Chapter 1

TERMS OF REFERENCE

PARALLELS AND ANALOGIES

The present social and economic order of the Soviet Union, with its emphasis upon industrial economy and the urban mode of life, is only a phase of that general process of change which has produced modern industrial society. The principal instrument of change occurred in the mastering of the new technological processes and in the application of modern science to the satisfaction of social needs. In the Soviet Union, as well as in the Western societies where the process of change originally started, industrial and social revolutions made it necessary to redefine certain basic legal concepts, with the result of a veritable jural revolution. In the Soviet Union, no less than in the West, the role of the state and the concept of public order have been reformulated as the control and management of the national economy became the central problem of public concern. Thus, in new social conditions the concept of public function has acquired a new meaning.

The purpose of the present chapter is to lay ground for a systematic examination of Soviet reality in terms of the social functions of Soviet legal institutions. Soviet jurists, preoccupied with the political aspects of their legal order, reject the idea of the comparative method regarding the Soviet legal order. In spite of the formal similarities between socialist and capitalist legal institutions, Soviet professors alleged that the different political content precludes analogy between socialist and capitalist law, for:

Terms of bourgeois legislation are found in separate articles of Soviet statutes and in the statutes in their entirety. That, however, is not the point. The heart of the matter is that Soviet character of . . . the law is expressed in its political character . . . in its socialist content.¹

Admittedly, the political motivation behind a legal rule is an important element in the determination of its purpose and of its function. It is equally true, however, that governmental policies do not account for all aspects of the social function of the enacted rules of law. Legal institutions live their lives and are inspired by their own policies. And these are broader than the actual policies of the regime. In order to obviate overemphasis on the political aspects of social ordering in the Soviet polity, the present inquiry is less concerned with the general theories of the function of the Soviet legal system than with the social role of the institutions of Soviet law, including all aspects of their influence on the course of human affairs.

In order to provide a general framework for the comparative treatment of the institutions of Soviet law, the reader's attention is drawn to some of the main features of the modern legal systems in Western Europe. New social conditions tend to emphasize the role of public law. The final result has been the creation of a new branch of legal regulation, administrative law, while private law has declined as a regulator of basic social functions. New avenues are thus opened for action by the public authority in the promotion of the interests of the polity and of the social welfare. The shape and systematic arrangement of the rule of law have been seriously affected by the increased flow of legal regulations. Finally, the expansion of administrative action has called for the redefinition of the tasks and scope of judicial control.

In the field of legal theory, two trends of jurisprudence have been outlined as important for the understanding of Soviet legal ideas; though never fully acknowledged by Soviet jurists, they reflect the evolution of ideas which resulted from the social changes of the nineteenth century. The positivistic school, in linking legal order with the institution of the state, sees in the latter the most important element in the preservation of social order. The sociological school, emphasizing the role of the social milieu, on the other hand, relegates the state to a less important place.

The central idea inspiring the policies of social reform in the Soviet Union is the theory of the progress of human society toward higher forms of social organization as it was formulated by Karl Marx. This theory was conceived as a process of social evolution
under the impact of the changing, ever more efficient and more collective production techniques. Soviet policy has supported the action of social agents by the action of the state in enforcing Soviet law. Thus, a new legislative technique has been evolved. Aiming at the achievement of social reform through the enforcement of the rule of law, it is an idea not only non-Marxian, but in addition, has been borrowed from the sociological ideas of the West.

THE IDEA OF PROGRESS

After a period of initial doubt as to the place of legal regulation in the socialist society, Soviet leadership determined to accord it a role in the realization of the aims of the Soviet state. The law, it was concluded, offered a useful mechanism for coordinating the activities of social organizations, for reorganizing economic life, and for instilling new ideas on the purpose of social action in the minds of the people. In the words of Vyshinskii, who was called on to perform the act of faith in the name of the Soviet legal profession, the state and the law serve to "eradicate completely and finally the remnants of capitalism in the economic system, to develop the class conscience of the people and to create the Communist society." 2

A Soviet jurist, writing in the post-World War II period for the benefit of his less experienced Polish brethren, stated that:

Socialist legality . . . is defined by the policy of the Soviet state. . . . The policy of industrialization, of collectivization, required a number of legal measures, which ensured historical achievements of socialist construction in the USSR. Stalin's five-year plans are laws strictly executed. . . . Here the correlation between politics, legal regulations and socialist legality is direct and immediate.

Thus, the idea of planned progress toward higher forms of social and economic organization provides the ethos for the legislative embodiments of Soviet policy. In addition, it constitutes the foundation for the Soviet claim that socialist law is a higher type of law. As the Soviet scholar continued:

At the present time, countries of people's democracy having liquidated the capitalist order, are achieving in the development of their new law,

2 Vyshinskii, Materialy pervoi konferentsii nauchnykh rabotnikov prava, May 16–19, 1938, at 183 (1938).
not the reception of Roman law patterns, but of the highest type of law: socialist law.8

In spite of its simplicity, however, the idea of irresistible progress toward better forms of social organization, when viewed in the context of the basic assumptions of Marxist world outlook, presented a number of practical difficulties in the promulgation of concrete legal rules. While there was no doubt in the minds of Soviet leaders that transforming the backward economy of Russia required imitation of Western industrial techniques, it was far less certain in which direction to seek the models for reforming the antiquated laws of the country. Since Marxist theory dictated that progress be conceived as a dialectical process, in which higher forms of production were reflected in new social relations, the new laws could not be borrowed nor imitated outright from the bourgeois experience or patterns.4

And yet, repeal of prerevolutionary laws did not mean renunciation of the basic convictions of Russian jurists who, though siding with the Revolution, nevertheless sought to correlate their own revolutionary convictions and work for the new order with the teachings of progressive jurists of the bourgeois world. A decade after the outbreak of the October Revolution, a Soviet jurist reporting on trends in legal science in the Soviet Union acknowledged that Soviet legal scholars still adhered to the main current of European jurisprudence.5 It is not surprising then that a great many ideas and formulations of modern European scholars have been incorporated into Soviet legislation, although on occasion there was involved little more than terminological similarities reflecting, it would appear, habits of thought rather than fundamental convictions.

In view of the intellectual debt owed to Western jurisprudence, it is no wonder that the idea of uniqueness of the Soviet experiment did not appear coterminous with early statutes. The conviction of the Bolshevik leaders that the October Revolution was only the first outbreak in a chain of revolutions which would change the political

5 Stalgevich, Puti razvitia sovetskoi pravovi mysli (1928).
and social face of Western civilization likewise militated against the assertion of uniqueness. To the same effect, Soviet jurists, together with sociologists, poets, artists, and scientists, looked upon the achievements of modern social and scientific thought, and modern trends in art and literature, as a legitimate heritage of revolutionary Russia.

Further, the method of legal reform in revolutionary Russia was the very process of codification, employed in the Western European tradition, and indeed, by prerevolutionary Russian lawyers themselves. Thus, after an initial averment of the revolutionary concept of law, which relied on the theory that revolutionary justice could function without formal legal rules, the Soviet government, in order to implement its policies and provide the foundations for the orderly operation of its institutions, returned to formalized lawmaking, and legislative procedures became the main source of Soviet law.6

As a result of the intellectual heritage of the West and the relative indifference of Soviet leaders to socialist aspects of legal form, the Soviet legal system, even after forty years of existence, has not ceased to belong to that broad category of legal tradition which is known as civil law. This is even more remarkable in view of the fact that the Soviet regime, as distinguished from Soviet scholars, has accorded little attention to modern developments and legislative trends in the free world. Hence, in spite of the current claim that the Soviet social system represents a unique achievement, qualitatively different from the institutions of the free world, Soviet legal order nevertheless may be analyzed in terms of response to the challenge of social change, a response which has retained the formal aspects of the modern European law. By no means may the Soviet legal system be called a legal order of the new civilization, for Soviet institutions remain copies of similar institutions in Western Europe.7

While the formal similarities represent a valid basis for comparing legal institutions with those of nonsocialist countries, there are other important reasons to justify the comparative treatment. No economist or sociologist would hesitate to compare social and eco-

nomic data of socialist countries with those of Western societies. On the contrary, they readily integrate the Soviet experiment into the general pattern of the development of modern industrial societies. Furthermore, the phenomena explored and the terminology employed are entirely compatible with a legalistic analysis of Soviet reality, and particularly is this true regarding the active role of the State in managing and shaping social institutions. Soviet legislative policies, the content of the legal rule, and the doctrines of Soviet legal institutions are related to similar phenomena in the nonsocialist world. The Soviet experiment with the social reconstruction and industrialization of Russia is part and parcel of the general process of the growth of industrial societies, with all that those changes mean to the mode of life of modern man. The structural alterations in Soviet society, the functions of organized social groups in the public life of the socialist countries, the social and moral ills of modern man within the socialist orbit—all bear a striking resemblance to the developments and problems on our side of the world.

At the present moment, Soviet polity represents perhaps the only social milieu in which the idea of inexorable progress provides a motive force for social action. Soviet world outlook expresses unfailing optimism and the promise of the planned achievement of the millennium. Nevertheless, even in this atmosphere of official optimism, the idea of progress has not survived untarnished. Indeed, the very concept of the role of Soviet law would appear the result not so much of the teachings of Marxism as of the Russian national tradition in which action by the central government constituted the principal motor of reform.

This tradition, combined with the influence of prerevolutionary legal education, was characterized by the great concentration on

8 For a recent expression on the role of progress in Soviet thinking, see Doklady i vistuplenia predstavitelei sovetskoi filosofskoi nauki na XII mezhduarodnom filosofskom kongresse (1958).

"Broad propaganda by the contemporary bourgeois philosophy of scepticism and agnosticism represents one of the forms of struggle against science and dialectical materialism." 39 Bolshaia Sovetskaia Entsiklopediia 223.

"The world outlook of the proletariat, the basis of which is Marxism-Leninism, is permeated by the faith in the brilliant future and the triumph of communism." 32 id. 564.
private law problems, which figured high in the plans of the reform of Russian laws. The legal mind of prerevolutionary Russia operated within the framework of the individual collectivity relations, which predicated progress on the influence of the rule of law on the human mind in the position conceived by the French philosophers of the eighteenth century. In this respect, then, Soviet ideas on the function of the legal order in modern society predate the origins of the Marxist doctrines. Scientific achievements of the age of enlightenment were useful in germinating within the individual a new understanding of the surrounding world, in dispelling his prejudices and liberating him from the tyranny of superstition. Social progress was conceived to be a matter of the moral advancement of each individual, which in turn could be advanced by proper legislative policy.

Beccaria, formulating his ideas on modern penal policies, insisted on moderate punishments and efficient administration of justice as the best means of crime prevention, on the ground that swift justice has a greater chance of eradicating criminal inclinations from the human mind. The very idea of nonretroactive justice was rooted in the concept that moral improvement had a decisive part in determining the purpose of criminal law.

To similar effect, Condorcet, in his plans for reforming French society, saw in bad laws the only cause of bad social mores. "To remove bad morals, it is necessary to remove their cause. And there is only one, that is bad laws." 9 And in 1794 Cambacérès, the chief author of the French Civil Code, wrote: "laws are the seeds of mores." 10 His associate, Portalis, who was the author of the Discours préliminaire, a first modern example of legislative motives for the consideration of the legislative assembly and for the enlightenment of the public, concluded that a statute's main purpose was to "make people better." 11

This moralizing role of legal regulation bore directly upon the individual collectivity relations noted above. Thus, the autonomy of

10 1 Fenet, Recueil complet des travaux préparatoires du Code Civil 108 (1827).
11 Id. at 473.
the individual will constitute the main source of laws, although the law itself enjoyed obligatory force only as the dictate of reason. The more reasonable, therefore the more moral, was the individual human being, and the easier it was for society to discover the rule of law by which to establish a balance between individual life and the interests of the collectivity.12

This concept of the function of the legal rule in modern society, however, did not survive. A century later Pollock had a less exalted idea as to the function of legal rule: "Law does not aim at perfecting the individual character of men, but at regulating the relations of citizens to the commonwealth and to one another." 13

Pollock's views summarize a veritable revolution of ideas concerning the nature and mechanism of progress. In revolt against the French concepts of lawmaking, the German historical school, as well as the philosophy of Hegel, was addressed to the social milieu as differing both from the state and the individual. The simple formula of individual collectivity relations was replaced by a scheme of human relations including the individual, society, and the state, each of which was assured separate autonomous existence. Though Hegel focused primary attention upon the state, society as well was endowed with especial function in his analysis of social reality. To the latter, the state was no longer the result of social contract—something consciously created by the compact between individuals for the fulfillment of specific purposes. It was, rather, the organ of the entire community and a historic necessity.

In time the historical school, which ascertained the source of law in the ideas of law and justice crystallized during the course of the historical development of human societies, and in the tenets of the transcendental truth the agent which limited the arbitrary human will, was supplemented by the theory of evolution. This even more perfect motor of progress espoused the view that society was the environmental milieu in which evolutionary changes took place. At-

12 Rommen, Die ewige Wiederkehr des Naturrechts 76 ff. (1947); also Rommen, Natural Law, A Study in Legal and Social History and Philosophy, 77, 83–85, 94–96 (1947).
tention was thus directed to society as opposed to the Hegelian preoccupation with the State.

The idea of society in conjunction with the theory of evolution made possible the studies of Comte, Bagehot, Spencer, and Marx. Comte, the most systematic thinker of this new trend, established a new direction of inquiry into human affairs by laying the foundations for sociology as a separate discipline. Crucial to his theory was the so-called "law of three stages" through which Comte believed sciences and societies have passed: the theological, the metaphysical, and the positive. In the theological stage, imagination played the principal role, and man interpreted his environment in terms of gods and spirits. In the metaphysical stage, universal ideas were used to explain the universe, and the idea of nature was substituted for the idea of God. The third stage, the positive, subordinated both imagination and reason to experience. Truth was said to consist of empirical facts. Thus, he arrived at the concept of sociology, or "social physics," limiting its tasks to the discovery of the laws of social life. Society was, for Comte, an organism subject to evolution. In consequence, it could be explained scientifically by reference to the concept of cause and effect.

In 1859 there appeared Darwin's *Origin of Species*. It was then left to the sociologist to demonstrate that social life obeyed the same general laws of evolution as did nature, and thus to predict scientifically the future development of society. The *Origin* had demonstrated that the evolution of species led to better and more perfect forms of life. Thus, Darwin discovered the laws of the development of the organic world; according to Engels, Marx discovered the laws governing human society.14

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"In the last quarter of the century Darwin's ideas set a fashion for positivist-historical thought. Embryology seemed to give an analogy for history. The development of an institution or of a doctrine was parallel to the development of an organism. A crop of books on the evolution of law followed, expounding legal institutional development in terms of Darwin.... Today, no one thinks in this fashion. Instead, the correct thing is to urge an administrative absolutism." Pound, Fashions in Juristic Thinking 9 (1938).
Of the various trends of socialist theory on the role of the law and the state in social development toward higher forms of existence, Soviet theory is without doubt the farthest removed from the original Marxian doctrine. Only reformist socialists in the West have accepted fully the doctrine of the growth of the socialist forms of life in its pure form. Only they have found it possible to coordinate the growth of socialism with the existence of the modern state, to assure social peace in order to foster the growth of socialism through the work of social processes alone.

Soviet leadership has found it impracticable to implement fully the idea that changes in social structures and in property relations are the result of such social forces, as techniques of production, which are equated with Darwin's environmental causes.

Thus, after more than forty years of the Soviet order, L. Sobolev, chairman of the Writer's Union of the RSFSR, in addressing the plenary session of the Union's Board in May 1960, still clung to Stalinist concepts of the role of the state and of coercion in social engineering. Sobolev visualized progress toward higher forms of social existence in terms of an attack on the prejudices which he believed to constitute an unhappy heritage of capitalism. "We find ourselves," Sobolev asserted, "on approaches to communism. I consciously use this military term, because, in the progress of the assault which our society is mounting, we must still overcome the minefields laid thousands of years ago—the so-called survivals of capitalism in the consciousness of the people." 

**SOCIAL CHANGE AND THE RULE OF LAW**

An additional perspective for the study of Soviet legal institutions may be gleaned from the realization that the fundamental juristic ideas underpinning the legislation of the free world preceded the emergence of the modern industrial society with its concomittant submergence of individual life. Thus, the Code Civil of France was the code of an agricultural society. It was conservative and static in its concepts, and was addressed primarily to the various types of property and to the family unit. It was designed to serve the interests

and life of a society which depended for its existence upon the cultivation and ownership of land.

But even more important was the fact that in the Code culminated the idea of the two kinds of law, public and private. The Code reflected the scheme worked out by Jean Domat (1625–1696) who in his *Traité des lois* had delimited the separate spheres of public and private law with a greater precision than was ever done before him. To the province of private law belonged all matters of property, contracts and other agreements, guardianships, statutes of limitation, mortgages, and successions. In a very real sense, therefore, the Code had its roots in the social order which preceded the Revolution. In their quest for the abolition of medieval society, the philosophers of legal reform in France relied on the idea of individual liberty, whether their specific concern was with the structure of property relations, the economic organization, or with the political order.16

The structural changes produced by the Industrial Age in the Western World found expression primarily in the separation of ownership and control of the means of production. Personal ownership of industrial property was replaced by the ownership of stocks and bonds, while physical control of productive processes passed to centralized groups of professional managers. With the management of property in bulk, business concerns frequently acquired the character of public institutions.17 Increasing urbanization and standardization of life produced the phenomenon of masses, the latter being characterized by identity of interests and similarity of occupation and conditions of existence. In the new conditions, classes and social groups “must be taken account of no less than individuals.”18 This in turn produced a veritable revolution in the content of the legal rule and led to the reform of the basic concepts of the legal order.

Generally speaking, as a response to the legal reform changing conditions of modern life took three forms. The most obvious and

easiest to account for was the increased scope of regulation, the effect of which was to change the role of public authority and of social organizations. The second was the activity of the courts in re-shaping and redesigning the rules of positive law. Thirdly, the civil law institutions themselves lost much of their social significance.

In that system of social and economic activity which linked business activity with personal control of the means of production, private law institutions were of central importance. Provisions of civil codes regarding inheritance, community property, and the management of property during the personal incapacity of owners constituted a vital part of a vast social and economic structure of which family and individual entrepreneur were the most important features. The depersonalization of economic activity and the substitution of great corporations for individual enterprise, however, relegated private law with its system of rights to an inferior position in terms of social function.

The place of individual entrepreneurs and family businesses became occupied by enormous corporations and employers' associations. These new bodies were faced at the other end of the social spectrum by the trade unions, together with a host of other organizations representing the related and intermediary interests of consumers, small producers, cooperatives, professions, etc. The resulting complication is compounded by the fact that the modern state has abandoned its exalted position of social umpire protecting the broader interests of the polity. Rather, it has assumed direct responsibility for the management of key branches of the national economy.

The state's intervention is justified by the necessity of assuring the flow of services deemed essential to modern life and its public functions and of adjusting the availability of capital, raw material, and other resources in order to promote industrial activity or consumption.

Furthermore, judicial activity in the adaptation of civil law rules, as well as in the implementation of the modern laws of the welfare state, tends to equalize the burden of risk inherent in such modern

19 Cf. Geny, Méthode d'interprétation et sources en droit privé positif (1899).
forms of life as mass transportation, the operation of great industrial factories, and the catastrophic fluctuations in economic activities.\textsuperscript{20} Lines of division between what was previously considered as the exclusive realm of the private law and that which pertained to public law have been further blurred by the fact that the state, in order to discharge its responsibilities, has assumed the garb of a private entrepreneur. The result has been a great difficulty in demarcating between government owned or controlled, public or mixed corporations, and economic institutions which are not owned by the state, emphasizing further the fact that modern forms of industrial and economic activity ceased to be wholly encompassed by the rules of private law.

These structural changes in modern societies have confronted the modern state with new problems. Depersonalization of control of the means of production and the corresponding concentration of economic power have created tensions which the state has had to control in order to preserve social peace. Further, the great mass of private entrepreneurs was replaced by a small number of organizations, thus permitting easier identification of social issues with the conflicting interests of economic and social organizations. This, in turn, has permitted a change in the method of social regulation. The state has been enabled to intervene directly in a manner which makes of itself a third party representing broader interests.

Prior to the emergence of great social organizations representing the interests of the masses, the state had been little interested in the internal organization of associations. Only where external interests expressed in the standards of legal commerce and public confidence were concerned did the state intervene. Now, with the mass participation of individuals in associations, the matter of membership has become a matter of public concern. The obvious reason is that inclusion or exclusion may mean very much the same thing as partnership in the national polity itself. Thus, the restriction of contractual freedom and the intervention of public authority in the process of

\textsuperscript{20} Cf. Friedmann, Law in a Changing Society 24–25 (1959); also Savatier, \textit{supra} note 16; Savatier, \textit{Métamorphoses économiques et sociales du droit civil d'aujourd'hui} (1948) specifically in regard to the function of contract.
collective bargaining have been paralleled by government intervention into the internal affairs of great associations representing economic and social interests. Regulation is justified on the ground that, though voluntary in principle, such associations by their very size exercise what amounts to a monopolistic position in their particular spheres of professional or social activity.

An interesting process may be observed in connection with the vast expansion of the social activities of the state and the virtual statification of social and economic institutions which are not state organizations. Regulation by the public authority tends to shape the business and social activities of great organizations into standard forms, which are then presented in uniform terms to the public. Contracts and forms of organizing activity must conform to standards dictated by the needs of public order. At the same time, legal regulation tends to rely less and less on the form of an abstract legal command.

Portalis, the spokesman for the committee which drafted the French Civil Code, asserted that the abstract form of the legal rule constituted its indispensable characteristic: "[T]he law provides the rule for all: it considers men en masse, never as individuals; it should not deal with individual facts, nor with litigations which divide the citizens...." 21 The French society of the Civil Code, however, was a society of individuals. The modern nation, on the other hand, coalesced into great organizations. In consequence, the state has had to readopt the role of the medieval sovereign. It must face broad social interests and powerful groups, joining them in compacts, playing one against the other, and using its influence and control of resources in order to promote cohesion and the orderly operation of social services. 22 The basic difference between the modern state and its medieval antecedent is that the aspect of liberty which was the product of the French Revolution has survived the social crises of modern times. Thus, personal freedom continues to represent a social goal in its abstract formulation and may not be

21 Portalis, Discours préliminaire, Projet de Code Civil présenté par la Commission nommée par le Gouvernement, le 24 Thermidor an 8.
translated into terms of status with reference to the social and economic ramifications of modern societies.23

LEGAL ORDER OF SOCIAL INTERVENTION

The social mechanism envisaged by the Civil Code of France was perhaps best described by the following quotation from Jhering's classical work (1872):

What is sowed in private law is reaped in public law and the law of nations. In the valleys of private law, in the very humble relations of life, must be collected, drop by drop, so to speak, the forces, the moral capital, which the state needs to operate on a large scale, and to attain its end. Private law, not public law, is the real school of the political education of the people, and if we would know how a people, in case of need, will defend their political rights and their place among the nations, let us examine how the separate members of the nation assert their own right in private life. . . . Law is idealism—paradoxical as this may seem—not the idealism of the fancy, but of character: that is, of the man who looks upon himself as his own end, and esteems all else lightly when he is attacked in his personality.24

Thus, the main stream of legal commerce was thought to flow in the bed of private law transactions; and private law litigation, to constitute the principal means to be employed by the public authority in upholding the rule of law. It was in this spirit that West European legal scholarship in the nineteenth century approached the problem of reforming codes of civil procedure. Simplification of court proceedings was sought through the adoption of the principle of immediacy and publicity, by the oral examination of witnesses, and by the direct participation of parties and their legal counsel in court proceedings. But almost simultaneous with the achievement of these goals of simplification and expediency, permitting speedy and cheap disposition of cases, juristic preoccupation with private litigation was superseded by the problems of social change.25

Gradually, juridical attention became riveted to the forms of the administrative activities of the state.\(^{26}\)

As social interests could no longer be safeguarded through the enforcement of private rights, state activity assumed new forms. From the role of umpire in private litigations, it now assumed the role of social and economic organizer and administrator of national assets. The creative function of public administration, with its new forms of governmental action, thus became an indispensable feature of the modern state.

The intervention of the state in social and economic affairs, however, raised a number of legal problems requiring solutions which challenged accepted ideas of the role of public authority vis-à-vis the public. The final outcome has been the evolution of administrative law. Its subject matter consists in the attempt to determine the responsibilities of governmental authorities, as well as the rights of citizens and social organizations. It further provides the framework for a partnership between the authority and the citizen either as a private individual or as a member of an organization.

The emergence in Western Europe of the modern welfare state was facilitated by the familiarity of the civil law world with state and territorial corporations acting in the capacity of private persons. And it was due to this tradition that there finally emerged the principle that in all of its activities the state was subject to the rule of law, and to administrative procedures and a system of controls in which the courts performed the important function of preventing the abuse of power.\(^{27}\)

The appearance of the modern welfare state in its varied aspects called for the reassessment of the criteria of legality of governmental action. Now, it is obvious that, in order to achieve their purposes, administrative authorities must be guided by different and perhaps more lenient rules as to the formal legality of their action than those rules pertaining to courts of justice. In fact, even with regard to the latter, the European tradition contained the seeds of that type of public action which finally became characteristic of the

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26 Robson, Justice and Administrative Law 229 (1947).
27 Friedmann, supra note 20, 351–52.
life of the modern state. Civil law courts in pursuit of their functions as guardians of minors, of absentee interests, and of those deprived for various reasons of their capacity for legal transactions, and in all nonadversary proceedings, exercise their power with a minimum of attention to form. Discretion is moderated by expediency rather than by formal legality. While public authority acting \textit{qua} public authority has had to adhere to the principle of legality, its criteria have been changed. Thus, when representing the proprietary rights of the state, it is endowed with a certain degree of discretionary power, somewhat similar to that degree of freedom of action enjoyed by a private person or state agency. As French jurisprudence has almost unanimously recognized, freedom of action is essential if the state action is to achieve its purpose:

The mission of public administration cannot be restricted to a slavish execution of the provisions of the public law legislation. Missions of public authority cannot be put in terms of the blind execution of the commands of the legislator, not even in terms of ideas contained in the legal rules. Public authority must examine independently those elements which are left to its decision in the perspective of its proper functions, in accordance with the spirit of the institution. . . . When an administrative authority applies the law, it does so with certain independence, which is quite considerable at times.28

This freedom of action of the administrative authority was further enlarged by the recognition that it could also act as a private person, and could engage thereby the interests of the state in the terms of private law. "The methods of performing public services have the character of administrative action, except when administration voluntarily resorts to the procedures of normal life, or is enjoined by the legal rule to resort to them." This rule, firmly established since 1872 by the French \textit{Conseil d'État}, provides another

28 Walter, \textit{Le contrôle juridictionnel de la moralité administrative} 34–36 (1929).

"L'administration n'est seulement l'exécutrice servile de la loi ou le rouage de transmission des commandements législatifs; elle est encore un organe autonome et créateur." Alibert, \textit{Le contrôle juridictionnel de l'administration au moyen du recours pour l'excès de pouvoir} 16 (1926). \textit{Cf.} Renard, \textit{Le droit, la logique et le bon sens} 362 (1926); Stier-Somlo, \textit{Politique} 29 (4th French ed. 1919).
basis for the integration of public action with the social and economic pursuits of the citizens.29

In the final analysis, however, the character of public action depends not so much upon the form as upon the need for action in the discharge of the duties and functions of the modern state. The tendency has been toward expansion of those activities which cannot be strictly determined by legal regulation. Administrative authority, as some French writers suggest, follows rules of conduct which are not law in the strict sense, but are rather rules of conduct within the framework of legal order. Here standards of public action acquire a coloring which suggests assimilation of the criteria of public action into the standards of ethics controlling the actions of the individual. Realization of the “bien commun” must follow the rules of what is suggestively termed “moralité administrative,” “administrative convenances,” or “rules of good administration.” 30 The analogy between private initiative and the intervention of public authority is further suggested by the fact that ultimately the tasks and responsibilities of the modern state are dictated not so much by the fact that the state alone can undertake to provide social services, as by the fact that these services cannot be provided by private initiative:

Public service exists in all those cases when competent authorities consider that... private initiative is unable to perform a certain task or cannot perform it in a satisfactory manner, and decide to assume responsibility for the service which seems to them to be of public utility.

This same flexibility applies also to practical measures which the public authority adopts in order to discharge its responsibilities. Such may entail direct action by the public authority itself, a gov-

29 Hauriou, Précis de droit administratif 40 (1927); Fleiner, Über die Umbindung der zivilrechtlichen Institute durch das öffentliche Recht 6 ff. (1906).

30 “Le contrôle juridictionnel de la moralité administrative est, avant tout, le moyen d’assujettir l’activité administrative—non à la seule legalité formelle, mais au buts qui lui sont impartis, suivants la disposition de l’ordre administratif, en vue de satisfaction de l’interêt public.” Welter, supra note 28, at 36. Cf. Hauriou, supra note 29, at 197; Renard, Le droit, la justice et la volonté 400 (1924); Beurdeley, Le détournement de pouvoir dans l’interêt financier ou patrimonial de l’administration 164–65 (1928).
government-organized commercial corporation, or a government inspired private enterprise.\textsuperscript{81}

The revolution in the scope of governmental action was followed by a revolution in the field of concepts regarding judicial control, as the old precept that court action was restricted to the private law area alone could no longer be maintained.

The principle of judicial control of administrative authority, and the problem of the type of judicial control to be employed, called for the reappraisal of time-sanctioned doctrines as to the existence of two branches of legal regulation, public and private, over which the powers of the courts were thought to hold a different compass. Thus, civil law relations were subject to judicial adjudication even when the state appeared as a claimant of proprietary rights. Otherwise, public authority was not subject to judicial control.

Roughly corresponding to the above distinction was the doctrine that only those actions of the state which were covered by the provisions of the law, i.e., legal interests, were capable of judicial review according to the general principles of litigation. Eventually, this latter doctrine was replaced by still another distinction, this time between government activities which constituted an exercise of power (\textit{actes de pouvoir, acta imperii}) and those which were the acts of normal administration (\textit{acta gestionis}). This last division corresponded to the view of an absence of court jurisdiction regarding those acts of the state which were not a subject of parliamentary legislation, or which did not involve proprietary rights of the state in its capacity as a private person (\textit{fisc}). This, in fact, was true quite irrespective of their impact on the rights of the individual.\textsuperscript{82}

The succession of theories and doctrines described above exhibited inexorable progress toward the principle of judicial control of state action. The only question remaining was that of a proper distribution of responsibility, according to the specific qualifications of the two great branches of the judiciary, i.e., courts of general jurisdiction and the administrative judiciary. Since 1872 in France,

\footnotesize{31 Waline, \textit{Traité élémentaire de droit administratif} 6 ff. (1957); Fleiner, \textit{supra} note 29, at 6 ff. 
32 Laferrière, \textit{Jurisduction et contentieux} (1896); Bahr, \textit{Der Rechtsstaat} (1864).}
the *Conseil d'État* has made it clear that administration is always accountable at court, and court jurisdiction depends upon the manner of public action.88

Today, even on the continent of Europe where the history of administrative law nears the century mark, the accelerated pace of social and economic change has impeded the efforts of administrative law both in the achievement of clarity and of simplicity in legal provisions and in the effectuation of symmetrical and systematic arrangement characteristic of the admirable monuments of legislative technique represented by the modern codes of Europe. The result is that a good deal of uncertainty continues to persist as to the distribution of the border areas of social life and as to their definite assignment to one of the two branches of adjudication. This situation is further complicated by the feeling that new social services call for the participation of the social interests involved, which in turn cause multiplication of special tribunals. The concept of “public service,” which replaced other criteria of expediency of administrative action in specific situations, again caused confusion. The problem was that the old distinction between action resulting from special authorization and a transaction of private law was no longer held to be decisive in the assignment of judicial responsibility.84 This approach was further confused by the emergencies resulting from national catastrophes. After World War II, the need to organize basic services and to undertake social and economic reconstruction, coupled with the mobilization of private enterprises, created another problem of jurisdiction. It was held that private entrepreneurs servicing the public under government contract also could be classified as falling into the category of the agents of public services.85

The common feature of the experiences of the two great legal cultures of the world, of the civil law and of the Anglo-American tradition, is that the principle of judicial control dominates juristic thinking in regard to the responsibilities of the modern state. In the

33 Hauriou, *supra* note 29, at 40.
Anglo-American tradition, the technique was to expand the responsibilities of the general courts, while the tendency in the civil law countries has been toward more specialized tribunals. The result, however, has not been the devaluation of judicial authority. Rather, great administrative tribunals rival in stature and authority the supreme courts of their countries. The emergence of the former was due to the complexity of administrative action and to the unsystematic character of the provisions of administrative law. Public authority could not, in a world of great corporations and mass organizations, assure satisfaction of broader social interests through the formal commands of the law. Even before the period of the great wars, a French jurist, in characterizing the new law which had come to occupy the most important place in the legal systems of modern societies, said:

In its new conception the law no longer assumes to tender absolute commands, it strives at diversity in its practical operation, seeks to guide, to counsel, endeavors to regularize the movements of social life. . . .

And indeed mediation, arbitration, administrative pressure, persuasion, mobilization of public opinion, joint industrial enterprise, use of privilege and exemption from taxation, subsidy and control of standardized contracts, and internal intervention into the life of private associations—all have become legitimate means of administrative action. A distinguished jurist, referring to the circumstances of postwar France, has expressed doubt that the social stresses and conflicts of contemporary society permit orderly law enforcement at all. Indeed, it seems that the "acceleration of history," which appears to be the mark of our time, will not permit modern societies to engage in a labor comparable to that of the Civil Code of France, which aimed at systematic codification of all law into one book. Nevertheless, there are fundamental legal ideas which do con-

36 Tezner, Das Oesterreichische Administrativverfahren 430 ff. (1925); Geny, Science et technique en droit privé positif (1927); Perraux, Technique et jurisprudence en droit privé (1923).
39 Halévy, Essai sur l'accélération de l'histoire (1948).
stitute the core of the administrative law of modern societies. Principal among these is the conviction that public authority has the power to act only with reference to a rule of law. Thus, the attributes of discretion and freedom from judicial control persist only when the law directly and expressly so provides. In this manner, the function of legal order to provide balance between individual life and collective existence has asserted itself anew. In reference to new conditions, law enforcement has changed in form, but not in ultimate purpose.40

Structural changes in legal systems and the reappearance of old concepts which stress the idea of relation or function have been sometimes interpreted as per se significant to the acceptance of new ideas regarding social aims and methods of social control. Some authors aver that concepts of function or relation are specific for certain social or national environments.41 Others claim that jurists' concern with the issue of rights is only a relic of a situation characteristic of the conflict between the exercise of governmental power and the idea of the law.42

A mere glance at the history of these ideas should dispel such

40 Bernatzik, supra note 34, at 36–47; Laun, Das freie Ermesse und seine Grenzen 61–79 (1910); Jellinek, Gesetz, Gesetzanwendung und Zweckmassigkeitserwägung 89 (1913).
42 "An opposition has for long existed in Britain between the idea of 'law' and the idea of 'government.' This is a heritage from the conflict in the seventeenth century between, on the one side, a sovereign claiming to rule by the divine right and to exercise an undisputed prerogative in all matters of government, and, on the other side, a nation claiming a supreme law to which the sovereign should be subject. That struggle between King and Commons has become transformed in our own day into a conflict between the Executive on the one hand, and the Judiciary and the legal profession on the other. The lawyers still regard themselves as champions of the popular cause; but there can be little doubt that the great departments of State administering or supervising public health, public education, pension schemes, unemployment and health insurance, housing and all the other modern social services, are not only essential to the well-being of the great mass of people, but also the most significant expressions of democracy in our time. Considerations of this kind, however, could scarcely be expected to weigh with the predominantly upper middle-class legal mind." Robson, supra note 26, at 316.
preconceptions. Their employment in juristic constructions to meet the needs of changing times has no ideological significance per se. Similarly, it seems quite futile to endeavor to explain away the issue of rights as no longer providing an insight into the meaning and the function of legal institutions. Only the context of the exercise of rights has been changed, and both the sociologist and the jurist must seek their content within broader human institutions.48

DOCTRINES OF THE INSTITUTIONS

Soviet legal theories are predicated upon the idea of progress and are identified with the Soviet policy of transforming, according to a predetermined plan, the economic and social order into that of an industrial civilization. In order to achieve higher material and moral values, Soviet leadership has concentrated all social and official action, including the method of legal regulation, on the task of surpassing the economies of the more advanced industrial nations of the West. Soviet legal order is thus designed to accomplish concrete functions in the program of the transformation of social reality in Russia.

Hence, a comparative study of the Soviet legal system must seek to answer two questions. First, have Soviet jurists been able to develop new techniques in response to the singular tasks faced by the Soviet society and legal order? Second, have the role of the Soviet legal order and concrete social conditions affected the inner meaning and function of Soviet legal institutions, and if so, in what manner? Soviet jurists claim broadly that Soviet law and Soviet legality represent new values, permitting realization of higher standards of personal freedom.

Our inquiry here calls for a sketch, albeit in most general terms, of the impact of the process of social change on the legal institutions of modern societies. Admittedly, in open societies neither the state nor the legal order has entertained ambitions comparable to those advanced by the Soviet polity. However, the planned participation of the state and its legal order in the program of social re-

construction can hardly be considered, from the viewpoint of Western civilization, as a full and complete response to the social needs of any environment. While the law must promote social discipline, its functions cannot be limited to that task alone. It must also preserve human autonomy in forms related to the social techniques of the time.

Doctrines of legal institutions must be distinguished from broad legal theories. Thus, doctrines, as opposed to theories, constitute the premise on which a legal institution operates in a concrete historical situation. They also explain the inner changes generated by social conditions, which find reflection in the institutions themselves. In the light of doctrines, institutions appear as social techniques intended to achieve political aims and in the process to realize eternal values of the law.

To take a concrete example, legislation represents a method of social ordering. In modern times, it operates on the theory that it is a major instrument of democracy in that it constitutes the chief function of the representative institutions. However, changes in the legislative techniques and in the formal aspects of the laws reflect the impact of the times. One of the experiences of our times is the fact that lawmaking is no longer a monopoly of a single governmental institution.

Proceeding further, it would perhaps be well to point out the close kinship between the basic juristic categories which constitute the common background of the Soviet legal order with the legal orders of the free world.

The era of codified statutes in Western Europe, which sought to comprehend within a single book all the various fields of law of a given state, was fathered by the conviction that there exists a system of natural laws, discoverable by reason and legal scholarship. In the course of the nineteenth century, however, the idea of immutable and perfect natural law was replaced by the scholarship of trained lawyers. The Austrian Civil Code of 1811 still referred the judge to principles of natural law when the law could not provide a rule for the solution of a case. Section 9 of the Russian Civil Procedure of 1864 ruled that in such a case the court was to base its decision on

the "common sense of laws." And Article 1 of the Swiss Civil Code, which was the product of legal scholarship of the twentieth century when the theories of natural law had lost their validity, enjoined the judge, unable to solve a case by application of a written statute or its interpretation, to resort to the customary law as a subsidiary source of legal rule. In the absence of the latter he was to apply a rule such as he would enact if he were a lawmaker, being guided by established doctrine and tradition.

Under the Austrian Code, the judge was called upon to enforce a legal system of which the Code was only a written part. Russian and Swiss provisions for filling lacunae in the laws of the country were the result of century-old experience in codification. The conviction that a legal order was a part of a natural system of law had dimmed by that time, but not so the belief that law was an autonomous discipline. Thus, it was still felt that answers to every legal problem could be found, either in the common sense of law or in doctrine and tradition.

An interesting aspect of the evolution of ideas regarding methods of providing an answer to legal problems where no direct answer is prescribed in the rules of the positive law is that in the main the tradition survived the impact of revolutionary changes. Article 12 of the Italian Civil Code of 1942, which was the product of the Fascist regime, has departed little from the original pattern. It ordained that if "a controversy cannot be solved by the application of the provision which applies directly to the case, regard will be taken of the provisions which apply to similar cases or regulate analogous matters; if the case is still doubtful, it shall be decided according to the general principles of the general legal order of the state."

The general purport of Article 12 of the Civil Code of 1942 leaves little doubt that it is a product of the traditional approach. But it also leaves little doubt that the actual content of the legal rule which the court would establish by following its instructions would be colored in the final analysis by the political nature of the actual regime, and that the real doctrine of the institution is discoverable only by analysis of its function within the social context of the moment. Although no legislator in the past anticipated it, the same ap-
plies with equal force to the Austrian, Russian, or Swiss examples.

The teachings of general experience, necessitating the correlation of the formal provision with the actual social and economic order in order to arrive at the proper role of legal rule, apply equally to the legal order of the socialist countries. Particularly is this true where Soviet legislators rely on the experiences of the common historical past. To this end, Section 1 of the Bulgarian law on Obligations and Contracts of 1950 provided that:

This law regulates obligations and contracts in order to support the construction of socialism, fulfillment of the national economic plans, and the realization of the rights of the toilers in the People's Republic of Bulgaria.

According to Section 2 of the same law, if the law contains no direct rule covering the case:

[A] provision which governs a similar case is applicable to the case not provided in it, if this corresponds to the rules of life in the socialist community. If this is not possible the general principles of the socialist law apply.45

The Bulgarian formulation added a new element, which qualified the use of the analogy by demanding adherence to the general goals of the legal order. It does not materially differ from the Italian formula, except that it lists specifically the constituent "rules of life in a socialist community." But even this formulation leaves little doubt as to the source of the inspiration for the Bulgarian provisions, and the mere detailed enumeration of social goals to be achieved in the course of law enforcement constitutes no guarantee of performance. In the final analysis, therefore, the technique is a different matter from the political or social content of the legal rule. The former is apparent from the form of the legal rule, the latter from its actual operation in life.

Thus are set forth the scope and the method of the present study.

45 D.V. 275/1950. Bulgarian Civil Procedure as amended in 1930 provided in section 9 as follows: "The courts shall decide according to the exact meaning of the laws in force. If these are incomplete, unclear or contradictory, the courts shall decide according to the general meaning of the laws; in case of a gap in legal provisions with respect to a given matter, they shall decide according to custom, and in the absence of such, according to justice."
The task is to establish, on the basis of external criteria, the origin of Soviet legal institutions and to confront their original purpose with their role and function in the Soviet polity. In a sense, the institutions of Soviet law are treated as part and parcel of the legal tradition of Europe; and the question is, what is their role in a social and economic order which claims to have achieved higher standards of liberty and a more perfect realization of the postulates of social justice?

**JURISPRUDENCE OF STATE WORSHIPERS**

The identification of Soviet legal thought with the policies of the regime is achieved in Soviet theory through concentration on the idea of progress, with the latter's postulation of a social environment highly influenced by the state and legal order. The final outcome of state action is to achieve the merger of public institutions with social structures. By some process, the outlines of which are at present the subject of earnest discussion in leading Soviet intellectual circles, society is to emerge finally as the composite of the assumption, by the public institutions, of all the functions of the state, while nevertheless parting with none of their own. Although highly purposive and teleological in their formulations, Soviet jurists, in working out the grand lines of the process of transition to higher forms of social existence, are not concerned with the doctrines of Marxism. Their concern is chiefly with the practical problems of lawmaking as responses to the social needs—such responses being occasioned by commands from the leadership of the Party.46

The pattern of Soviet theoretical thinking is thus linked with two main trends of thought in the West, which make either the state or society the frame of reference within which problems of legal order are considered. Hence, in order to provide proper perspective for the problems discussed in this study, some restatement of the principal theoretical propositions concerning the relationship between the state and the operation of the legal order within the social structures appears useful if not essential. In particular should be noted those propositions which have exerted an influence on the theoretical formulations of Soviet scholars.

In this connection, two trends of thought seem to be of importance. In the first place, the normative school has provided the material for the construction of Soviet legal concepts; and secondly, the modern sociological school has stimulated Soviet theoretical speculations. It would be futile to seek recognition of Soviet indebtedness to the thought of Western European scholars. Soviet thinkers are precluded from such acknowledgment by the theory of the qualitative difference of Soviet institutions from their counterparts in the free world. Nevertheless, Western European legal thought provides a capital guide for the analysis of Soviet reality.

In this context, the idea of the rule of law within the framework of the constitutional government (Rechtsstaat) deserves special attention. Such was a logical derivative of the idea of natural law. The function of the Rechtsstaat is to administer justice to all. It is not merely to protect individual status, but to establish every individual in his right status. The concept of the rule of law in this form originated with a group of liberal jurists (Gneist, Lorenz von Stein, Bahr, and others). Embracing the legal ideology of the French Revolution, and in particular the doctrines of Montesquieu, they assimilated such theories for the use of German jurisprudence.

In the early formulations of the rule of law, the idea of law was distinct from the idea of the state. The state was governed by law, but it became Rechtsstaat when it was governed by the right law. Although differing from the public order described by Montesquieu in his claim of integral governance by the law, it did not differ in nature from the state of the eighteenth century. As a consequence, it had to be controlled. As Otto Bahr put it:

To make the Rechtsstaat come true it is not sufficient that public law be expressed in statutes; there must also be a judiciary qualified to establish what is right in the concrete case and thus give an indisputable foundation for the rehabilitation of law where it has been violated.\textsuperscript{47}

In time, the idea of judicial control was supplemented by the idea of the independence of the administrative mechanism of the

\textsuperscript{47} Bahr, \textit{supra} note 32, at 8; Mohl, "Gesellschaftswissenschaft und Staatswissenschaft," 7 Zeitschrift für die gesamte Staatswissenschaft (1851); Stein, System der Staatswissenschaft (1856); Stein, Der Begriff der Gesellschaft (1855); Gneist, Zur Verwaltungsreform und Verwaltungsrechtpflege in Preussen (1881); Gneist, Der Rechtsstaat (1872).
state from the political elements in the higher echelons of government. An additional supplement was the theory that statutory enactments, although representing the pressure of politics on the system of public authorities, become divorced from their makers. The state in this role was conceived as the supreme association, though but one of many in the social structure. Its primary function was to assure unity of all social elements.

Further in this direction was the identification of integral government by law with the state, as the legal order itself. Thus, the state became only a name for the legal order. Kelsen, who extended this line of thought to its ultimate conclusions, stated the point in truly magisterial terminology:

The state as a legal community is not something apart from its legal order, any more than a corporation is distinct from its constitutive order. . . . We must admit that the community we call “State” is “its” legal order.48

Identification of the state with the law was the last step in the process of rejection of natural law theories. Individual rights could not be conceived otherwise than in relation to the positive legal order. As such they depended on membership in the specific polity. Individuals had rights not as humans but as citizens.

The integral identification of public order with legal order constituted a first step in the direction of the total separation of laws from the transcendental values which constitute the legitimacy of the legal rule. The development of democratic institutions had identified the right law with the idea of the formally right law adopted by the representatives of the people, or rather by their majority. Once this happened, the way was open for all theoretical speculations stressing the formal aspects of legal rule, and for the method which was characterized by the progressive elimination from legal inquiry of all elements of reality which were unsuitable for the employment of the method. Starting with the age of reason, through the historical school and down to the period of positivistic orientation, progress in the techniques of legal method signified a constant narrowing of experience, on which each succeeding generation of learned jurists relied for the materials for their scholarly theories. Juridical speculation was

finally restricted to the legal rule itself, exclusive of social trends, scientific developments, and technical developments affecting social and economic facts, which in turn affected the meaning and the function of legal institutions. The task which Kelsen envisaged for legal science was the building of a theory "resulting from the comparative analysis of the different positive legal orders." 49

It was little realized that in the quest for a pure science of law, the very idea of restraint in lawmaking, which after all constitutes the soul of legal order, is lost. Jean Domat, in attempting a systematic arrangement of all the laws of the realm of France, differentiated those which were made by the king from those made by the Church. Simultaneously, he recognized the force of custom, the rules of law found in the Digesta or Codex Justinianus and also some that were made by the decisions of the courts. Not all of these laws, however, belonged to the same order, as some of the rules were unchangeable, while others were imposed at will. Nevertheless, they could not be contrary to the laws that were unchangeable, and no one could change laws resulting from the nature of things or discoverable by reason.

For Bodin, the supreme authority was subject to the authority of natural and divine law and the law of all nations. While supreme authority was exonerated from following the positive law of the state, owing to its power to enact new positive laws, it could not alter the laws which concerned the state of the realm. The king had to respect the property of his subjects and honor royal contracts. Both Domat and Bodin would have recognized the value of the Kelsenian inquiry, but would not have agreed that it could provide the material to build a general system of legal theory. Social reality, which they contemplated, told them that such was a futile endeavor.

Stammler, who represented another trend in the same general direction, concerned himself exclusively with the normative and formal aspects of law: "The pure forms . . . are conceptual methods of ordering. . . ." In his opinion, any endeavor to establish an ideal legal system with a concrete content was futile. It was not possible to conceive

49 "The general theory, as it is presented in this book, is directed at a structural analysis of positive law rather than at a psychological or economic explanation of its conditions, or a moral or a political evaluation of its ends." Kelsen, supra note 48, at xiii–xiv.
of a legal system which would have a content, however limited in its subject matter, which would nevertheless hold good for all times and for all peoples. Only pure forms could claim an absolute validity of conceptions, and this held true in legal questions as well. Experience regarding the normative and formal aspects of the legal rule might be arranged according to a fixed and mandatory plan, valid for all ages and social conditions. "There are certainly," as Stammler asserted, "pure forms of juristic thought which are unconditionally necessary as ordering principles for any content of law."  

Along different lines, neo-Kantians argued that legal science differed from sociology, which was a natural science (Kausalwissenschaft), since legal theories were directed only to the "ought" and not to the social fact. Their successors, however, abandoned this distinction. Thus, sociologists of the positivist conviction claimed that it was possible to discover by observation and experience absolute mechanical social laws, such having produced all social, political, and legal institutions irrespective of human will. 

The positivist sociologist considered the legal norm as a social fact in the same sense that Kelsen regarded sociology, i.e., as natural science. The most extreme among them, the Nordic school, in fact, identified legal analysis with the study of the exercise of power.

The basic principle of the Nordic theories is the categorization of the various phenomena observable in social life into those which really matter for the determination of the nature of law and such as are important for its analysis. These are to be separated from those which constitute legal ideology, sham structure, a figment of imagination, if not a pure superstition. Stripped of those elements, law is but "a link in the chain of cause and effect. It has a place among the facts of the world of time and space." The binding force of law, separate from the process of its enforcement, exists, according to this view, as a reality only as an idea in the human mind. Law is a fact


51 Verdross, Abendlandische Rechtsphilosophie 180 (1958); Pound, supra note 18, at 161-62; 1 Pound, Jurisprudence 304 (1959); Cohen, "The Place of Logic in Law," 29 Harv. L. Rev. 630 ff. (1914-16); Olivcrona, Law as Fact 16-17 (1939).
only in the form of pressure exercised on the population. This distinction, according to Olivecrona, constitutes a dividing line between realism and metaphysics, scientific method and mysticism.52

Somewhat naively, Olivecrona announced that "words" printed in the law books were facts, as were ideas evoked in the mind of the reader of these words. But if this is reality, in what sense do these words in the law books differ from other words in other law books, which constitute ideology? In the mind of the judge who renders sentence, opined Olivecrona, printed words of the statute met and merged with the ideology.58

Law as social fact, according to the Nordics, is the norm which concerns the application of force. Right and might are not opposites, and the relation between those who decide what is to be law and those who are subject to the law is one of power. Identification of power with the law is complete; power functions through law.54

Lundstedt, the most radical of the Nordic school, rejected that "body of concepts properly called legal ideology, under whose continued domination jurisprudence has remained in a deplorable state of prescientific wordmongering." Rather, he identified law with the very life of mankind in organized groups and with the conditions which made social coexistence possible—with the controls which made it possible for man to exist in society. Social control consisted of legislation and of the legal machinery in action. For Lundstedt, legal machinery had one purpose only, and that was "checking the impulses of the people" in following their otherwise natural inclinations to make use of existing commodities within their reach.55

Lundstedt rejected the view that law was the result of a conflict between the individual and the collectivity, thus providing a setting for the concept of individual rights as counterpoised by the rights of the community. "It is impossible," said Lundstedt, "except in an imagination entirely divorced from reality, to take the whole and set it up in contrast to its parts." Nevertheless, he admitted that it was

52 Olivecrona, supra note 51, at 17.
53 Id. at 19–20.
54 Ross, On Law and Justice 52–53, 58 (1959); Olivecrona, supra note 51, at 134 ff.
55 Lundstedt, Legal Thinking Revised 9, 86, 301–2 (1956).
possible to speak of "the rights of state against an individual, and vice versa." 56

The crux of the matter is that even the state of the rule of law is capable of injustice. Such is clearly demonstrated in the fate of the minorities and the ever-recurring phenomenon of exceptional legislation. To give an example from French practice, it is enough to quote the case of the decree law of November 3, 1939, which amended Article 83 of the French Criminal Code, and treated as crimes "all wilfull acts which by their nature could obstruct national defense," if such acts could not be qualified as an offense against the external security of the state. After the liberation of France, Executive Order of December 26, 1944, created a crime of national indignity, which consisted of "wilfull direct or indirect assistance to Germany or her allies, or of an attack on the unity of the nation, or on the liberty of the French or equality between them." Simultaneously, special tribunals were established for trying such offenses. Quite apart from the question of whether these measures were dictated by real expediency, their conflict with the fundamental principles of the French criminal law is evident. One might say that this type of legislation is in conflict with the very idea of the state, which is considered by the positivists to be the legal order itself. However, positivist jurists concede that, according to their criteria, exceptional legislation and retroactive laws constitute valid rules. Thus, a Danish representative of the Nordic school admitted that:

It has been maintained that Hitler's rule of violence was not a legal order, and juridical "positivism" has been accused of moral treason.... But a descriptive terminology has nothing to do with moral approval or condemnation. While I may classify a certain order as a "legal order," it is possible for me at the same time to consider it my highest moral duty to overthrow that order.57

LEGAL THEORIES OF SOCIAL CHANGE

Thus, the theories of the normative school permitted contemplation of the systematic arrangement of legal institutions and rendered thereby great services to academic studies and legal instruction. On

56. Id. at 33.
57 Ross, supra note 54, at 31–32.
the other hand, practical problems, which were the result of the changing content of the legal rule, called for a new approach, more closely connected with social realities. One of the first questions which had to be answered was where to find a scientific guide for the action of public authority when the social premises of the existing legal order underwent a process of change. The very life of modern society had made obsolete the rules of the Code and required the various organs of the state, the courts and administrative authorities, to discover new meanings and functions for the legal provisions. The guide to such actions had to be found in the social sciences, where the modern jurist was enjoined to seek understanding of the conflicts of interests and to ascertain the purpose of the rule of law. Hence, the new trend in jurisprudence abandoned the pretence that law constituted a self-contained discipline and invoked, by way of supplement, the use of auxiliary disciplines.\(^58\)

From these auxiliary guides into social reality, the jurist learned that the central position, which until then firmly belonged to the state, now belonged to society. This called for re-examination of basic issues and conceptions. Liberty and property rights were no longer conceived to be absolute values limited only by the regard for the liberty and property rights of others. Individual rights became subordinated to the necessity of conforming with the social order. Property, while serving the individual, constituted a factor in the general welfare: "Property belongs to an individual on the strength of the fact that he belongs to the human society; it constitutes a part of the patrimony of all." This was the new dogma.\(^59\)

The old position of exclusive reliance on positive law, i.e., law formally introduced by the competent authorities of the state, was no longer adequate. Society was now viewed to be governed by its own rules. In consequence, only a portion of the elements of the

\(^{58}\) Geny, \textit{supra} note 19, vol. 1 at 2–3.

\(^{59}\) Renard, \textit{Propriété privée et propriété humaine} 2–3 (1926): "Beginnings of the new jurisprudence which rejected formal methods of legal interpretation may be traced to Jhering who insisted on the interpretation according to the social purpose of the law which is determined by social goals and not by the individual will." See also 1 Pound, \textit{Jurisprudence} 335; 1 Jhering, \textit{Der Zweck im Recht} 74–75 (4th ed. 1904); Jhering, \textit{Der Besitzwille}, ix–x (1889).
positive law was formally given. Others had to be found through the process of interpretation. Law was partly science and partly technique. Legal rule was conservative and constituted a drag on social development. One of the functions of modern jurisprudence, then, was to gain an up to date understanding of the needs of society. It was to promote reinterpretation of the rule of law, not only in terms of the ageless tenets of legal method, but also in accord with social realities. Hence, the state, but not the legal rule, was relegated to subsidiary status in social ordering. Law was conceived as a function of social rule, the litigious aspect of law enforcement becoming reduced to a matter of technique. Law enforcement was viewed as one of the numerous reasons for upholding the legal rule:

It is quite obvious that a man lives in innumerable legal relations, and that with few exceptions, he quite voluntarily performs the duties incumbent upon him because of these relations. One performs one's duties as father or son, as husband or wife, does not interfere with one's neighbor's enjoyment of his property, pays one's debts, delivers that which one has sold, and renders to one's employer the performance. . . . The jurist of course, is ready with the objection that all men perform their duties only because they know that the courts shall eventually compel them to perform them. If he should take the pains, to which, indeed, he is not accustomed, to observe what men do and leave undone, he would soon be convinced of the fact that, as a rule, the thought of compulsion by the courts does not even enter the minds of men.60

A different school of thought claimed that: "fundamental changes in society are possible without accompanying alterations of the legal system." 61 Karl Renner, one of the most distinguished representatives of this trend, has suggested the existence of a basic dichotomy between the normative functions of the legal order and the creative functions of social laws. Each of these two social orders, in his view, governed separate realms. The law was addressed to individuals, but was unable to command the economic development of society:

The relations between the individual and the natural object, the technical power of the man, the productive capacity of the individual, all those

develop under the eye of the law but not by means of the law. Where it aims at the control of groups the law cannot do more than to address itself to the individual. . . . the law must resolve all collective relations among men into rights and duties of individuals. Wherever men enter into a definite but extralegal relationship, as for instance in the form of cooperation for manufacture, or a body of factory workers, in actuality they constitute groups whose collective actions are beyond the reach of law. Even a casual gathering of the individuals, such as a crowd, develops potentialities for social action outside the direct control of the law. 62

Consequently, for Renner, legal rule was not a relevant social rule. It could not influence the development and transformation of social forms of action. Economic developments, however, did affect the legal rule, and deprived of legal force those formally binding legal rules which no longer applied to changed economic and social conditions.

The function of the jurist, in Renner's analysis, was to provide the bridge between these two phenomena, i.e., to link the legal order with the state and the social forces. Social facts thus were correlated with the legal order by providing a foundation for its operation. The legal and social orders acknowledged their allegiance to the central principle of social organization, described variously as "a complex of social facts involved in the manifold associations and relations which make up human society" (Ehrlich), "social interdependence in the economic order" (Duguit), or "social solidarity" which constitutes the principle of law (Bourgeois). 63

The institutions which translate social action into the forms current in legal commerce have been variously conceived. Jellinek, still standing astride the two systems of rights and the mechanism of social functions, resorted to the device of fiction. Thus, true contracts involving individual will were arranged in the same category with the quasi contracts which clothe social action. 64 Hauriou developed the theory of the institution, which he conceived to be an "association of human activities" endowed with significance and con-

62 Renner, supra note 61, at 255.
63 1 Pound, Jurisprudence 335 ff.; Leroy, supra note 37, at 38, 277-78.
64 Jellinek, L'état moderne et son droit 74 ff. (1904); cf. 1 Pound, Jurisprudence 341; Pound, supra note 18, at 84.
tinuity in a social milieu. The state was one of these institutions. Along with other institutions, it provided anchorage for the legal system.

Renard developed Hauriou’s concept still further. Institutions represented, to Renard, not only the elements of stability and continuity, but contained as well an element of progress. While the contractual forms of relations were sporadic, and represented little or no continuity, institutions represented the dynamism of social life.

Renard’s new jurisprudence was addressed to the problem of liberty in the sense that it tended toward subordination of the individual will to the rule of reason. Individual will left to itself was an anarchistic element. Social order grounded on the principle of social discipline provided the element of balance in the conflict of antagonistic forces. The element which unified all people was reason. Therefore, the legal system should be redirected from the principle of individual will and contract to the principle of order based on institutions and reason.

In other words, reason was identified with the scientific approach to the problem of lawmaking. Isolated from politics, the latter was to be directed only by the scientific findings of the supporting sciences which analyzed and established the needs of society. The age of politics, with its struggle for freedom, had passed. Freedom had been won. The need now was for a better rule of law more adapted to social needs.65

Various authors of the modern sociological school differ in their understanding of the role of the state and of the legal order. Socialist theories of social change reserve to the state its traditional role as guardian of public order. Contrariwise, the main trend of sociological jurisprudence calls for a more active role for the state and legal order. However, in the system of social organizations the state is only one of several constituents, though perhaps the most important. In order to be creative, the law would then be required to seek harmony with the social rule.

65 “[L]e virement de l’institutionnel au contractuel dénote habituellement une malaise, le virement du contractuel vers l’institutionnel un progrès.” Renard, La théorie de l’institution 30 (1930); also id. at 445–46. Cf. Rommen, supra note 47, at 40–41, 55, on the relationships lex-ratio and lex-voluntas.
According to Duguit, formal standards of legality are not adequate criteria by which to test the validity of the rule of law. The latter was that rule which promoted social solidarity. The force of law rested in the fact that the people's individual consciences were persuaded that this norm could be enforced. Law existed and was valid independently of the technique of enforcement by the state. But fundamentally, it was not the creation of the state, although formally it appeared to be.

These two concepts, the purposive character of the legal rule and the state of individual conscience, determined in Duguit's analysis the content and binding force of the law; and on this basis, legal rules were integrated with social laws. On this basis also, individual rights and interests were identified with the interests of society at large.66

The sociological school argued against the division of the legal system into public and private law, and against the concept of state sovereignty. Duguit considered both to be contrary to the principle of solidarity. Renner, on the other hand, rejected private law altogether, as in his opinion it was a system of rules which delegated the exercise of public power to private entrepreneurs. The homogeneity of the legal system warranted full judicial control of all aspects of social activity, whether within the jurisdiction of public authorities, social organizations, or private entrepreneurs.

No less important among the contributions of the sociological school were the reforms which increased judicial control of proceedings in civil causes. Thus, with a view to arriving at the material truth, the court was permitted to control the flow of evidence and to decide for itself what evidence it needed in order to discharge its responsibilities. Furthermore, the court was given great powers to expedite proceedings in the cases before it. After the reform of German civil procedure in 1924, which may be taken as typical of the reforms introduced in the period between the wars in the European countries, the parties, by joint agreement, could no longer suspend proceedings in the case until further motion. The court, on the other hand, could order the parties to continue the pleading unless good cause was

66 1 Duguit, Traité de droit constitutionnel 80–81, 93, 174 (1927); cf. Willoughby, The Ethical Bases of Political Authority (1930).
shown. Also, as social harmony was the primary value of which laws were required to take account, European courts were instructed to favor in each stage of proceedings amicable settlement of litigations, and to render necessary assistance to the parties to that effect.

In the field of the criminal law, the sociological school made the courts chief instruments of modern penal policy. Criminal courts were accorded great powers of punishment, of judicial pardon, and the application of preventive, correctional, and therapeutical measures. Their aim in the disposal of criminal cases was to assist those who promised a return to normal life.

Of similar import were the powers accorded to the civil courts in regard to enforcing private contracts and adjusting relations between individual parties according to broader social interests. In particular, courts were accorded great powers in the distribution of risks resulting from the hazards of modern life. An interesting indication of the trend of thought initiated by the sociological school was the proposal contained in the draft of the German Civil Code which was prepared at the beginning of the present century. According to this proposal the court could, in adjudicating a case, adapt the stipulations of a private contract to the requirements of public utility and in accordance with the commands of morals.67

At the turn of the century, the work of the sociological school was beginning to produce practical results in the form of legislative reform.68 Its main achievement was the recognition by the legal profession and the legislators of the need to utilize the new techniques for the purpose of realizing the eternal goals of the rule of law within the context of new social conditions.

The sociologists have demonstrated that, in order to provide a balance between individual rights and the general welfare and security of all, the rule of law must abandon its abstract and general form and become a more flexible tool of social ordering. Sociologists have

67 For the listing of the most important works of the early period of the sociological school see 1 Geny, supra note 19, v ff.; cf. Leroy, supra note 37, at 84.
also taught that it is necessary to take account of social and economic disparities rather than to insist on the equality of all members of the community under law.

This shift in the ideas concerning the function of the rule of law was occasioned by the realization of social environment as the milieu which shapes the forces of progress responsible for the conditions of life. In addition, it has been recognized that the role of the state has had to be correspondingly enlarged in order to maintain social peace. The state, although no longer enjoying the pre-eminence accorded to it by the positivists, has remained the most important and most general social institution affording protection to individual rights. In the final analysis, then, sociologists have added a new dimension to the concept of legal order, though still inspired by the idea that the rule of law represents a balance between the general welfare and individual liberty.