to implement human rights. While honoring the diversity of cultures, we can also build toward common principles that all can support. As agreement is reached on the substance, we may begin to trust international law to provide a salutary and acceptable safeguard to ensure that all people can count on a minimum standard of human rights."[314]

So, the conclusion which could be made from looking at the origins of democracy and liberalism is that both of them are Western due to the origins of its main actors, historical aspects of drafting of the most important human rights treaties, common contribution of the West in elaboration and the development of democratic institutions. However, Western concepts have been diffused globally. We can't just agree on a "blind" application of human rights since domestic national contest modifies legal concepts significantly. But it is clear; we can agree that rights have their common "core" due to the

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313 KOSKENNIEMI M. "Human rights, politics and love" from "The politics of International law", Hart Publishing, USA, 2011, p.161

314 SCHWATS R. "Human rights in an evolving World Culture" in "Human Rights in Africa: Cross-Cultural Perspectives" Di An-naim, Abdullahi, Francis M. Deng (eds.), The Brooklings institution, Washington D.C., 1990, p.382

common Western roots. And values and legal structures derive from the Western liberalism. This is relevant for the post-communist countries, including Russia. Western liberalism and democracy were both modified considerably due to the realities and complexities of the post-Soviet period.

2. Assessment of the democratic reconstruction

2.1. What is a democracy?

The disputes about democratic reconstruction and measurement of the liberal transformation provoke reflection on what democracy actually is. What are the main features of democracy? And which guidance criteria are there which allow us to assess whether democratic transformation has been successful or not?

Under such an argument, the reexamination of democracy requires a rethink about its cornerstone characteristics and further observation of those features in post-communist societies.

Samuel Huntington mentions two features of democracy in connection with the decision-making process: contestation and participation. The major decision-makers (whether individuals or institutions) through periodic elections, for which an honest basis is assured. Secondly, there is no restriction on the adult population voting and the candidates that are able to compete for the votes.[315]

Makao provides a more detailed system of democracy, which adds to Huntington's paradigm of "participation and contestation" with more complex elements such as popular sovereignty, checks and balances and the separation of powers, the rule of law and priority of human rights:

(i) 'Political society is based on the concept of popular sovereignty;
(ii) The government of the state is constitutionally required to be accountable to the populace through various processes such as periodic, genuine, multi-party elections;
(iii) Government is limited in its powers through checks and balances and the separation of powers, a central tenet of the liberal tradition;
(iv) The judiciary is independent and safeguards legality and the rule of law;

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[315] HUNTINGTON S. "The third wave: Democratization in the Late Twentieth Century 6 1991 p.7

(v) The formal declaration of individual civil and political rights is an indispensable facet of the state."[316]

For the purposes of the present research will be used a clear outline of the institutional structure of post-communist democracy formulated by Karl Klare, which "consists of four basic components: representative political institutions, free markets and human rights guarantees, with these all in turn founded upon the autonomous rule of law. […] post-communist transition will require the development of wholly new codes across the range of public and private law fields."[317]

Klare highlights that for this paradigm, the concepts of the "free market" and "human rights" are primary since they entail the fundamental principles of a functioning society. The idea that the market is "free" or "self-regulating" is an illusion. The transitional period from state-planning towards free market prescribes the necessity of a wide range of different political decisions to be made in order to define and elaborate the market in legal detail. The free market does not have a fixed legal structure, the foundational process of specifying it is always a result of political deliberation. Moreover, the idea of a free market still foresees the regulating necessity of a state power in order to make socially significant choices, such as to distribute power between non-equal social elements – employers and employees, creditors and debtors, state and business, as well as to correct market failures. As Klare explains:

"[…] to have a market at all assumes the existence of a background regime of legal rules and entitlements. It assumes, for example, that the coercive power of the state can be invoked to protect property and enforce contracts. The state can withdraw from central planning but it cannot withdraw from its role in defining market structures and property entitlements. The background rules are not socially neutral; they distribute power and

316 MUTUA M. "The ideology of human rights", Virginia Journal of International Law Association, 1996, p.596
317 KLARE K.E. "Legal theory and democratic reconstruction: reflections on 1989", U.B.C. Law Review, Vancouver, 1991, p.72

frame the possibilities of human fulfillment. The choice of a particular market structure is therefore the implementation of a distinct regulatory strategy."[318]

Klare calls it that the struggle is not for the "free" market, but for democratic market structures. He wrote that lawyers who elaborate the post-communist legal reconstruction should be aware that all influential decisions, legal or economic, must be responsive to democratic input. That means "an appeal to recognize the political character of legal practices and develop an understanding of our work that links that recognition to democratic commitments."[319]

These insights into democracy will be used as a framework for further chapters on democratic transitions in post-Soviet Russia. For the purposes of this research, major attention will be paid to the political aspect of the legal decisions and their assessment in terms of democratic reconstruction.

2.2. Human rights as a result of political deliberation

Even under the premise (which is still disputable) that human rights inherited its ideological base from Western ideology, could be claimed that all post-communist countries have imitated the Western model in their democratic reconstruction? Which role does the domestic context play? Is Western liberalism the same in any given country or it is modified due to the necessities and special features of any given society?

The claim about universality of any legal concept was strongly contested by international scholars. Debates on universality of rights present constant failure on common reliance on the scope, content, language and philosophical basis of universal rights.

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[318] Ibidem, p.81
[319] Ibidem, p.103

These rights are far from being absolute, and, as Koskenniemi claims:

"rights depend on their meaning and force on the presence of institutions, histories and cultures, of people thinking in broadly similar ways about matters social and political. Freedom of speech is dependent on the systems of political decision-making and public information that prevails in society. Freedom of speech is dependent on the systems of political decision-making and public information that prevail in society. Freedom of contract is limited by the conditions of the actually existing market. Rights protect autonomy but autonomy is possible only if society offers collective goods. In a society that offers no choices, autonomy is meaningless. The availability of collective goods, however, in a pure issue of political value; of struggle and compromise between alternative views about what a good society would be like. […] No right is "given"; a right is what one is due as a result of political deliberation. However, this is what rights tried to avoid. It was precisely because politics seemed to degenerate into a struggle for the advancement of particular interests that rights were introduced to protect those in weaker positions. If rights are a function of social arrangements, then this point is lost. They become just one more policy among others."[320]

Following the premise that no right is "given" and that the amount of guarantees and human rights always depends on political deliberation, the democratic system seems very fragile. Existence of the above mentioned (see chapter 2.1. The model of democracy) features of democracy such as political representation, free markets and human rights guarantees doesn't exhaust the meaning of the democratic society and the rule of law. Institutionally, stable democratic institutions and laws do not automatically guarantee their correct functioning. Formal institutions determine the foundational choice of the regime, but such notions as rule of law require more detailed discernment. They cannot be measurement simply by the existence of democracy's most basic features. A wide range of legal structures are compatible with the liberal and democratic systems. But variations between legal structures could have huge consequences for power relations in the state and life of the society in general. As Karl Klare explained:

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[320] KOSKENNIEMI M. "Human rights, politics and love" from "The politics of International law", Hart Publishing, USA, 2011, p.160

"Therefore, the process of articulating the new legal orders will continuously reopen foundational questions regarding the character of the democracy under construction. And decision-makers go about giving legal content to the foundational ideals of representation, markets and rights, they will be permanently and inescapably engaged in making significant political choices.

It follows that the ideal of a neutral and depoliticized ("autonomous") rule of law is misconceived and cannot supply the philosophical underpinning of post-communist transition, at least in the way the rule of law ideal has traditionally been understood. Because law and politics are inescapably linked, the traditional view of the rule of law is inadequate to the problems of democratic legal reconstruction."[321]

This inescapable link between law and politics makes the post-communist democratic reconstruction more complex. During the transitional period, lawyers played a major role – their decisions established new legislation, institutions, the ways of non-violent dispute resolution and functional provisions for post-communist society. But their choices were never determined beforehand and they took form as a result of social deliberation. Different problems and legal aspects were very complicated in the transitional society in all spheres, and there was not a model which could merely be transplanted; a lot of details need to be worked out to face the needs of a post-communist country. The question is how much of the historic project of constructing democracy is oriented to the needs of society and in strengthening the rule of law rather than to a random political situation or consensus which is far from being an etalon of higher values in the promotion of human rights? It is essential to study the political aspect of legal regulation in order to avoid a technical approach. This aspect will be analyzed further in order to measure the democratic transitions in post-communist Russia.

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[321] KLARE K.E. "Legal theory and democratic reconstruction: reflections on 1989", U.B.C. Law Review, Vancouver, 1991, p.74

3. Juridical libertarism of V.Nersesyants: from socialism to democracy

The author of original concept of libertarism was Vladik Nersesyants, Soviet and later Russian legal scholar. Initially he formulated his theory in the 1970s in his article *"Law and legislature: defining and correlation"* which was refused for publishing in the leading legal journal *"Soviet state and law"* due to criticism about the shallow relation of his theory to the acknowledged classical Marxian provisions. However, Nersesyants' views on the problems of redefining law were still included for publication due to his participation in the Soviet Academy of Science's symposium on the Institute of state and law. After the collapse of the Soviet Union, Nersesyants elaborated his theory on the basis of the initial premises where he detailed the path from socialism to a new democratic legal order.

The core premise on which the legal conception of libertarism is based is the division of law in a strictly positivist sense and legality as a legal order. Nersesyants wrote that it is absolutely wrong to agree with the claim that the existence of Soviet socialistic legislation necessarily creates Soviet socialistic law. He insisted that legislation (or law in a positive sense as written norms and ordinances) existed in the Soviet Union but this in fact didn't create law itself since law in terms of legality prescribes the necessary conditions of individual freedom and equality under the law. Nersesyants went on to call Soviet socialistic legislation as the "illusion of historical scale, when totalitarian illegal legislation is interpreted as "socialistic law".[322]

Nersesyants explained that this misunderstanding and perception of totalitarian legislation as law became possible because of the absence of clear specific description of what law in a classical sense really meant and implied. Consequently, it became impossible to specify the illegal character of some official legal acts and legislation. It created the situation when criticism was impossible because any act by the communist party was *a priori* correct and the only possible position of lawyers was "uncritical apologetic positivism".[323]

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[322] NERSESYANTS V. "Философия права" [Philosophy of law], Publishing house of Institute of state and law of Russian academy of Sciences, Academy of law, Moscow, 1998, p.321
[323] Ibidem, p.322

Nersesyants explains that due to the distinction of the notions of law in a strictly positivist sense and legality libertarism makes it possible to circumnavigate illegal Soviet concepts of "socialistic law" and define ways towards the legal democratic order. This is a core premise of the distinction of law in a strictly positivist sense and legality. Nersesyants explained it accordingly:

"The distinction of the legality and law in positivist sense [as written from a normative base] as a theoretical construction has two main functions: evaluation and explanation. The essence of evaluation is in the characteristics of law [as a written norm] as legal or illegal prescription. In this process legality acts as a main criterion for the evaluation of the legal or illegal character of law, its value and correlation to its main functions etc. The importance of such an evaluation consists of its conceptual character: since this evaluation is provided not from random, unnecessary or non-binding position, but from the point of view of legality – something necessary and unconditional. In other words, in its evaluative relation to law, legality is seen as concentrated expression of all its requirements, without which law couldn't be seen as law: law which doesn't correspond to legality is arbitrariness. The evaluative function of the distinction of law and legality is strictly correlated with their interpretative function and is based on it. The prescriptions for law ("what law must be like?) represent exclusively the consequences of relative interpretation of legality ("what is legality?")".[324]

Nersesyants claimed the necessity of upbringing legal thinking for scholars in a way that was independent from state will, seeing in it a fundamental condition for developing the term legality as an unconditional source of principles and evaluation of laws:

"For legal thinking, law is not only arbitrary and subjective governmental order, but it is something objective and independent, which possesses its own (independent from the will of the state) nature, its essence and specifics, in other words – it has its own principles. In other words these principles are the principles of formal equality, which expresses the

[324] Ibidem, p.361

essence and specifics of law and makes distinction in it from other social phenomena, norms and regulations."[325]

Nersesyants analyses what law and legality really mean in order to elaborate an objective criteria:

"Law is the perspective of libertarism is an expression of the sense and principle of the freedom of individuals, and following this premise the initial foundation and essential feature of any law. So, this [freedom of individuals] is just a necessary minimum for existence of law, without this feature law in general, and legality itself, could not exist."[326]

This way libertarism defines the socialistic law as unlawful since it doesn't have an essential foundation for any law that enshrines formal equality and freedom of individuals. Nersesyants highlights that fact that criticism provided by the concept of libertarism has as its important function a scientific platform. This correspondingly tries to explain and figure out the necessary and essential foundations which can be used to construct Russian society in order to overcome any unlawful situation that arises out of socialistic law and subsequently creates a new legislature. Nersesyants explains the scientific role of libertarism:

"A very important feature of libertarism is that from its perspective it is possible to highlight those objective conditions which make the existence of law possible. …Libertarism provides a theoretical foundation for the necessary exit from the social and historic frames of socialism."[327]

Nersesyats claims that socialism was in its essence a form of totalitarianism which denied all forms of legality in a true sense in exchange for dictatorship of proletariat. That, he says, excluded the possibility of development of the state in a democratic way, and what is more importantly, excluded the existence of concepts which could evaluate dictatorial legal orders as illegal:

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[325] Ibidem, p.33
[326] Ibidem, p.35
[327] Ibidem, p.36

"Totalitarianism in all its variations and expressions is the denial of sovereignty of state and exchange of state forms and objective legal norms for other extraordinary, based on violation… political structures, institutes and norms. Totalitarianism compensates its humane inferiority by vain, predominantly verbal, constructions and forms, which imitate state legal order. […] A totalitarian system of real socialism is incompatible with the freedom, law in a true sense and legality. So called "withering away of state and law in "total communism", which was foreseen by Marxism-Leninism, was in fact the denial of real lawful state institutions and norms (including the principle of the division of state powers) and exchange for proletarian-communist dictatorship. Real political power was totally in the hands of the communist party, and all other semi-state institutions (representative, executive and judicial) were superficial and completely dependent on the decisions of the party."[328]

The progeny of Nersesyants' ideas is Vladimir Chetvernin. In his thesis on individual freedom as a foundation for the existence of legality, he explained the functioning of the state:

"Juridical libertarism claims that law and the state are necessary forms of freedom: legal norms – are normatively formulated freedom, and state is a powerful organization which provides this freedom. The sense of state regulation is to set up such socially obligatory norms and order, which will make freedom for every member of society possible (freedom for all individuals who admitted to be a subject of law and state in certain historical epoch)."[329]

Underpinning such ideas of freedom for the individual, the necessity of a definition of law which is not dependent on state will were clearly determined by the historical circumstances of the transition period from socialism to a democratic legal order. Legal scholarship saw the necessities of society in the transitional period and provided the answers to the most crucial questions which post-socialist Russia faced. These were the

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[328] Ibidem, p.367
[329] CHETVERNIN V., "Введение в курс всеобщей истории права" [Introduction to the course of global history of law], Publishing house of Institute of state and law of Russian Academy of Sciences, Moscow, 2003, p.16

answers about the necessity of educating and upbringing of the democratic and legal order in a true sense on values and principles. O. Vlasova reflecting on the essence of Nersesyants's concept, added:

"Philosophical type of legal thinking oriented on defining the essence of legality as criteria for the evaluation of legal character of law and legal quality of *ius naturale*, has its advantages in comparison with strictly positive or natural legal approaches. And, perhaps, it is not an accident that the most logical version of philosophical way of legal thinking – juridical conception of libertarism – was formed particularly in Russia, where necessity in critical evaluation of law making and executive state practice from the part of society is extremely high."[330]

Vlasova highlights the fact that libertarism as a concept was formulated with a strong orientation towards state and social reality, which determined its philosophical and practical character. The philosophical orientation in legal thinking played an important role in formulating new principles of legality.

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[330] VLASOVA O. "Либертарно-юридическая концепция В.С.Нерсесянца в контексте нашего времени" [Juridical concept of libertarism of V.S. Nersesyants in the context of our epoch], Journal "Economic and social processes" №3-4, Publishing house of Tambov state University, Tambov, 2011, p.363
Available at: http://cyberleninka.ru/article/n/libertarno-yuridicheskaya-kontseptsiya-v-s-nersesyantsa-v-kontekste-nashego-vremeni, accessed on 01.10.2015

4. Transitions of 1993. The Constitutional crisis.

4.1. The premises of the conflict

1990 to 1992 was a period of a serious conflict between the legislative power and the President, which had serious consequences for the Russian state. The political situation in the early years after the collapse of the USSR was dictated by the constitutional formation of the new Russian state. The Soviet Constitution of 1978 did not make provisions for the establishment of democratic authorities and it was only with the executive powers that democracy was able to be realized. The first years of post-communist transformations were full of legal and legislative contradictions which provoked a serious state conflict.

The government was formed directly by the President with all candidates being appointed through his direct order. It was through the same executive order of the president that the governance of the state was carried out. None of these measures complemented the old Soviet Constitution of 1978 which was legally in force at that time, because that did not have any norms on the formation of Presidential power. Such measures, which could be seen as unconstitutional, were justified as being a critical necessity to overcome the old soviet system of governance. The old Constitution of 1978 did not contemplate the division into legislative, executive, and judicial powers. It stated that the main government power was The Congress of People's Deputies, the main Soviet authority, which officially consisted of 1068 deputies, most of whom were elected in the general election on 4 March 1990 – the first relatively free parliamentary election in Russia since 1917. Despite the fact that elections were proclaimed free, 86% of the deputies elected were from the Communist Party. Other parties apart from the Communists were legally allowed to participate in the elections but due to poor organization, they were unable to win any significant powers. The Congress of People's Deputies assembled together 2-3 times a year, and during the periods between the Congresses, all powers were at the Supreme Soviet of RSFSR (legislative, executive and control governmental body of RSFSR). The Supreme Soviet had as large of a range of the power as the Congress of People's Deputies, and even Government was subordinate to the Supreme Soviet RSFSR. The Congress had the ability to pass laws by majority, which then had to be signed by the

President (with no right to veto until July 1991). The Congress held the ultimate power in the country (that is, power to decide on "any questions within jurisdiction of the Russian Federation") and some of the most-important powers including the passage of any amendment to the Constitution, approval of the Prime Minister of Russia and the holders of the highest public offices, the selection of the members of the committee of constitutional supervision. These issues, as well as the appointment of judges of Constitutional Court since 1991, declaration of referendums, and impeachment of the president, were exclusive powers of Congress, exercised solely by it.

While the Presidential institution was gaining more power, it was creating a dual-power between it and Supreme Soviet RSFSR. It was possible due to the situation of doubling the same function's and the lack of a legislative division. In the beginning, this dual power wasn't striking, especially when President had the support of the majority of the People's deputies. In a sense, the political course was divided, but essentially unified. With the further development of the unpopular economic reforms and increasing social tensions, the Supreme Soviet and President had serious conflicts. In Moscow and other Russian cities, between January and February of 1992, meetings were being organized by people who were for the return to the old Soviet system of the governance. Such meetings often resulted in violent armed conflicts. The growing violence acted as a catalyst in the conflict between legislative and executive powers.

In December 1992, the VII Congress of People's Deputies was agreed that President was responsible for the decrease in industrial production and in increase in the poverty of the people. Another reason for conflict and non-coordination between Parliament and President was the question of the adoption of the new Constitution. The President was insisting on the adoption of a new Constitution which would proclaim RSFSR as a Presidential Republic. Parliament was seeing the situation in the other way, pushing for the renovation the old Constitution of 1978 with necessary amendments, but making the RSFSR the Soviet Republic with limited credentials to the President. Request of the President to make a referendum on this important question was refused by the Parliament.

The president's response was tragic. On 20 March 1993, The President addressed the Russian people in a televised speech and stated that the actions of the Congress of

People's Deputies were unconstitutional and took the responsibility for the further development of the political situation. He proclaimed the necessity of the public state referendum and presented the people with the question of who could better lead the country: The President or The Congress of People's Deputies?

On 26 March 1993, The Congress of the People's Deputies had an unscheduled meeting in response to the Presidents television speech and they considered the possibility of attempting a *coup d'etat*. It tried to divest from authority the President but it didn't succeed. With 2/3 of the votes was taken a decision of staying the current President and agreed on making a public referendum with a question to the population of Russian Federation about further development of the state.

Crisis of the powers ended on another compromise. The President refused from his television speech and agreed with the Congress about the questions asked on the referendum. On the 25 of April 1993, a public referendum had taken place. From the beginning of the organization of the referendum there were a lot of debate about its political significance and obligatory character of the results because the current legislation didn't give the answer on that question. The current legislation determined that answer if the results of the referendum would be obligatory or it will be just interpretation of the will of the people. It was the social opinion that the result of the referendum would be interpreted by both political parties to be in their own favor since there was no clear answer to how the results should be interpreted. There were four questions asked: "Do you trust president of the Russian Federation Boris Yeltsin?", "Do you agree on the social politic which carry out President of the Russian Federation and Government of the Russian Federation from 1992?", "Do you think if pre-term elections of the President of Russian Federation are necessary?", and "Do you think elections of People's Deputies of Russian Federation are necessary?"

The results of the referendum were surprising for all political parties. The Anti-reformist forces lost this battle. The major part of the people who took part in the referendum (58.7%) supported the current President, agreed on social politics which they were carrying out (53.0%), and requested pre-term elections of the People's Deputies (67.2%).

After the publication of the results of the referendum, R.I.Khasbulatov, The Chairman of the Supreme Soviet of the Congress of People's Deputies, proclaimed the results as illegitimate because they stated, referencing the old soviet legal norm, that the referendum could be legitimate only if the certain decision was voted by more than 50% of all registered voters, which was almost impossible. The President on the other hand, viewed the referendum as his triumph because he was insisting on the norms which were adopted for all other elections: the decision should be considered taken, if for that voted more than 50% of the people taking part in the referendum.[331]

4.2.The bifurcation point in the Russian history

The political situation caused strikes and conflicts between allies of The Supreme Soviet and allies of President. The country was in a serious risk of a civil war. On the 29th of April 1993 in a meeting of Heads of the republics of the Russian Federation, the Heads of Kray, Oblast, Moscow, and Saint-Petersburg, (all entities of the Russian Federation), President Boris Yeltsin for the first time spoke of the idea of the Constitutional Council as a body for elaboration of the text for a new Constitution. The old Constitution of 1978 didn't give answers to many of the striking problems of the period on the economic reform, and it also created a lot of antagonisms because it consisted of a lot of amendments which weren't corresponding together. According to some experts, the political crisis was determined by the legal constitutional reasons because the legislation was missing a lot of necessary legal concepts[332]. By that time, B.Yeltsin was already the Chairman of the Constitutional Commission which has founded in 1990 by the Supreme Soviet. But he didn't want to be guided by its work and began working on preparing the text of the new Constitution. One of the reasons for this was that, being dependent on the

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331 BELKIN A.A. «Дело о референдуме 25 апреля 1993 года» [Case on referendum of 25 April 1993], Scientific journal «Правоведение»[Pravovedenie] №5-6 for September-December, Saint-Petersburg State University Publishing House, 1994, p.80-102

332 MORSHAKOVA T.G. «Это больно и стыдно» [It is painful and shameful] An interview for the "Expert Online" from 3.10.2013, accessible on www.expert.ru

Congress of People's Deputies, this Commission prepared the text of the new Constitution with state order as Parliament Republic, what didn't correspond to the expectations of the President to make a new Russian State a Presidential Republic. Also, the President was making plans to attract a large range of different social groups for working on a new text of law – federal state governmental bodies, legislative and executive powers of entities of Russian Federation, local governments, political parties, Academy of Sciences, religious confessions, which were invited to enter into the new Constitutional Council for the discussion.[333] Constitutional Council was opened in the Kremlin on the 5th of June 1993. By the 12th of July 1993, the Constitutional Council presented its draft of the new Constitution. At the same time, the Supreme Soviet published its draft and began sending it to the Heads of the entities of the Russian Federation. The conflict between the President and Supreme Soviet intensified. It was not only a disagreement on the adoption of the Constitution, but also on other issues such as monetary policy, privatization, and economic reforms. As commentator described it in August of 1993, "The President issues decrees as there is no Supreme Soviet, and Supreme Soviet issues decrees as there is no President" (Izvestiya, 13 August 1993)[334].

Political crisis finally led to the armed conflict of the supporters of President and Supreme Soviet on the 3-4 of October 1993. The conflict intensified when the President asked the Congress of People Deputies to leave the building of the White House, implying by this, the termination of its authorities. When the Congress of People's Deputies refused to leave the building, their lines of telephone communication, hot water, and electricity were cut off. The Russian Orthodox Church and its Head Patriarch Alexiy II tried to act as mediators and to lead to an agreement between the two parties. Representatives of the President and of the Congress were to meet at the Saint Daniel Monastery for negotiations. Yeltsin accepted the offer, but the Congress's representatives demanded the electricity be put on before they will say their answer, R.Khasbulatov (Chairman of the Supreme Soviet of the Congress of People's Deputies) and A.Rutskoi (Vice-President) in a provocative

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[333] KOROTKEVICH V.I. «История Современной России 1991-2003» [History of Modern Russia], Saint-Petersburg State University Publishing House, 2004, p.13

[334] CAREY J., SHUGART M., "Executive Decree Authority", published by the press syndicate of the University of Cambridge, 1998, p.76

manner announced the necessity of the civil opposition to Yeltsin's "illegal and dictatorial" decrees. So, even the Church's mediation did not help to improve the situation[335].

Neither the public nor the military took any actions to respond to the rebel from the Congress. People understood the evident danger of public disorders. Extremist right-wing communists were the only ones who took to the streets and began to attack the law enforcement officers. The police force, were instructed to avoid the provocation, weren't equipped to deal with the rioters. On October 3rd, demonstrators from the side of Supreme Soviet stormed the Mayor's House and tried to storm the Ostankino television Center (the main Mass-Media Center), trying to have an opportunity for a television speech for the representatives of the Congress of People's Deputies. There were casualties from the both parts.

The army, which had initially declared its neutrality, by Yeltsin's orders, stormed the White House in the early morning hours of October 4 using tanks. Captain Gennady Zakharov, who knew the White House's layout, offered a plan of attack. Ten tanks were to open fire on the upper floors of the White House to minimize the human casualties and to create panic and confusion among the people inside.

Special military units Alpha and Vympel were to storm the building after the tank shelling, but unit Alpha, wishing to act legally, refused to take part in the storm without an order from the Constitutional Court. They refused their orders even after a personal meeting with the President, considering the direct order of the President as illegal without the consent of the Constitutional Court. But the situation developed unexpectedly - while Alpha units were patrolling the area, Alpha's lieutenant was killed by the sniper's shot. This dramatically changed the mood of Alpha which instantly agreed for the storm. As the news of the loss of the member spread through the Alpha, all members reported to the President they are ready to storm the White House[336].

By mid-afternoon of 4 October, after the storm and tank shelling, the White House was captured by Presidential troops. All leaders of the resistance were arrested (but later in

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[335] FELKEY Andrew, "Yeltsin's Russia and the West", Praeger Publisher, USA 2002, p.79
[336] Ibidem

1994 all of them were amnestied by the State Duma of the Russian Federation). 4 October is the day when, due to these event, the Soviet power was overthrown after 76 years of the government. There was a radical change of the state system: before the adoption of a new Constitution the Russian Federation was proclaimed Presidential Republic, after the adoption of the Constitution in 1993, it was declared the Presidential-Parliamentary Republic.

Yeltsin won but with a high price. The ten-day conflict became the deadliest single event of street fighting in Moscow's history since the revolutions of 1917. According to government estimates, 145 people were killed in the two days of violence and estimates from non-governmental sources and press suggest the number of deaths as high as 1500[337].

The situation of 3-4 October still remains a contentious topic of political and moral debate in the Russian society. Moscovites and Russians throughout the country were hoping on a peaceful resolution of the conflict. People were horrified by the merciless of the shelling on the White House in the center of Moscow. Photos after shelling of the White House and tanks near it were published widely, showing the brute force regardless of who had started the confrontation and were not agree for the mediation[338]. On one hand, the critical situation demanded harsh decisive actions, but on the other – human victims still remains a very painful part of that period. Thus, a conflict can escalate dramatically if it cannot be resolved through rules, procedures, negotiations, or compromise.

The reaction of Western politicians and the Chancellor of Germany Kohl's assessment of the brute force were correct. Kohl himself and all Western leaders rallied around Yeltsin, agreeing that under the circumstances there was no other way to get Russia out of its intractable political crisis.

On the 12th of December 1993, the All-Russian referendum was adopted the new Constitution of the Russian Federation. The state order was determined as mixed

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337 KOROTKEVICH V.I. «История Современной России 1991-2003» [History of Modern Russia], Saint-Petersburg State University Publishing House, 2004, p.14
338 FELKEY Andrew, "Yeltsin's Russia and the West", Praeger Publisher, USA 2002, p.80

Presidential-Parliamentary Republic. New legislative state body became the Federal Assembly of the Russian Federation consisting of two houses – Federal Council and State Duma.

Events that took place in 1993 showed how the first signs of democracy and legal state reconstruction in Russia were uncertain. But still it showed that the ideas of democracy instead of the old socialistic regime were relatively strong – that was the most important aspect which predetermined the further development of the situation. The Constitutional crisis of 1993 laid the basis for institutional establishment of democracy in post-communist Russia.

5. The institutional components of the democracy

5.1. Judicial reform in Russia of 1991

In October 1991, the Supreme Council of the People's Deputies adopted the "Conception of judicial reform" presented by President Boris Yeltsin, which marked the beginning of democratic transformation of judiciary. It was a period of establishing new state order after the collapse of USSR and the formation of an independent judicial authority, free from political and ideological influences, independent in its activities from the executive and legislative authorities. The importance of judicial reform was obvious for all political forces since a new democratic state cannot effectively function without an independent and competent law court based on a rule of law.

The period of formation of the new state order was not simple. Civil institutes were not developed and could not make a strong opposition to the political forces. Due to the Soviet legacy, the judicial system was seen as part of common "law-enforcement machine", which was connected with common aims with other law-enforcement authorities, such as Ministry of Home Affairs, the Prosecutor's Office, and State Security Service. The main aim of all of these authorities was fighting crime, and the role of the court in this chain of "common fight" was to legally finish the process of punishment of the criminals[339]. That role of the justice was officially proclaimed in the Soviet doctrine. The Chairman on Justice of the Council of People's Deputies, Krylenko N.V., stated that, "correct and corresponding to the proletariat interests' functioning of the court and judicial system could be guaranteed only if there is systematic and daily managing of it from the part of directing authority on every case which happens."[340] The Judiciary was not considered to

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[339] MORSHYAKOVA T.G., Independent Council of legal experts, "Российское правосудие в контексте судебной реформы» [Russian Justice in a contest of Judicial Reform], "Р.Валент" [R.Valent] Publishing House, 2004, p.178

[340] KRYLENKO N.V., «К реформе действующей судебной системы» [To the reform of modern judicial system], Daily Soviet Justice, №5, 1922, p.4-5

be independent - on the state level it was just "an instrument of the state"[341]. In that way, any attempt of the court to modify the state accusation or to try to examine the case was seen as an obstacle of exercising the justice. But in fact, with the judge being weak in his authority, he had no other way than to agree with the recommendations of the state prosecutor. One of the aims of the judicial reforming was to set up new approaches to the functioning of the judiciary and its principles.

For the purposes of highlighting the most efficient ways of reforming the judicial system, there was a group of leading academics from organized from the Institute of State and Law of Academy of USSR and other Research Scientific Institutions. Members of that group include such specialists as T.G.Morshyakova, V.M.Kogan, S.B.Bobotov, I.B.Mikhailovskaya, S.E.Vitsin, G.F.Hohryakova, O.E. Sokolsky and some others.

The group was developing reports where the most important and useful legal concepts were for the reform of the judicial system for the new post-Soviet Russia. These specialists were highlighting weaknesses of the functioning of the judicial system and preparing ideas of the most efficient remedies for it, reports had many valuable ideas and concepts which were holding together previous experience and necessary perspectives. The reports did not have a direct way to the law-making authorities. They were published in "Soviet State and law" and "XX century and World" (newspapers) and by this way, it was taking attention of the public and authorities.

But still the concepts of the scientific counsel were adopted by B.A.Zolotuhin – who was running the Supreme Council of RSFSR. These ideas were taken to prepare "The Conception of judicial reform", a unique document which fully formed and created a judicial system in a state mechanism. "Conception of judicial reform" was the only document in post-Soviet Russia adopted in a legislative way which held full detailed plans for constructing and maintaining one of the state authorities. It was the common

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[341] KRYLENKO N.V., «Судоустройство РСФСР» [Judiciary of RSFSR], Moscow Legal NKU Publishing House, 1923, p.458

achievement of academics and scientists involved in research and preparing reports and law-making authorities of the new Russia[342].

The aim of the Conception was to publicly name the shortcomings which appeared in the practice of law-enforcement authorities, determine and formulate the problems which are in the system of justice, become sure that the way of separate amendments and administrative pressure is not admissible for the overcoming of the critical situations, formulate and describe the system of general principles which will be complementing the inner nature of the system of the justice and which will become the main indicators during forthcoming judicial reform, to offer the concrete legal and organizational measures of the progressive reformation of the law-enforcement system in the democratic state, highlight the weaknesses of the theoretical support of the judicial reform and found out the needs for the working out on the new approaches for the solving of the certain problems. [343]

During elaboration of the concepts of judicial reform two systems were considered – American and German one. In the German system, federal courts are higher judicial bodies and courts of the "lands" are subordinate. The courts are in a judicial hierarchy and all together form one integrated judicial system. The American system has another structure: federal courts are authorized to judge cases of federal importance – if case interfere with federal Constitution or other federal law, international treaties of US, constitutionality of law, disputes between two or more states or cases in which the crime is committed on territory of several states. It is the competence of Federal Courts. Jurisdiction of Court of the State is connective to legislative of the state. The complexity of the American system is that it requires construction of two different systems of the Courts – Federal and State, with different jurisdiction and complex interaction between them.[344]

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342 www.ru-90.ru History of the New Russia. Interview with T.G.Morshakova, ex-judge of Constitutional Court of Russian Federation (source in Russian), accessed on 14.08.2015

343 «Концепция судебной реформы» [Conception of the Judicial Reform in RSFSR], Supreme Council of RSFSR, 21 October 1991, accessible on http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=EXP;n=221794

344 http://www.uscourts.gov/federalcourts/UnderstandingtheFederalCourts/Jurisdiction.aspx Official site of the United States Courts. Jurisdiction of the Federal Courts (source in English), accessed on 14.08.2015

Russia is a Constitutional Federation, the state structure established by the Constitution and not by the treaty as United Stated. Also, the difficulty of establishing two separate systems of the Courts and making them accessible for people, this reasons stipulated the choice of the unified judicial system and with hierarchy and federal subordination. Unified judicial system was established by the Federal Constitutional law "About judicial system in Russian Federation" which was adopted 31 December 1996. All courts stabilized by this law are federal. They form the unified integrated system of Federal Courts. Only two types of the courts are not federal – Judges of the Peace and Constitutional (Ustavniy) Courts of the subjects of Russian Federation.

5.2. Judicial system of Russian Federation

Conception of the judicial reform became later a frame-law for further Russian legislation which formed the existing judicial system: Federal Constitutional Law of December 31, 1996 «On the judicial system of the Russian Federation», Federal Law of June 26, 1992 «On the Status of the Judges in the Russian Federation», Federal Law «On the Justices of the Peace in the Russian Federation» of December 17, 1998.

In its Article 10 the Constitution establishes that state power in the Russian Federation shall be exercised on the base of its division into legislative, executive and judicial authority. Bodies of 3 authorities shall be independent. The structure of the judicial system of the Russian Federation and the sphere of activities of its various parts are determined only by the Constitution and federal constitutional laws (paragraph 3 Article 118 of the Constitution of the Russian Federation).

The Constitutional Court of the Russian Federation and constitutional courts of the republics and other subjects of the Russian Federation are established by the article 125 of the Constitution. The Constitutional Court of the Russian Federation decides on conformity of the federal laws, normative acts of Russian State bodies and the President of the Russian Federation, the Council of the Federation, the State Duma, the Government of

the Russian Federation, constitutions of republics, charters and other normative acts of the subjects of Russian Federation with the Constitution of the Russian Federation (Article 125 of the Constitution). It was a very important legal concept and a great achievement for the Russia of that period. During the Soviet period it was impossible to give the legal analysis to the laws. Or even doubt if a prescription from government could be unlawful. In Constitution of USSR was proclaimed that Supreme Counsel of public deputies (a highest law-making authority in USSR) could decide any question and the decision couldn't be challenged or disputed, or appealed. In USSR for many governmental orders there was no higher authority for disputes. So, the functions of the Constitutional Court proclaim were innovative but necessary for the construction of the new democratic state. It could be stated that the history of the development of the Constitutional Court in Russia is an evidence of the division of the state powers 3 branches and self-determination of the judicial authority itself. Before the existence of the Constitutional Court in the Soviet reality there were no legal way to contradict the legislative authority.[345] The judicial authority has its power when it could have influence and make lawful sentences when law has some shortcomings. In the state systems of common law it is a natural function of the courts – to create soft law in its decisions. So judges have direct opportunity to influence on the laws. In the statutory system of the law, judges cannot create soft law by precedents but have other mechanisms of influence on the law making authority and challenging the law which are not lawful. The possibility of a control of law-making authority by the judicial authority ' the one who need to implement the adopted law ' is a necessary element for the system of "checks and balances". So, conducting the judicial reform Russian legislative systems adopted conceptions unusual for the Russia for that period but necessary for the construction of a new democratic state.

The establishment of the Constitutional Court was held in the situation of historical absence of relevant tradition, as the judge of Constitutional Court Tamara Morshakova put it:

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345 «Конституционный Суд Российской Федерации» [Constitutional Court of the Russian Federation], edited by I.L.Petruhin, Publishing House «ТК Велби» [TK Velby], Moscow, 2003, p.321-350

"The development of the Constitutional Court in Russia disproved the diffused opinion according to which new legal institutes could be effective only when they appear from the relevant historical tradition, when they have certain roots in legal thinking of the society and more or less developed legal basis. Established in 1991 the Constitutional control did not have this basis. On the contrary, it became a completely foreign institute for that system, as much as the system of the division of powers or principles of legality. Transformational process at the end of the last century in many countries was characterized by the implication of Western practice of democratic development: common values of law, including basic human rights guarantees, make it essentially necessary. We are talking not about the imitation, but about the use of the effective instruments for the protection of the individuals from the arbitrariness of the state power, - this danger remains after the Soviet period and could be seen from the Russian experience."[346]

The Constitutional court consists of 19 judges, introduced by the President and appointed by the Council of the Federation of the Parliament. The judges must be Russian citizens of 40 years old with a degree in law and at least 15 years of experience in legal profession. A judge is appointed for 15 years and cannot be reappointed. There are two chambers with 9 and 10 judges in each respectively. The chambers consider the majority of cases; the most important issues are resolved on the Plenum Session of the Constitutional Court.

Also the "Law of judicial system" established four-level system of the courts of general jurisdiction. Three-level system of the military courts is an integral part of it. The Supreme Court of the Russian Federation is the supreme judicial body of this branch.[347] The Supreme Court of the Russian Federation is the supreme judicial body for all courts of general jurisdiction, both civil and military.

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[346] MORSHAKOVA T.G. "Конституционное правосудие: российское начало" [Constitutional judiciary: the Russian beginning] in "Судебное правоприменение в России: о должном и реальном" [Judicial implication of laws: about proper and real], Publishing house Valent, Moscow, 2010, p.8

[347] http://www.vsrf.ru/catalog.php?c1=English&c2=Documents&c3=&id=6800 Official homepage of the Supreme Court of Russian Federation, accessed on 28.08.2015

The Supreme Court is at the head of the courts of the general jurisdiction, which include civil, criminal and administrative cases. The Supreme Court supervises all subordinated courts, including military and specialized courts and gives clarifications on issues of judicial practice. It is a cassation instance in relation to the regional courts. The Supreme Court acts as a court of the first instance for cases of special public interest. The court has the right of legislative initiative, in other words it may introduce a new law to the parliament.

According to Art.128 of the Constitution, judges of the Supreme Court are introduced by the president and appointed by the Council of the Federation. A judge of the Supreme Court must be a Russian citizen with a law degree and experience in the legal profession for 10 years. The organizational structure of the Supreme Court includes the head of the court, their deputies, the Plenum, the Presidium, the chambers for civil and criminal cases, and the Military Chamber.

On the second level there are courts of republics, regions, autonomous provinces and autonomous districts or federal cities (St. Petersburg and Moscow). These courts act as the supervisory body for local courts, examine cases in the order of cassation, by way of supervision and upon newly discovered evidence. For certain cases they act as courts of first instance. They work in the following composition: presidium of the court, judicial panel for civil cases and judicial panel for criminal cases.

The local courts form the foundation of the system of general jurisdiction: they consider the overwhelming majority of civil, criminal cases and cases related to the administrative offences. Local courts act as a higher judicial instance for the Justices of Peace operating on the territory of the appropriate judicial district.

Justices of the Peace are judges of the subjects of the Russian Federation and form an integral part of the system of courts of general jurisdiction. The reestablishment of the institute of Justices of the Peace in Russia in 2000 is an important step in the course of development of the judicial and legal reform and provides for more operative and accessible judicial protection for the citizens of the country. Judges of the peace have the jurisdiction in cases of the first instance of criminal cases with the penalty less than 3 three years of prison, divorce and separation of the property, adoption of the child, labour disputes, civil disputes where the amount of claim is less than 50 000 rubles (which is

around 1600 euros) (Article 3 of the Federal Law 'On the Justices of the Peace in the Russian Federation' of December 17, 1998)

The law entrusts the Justices of the Peace with functions and duties equal for all the judges of Russia: to exercise justice observing precisely and strictly the requirements of the Constitution of the Russian Federation, generally recognized rules, norms and principles of the international law and international agreements concluded or joined by the Russian Federation. The Justices of the Peace are within the courts of general jurisdiction and participate in the work of its bodies. The idea of establishing that kind of jurisdiction was to relieve the federal judges and to make the certain types of the cases faster since the competence of the Judges of the Peace.

Three-level system of arbitration courts with the Supreme Arbitration Court of the Russian Federation as a supreme judicial body competent to settle commercial disputes and other cases considered by arbitration courts, exercise judicial supervision over their activities according to the federal law-envisaged procedural forms . It should be noted that the name "arbitration court" is misleading as it does not relate to arbitration tribunals but is inherited from the Soviet Law. In the USSR any differences between state enterprises could be settled by the State Arbitrary, which was a quasi-judicial governmental body. Today the term arbitration court" relates to a State court that is competent to hear disputes between commercial entities. The system of the arbitration courts comprises: arbitration courts of the subjects of the Russian Federation; courts of arbitration districts and the Supreme Arbitration Court. The second Level is formed by 10 district courts: Volgo-Vyatsky; East Siberian; Far East; West Siberian; Moscow; Volga region; Northwest; North-Caucasian; Ural; and Central district. This is made for more guarantees of independence of the justice from other state powers. Because it was considered that in case if court district will be the same as the territory of entity (subject) of Russian Federation, it will be easier to unite the interests of legislative and executive powers with the judicial authority.

Another type of specialized courts is the military courts. The main type is the military courts of armies, fleets, garrisons and military formations. The middle level of the system of military courts consists of military courts of the branches of the Armed Forces, military districts, districts of antiaircraft defense, navy and separate armies.

For the first time jury trial appeared in Russian in 1864 and lasted till 1917, it was revoked legally only in 1922. Jury trial consisted of 12 jury and 3 professional judges. Due to the statistics 76% of all criminal cases were examined with jury trial and this made a great contribution to the legal education of the people. But this process had also controversial effect – some sentences made by jury provoked government to revoke the old too harsh laws and review some obsolete legislative basis.

It was decided to renovate the existence of jury trial since being a very effective measure for the increasing of the transparency of the justice, helps to overcome distrust of the society to the judicial power and that way to increase the effectiveness of the justice, also to improve the quality of the pre-trial investigations. So, the regulations of the jury trial in the history of modern Russia were adopted in 1989 in the «Fundamentals of the legislation of the USSR and the Soviet Republics about Judiciary», and later adopted in the article 123 of the Constitution of the Russian Federation and in Federal Constitutional Law "On the Judicial System of the Russian Federation" of 1996, categories of the cases which could be examined in the proceeding with the jury are in the Code of Criminal Procedure. It stabilized in a composition of 12 juries and one professional judge. The first jury trial in a post-Soviet Russia took place in Saratov in 1993.

5.3. Human rights guarantees

The establishment of the new state system based on democratic values and the rule of law faced complexities connected with the necessity not only to imitate, but to develop new legal institutions on the example of foreign experience. Achieving democracy is inextricably linked to the high risk that taking decisions could lead directly to a result different from the expected one or have a negative effect as an unintended consequence on

democracy. Klare wrote: "The initial problem is that many of the most important rights concepts are formulated at an exceedingly high level of abstraction. This is because human rights concepts tend to be very elastic and open-ended."[348] Reconstructing those human rights concepts in the situation of indeterminacy required a lot of effort from the side of the lawyers and drafters of the new legal provisions. In post-Soviet Russia the main human rights guarantees were formulated in state laws and the Constitution, taking the UN Declaration of human rights and International treaties as examples, in order to provide the minimum standard of human rights for the citizens of a newly democratic Russia.

The new Constitution of the Russian Federation formulated three components of democracy – humanitarian (human and civil rights), normative (constitutional legal requirements or all sources of law) and institutional (the system of division of powers and their correlation).[349]

The Russian Constitution proclaims "a democratic federal law-bound State with a republican form of government." (art.1)[350] Also, The Russian Federation is a "social state" (art.7) and a "secular" one (art.14). In conformity with the art.3, "the bearer of sovereignty and the only source of power in the Russian Federation shall be its multinational people." The sovereignty expands on the whole territory of the Russian Federation. And "the Constitution of the Russian Federation and federal laws shall have supremacy in the whole territory of the Russian Federation" (art.4). These basic principles laid foundation for the normative formulation of individual human rights and institutional formation for the democratic transformation of the society. Those dispositions were qualitatively new for the post-Soviet Russia.

The new Russian democracy was based on the principles of the supreme value of the individual rights and freedoms (art.2), division of powers (art.10) and direct application

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348 KLARE K. "Legal theory and democratic reconstruction: reflections on 1989", U.B.C. Law Review, Vancouver, 1991, p.99

349 NERSESYANTS V. "Преодоление тоталитаризма: путь России к праву" [The overcoming of totalitarianism: the Russian path towards law" in "Философия права" [Philosophy of law], Publishing house of Institute of state and law of Russian academy of Sciences, Academy of law, Moscow, 1998, p.373

350 The Constitution of the Russian Federation, adopted on 12 December 1993, available on: http://www.constitution.ru/en/10003000-02.htm

of the Constitutional provisions (art.15).[351] Also, equality among the subjects of the Russian Federation, state integrity, and "guarantees shall be provided for the integrity of economic space, a free flow of goods, services and financial resources, support for competition, and the freedom of economic activity" (art.6, 7, 8).

The new Russian Constitution was adopted in the unique situation of being the supreme law in a transitional period, which did not reproduce legal culture or legal consciousness of the people, but had another very important role – it had to establish new principles of democratic society. Some scholars noticed that feature of law, when law represents just a product of people's consciousness and overall culture of certain society. As an example of that phenomenon we can look at any problem which is regulated by specific legal provisions. Usually, that adopted legal provision is not the only possible solution: with due analysis we can imagine different, alternative solutions. But the reason why that exact law was adopted is rooted in deep layers of societal culture and expectations, which makes that certain provision the best option among many alternative ones due to the complex set of different social trends.[352] The Russian Constitution did not have that basis in the consciousness of society, and that increased the role of lawyers in adopting and elaborating the Constitution to establish the main legal principles.

An interesting feature of the new Constitution was the formulation on the limitation of individual rights. Art.17 of the Constitution set up the guarantees of the individual rights which includes not only the Constitution and internal laws but also international standards of human rights: "In the Russian Federation recognition and guarantees shall be provided for the rights and freedoms of man and citizen according to the universally recognized principles and norms of international law and according to the present Constitution." Soviet legal doctrine and practice presumes the priority of the public interests upon individual. That meant conflict between the interests of the state and the individual person, whereby the interests of the state prevailed since it was proclaimed that

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[351] NERSESYANTS V. "Преодоление тоталитаризма: путь России к праву" [The overcoming of totalitarianism: the Russian path towards law" in "Философия права" [Philosophy of law], Publishing house of Institute of state and law of Russian academy of Sciences, Academy of law, Moscow, 1998, p.373

[352] GORDON R. "Law as a Constitutive of Consciousness" in "Critical legal histories", Stanford Law Review, 1984, p.109-113

it is more important to protect the collective rights rather than individual. The new democratic regime required the changing of the Soviet paradigm, though the public interest is a possible condition for the limitation of individual rights even due to the international treaties, that particular Soviet understanding of correlation of public and private was not democratic. The limits set up for individual human rights in art.55 of the Constitution allowed the limiting ones rights only if they harm or threaten other's individual rights, and were formulated as the following: "The rights and freedoms of man and citizen may be limited by the federal law only to such an extent to which it is necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defense of the country and security of the State." The qualitative change in the understanding of setting up limits to the individual rights was that this new provision is based on the premise of the priority of individual rights, and public interest could be a condition for limiting, only if it is necessary for the protection of the rights, of the individual.[353]

Another guarantee for the protection of human rights was the foundation of the institute of Ombudsman (High Commissioner for Human Rights), whose duties are aimed at monitoring the violations of human rights with the aim of providing the guarantees of the protection, informing state bodies about the current situation within the field of human rights protection.

[353] MORSHAKOVA T. "О духе и букве Конституции РФ и баланса конституционных ценностей" [About spirit and textual understanding of the Constitution of the Russian Federation and the balance of the constitutional values] in "Судебное правоприменение в России: о должном и реальном" [Judicial implication of laws: about proper and real], Publishing house Valent, Moscow, 2010, p.60

5.4. The Presidential power

The democratic direction of the post-Soviet state reconstruction provided the framework for the institutional formation of the new state order. The principle of the division of powers was formulated in art.10 of the Constitution: "The state power in the Russian Federation shall be exercised on the basis of its division into legislative, executive and judicial power. The bodies of legislative, executive and judicial power shall be independent." Further details about the status of the President of the Russian Federation (chapter 4 of the Constitution of the Russian Federation), the Federal Assembly (chapter 5 of the Constitution), The Government of the Russian Federation (chapter 6) and the judicial power (chapter 7) are formulated in certain sections of the Constitution. The special feature of the division of powers according to the Russian Constitution is that the system of the division of powers is asymmetric and misbalanced – with clear distortion towards excessive power of the President.[354]

The President, as a guarantor of the Constitution and of the rights and freedoms of man and citizen (art.80), has a wide range of the Constitutional rights such as to chair meetings of the Government of the Russian Federation, to dissolve the State Duma in cases and according to the rules fixed by the Constitution of the Russian Federation (art. 84 of the Constitution), to suspend acts of the Bodies of executive power of the subjects of the Russian Federation (art. 85 of the Constitution). Also, "according to the Constitution of the Russian Federation and the federal laws the President of the Russian Federation shall determine the guidelines of the internal and foreign policies of the State" (art.80 of the Constitution of the Russian Federation). Since the Constitution provides the main basic principles of the state functioning, detailed specification of each state power's function is provided in state laws, but the federal law about the President of the Russian Federation has not been adopted yet. That makes a possible a wide-interpretation of the Presidents rights in terms of indeterminacy of many Constitutional provisions.

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[354] NERSESYANTS V. "Философия права" [Philosophy of law], Publishing house of Institute of state and law of Russian academy of Sciences, Academy of law, Moscow, 1998, p.381

As Nersesyants noticed, though the principle of the division of the state powers into legislative, executive and judicial, this is clear that the Presidential power is a branch of the executive power. But if we see other provisions of the Constitution towards the presidents rights it appears to be the forth independent state power, moreover, it appears to be superior in comparison to the legislative, executive and judicial.[355] So, art.11 of the Constitution names the President as an independent state power: "The state power in the Russian Federation shall be exercised by the President of the Russian Federation, the Federal Assembly (the Council of the Federation and the State Duma), the Government of the Russian Federation, and the courts of the Russian Federation."

Such phenomena could be explained by historical events – in 1992 when the Constitution was drafted, the Constitutional crisis showed that the real power which was able to construct the new democratic principles appeared to be the Presidential power. The President in a transitional period exercised many duties which were not formulated by the law, but were necessary for the complex, post-communist period. The new Constitution legalized the rights which already existed *de facto*.

[355] Ibidem

6. The reemergence of civil society

6.1. The role of civil society in post-communist country

John Gray in his essay "Post-Totalitarianism, Civil society and the Limits of the Western Model" agues the widely-held view on the triumph of Western liberalism and expectations about the Western model coming into the existence in all the post-communist countries. His main argument is that due to the crisis of communist regimes post-Soviet countries must have to emerge as civil societies, and need not (and often will not) resemble Western liberal democracies. The view is extremely interesting due to the conclusions specified above – legal institutions and concepts do not function by themselves. They always require historical, political and social context. Is that a degree of reemergence of civil society which determine the democratization of post-communist countries?

What is civil society? The notion of the civil society was a subject of such great masters such as Hobbes, Lock, Hegel, Tocqueville, Paine, Gramsci and many others. On of the common features of the understanding of the civil society relevant for the present research might be highlighted in the following way: "civil society is a historically evolved form of society that presupposes the existence of a space in which individuals and their associations compete with each other in the pursuit of their values."[356]

Gray's conclusion about the achievement of the reemergence of the civil society in the post-Soviet countries is not a positive one: "Romania and Bulgaria, though in the medium term they are likely to become so, are not yet genuinely post-totalitarian, since they are ruled by neo-Bolshevik cliques which have not permitted the reemergence or reconstruction of the institutions necessary for civil life. Czechoslovakia, Hungary and Poland all appear authentically post-totalitarian, and probably irreversibly so. The most

[356] RAU Z. "The reemergence of Civil Society in Eastern Europe and the Soviet Union", Westview Press, Oxford, 1991, p.4

intriguing case is that of the Soviet Union itself. It cannot be affirmed that a civil society has emerged, full blown anywhere in the Soviet Union."[357]

Gray argues that it is important to abandon the model of contemporary Western democracy and return to the conceptions of civil society, since it would be a proper index of the democratic reconstruction in society. The same tendency was described by Paolo Grossi, emphasizing the crisis of law and its increasing political character. He insists on the necessity of "less state, and more society", which means that only civil society could successfully manage the whole variety of problems and complex issues rather than state bodies which are influenced by political interests.[358] And as Gray wrote: "Civil society and liberal democracy need not and often do not go together, and that the most decisive phenomenon in the collapse of communism is not the adoption of democratic governance, but rather the emergence of civil life."[359] This is a qualitatively different premise from the one which was analyzed above – the measurement of democracy in post-communist society due to the assessment of the construction of the institutions and other different components of the democracy. Gray offers to measure the democratic transformation against the development of civil society. Further will be provided an insight into the institutional foundations of the civil society in Russia.

6.2. Presidential Council for Civil Society and Human Rights

The foundational principles of the civil society are formulated in the Constitution of the Russian Federation in the provisions about recognition and equal protection of the private, state, municipal and other forms of ownership (art.8).

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[357] GRAY J. "Post Totalitarianism, Civil Society and the Limits of the Western Model" in "The reemergence of Civil Society in Eastern Europe and the Soviet Union", Zbigniew Rau (ed.), Westview Press, Oxford, 1991, p.147

[358] GROSSI P. "Ritorno al Diritto" [Back to the Law], Publishing house Editori Laterza, Bari, 2011, p.11

[359] GRAY J. "Post Totalitarianism, Civil Society and the Limits of the Western Model" in "The reemergence of Civil Society in Eastern Europe and the Soviet Union", Zbigniew Rau (ed.), Westview Press, Oxford, 1991, p.146

Presidential Council for Civil Society and Human Rights or just "Presidential Council for Human Rights" as it sometimes mentioned in the press (hereinafter – Council), is a state governmental body which carry out advisory functions for the President in order to help to the President to exercise his constitutional obligation being "the guarantor of the Constitution of the Russian Federation and of human rights and freedoms." (Art. 80, the Constitution of the Russian Federation). For this purpose Council informs the President on human rights situation in Russia, contributes to the development of the civil society institutes, and prepares reports on the topics which are on the Council's terms of reference. Apart of this activity, Council prepares projects for President on a large number of different topics connected with the human rights: collaboration with Human rights NGOs, development of the institutes of civil society, coordination of the activity of the human rights organizations between themselves and state bodies, developments of the mechanisms of control of the human rights activities, international collaboration in sphere of human rights defense.

Another duty of the Council is to analyze the claims of people, companies and other legal entities on violation of human rights. This list of the functions is not limited – Council could make any other activity or work on the questions asked by the President.

The legal basis of the Council is Executive Order of the President № 120 from 01.02.2011r. "On Presidential Council for civil society and human rights".

Council was founded on 26 September 1993 by the Executive Order of the first President of Russia Boris Yeltsin and was called a Human rights Commission.

From 1993-1995 the Head of the Council was S.A.Kovalev (leading human rights activist). From 1996-2002 the Head became V.A.Kartashkin (academics in international public law). Later, due to the Executive Decree of the President from 06.11.2004 № 1417 – Commission on Human rights was transformed into the Council on development for the civil society and human rights and its Head from 2002 till 2010 became Ella Aleksandrovna Pamfilova.

In 2010 Mikhail Fedotov has been appointed Chairman of the Presidential Council. In 2011 by the initiative of the Council the new Rules of Council on development of the civil society and human rights were adopted. The main purpose of the new document was

to form the existing Council as a unique state body – collective Council of the President and make wider the range of the question which was in the jurisdiction of the Council. Due to this scope a lot of new members from representatives of the civil society which are the specialists in a lot of spheres new for the Council. These changes were agreed and adopted by the President in 2011 and nowadays Council consists of 61 members, which are leading Russian lawyers, academics and also representatives of civil society.[360]

Work in the Counsel is a kind of "civil duty", members are not paid or don't have any other privileges from it. All work is made on a good will of the members. It is very important because this guarantees independence and liberty from the state power, more objective activity of it and makes less possibility for the influence on the members from state.

All documents (reports to the President, recommendations and other) which are made by Council itself or any groups of its members are published and could be found on the official website of the Council.

Its functions are realized by informing president on the situation in the sphere of human rights on the territory of Russian Federation and abroad. For this purpose experts of the Council prepare reports on different topics on the current most relevant issues connected to the situation with the human rights. All reports are published and are open to public access.

Also, a very important function of the Council is to prepare civil expertise of the projects, laws, judicial decisions and other legal acts of the state which are connected to the situation with the human rights. On the legal basis of that expertise also recommendations to the President are prepared if a certain legal act harm some or any aspect of human rights. To conduct such expertise Council invite experts (leading professionals in a necessary sphere) who make their conclusions on the topic. Such invited experts make their work on a good will and not paid as well as other members of the Council.

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[360] Official homepage of the Presidential Council for civil society and human rights, http://www.president-sovet.ru/composition/

The lawfulness of this function of Presidential Council was doubted by Presidium of the Supreme Council of the Judges: they have sent a conversion to the Constitutional Court to clear out if expert comments and evaluation of the judicial decisions could be made by any state body since this function is exclusively delegated to the Constitutional Court. Supreme Council of the judges had apprehensions that activity of the Presidential Council on monitoring judicial decisions interferes in the guaranteed of independence of the judges and could influence in certain cases on the realization of the justice[361].

These doubts were reflected in a public letter of Chairman of the Constitutional Court of the Russian Federation V.D.Zorkin on the question about lawfulness of the monitoring and expert's report about cases with deep public resonance: "that experts' reports should be seen in the contest of the legal nature of the judicial authority and judicial independence […] Independence of the judicial power is a fundamental value of any democratic state. But this value doesn't mean isolation and non-transparency of the judicial authority. Transparency of the judicial authority as one of the principles chosen for its future development[362], means not only making bigger access to the information about work and activity of the courts, but also possibility of the public reaction on it. Such reaction due to the complex structure of the civil society could be expressed from different social groups, even from the representatives of the legal entities."[363] He wrote that:

«The credentials of the judges are directly connected with their responsibility, what means their accountability to the society. Judicial authority, having its power delegated to it from the society, needs special guarantees for non-intervention to the justice.

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361 Conversion to the Chairman of the Constitutional Courts of the Russian Federation V.D.Zorkin from the Presidium of the Supreme Council of the Judges from 10 February 2011 Accessible on official homepage of the Supreme Council of the Judges http://www.ssrf.ru/

362 Due to the Russian legislation, the examination of the cases in all courts shall be open and should be conducted on the basis of controversy and the equality of the parties concerned for the purposes of the social control on the justice. Only certain cases may be heard in closed sessions in those instances where this is permitted by federal law. (Art. 123, the Constitution of the Russian Federation; art. 9, Federal Constitutional law №1-FKZ of 31 December 1996 "On the Judicial system of Russian Federation").

363 Conversion to the Chairman of the Constitutional Courts of the Russian Federation V.D.Zorkin from the Presidium of the Supreme Council of the Judges from 10 February 2011 Accessible on official homepage of the Supreme Council of the Judges http://www.ssrf.ru/

That is why there are the low possibilities of the control of the judicial authority by other state powers, for this reason social control takes a special role. From the other side, such public attention is one more guarantee which prevents the wrong administrative pressure on the court. Being one of the forms of connection between society and juridical power, social reaction on the judicial decisions on the exact cases as well as existing practice on certain groups of the cases, cannot be limited from the point of view of the analysis of such cases and its evaluation, even made in a public way… Otherwise, it will lead to the absolute absence of the dialogue with the society, isolation of the judicial authority, coming back to the medieval principal that "King is never wrong". Especially in such important resonance cases where there is the possibility that fundamental human rights could be violated – rights on life, right to the private liberty and physical inviolability[364]. History shows to us, that that absence of the connection of the judicial authority with the society could cause the situations where a person finds himself lonely in the fight with all the power of the state mechanism without any means of influence or control on it».

Due to the opinion of the Chairman of the Constitutional Court, «Society and its groups will always have right to discuss judicial sentences. Because increase of the trust to the judicial power is one of the most effective condition of its normal functioning, so it should be considered that such trust depends on how much the judicial decisions are understandable to the public. For the judicial authority evaluation of its work in public opinion expressed by the means of discussion, publications, expert evaluation should be an important index of the level of the confidence to the judicial authority in the society.»[365]

At the end of the letter V.D.Zorkin agrees on the consultative competence of the Presidential Council which does not have any obligatory consequences for the court. Council makes monitoring only in the frames of civil control on judiciary. And it could choose its own opinion on the most resonance cases for the monitoring and bring the President's attention to it.

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[364] Guaranteed by the art.20, 22 of the Constitution of Russian Federation

[365] Conversion to the Chairman of the Constitutional Courts of the Russian Federation V.D.Zorkin from the Presidium of the Supreme Council of the Judges from 10 February 2011, available on official homepage of the Supreme Council of the Judges http://www.ssrf.ru/

7. Russian approaches to human rights

The Soviet understanding of law had its unique patterns due to the political, cultural and social contexts in the reality of the construction of communism. The claim about existence of new Soviet law formulated by P. Stuchka explained the phenomenon, when Soviet lawyers invented new legal notions or just called different things by the same words as used in the universal legal doctrine:

"Moreover, sometimes on purpose and sometimes unconsciously, the Soviets meant different things by the same words as used in the West. For example, the Soviet constitution of 1977 established that all 15 Soviet republics were 'sovereign' even though all competence in foreign relations, and not only that, belonged to Moscow. Although in terms of peoples' rights, the Soviet proclamation of the right of peoples to self-determination and even 'sovereignty' may have been a step forward compared to the Tsarist period, this was still not the way the notion of 'sovereignty' was understood in the West. What the Bolsheviks eventually seem to have meant, was: peoples formerly part of the Russian Empire could have their sovereignty and self-determination but only under the guidance of Moscow. In any case, only in 1991 did Soviet international law scholars start to admit that Soviet republics had not actually been 'sovereign' at all. The Soviets also understood the political world outright differently, e.g. when the leading Soviet international law scholar Grigory Ivanovich Tunkin (1906–93) wrote that socialist democracy was a 'new, higher form of democracy'. Such a thing, if meant seriously, could only be argued from the perspective of an utterly different thought world."[366]

However, after the collapse of the USSR in the academic scholarship the interest in the research of post-communist Russia declined drastically. It was more prominent to study the Soviet law at the time of Cold War rather than the study of post-Soviet Russia after the collapse of the Soviet Union.[367] It was noticeable, for instance, from the input of the search in leading Western libraries – vast number of various materials on Soviet law and

[366] MÄLKSOO L. "Russian approaches to International law", Oxford University Press, 2015
[367] Ibidem

international treaties and relatively few on post-Soviet Russian studies.[368] This position was developed due to the Fukuyama's predictions about the "end of the history". Predominant view was that post-Soviet Russian will not continue its trend of "otherness" and that it will plainly join the Western liberal tradition. The expectations were that after the ideological defeat of the Marxism-Leninism the uniqueness of the Soviet legal thinking will disappear. Nonetheless, those expectations did not come true – the predominant view is that Russia had kept its tradition in legal thinking and understanding of law.[369]

Even in the academic discourse, not only Soviet legal scholars were a kind of isolated from the Western scholarship – modern Russia continues being not inserted deeply in the context of international legal academic studies. One of the reasons is a certain linguistic barrier – many books prove that predominantly Russian legal literature rarely quotes Western scholars. And as Mälksoo notices, that "this has been mutual: not only have Western authors usually ignored treatises in Russian but knowledge of Western sources by Russian authors also tends to be limited and fragmentary."[370]

For period of Soviet government the fundamental ideas of justice, state functioning were transformed in communist analogue being alike the universal ones only on the surface. Judiciary, for instance, in the Soviet system was seen as one of the "instrument of the state" which is necessary to be submitted and managed by the ruling communist party. It had lost it primary fundamental principle of independence. It is a very complicated task for lawyers to consider how the structure of background rules and Russian "civilizational" values will affect the output of the legal transitions and reforms. The state has a necessity to take into the account the unique cultural patterns in the endless series of socially significant choices. This is the difficulty for the post-Soviet countries to orient themselves on their national identity and certain social needs due to the historic context, as Gray put it:

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[368] Ibidem

[369] See e.g., ROSENNE S., 'The Influence of Judaism on the Development of International Law: An Assessment', in M. W. Janis, C. Evans (eds), Religion and International Law (Leiden: Martinus Nijhoff, 2004) 63–94 at 63

[370] MÄLKSOO L. "Russian approaches to International law", Oxford University Press, 2015

: "post-communist countries should avoid both the lawless legality of the communist past and the politicized legality of the western present."[371]

[371] GRAY J. "Post-totalitarianism, Civil Society, and the Limits of Western Model" in "The reemergence of Civil Society in Eastern Europe and the Soviet Union" Zbigniew Rau (ed.), Westview press, Oxford, 1991, p.159

Conclusion

Soviet legal doctrine, being extremely interesting for researchers of the history of legal thought as a research object itself, is a deep source of knowledge about the peculiarities of modern Russian legal thinking.

The Italian historiographic legal tradition pays close attention to the historical roots of any legal concept as an essential additional source of empirical research, especially in terms of the construction of legal systems and the interpretation of legal concepts:

"The legal consciousness of the nation, the primary source of any kind of law, didn't reveal itself only through customs and laws, but most of all through the science. Science had the task to interpret customs and law, disclosing the deepest principles of law […] if the systematic construction of law was the object and the ultimate purpose of the legal science; it would have been possible to get this aim only by recognizing the historical dimension in which the legal science itself was plunged. The scientific organization of legal

discourse meant doing legal history, reconstructing and representing its historic and theoretic development."[372]

The main argument of the present research is based on that premise – the historical and theoretical development and historical systemic construction of law offers an insight into the important tendencies and phenomena of modern legal understanding. Any legal research without a historical view would not be able to reflect the important patterns, especially if they are not that obvious. Moreover, as Mannoni wrote, theoretic doctrinal development still plays a huge role in the formation of modern practice when it gives interpretation of legal events directly, and indirectly, when it influences on the understating of law and its further implication in practice:

"How is it necessary to pursue the research? It is very important foremost to see things through the theoretic doctrinal dimension. Legal doctrine has the capacity to render the force of the political regime, to present and explicit it clearly, dividing the essential aspects from secondary issues. It offers an illustrative representation which combines academic discourse with the most important practical issues. So, the doctrine is a source of two factors: the first one is direct, which forms in legal consciousness the phenomena with potential for the development. And second one, indirect, when it forms the practice, evidently in an inexpressive way, but no less influential. This is an invaluable guide for a historic researcher."[373]

A very special case is the Russian one. It could not be denied that Russian modern legal thinking still has traces of its Soviet heritage. Legal culture forms several generations (or more) of time, and this is that layer of consciousness of the nation which is not rapidly transformed, but being the basis of all social events it provides inevitable influence. The present research is aimed at gaining insights into Soviet legal science and peculiarities of legal thinking, especially into the works of Soviet lawyers, whose writings were not widely studied in international legal scholarship due to a lack of translation of their texts from

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[372] NUZZO L. "History, Science and Christianity. International law and Savigny's Paradigm", Volume "Constructing international law. The birth of a discipline", publishing house Vittorio Klosterman, Frankfurt am Main, 2012, p.42-43

[373] MANNONI S. "Da Vienna a Monaco (1814-1938). Ordine europeo e diritto internazionale", G.Giappichelli Editore, Torino, 2014

Russian. The conclusion which comes as a result of the present research is that Russian understanding of law is special, and it has a peculiar legal culture which is not exactly Western in its essence. The adoption of legal concepts of Western liberalism and democracy after the collapse of USSR did not lead to mere use of legal transplants. Due to an obvious national context, and less obvious but perhaps even more important, a historical dimension to the development of legal scholarships, Western concepts were significantly transformed. The result, being the biggest difficulty for lawyers, politicians and academics, is that essentially different systems often have the same names and operate the same notions, meaning qualitatively different things. The universality of human rights is widely contested in international legal scholarship, and this fact confirms the necessity of looking at national contexts and studying deep layers of legal thinking in order to understand the real nature of legal concepts. The present research is focused on filling this gap in the academic study of Russian approaches to human rights. Another important aim is to highlight that emptiness in historical legal study of Soviet law, which has together with academic interest, an important impact on understanding human rights in modern Russia.

Soviet legal doctrine has its very original dimension. It was officially stated and widely proclaimed, that Soviet legal doctrine and the whole political as well as social and economic systems are based on Marxian theory of communism. But, in fact, even at first sight, which is confirmed through more accurate study, the Soviet formation of communist theory contains numerous contradictions despite making claims about following the theory literally. Those contradictions were inevitable since complex social problems were not premised by the theory outlined by Engels and Marx, and situations often demanded ad-hoc decisions.

Marxian theory, and its interpretation by Lenin, distinctly prescribed the gradual withering away of law upon the achievement of communism. Marx clearly formulated in his theory the absence of any type of law (whether it would be a proletarian law, socialistic law etc.) under communism.

Different theories formulated by Soviet scholars - conception of "proletarian" law of D.Kursky, the "socialistic" concept of human rights of S. Kechekyan, E. Lukasheva and V. Chikvadze, the claim of P.Stuchka about the formation of the new type of special Soviet law - contradicted the provision of Marxian doctrine about the overcoming of law

on a global scale. Marxian theory did not contain a theoretical notion of law itself due to the social, historical and practical impossibility of its existence in the contest of the Marxian concept of proletarian communist socialism. [374]

Though the whole structure of Soviet theory was firmly rooted to Marxism-Leninism, the doctrine was not purely Marxian. As Scobbie wrote about the extent of existing contradictions between Marxian theory and Soviet legal doctrine that "at times it seems simply to amount to taking the dogma for a walk."[375] That is why it is interesting to study the concepts of alternative lawyers who did not have a mainstream during the Soviet rule. Their works were still influenced by the political will and due to their non-mainstream position, they were more liberal in elaborating concepts which reflected the immediate conditions more precisely rather than adjusted to mainstream doctrine. Arguably, their less prominent position gave jurists more freedom to disentangle their conception of law and ideology.

Such as, for example, the theory of "octroyed" rights of A.Malitsky (1874 - 1930), according to which the rights and freedoms of an individual were a privilege granted to him from the state. Since rights were seen as a kind of "gift" it was logical that privilege from the state required exercising some obligations in exchange for it toward the state and public interests. It is striking that in this theory rights are seen as a bond with a state and depend on its will without even admitting a premise about the human essence of individual rights. Though this concept was harshly criticized for contradicting the Marxian theory, it reflects two very important features of legal understanding at that time – first, that rights were seen as a privilege granted by the state, and this privilege was directly influenced by the state's will. And second, an individual was supposed to follow all prescriptions of the state, since public interest was a priority provided by the public necessity of the construction of communism.

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[374] NERSESYANTS V. "Философия права" [Philosophy of law], Publishing house of Institute of state and law of Russian academy of Sciences, Academy of law, Moscow, 1998, p.175
[375] SCOBBIE I. "Some common heresies about international law: Sundry theoretical perspectives, in M.Evans (ed.), International Law, 2nd edition (Oxford: Oxford University Press, 2006), p.83

Another alternative representative of legal scholarship is Leon Petrajitsky (1867-1931). Being an academic of Saint-Petersburg University in 1898-1918, Petrajitsky was a representative of Imperial Russian scholarship. Because of that, after the revolution of 1917 he was constrained to immigrate to Poland in order to protect himself from the new communist authorities. His psychological concept of law represents a complex philosophical legal theory which concentrates on the individual perception of law and consciousness origins of legal understating. This concept was adopted by Mikhail Reisner who put it on "Marxian foundations" and with this provided a new paradigm of psychology in Soviet legal scholarship.

Traces of psychologism could be observed also in later concept of libertarism of Vladik Nersesyants (1938-2005), who explicated the necessity of the division of legal norms and legality in order to reconstruct the true meaning of law. According to Nersesyants during the Soviet period, the notion of law was perverted in the national consciousness because in the Soviet period every political decision officially formulated was called law. He insisted on the necessity of rebirth of the essential core of legality, which is based on high principles and human values. Only by the reemergence of that initial meaning of law also in national consciousness, according to him, will it be possible to construct democracy in a post-communist society.

The contradictions in legal theory were not only due to the lack of provisions in Marxian theory about complex social demands which faced a new, post-revolutionary state, but were also conditioned by the need of constant adaptation of itself to the necessities of the Soviet political power.[376] Soviet legal scholarship had to face the same complexities as political power did, but it had a secondary role and had to always correlate it and justify its political choices. As Mannoni wrote:

"The power, in order to obtain legitimacy should transform itself into the authority, and needs to be recognized legally. Of course, the legalizing power is always the political

[376] KELSEN H. "The communist theory of law", Frederick A.Praeger Publishing House, New York, 1955

process, which is founded on the consensus, but this consensus is achieved on the basis of legal norms."[377]

Soviet politics was extremely aimed on and demanded legal justification. Soviet Procurator A.Vyshinsky during the trials in his accusation speeches used highly elaborated legal rhetoric mixed with personal insults about the defendant. Of course, legal rhetoric was only literal during the political processes but it had the desired effect of superficial justice.[378] Legality was a political power's language for justification of any necessity. As Harold J. Berman (1918–2007), said about violations in Soviet GULAG:

"[…] the arbitrariness of the system was expressed above all in its legalism. Everything was done in the name of the law—some article of the Code, some regulation of the Ministry or of the Chief Administration or of the Director, some rule of the camps that had to be obeyed. […] The forms of law were utilized, but in a completely perverse way."[379]

Soviet power widely used legal justification for any of its activities, but sometimes it in opposite way did not create legal acts on politically significant issues not to be bond with them so this way the legal status of CPSU was not stabilized comprehensively by any legislative act.

Though the role of the Communist Party could hardly be over-emphasized since it was a core institution in almost all spheres of Soviet society, it became a "vanguard" and orientated the political course as well as public morality for the whole population. In a strictly legal sense the CPSU was a social organization, but still the Constitution of the USSR of 1977 emphasized the Party's "leading role" for the whole political system (art.6):

"The Communist Party of the Soviet Union shall be the guiding and directing force of Soviet society and the nucleus of its political system and of State and social organizations. The CPSU shall exist for all people and shall serve the people.

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377 MANNONI S. "Da Vienna a Monaco (1814-1938). Ordine europeo e diritto internazionale", G.Giappichelli Editore, Torino, 2014, p.5

378 See e.g., SHIKMAN A. "Деятели отечественной истории. Биографический справочник" [Activists of national history. Biographical encyclopedia], Publishing house AST, Moscow, 1997

379 BERMAN H. 'The Weightier Matters of the Law', in R. Berman (ed.), Solzhenitsyn at Harvard. The Address, Twelve Early Responses, and Six Later Reflections (Washington, DC: Ethics and Public Policy Center, 1980) 99–113 at 100.

Armed with Marxist-Leninist teaching, the Communist Party shall determine the general perspective for the development of society and the internal and foreign policy line of the USSR, direct the great creative activity of the Soviet people, and impart a planned, scientifically well-founded character to its struggle for the triumph of communism.

All Party organizations shall operate within the framework of the USSR Constitution."

The guiding role of CPSU as well as directing foreign and internal policy makes its status rather disappointing. As Butler emphasized it:

"Article 100 of the USSR Constitution gives Party organizations the right to nominate candidates for deputies of soviets of all levels. […] Enterprises owned by the CPSU are taken into account in national economic planning and are exempted from the duty to pay income tax on balance-sheet profits. On the other hand, no State legislation appears to govern the formation or termination of the CPSU as a juridical entity or define its external powers or jurisdiction. […] While the Party undoubtedly enjoys legal personality, which has the right to sue and to be sued, or be answerable for liabilities out of Party assets."[380]

This is relevant for the main argument of the present research as an example of contradictory and peculiar juridical constructions which are conditioned by a special historic context and which could be traced in the national legal consciousness in terms of understanding modern legal practices. Martin Krygier argues that disrespect to legality in Eastern and Central European regimes has its roots in the view of the "law's role as subordinate to social forces and as a mask for ruling class interests"[381]. This tendency exists due to the Marxian doctrine provision about withering away of law in future and as a consequence its unimportant function:

"Many of Marx's comments on law seek to unmask it and its pretensions, as a limit to the power of the powerful it is either illusory and systematically partial – for law is

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[380] BUTLER W. "Soviet law", Butterworths, London, 1988, p.166-167
[381] KRYGIER M. "Marxism and the rule of law: reflections after the collapse of Communism", Journal "Law and Social Inquiry", Volume 15, 1990, p.633

involved in class exploitation and repression – or useful to ruling classes as an ideological emollient and mask for their social power, a power which, however, well disguised, is fundamental – at least, Engels come to add after Marx's death, "ultimately", "in the last analysis". It was necessary, not that law fulfills any mythical essence…but it disappears along with the state, and with the civil society which supported them and which they supported.

[…] That [law] might…. Be liberating was only conceded by Marx in comparison with the feudal past or with worse versions of the capitalist present, certainly not in comparison with the socialist and communist future. So to ask Marxist revolutionaries to make space for restraint by the rule of law would be to voice a quaint liberal demand for which they were not theoretically – let alone temperamentally – programmed."[382]

As Lauri Mälksoo noted, the Russian international legal scholarship has been "a world apart from Western scholarship."[383] This tendency has old roots from the Soviet legal scholarship - claims about a new type of special Soviet law or Soviet "socialistic" law, did not prescribe the necessity of knowledge of Western legal academic studies. Soviet legal scholarship highlighted its self-sufficiency, and used the citation of foreign lawyers with only one purpose – to demonstrate the falseness of bourgeois legal concepts. Mälksoo notices the same tendency in Russian international legal scholarship, claiming that Russian authors tend to have a limited knowledge of Western sources, usually they are fragmentary. One of the reasons he gives for this is the language barrier. A lot of representatives of Russian legal scholarship do not read or write in languages other than Russian.[384] Another reason for this phenomenon is the historical tendency in the development of Russian scholarship, and image of "self-sufficiency" of Soviet academia which still has its traces in self-determination of Russian lawyers and their academic traditions.

After the collapse of the USSR a very wide-spread opinion was that the Russian Federation had no other choice other than to adopt Western values. Fukuyama presented

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[382] ROTH R. B. "Marxian insights for the human rights project" in "International law on the left", Susan Marks (ed.), Publishing house of University of Cambridge, 2010
[383] MÄLKSOO L. "Russian approaches to International law", Oxford University Press, 2015
[384] Ibidem

history as a clash of ideologies. According to him, since the end of World War II there was a constant rivalry between liberal democracies and totalitarian, usually Marxist, regimes. (CIT) After the "defeat" of communist ideology, Russia was constrained to transplant Western model of democracy and liberalism in the situation of absence of any other viable alternatives.

Mutua Makao gradually proves that existing systems of human rights could hardly be called "universal". He argues that due to the fact that main actors in providing or exercising human rights – the activists of the biggest human rights NGOs – are Western, they influence the legal concept of human rights adding it to their own values.[385] The UN Declaration of human rights has a significantly Western view on human rights.[386]

The concept of Western liberalism, which incorporates human rights, is deeply rooted in the European tradition due to common history. The main democratic institutions found in Europe were formed over long periods in the West and as a result it is more natural for Western societies to share a stance on human rights since they share the common habits, perceptions and an understanding of them.[387] The concept of Western liberalism is also rooted in the European tradition. Main democratic institutions were gradually developed in the West and became an integral part of the national legal culture and consciousness. Many concepts function reasonably well in Europe because the vast period of their adjusting formed a strong basis of the common understanding of in the consciousness of people.

And still, could we claim peremptorily that after the dissolution of Soviet Union and overthrowing of communist ideology, post-Soviet countries adopted the Western model of liberalism and construction of democracy in conditions of the absence of any other relevant ideological alternative? The expectations about post-communist countries merely joining to the Western liberal tradition could not be admitted. The complex

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385 MUTUA M. "The ideology of human rights", Virginia Journal of International Law Association, 1996

386 CASSESE A. "The General Assembly: Historical perspective 1945-1989" in "The United Nations and human rights. A critical appraisal" Alston P. (ed.), Oxford, 1992, p.31

387 KOSKENNIEMI M. "Human rights, politics and love" from "The politics of International law", Hart Publishing, USA, 2011, p.161

situation and rich historical background makes it impossible in real life to make any claims about the pure adoption of legal and political transplants in post-Soviet countries. As Lauri Mälksoo put it: "Russia did not, politically or ideologically speaking, became like Poland or the Czech Republic. It became a member of the OSCE and the Council of Europe but not of the EU and NATO. Quite soon, efforts to 'Westernize' Russia were confronted by serious backlashes and it became obvious that rather than becoming 'Western', Russia was choosing its own way, also ideologically."[388]

Another explanation of the special character of Russian legal thinking is that since universality of rights is widely contested, this is inevitable, that every country has its own way in understanding of law: "the human rights regime has serious and dramatic implications for questions of cultural diversity, the sovereignty of states, and ultimately the "universality" of human rights."[389] Moreover, this is true for countries with a Soviet background, which has a special impact on any legal construction.

Also, usually very elastic and indeterminate legal concept requires wide interpretation, as well as detail elaboration. The most important and principled human rights concepts are formulated with extremely high levels of abstraction.[390] This elastic and open-ended character of legal concepts requires setting up a lot of special provisions which depend on the context and reality of a certain country. Moreover, in post-communist societies lawyers and drafters of new laws had an absolutely different legal thought, which was developed during Soviet rule. It is rather unrealistic to expect them to be synchronized with Western leading conceptualizing jurisdictions.

This view on the continuity of the Russian tradition is based on the premise that "not everything considered Soviet disappeared overnight after 1991."[391] Post-communist Russia experienced the come-backs of arguments on different cultural and civilizational issues on the features of Marxist-Leninist ideology. This view is opposed by the alternative

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[388] MÄLKSOO L. "Russian approaches to International law", Oxford University Press, 2015
[389] MUTUA M. "The ideology of human rights", Virginia Journal of International Law Association, 1996, p.595
[390] KLARE K.E. "Legal theory and democratic reconstruction: reflections on 1989", U.B.C. Law Review, Vancouver, 1991, p.99
[391] MÄLKSOO L. "Russian approaches to International law", Oxford University Press, 2015

position – that it is always people and institutions to blame about violations of legality.[392] Nonetheless, the main argument of the present research is based on historiographical method, which claims the necessity to reconstruct the bonds between the past and the present in order to grasp the essence of the object of the study and the premise that history should not be undervalued.

Besides this, in the research was covered a view which is completely different from such Westernized position. John Gray argues that is it profoundly defective to measure the democracy reconstruction in post-communist societies due to the accomplishment of Western liberal institutions. Post-communist countries in general would rather reach a dead-lock if they had been just plainly coping Western democracies. Any institutionalization of democratic forms were undertaken upon the gradual process of adaptation of foreign experience to the needs and circumstances of the society. As John Gray put it in his essay *"Post-Totalitarianism, Civil Society and Limits of Western model"*:

"This is not to say that the best prospect for the post-communist societies is in merely replicating Western capitalist institutions in their present forms. Although acceptance of the core institutions in market capitalism is an inescapable of the core institutions of communist societies, the forms these presently assume in the West are a historic accident, contingencies in the development of these institutions rather than essential, constitutive features of them. The different post-communist societies may reconstruct the core institution of private property in various ways, each appropriate to their environmental, cultural, and economic circumstances. Further, the degree to which they operate a mixed economy will vary significantly – though they are likely, if they are prudent, to opt for a state or public sector smaller than that in most Western countries, including the United States."[393]

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[392] See e.g. for some aspects of that position ETKIND A. "Decay of Public Sphere in Russia" 2015, available on:
https://www.academia.edu/16261875/_Decay_of_Public_Sphere_in_Russia_published_in_Current_History_

[393] GRAY J. "Post-totalitarianism, Civil Society, and the Limits of Western Model" in "The reemergence of Civil Society in Eastern Europe and the Soviet Union" Zbigniew Rau (ed.), Westview press, Oxford, 1991, p.155-156

Such a vision of the development of civil society on the democratic transformations in post-communist countries touches deeper layers of social consciousness rather than measure the technical approach to the establishment of democratic institutions. The category of civil society is strictly bounded to the social legal thought and overall culture of a certain community. It could reflect more precisely the real situation regarding democratic changes rather than the institutional approach.

Post-communist legal reconstruction revealed complex risks to achieve democracy and the responsibility of lawyers in democratic input. The role of Soviet heritage should not be neglected during any meaningful and complex study of the peculiarities of Russian understanding and use of law. The current political and legislative situation, reforms aimed at establishing new democratic authorities, and the judicial system should be explained from a historical perspective in order to have a complex understanding of the processes. An examination of the complex historical events in the Soviet Union and its post-communist democratic reconstruction is necessary to analyze the current Russian understanding of law. Historiographical study of legal theory forms the basis for academics and political thinkers to establish links between the past and the present situation, in order to achieve a deeper understanding of modern events as well as the essence of institutions and doctrines.

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