Chapter II

LAW, STATE, AND SOCIETY

GROWTH OF THE SOCIALIST RECHTSSTAAT

A collective work of Soviet jurists to celebrate forty years of Soviet legal order has stressed that the Soviet system has resulted from the achievement of the masses:

The Soviet state emerged not on the basis of some written statutes, but as a result of the direct initiative of the masses, which had destroyed in the course of the revolution of the old order, the old legality, the old system of authorities, which have created in its stead its own system of power, its own governmental agencies.¹

While this description is undoubtedly true regarding that part of the process which consisted of overthrowing the old regime, the Soviet regime itself was rather the result of political and military action conducted from the center. The victory of the Bolshevik Party was followed by the gradual integration of the revolutionary authorities into a single system of controls. Before its accomplishment, however, large parts of Russia lived without any system of government and without a legal order.

Decrees and instructions which flowed from the center of the revolutionary government might give the impression that from the very beginning the new regime was firmly entrenched and was able to afford new freedoms and a new social structure to the working masses of Russia. The Soviet professors, in continuing their description of the initial years of the Soviet order, have painted a grandiose picture of the various programs of social reform which occupied the minds of the new leaders:

¹ Sorok let sovetskogo prava 16 (1957).
It is enough to become acquainted with the first decrees of the Soviet power to realize how energetically the law making of the masses developed. . . . History shows that building the new social and governmental order in our country is indissolubly linked with the historic decrees of Soviet government on peace, on land, on establishment of the Council of People's Commissars, on the workers inspection, on the nationalization of banks and basic means of production, on the eight-hour working day, on the judiciary, etc.

In the same breath they admit, however, that the legislative activity of those days was far from being conceived as a measure of government. Rather, it was regarded as an act of propaganda and of class warfare. Lenin, speaking to the Eighth Party Congress, indicated that not all of these decrees could be enforced at once and fully. They were only a form of an appeal for bringing the masses into the political struggle on the side of the Bolshevik Party:

[S]hould we have refrained from pointing the way in the new decrees, we would have been traitors to socialism . . . . Our decrees were an appeal, but not an appeal in the formal meaning such as "workers arise, overthrow the bourgeoisie." No, it was an appeal to the masses, to undertake a concrete task. Decrees were instructions, calling for a mass participation in practical work.²

Thus, the first decrees of the Soviet government were not designed to possess absolute binding force, even in the eyes of their authors. They were, according to the definition of Trotsky, "the program of the Party uttered in the language of power" and, as such, "rather a means of propaganda than of administration."³ In 1917 Lenin wrote:

It does not matter that many points in our decrees will never be carried out; their task is to teach the masses how to take practical steps. . . . We shall not look at them as at absolute rules to be carried out under all circumstances.⁴

² Id. at 47-48.
³ Trotsky, Moia zhizn 65 (1930).
⁴ 16 Lenin, Sochinenia 149 (1924). As to the temper of the times, see Hazard, Settling Disputes in Soviet Society 2-3 (1960). The author wishes to acknowledge his debt to this capital work on the formative years of Soviet legal institutions. Cf. also Reisner, "Law, Our Law, Foreign Law, General Law," in Soviet Legal Philosophy 93 (Babb transl., 1951).
Similarly, the beginnings of the Soviet courts had little in common with the regular administration of justice. There was no order or plan in the activity of the various self-styled courts and tribunals, such as are now included in the genealogy of the Soviet judicial system. Rather, the revolutionary administration of justice was characterized by the activity of several self-organized courts, which took their authority from the general spirit of revolt, and not from the central authorization.\(^5\)

According to the description of a Soviet historian of the early days of the Soviet order, the revolutionary administration of justice began with the activity of several self-organized courts and revolutionary tribunals, avowedly created by the decrees of the Central Executive Committee of the Soviets. The first was the "Petrograd War-Revolutionary Committee" whose "penalizing activity became one of the sources of the new law and the new socialist legality." Several other courts followed, such as "Provisional People's Courts," "Courts of Social Conscience," "Inquiry Commissions," etc.\(^6\)

These courts made their own rules and established their own powers, in such terms as, for example:

Courts of authority, enjoying full confidence among the people; Courts of conscience, not bound by any existing laws. . . . (Rules of the People's Provision Court of the Government of Kuznetz).  

The Rules of the Provisional Revolutionary Court of the Government of Novgorod provided:

The Court decides on the issues by conscience, on the basis of its own conviction. (sec. 15.) In imposing punishment upon the guilty person, the court is not bound by any existing laws, but is authorized to use the existing criminal laws for non-obligatory reference. (sec. 18.) \(^7\)

Development in the first years of Soviet lawmaking and the administration of justice in Russia were dramatically but neatly summarized in the Guilding Principles of the Criminal Law of the RSFSR of December 12, 1919, which stated:

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6 Gertsenson et al., Istoria Sovetskogo ugolovnogo prava 81, 101 (1948).
7 Materialy Narkomjusta 42–48 (1918).
The proletariat, having won power in the October Revolution, smashed the bourgeois apparatus, which served to oppress the working masses. ... It is self-evident that all the codes of the bourgeois law, all bourgeois law as a system of legal rules, had the same part to play, namely to maintain by organized force the balance of interests of the various classes of society to the advantage of the ruling classes. ... Since the proletariat could not adapt to its purposes the bourgeois codes of the outlived epochs, which ought to have been placed in historical archives. Without special rules, without codes of law, the armed masses have been and still are coping with their oppressors. In the course of the struggle with their class enemies the proletariat is applying various measures of force, but it has applied these during the early period without any special system as each case required and without organization. The experience of the struggle has accustomed the proletariat to uniform measures, has led to systematization, has given birth to the new law. Almost two years of this struggle have already provided the opportunity to present the results as a concrete manifestation of proletarian law; to draw conclusions and the necessary generalizations. 8

While the political aspects of legalistic anarchy were gratifying to the new aspirants to the control of government in Russia, the absence of legal order was not an unmixed blessing. The official optimism of the leaders found the situation on the legal front inspiring and promising of new solutions to problems of law and justice within the framework of the new socialist civilization. This was paralleled, however, by the more sober tone of practical measures, by which it was sought to channel revolutionary sentiment into some common pattern of action. While accepting the repeal of the old laws, the new regime suggested adoption of orderly procedures in the process of repeal. The Decree of December 7, 1917, on the Judiciary instructed the new People's Courts, which were to supplant the courts of the Tsarist regime, to apply the laws of the previous government insofar as they were not abrogated by the Revolution and did not contradict the "revolutionary conscience and revolutionary concept of law." The second decree on the Judiciary, enacted in February 1918, created District People's Courts. These were to dispose of the cases pending in the old courts, and were instructed to follow judicial statutes of 1864 regarding their procedure. Further, the new judges

8 Sob. uzak. sec. 590 (no. 66, 1919).
were required to state the reasons why the court in each case "abrogated one law or another as obsolete or capitalist." Finally, the Statute on the People’s Courts of the RSFSR of November 30, 1918, definitely prohibited any citation of prerevolutionary law in court decisions. The courts were instructed to “render their decisions on the basis of the enactments of the Workers and Peasants Government and of the revolutionary consciousness of the judges.”

The text of the enactments would suggest that the Soviet government moved step by step in order to replace an orderly administration of justice with a regime of anarchy and terror. In fact, anarchy and lawlessness were present; and while the regime depended on anarchy for the success of the revolution, it attempted to put some order into the operation of its own courts by the correlation of this activity to such laws as were available. The Decree of November 1918 seems to indicate that the regime recognized for the time being the futility of its attempts in this direction. Consequently, one may question whether successive steps toward freeing people’s courts from the bondage of the laws of the old regime were the result of the growing revolutionary temper of the Soviet leadership, or rather that the regime was forced to accept the existing situation.

In spite of the official optimism of the leaders, the initial practice of the Soviet courts held little promise that their activities per se could lead to a system of socialist law. A Soviet historian of the early days of the administration of justice indeed demonstrated that without central action no systematic and orderly application of common standards of justice would be possible. Lynch trials were quite common. Sentences of death were imposed frequently by popular vote and sometimes were carried out by burning. In a village near Orlov, a man was put to death by 59 votes against 40. Sometimes whole groups of people suspected of robbery, and on one occasion a pregnant woman, were burned at the stake while the whole community watched. Some death sentences were executed by cutting the convicted man to pieces, or by

10 Gsovski, Soviet Civil Law 280 (1948).
throwing him onto hay forks. When a Red Army soldier was put on trial for killing a thief, his fellow soldiers nearly revolted because they were unable to grasp what the offender's crime was.¹¹

The action of Soviet authority took two courses. In the first place, as their control over the country increased, the central authorities replaced local courts with their own institutions. These possessed standardized organization and standardized jurisdiction and operated on the basis of uniform procedural legislation. Secondly, the regime sought to replace vague ideas about revolutionary justice with statutory enactments which finally grew into a system of codes.

Not in all these fields were Soviet policies clear and well reasoned from their inception. The initial concern was with the mechanism rather than with the substantive law. While a uniform system of courts was established with considerable dispatch, their operation and manner of rendering justice belied their uniformity of organization.¹² Not only was the regime little concerned with legal refinements in the enforcement of the legal order, but it experienced great doubts as to some of the fundamental questions of the legal order in a revolutionary country. In particular, the regime was troubled by the question of what kind of law a socialist country should have.

The original ideas as to the kind of law a socialist country might need were related to the modern trends in Western European thought. This latter tradition tended to favor free judicial interpretation of statutes rather than the formal analysis of text. One might have serious doubts whether extremist views on the subject entertained by some of the Soviet jurists in leading positions were widely shared by their colleagues. Nevertheless, the Commissar of Justice considered the situation in which courts were called upon to administer justice without any substantive law whatsoever as a great achievement of the revolution. Viewing the situation in the Russian Courts at the beginning of 1919, he stated:

Neither Roman law nor bourgeois law gave such authority to a judge. Perhaps we can find some analogy in more ancient primitive law. But one has only to consider the whole complexity of contemporary social relationships and to contrast these with the primitive use which was de-

¹¹ Isayev, Obshchaia chast ugolovnogo prava 63 ff., 86 (1925).
¹² Hazard, supra note 4, at 477.
veloped into a norm by the elders by custom, and by other sources of primitive law to grasp the immeasurable difference between the sources of primitive law and the new law created by the proletarian revolution.18

He emphasized that:

The bourgeois judge can only complete the statute by interpretation. The scope of the proletarian People's Court is much wider. In its basic function—criminal prosecution—the People's Court is absolutely free and is guided above all by its consciousness of law.14

He was certain that "the proletariat was not disappointed when it gave the courts such a strong weapon as the freedom of law making."16

The idea that the socialist order of economy might dispense with an elaborate legal system was not a Soviet invention, but was born in Western Europe.18 In the initial years of the revolutionary state, the new legal order was identified directly with a set of principles born out of the revolution. The Decree of November 23, 1917, described them as "revolutionary consciousness of law." The Decree of March 7, 1918, had a similar provision which prescribed that since the courts were not restricted in their functions by any formal law, they should be guided by their "concept of justice." The third Decree on Courts of July 20, 1918, mentioned again "socialist conscience" as a source of law, along with the decrees of the revolutionary government. The same provision also appeared in the Decree of November 30, 1918, which provided that "in deciding all issues, the People's Court shall apply the decrees of the government of the Workers and Peasants, and, in case of the absence of a decree or its incompleteness shall be guided by the socialist consciousness of law."

Thus, the Soviet judge was to be free from any familiarity with the legal rule except for a few applicable governmental decrees. This position was eventually confirmed by the Party program adopted at the Eighth Party Congress of the All Russian Communist Party 13 Kurskii, "Novoe ugolovnoe prave," 2 Proletarskaia Revolutsia i Pravo 24 (No. 2-4, 1919); cf. Timasheff, "The Impact of the Penal Law of Imperial Russia on Soviet Penal Law," 12 American Slavic and East European Rev. 445 (1953).
14 Kurskii, supra note 13, at 47.
15 Id., at 55.
16 Cf. supra Chapter I.
(March 1919). Then the judges, elected by the Soviets, were instructed to realize the will of the proletariat by applying their decrees. In the event of absence or incompleteness of the latter, they were to follow their socialist consciousness of law.\textsuperscript{17}

However, there is evidence that even at that early stage there were doubts in high governmental circles as to the wisdom of unguided judicial lawmaking, particularly as the number of decrees enacted by the new regime grew considerably. In this connection, the Sixth All Russian Extraordinary Session of the Soviets passed at the end of 1918 a resolution "on strict observance of laws." The resolution stated that "the working class of Russia has during one year of revolutionary struggle laid foundations for the laws of the RSFSR," the strict observance of which was declared to be indispensable for the further development and the strengthening of the Government of Workers and Peasants in Russia. The resolution further called upon all citizens, official persons and authorities to obey strictly the laws of the RSFSR.\textsuperscript{18}

The first step toward providing some order in the administration of justice by the new courts was the promulgation of the so-called "Guiding Principles," adopted on December 2, 1919.\textsuperscript{19} By this means was initiated a specifically Soviet legislative technique of providing central government directives for the creative improvisation of the legal order by the lower echelons of authority. After the federal structure was adopted, the Guiding Principles were to provide those basic guidelines to be followed by the legislation of the federal republics. The purpose, of course, was to maintain the uniformity of those legal aspects which constituted the basic principles of policy. Contrary to later practice, however, the Guiding Principles of 1919 were to be directly enforced by the courts, which were, nevertheless, to enjoy a large measure of freedom in devising rules of law applicable to individual cases.

The Guiding Principles did not constitute a complete code of criminal law. Rather, their purpose was to "make a balance sheet of achievements, and, for the sake of economy of effort, to establish rules and methods of defeating the class enemies for the transition

\textsuperscript{17} Cf. Hazard, \textit{supra} note 4, at 62.
\textsuperscript{18} Sob. uzak., sec. 908 (No. 90, 1918).
\textsuperscript{19} \textit{Id.}, sec. 590 (No. 66, 1919).
period of the proletarian dictatorship." Their function may be com-
pared, therefore, to that of the General Part in the criminal codes of
Europe. The latter provide guidance for the courts in terms of penal
policies; whereas, a special part provides penalties for individual

The second step was the enactment of a series of codes for the
Soviet state.

In the system of codes, which represented a response to the new
situation under the NEP (New Economic Policy, 1921-1927) when
the Russian economy was to return temporarily to capitalist forms
of production, only the criminal law was to retain the unadulterated
character of a class measure. The new labor code was to establish a
regime in which the Soviet worker would again be employed in a
private enterprise. The civil codes, the first in Russian history to
provide a uniform private law for the entire country, were also to
protect the interests of the national economy by promoting condi-
tions which would favor industrial enterprise. Only the criminal law
was to protect the interests of the socialist order of things, and only
in the field of criminal legislation could the experience of the revolu-
tionary period be used.

The first move for a full-fledged criminal code preceded by some
time the advent of the NEP. Such proposals were formulated by the
Third All Russian Convention of the Workers of Soviet Justice
(June 1920). The code itself was the result of a number of drafts.
In the course of the discussion, it was also proposed that Soviet courts
should return to the criminal code of 1903, which was a progressive
piece of legislation and an outstanding example of modern legislative
technique. Commissar of Justice Kurskii came out with a proposal
which he believed would salvage as much as possible from the experi-
ence of the socialist administration of justice. He proposed that the
Code should refrain from providing a full list of definitions covering
all possible offenses. In addition to a general part stating the general
purpose of the penal policy and general principles of criminal law,
the Code should contain, he believed, only a few general characteris-
tics of crimes which the courts would apply to individual situations
by the method of analogy.20

20 Materialy Narkomyusta, vol. 11-12 (1921).
The Code as it was finally adopted employed a number of the proposals advanced by Kurskii. Such was thought to be essential in a Code without a full list of crimes.

In the first place, the Code of 1922 gave a material definition of a crime as an act dangerous to the social order (Article 6):

Crime is every socially dangerous act of omission endangering the foundations of the Soviet system and legal order established by the Government of Workers and Peasants for the period during the transition to the communist system.

Furthermore, the new Code defined the dangerous character of the offender in terms of activity harmful to society or seriously imperiling social order. It also formulated the principle of analogy which was to remain the feature of Soviet law until its removal in 1958. Article 10 of the Code of 1922 stated:

In case of absence of a direct provision for a particular kind of crime in the Criminal Code, the punishment by means of social defense shall apply, . . . according to those articles of the Criminal Code, which provide for crimes most similar as to importance and kind.

FROM POPULAR TO THE SCIENTIFIC LAW

One of the architects of the Soviet legal system described the situation in the early days of the revolutionary regime as follows:

. . . our Marxists were utterly devoid of interest in problems of law and legal ideology, notwithstanding the fact that even the revolution itself and the period of war communism following thereafter posed problems of the utmost importance . . . as to the relations of the proletariat to law.

He continued:

This accounts for the astonishing sobriety and reality of principles and the plans established exclusively on the basis of expediency rather than upon the basis of justice or of formal principles of abstract authority.21

Absence of theoretical formulations in the official doctrines on legislative policies did not leave the early Soviet lawmakers without guidance. Indeed, Soviet legislators fell back on the well established doctrines and teachings of modern legal science. So, for instance, the

21 Reisner, supra note 4, at 92.
Section on the Judiciary in the 1919 Communist Party Program indicated that the Soviet courts were applying such advanced institutions as suspended sentence, public censure instead of punishment, and labor instead of confinement. Further, the formula to be employed by the courts in supplying the law in the event of statutory silence sounds very familiar to the ear of one conversant with Article 1 of the Swiss Civil Code or Article 12 of the Italian Civil Code of 1942. Professor Hazard has called attention to the resolution passed by the general assembly of Moscow judges, which protested against setting aside a court sentence by an administrative authority. It is significant that the resolution, introduced by Pashukanis, gained acceptance in spite of the doctrine of the unity of the People's power—a rule of Soviet constitutionalism. The resolution of the Third All Russian Convention of Workers of Soviet Justice, referred to above, in recommending codification of the Soviet criminal law, expressed the conviction that a codified statute was a better method of assuring the proper administration of justice than by appealing to the revolutionary or proletarian consciousness or conscience.

The jurists who sat in the councils of Soviet government were concerned with the improvement of the quality of Soviet Codes once they had been enacted and with the assurance of higher standards of the administration of justice. Their purpose was to avoid favoritism and partiality, and to assure the intervention of the class principle only in cases where the interests of society as a whole, in terms of the communist doctrine, were involved.

The process which took place in the post-revolutionary years in the Soviet Union cannot be interpreted by the conflict between the two prevalent orientations of the day. The first of these had called for the organization of national life and governmental action according to that understanding of Marxism which was inclined to see in legal institutions something which was characteristic of the capitalist society. The other had followed the so-called legal line which posited the usefulness of the legal rule in the period of transition to higher forms of social organization. In the final analysis, the political conflict purged

22 Hazard, supra note 4, at 62.
23 Id., at 17.
24 Id., at 433.
both doctrines in favor of Stalin, who could neither be accused of being legalistically minded nor sympathetic to the doctrines of Kurskii, Stuchka, and Pashukanis. The conflict between the two groups, in essence, centered upon the point of whether a modern legal system could be devised for Russia without employing techniques belonging to the European tradition. There was no conflict as to political or social aims of the legal order. Russian jurists, who supported the legal line, wanted socialist law to correspond to certain standards of codification and to certain formal standards of operation. In a sense, Russian jurists, though revolutionaries, could not escape their own background. As Max Weber said:

[A] body of law can be "rationalized" in various ways and by no means necessarily in the direction of the development of its "juristic" qualities. The direction in which these formal qualities develop is, however, conditioned directly by "intrajuristic" conditions; the particular character of the individuals who are in a position to influence "professionally" the ways in which the law is shaped. Only indirectly is this development influenced, however, by general economic and social conditions. The prevailing type of legal education, i.e., the mode of training practitioners of the law, has been more important than any other factor.  

Thus, the conflict between the two tendencies was resolved by the introduction of legal doctrines inspired without exception by the patterns and models borrowed from the West.

The problems of simplicity in court structure, of the involvement of the lay element, and of the informality of judicial procedure were major issues of legal reform in the West. European jurisprudence had, in fact, devoted great attention to these questions since the second half of the nineteenth century. The crop of civil and criminal procedures produced in the interwar years was inspired by the same ideas. Soviet criminal legislation represented an effort to formulate the penal policies of the Soviet state in the terminology of the Italian *Scuola Positiva.* Institutions of the Soviet Civil Code of 1922 were framed upon the patterns borrowed from the two modern codes of Switzerland and Germany. And, many of its provisions were incorporated from the draft of the Russian Civil Code prepared before the War.

26 Cf. supra at 15, 38–39.
27 Cf. infra at 184, 190, 200.
In spite of the official theory that Soviet law was the product of popular ideas of law, the initial years witnessed a great concern with the modern techniques of criminology of Western Europe. Indeed, extensive researches were conducted in the best traditions of the sociological school of Liszt.29

Long after that period and well into the post-Stalinist period, the Full Civil Chamber of the Polish Supreme Court had adopted a directive which stated the simple convictions animating the work of Russian jurists of the initial years, before Stalin's ascendance to power:

In every state, irrespective of its type, civil procedure in its broadest form . . . serves to protect civil rights, property rights, and claims based on those rights. The qualitative difference of the socialist state and law from the state and law of the exploiters, different class nature of the administration of justice in the socialist state, are unable to affect this function of the civil procedure, as long as the state and law shall continue to exist—which is and will be, to afford protection to private rights in the form of state coercion.30

These borrowings did not prevent the products of socialist law-making from being inferior. The Criminal Code was a mixture of ideas and concessions made to extraneous influences. The Civil Code was a hasty and inexpert work which again fell short of the great models which it endeavored to imitate. Even so, Soviet legislation, with all its imperfections, was not responsible for the questionable conditions of the administration of justice and the level of juristic thinking in the Soviet Union. The regime in Russia which followed the ascendance to Stalin's power was not a Rechtsstaat, but a police state.

THE PATTERN OF STALIN'S STATE

Leon Duguit had made his principle of social interdependence the starting point for an attack on the concept of sovereignty. The state was not an institution with a distinct personality, and public power was not separate from social facts. The state had to enact laws, but these laws were to correspond to the fact of social interdependence. The state had to conform to the laws which it made; and judges, ad-

29 Cf. infra at 206.
30 Decision of the Full Civil Chamber of the Polish Supreme Court of Feb. 12, 1955, PiP 290 (No. 7–8, 1955).
ministrators, and legislators were to act within the powers which it created until it was changed or abrogated.

For Duguit, the existence of social groups and the principle of social interdependence dictated the content of laws and determined mutual relations between the mechanism of government, the social structure, and the rule of law. As the content of the legal rule was the result of social solidarity, the governing apparatus could not be sovereign. As society did not perform public services itself (Duguit rejected the concept of public power), society was not sovereign. In other words, the identification of the content of the legal rule with the content of social solidarity and the integration of the mechanism of government into the social structure resolved the problem of the state and social relations. In addition, it eliminated the need for the concept of sovereignty as an attribute of the state, as something separate from the social milieu. Society was simply the environment in which was produced the phenomenon of the state, which, in turn, was the division between the governing group and the governed.81

The first Soviet theoretical answer as to the place of each of three components, the state, the law, and the society, in the process of change was dictated by the conviction that social action (class struggle) was the motor of progress. According to Stuchka, Pashukanis, and their followers, law had a function in the society, but once the institution of property disappeared, the state and law would disappear as well.82 Action by the state could produce little change in social structures. Even the act of nationalization (particularly nationalization of the land) and expropriation of the exploiting class did not by themselves constitute a transition from the lower level of social existence to higher forms of cooperation. This would take time and would be achieved by the establishment of new economic institutions.

31 Cf. supra at 38 ff.

In contrast with Duguit, Karl Renner denied the state and law a creative role in social processes. For Eugen Ehrlich law enforcement was a social process, and individual response in terms of obedience to the rule of law was predicated on facts independent of the state power. Nordics, on the other hand, reduced the problem of the correlation of the social structures, the state, and the legal rule to the issue of exercise of power in order to realize the interests of the state.

32 Pashukanis, Allgemeine Rechtslehre und Marxismus (1929); Stuchka, Introduction à la théorie du droit civil (1926).
In fact, the theories of Pashukanis described quite correctly the situation in Russia as it existed after the Revolution, and particularly under the NEP. However, once the state undertook to manage and plan for the economic development of Russia, a new theory had to be worked out.

The new theory was the result of a clash between two Marxist orientations. The deterministic interpretation of history, stressing the spontaneity of social processes, was superseded by the theory which insisted that Marxist determinism and concern with the economic forms of social activity were compatible with intervention in order to hasten the march of history. The policy of the five-year plan brought about a flood of regulations, directives, instructions, and other enactments to marshal national resources and organize industrial enterprises, to regulate consumption and production, and to bring about a conscious and planned realization of socialist society. Direct ties between the legal rule and economic life were not broken, but strengthened. If, as according to Pashukanis, law was bourgeois and the economy was socialist, then under Stalin's theoretical assumption, both law and economy could be socialist in content and function. The nature of the legal rule was determined not so much by its institutions and forms, as by its social purpose.

The Soviet mechanism of change thus represented a marshaling of all three elements—law, social structures, and the state—combined with the principle of a deterministic concept for the purpose of social action. As a Soviet scholar wrote at the time when the Soviet Union was facing mortal danger of German aggression:

Every society, irrespective of its form, follows laws based on objective necessity. In the socialist society this necessity acts as the economic law conditioned by the external situation of the society, by all historical antecedents of its development; this objective necessity perceived by men, infiltrated into the conscience and the will of the people—in the persons of the builders of the socialist society, as the leading and organizing force of the society, the Soviet state and the Communist party, directing the activity of the masses.33

This objective necessity was translated into direct and concrete commands of Soviet laws. Thus, Vyshinskii, attacking legal "nihilism"
and sociological tendencies in law, wrote: "Stuchka and his adherents liquidated law as a separate, specific social category, they drowned law in economics, deprived it of its active creative role." 34

As an important Soviet jurist wrote at the time when five-year plans became a permanent factor in Soviet life:

[I]t would be a mistake to consider economy as the only factor determining the understanding of the historical processes. One must take into consideration Marxian teachings on the mutual relations between the basis and the superstructure and of the bearing which the superstructure may exercise in turn upon its economic basis, so as to cause its further development and change. Politics are not a mere impression moulded from economy, as the vulgar materialists try to represent them, but the conclusion drawn from a generalization of the economy.

Politics are fully expressive of the economic level which conditions the class content of the state activity, in shaping by legal regulation the relations between the classes, the influence of the state on the development of the sciences, of arts, and vice versa the influence of the superstructure on the economic basis.

Politics, state and law—represent the three sides of a single process; politics (a full expression of the economic system) constitutes a transmission belt which sets law and state in motion and correlates their cooperation and relationship.85

If for the principle of social interdependence the principle of inexorable progress is substituted, the theoretical construction of the Duguit type resembles Soviet formulations of the correlation of the society, state, and law. The real difference, which on first sight does not seem to be of key importance, is in the concept of the role of the elite. The governing group had to render public services and was bound by its own laws. According to Trainin, the policy of the Soviet government and of the Communist Party was determined by actual economic conditions, not by the content of the law. This was because the governing group had a better understanding of the tasks which faced society than the rest of the social structure.

34 Vyshinskii, Teoria vosudarstva i prava 78 (1945).
THE INTEGRATED SOCIETY

The Soviet Constitution of 1936 affords to citizens the right to form associations as well as the unlimited capacity to join already existing ones (Article 126). The best among them may join the Communist Party, which holds a central place in the entire spectrum of social and governmental organizations by providing a nucleus in the state and social organization. Thus, what had begun as a concept of right, has ended as the principle of order, in much the same manner that democracy is predicated upon the citizen's willingness to participate in the government of the community.

Georges Gurvich in his systematization of legal sociology distinguished between kinds of law, frameworks of law, and systems of law. A system of law, in his view, consisted of a number of frameworks of law within which various kinds of law competed. Translated into less technical terminology, any legal system of a polity consisted of a number of legal orders such as state law, cooperative law, family law, and trade union law. Within their framework, these legal orders accommodated different kinds of law such as feudal law, bourgeois law, American law, etc. Without going into further analysis of this formulation, it is enough to state that the present chapter is devoted to an examination of the various frameworks of law and their correlation within the legal Soviet order. This approach will permit the tracing of the interconnections between various social organizations and the system of Soviet authorities. It will further permit the distinction between those parts of the framework of law of each social group which constitute a genuine part of the framework from others which represent an intrusion originating outside and, in the final analysis, representing a distortion of the group's social function.36

The theories of Gurvich are, as is already obvious, the result of the observation that a legal system of a polity is never the product of a single lawmaking agent. Rather, it is viewed as owing its existence to the interaction of many sources. Law consists of frameworks born of the needs and functions of what Gurvich calls real collective units. Through these frameworks are introduced elements of a legal system

which either reflect specific rules for various social groups or for various alien kinds of law.\textsuperscript{37}

Article 126 of the Soviet Constitution, which contains the principle of the penetration of the Communist Party into the viscera of each social organization, represents the basic plan for the correlation of social forces and the integration of social and governmental organizations. These latter include local administrative authority, professional organizations, and economic institutions. The characteristic feature of the social and political order of the Soviet society is that none of these organizations exclusively belongs to any of the two categories—society or state—and each of them owes its existence to the fact that it constitutes a channel for the coordination of human masses.

The Soviet administrative system, which finally emerged as a single system of elective authorities throughout the federal Union, has its roots in the dual tradition of public administration in Europe. According to this pattern, national affairs are handled by the central government with field offices, while local affairs are administered by local elective institutions. These latter are sometimes limited only to the communal level and sometimes are organized on the territorial basis; nevertheless, in principle they remain independent on each level, and are not subject to the control from the national center. In prerevolutionary Russia (1870), territorial and municipal government had been a center of important governmental reforms, and quite early some of the revolutionary parties saw in the institutions of local government a beginning of the future socialist regime for Russia. The Bolsheviks, however, came out against such notions and favored a single system of elective authorities handling all aspects of administrative activities, both national and local. World War I greatly weakened local government in Russia, and after the revolution, earlier territorial and municipal government played practically no part in the establishment of the new order. Functions of local government, if there were any left, were taken over by the revolutionary soviets—workers, peasants, or soldiers—which provided foundations for the future system of Soviet administration. Quite soon, it was resolved

\textsuperscript{37} Gurvich, L'expérience juridique et la philosophie pluraliste du droit 138 ff. (1935).
that all distinction between local and national affairs should disappear from the jurisdiction and powers of the administrative authorities of the revolutionary state. This approach to the management of public affairs was combined with the repudiation of the system of the separation of powers. Local revolutionary Soviets wielded, whenever and wherever they could, dictatorial powers without distinction of functions, and frequently clashed with more specialized agencies of the new political order, i.e., judicial agencies. Following the adoption of the Soviet Constitution of 1936, the Soviets were reorganized into Soviets of deputies of the workers and peasants, elected for each level of public administration.

The chief method of integration of various agencies belonging to the various levels of government, whether federal or local, is the power of the purse which under the Constitution of 1936 (Article 14 (k)) belongs to the Union.

In the West of Europe, the original theory of the independent commune, exercising its quasi-natural right to self-government, greatly lost its appeal. It was replaced by the theory that the essence of public administration consisted in the exercise of public power irrespective of the type of administrative authority, and later by the view that public services were the responsibility of both local government and centralized administration. The result has been the integration of administrative systems through the method of delegated powers and a general increase of local responsibilities. This has occurred, however, without prejudice to the original powers of local government, which still retained exclusive jurisdiction, subject to none other but judicial control.

In the Soviet Union, however, the end result has been a unitary system of administrative authorities, with no real means for the formulation of policies regarding local interests.

38 Cf. Siezdy sovetov v postanovleniakh i resolutsiakh 121 (1939).

In Eastern Europe only Yugoslavia and Albania followed the Soviet example. In Poland, Hungary, Czechoslovakia, Bulgaria, and Rumania, councils of all types continued in the tradition of local elective govern-
The principle which aligns the Soviets with the social structure is visible already in the election procedures. The Soviets are principally representatives of social organizations. In the initial period, social organizations of the proletariat and of the poorer peasantry nominated their representatives without any intermediate process of voting. After 1936, members of the Soviets were elected by general vote, but from a single list of candidates nominated by social organizations, which amounts to very much the same thing.41

The local Soviet is not the only basis on which the identification of the official authorities with social organizations takes place. Terms of reference which determine social functions and responsibilities of the governmental authorities, and at the same time public functions of the social organizations and their place in the social structure, indicate a great shift in the nature and character of their functions.

Any generalization aiming to distinguish between social and government parallel with the agencies of centralized administration. Only at a later date were their functions coordinated with those of the centralized administration, and an integrated system of administrative authorities established. Cf. Grzybowski, "La continuité légale dans les démocraties populaires," 54 Revue Politique et Parlementaire 57 (July 1952). Cf. also Grzybowski, "Continuity of Law in Eastern Europe," 6 Am. J. Comp. L. 58 (1957).

41 Organization of the executive apparatus of the Soviets in the Soviet Union reflects a recent trend toward deep involvement of the masses in the activities of the official mechanism of Soviet polity and identification of the state with social action. Social activists perform official functions either as auxiliaries of the Soviet state or as social organizers. According to statistics published in 1959, in the territory of the Soviet Union there were 121,000 commissions of the Soviets, each in charge of various aspects of local administration. In discharging their responsibilities these commissions, consisting of deputies to the Soviets, mobilized the cooperation of a great number of the so-called social activists affiliated with various social organizations representing associations of the citizens either on the professional or territorial basis. This permitted the commissions to tackle various administrative problems which called for a concentrated effort and a departure from routine procedure with the assistance of those organizations including street committees, commissions for cooperation in the maintenance of housing units, village assemblies, comradely courts, parents' associations, committees for the protection of social order, people's militia, etc. Vlasov, Studenikin, Sovetskoe administrativnoe pravo 37 (1959).
ernmental functions is open to criticism. It seems, however, that economic activity, as a matter of principle, must be considered a social function rather than one typically within the scope of the governmental responsibility. Marxist theories, as well as practical solutions in open societies, have tended toward assigning the management of economic institutions to the field of social responsibility. In the modern state, public enterprises, engaged as a matter of public policy in economic activities, follow the organizational pattern and the techniques of management of private economic institutions. Finally, according to the ultimate pattern of society under communism, responsibility for the processes of production is to be with the associations of producers.42

In the Soviet polity, however, the process of the distribution of responsibilities for various aspects of governmental and social services led to a pattern of jurisdiction which contradicts these assumptions.

Initially, Lenin was inclined to stress the need for preserving a degree of independence of social organizations, particularly trade unions, from interference by the state. The soviet state, Lenin argued, was not the state of the workers. It was still the state of workers and peasants. In addition, it had been "bureaucratically deformed." Although the trade unions should not indulge in systematic opposition, they were still bound to defend themselves from interference by the state because: (a) its policy might at times be the result of conflicting interests of workers and peasants and (b) elements of arbitrary bureaucratic rule might lead to defense of their rights on the part of the workers.43

When Lenin tendered this advice to the workers' organizations, the revolutionary state had had some experience with the workers' ability to handle nationalized industries. At the outset of the revolution, the Bolshevik Party called for workers' participation in the control of private factories. As the revolution and the nationalization of Russian industries made progress, this gave the workers full control of the economic institutions of the country. Workers' management at the factory level was combined with a most rigorous regimen introduced in the field of industrial relations under the Labor Code of 1918, and with a rigid system of administrative control from above. Conse-

43 Deutscher, Soviet Trade Unions 56 (1950).
quently, Lenin's remarks, made on the eve of the NEP, could be understood as anticipatory of changes which removed trade union control of the factories and of a return to a more conservative understanding of their responsibilities. Under the 1922 Labor Code, work contracts were again emphasized, collective bargaining was reintroduced, and the trade unions again became social organizations not fundamentally involved in the administration of economic resources. 44

Once ousted from management, the trade unions never returned to their previous positions. However, the era of the economic plans meant a new manner of involvement by trade unions in administrative responsibilities. The expansion of industrial plants was identified with the realization of the goals of social action by the workers' organizations; and the workers' struggle was identified with the struggle for fulfillment of the plan. At the same time, trade unions were given an auxiliary role in the administration of welfare services. 45

In their new position, the trade unions were directly involved in sharing the risks of economic ventures undertaken by governmental enterprises. And this was true in spite of the fact that their position vis-à-vis management differed little from that in the capitalist economy. The Sixteenth Congress of the Party (1930) insisted that the trade unions should take into consideration in their collective agreements the financial status of enterprises, and that their responsibility should cover also the financial and production aspects of the enterprises. In 1933, the Central Board of the trade unions assumed the functions of the People's Commissariat of Labor, and trade union bodies in factories replaced the labor inspectorates in enforcement of the protective provisions of labor legislation. The final step which identified trade union interests with that of management was the reform of the wage system by introducing piece rate as the center of the new system of remuneration. 46

The basic dogma of the system of public authority, in which there is no hard and fast rule separating governmental and social functions

44 Deutscher, supra note 43, at 14 ff., 62.
45 Gsovski, supra note 10, at 387, 810–11 in vol. 1 and 342 in vol. 2; Gsovski & Grzybowski, supra note 40, at 1413.
46 Id. at 1413 ff.
and in which responsibilities overlap, is the axiom of the identity of interests with a corresponding tendency by various agencies of government and of social organizations to assume functions which do not belong to their spheres of activity. Since the state and society are identical in class, there is no reason why various functions and responsibilities should not be freely handed over from center to center. This was vividly demonstrated by the Polish and Hungarian revolts in 1956 and by the challenge of the new workers' councils, which took over government enterprise. There was nothing contrary to the basic doctrines of Marxism about the workers if dissatisfied with the activities of their organizations, the socialist government, and the trade union committees, delegating new bodies to remove shortcomings and improve performance. Gomulka observed in the challenge of the workers' councils and the plans to provide interenterprise institutions a threat to the very existence of the workers' state:

Workers' councils extended upward in all branches of national economy would need some supreme authority. Would this authority be the government itself? The government cannot be the supreme authority for social organizations such as workers' councils. The alternative, therefore, would be to create a new body, either through direct or indirect elections. And thus we see that this concept leads us astray. It appears that the government must cease to concern itself with the national economy and then it becomes superfluous as there is another central body ... which has taken over the management of the national economy of the country. And in order to do this, the second body must take over from the government central planning, management of banks, procurement, distribution, etc. In other words, it must take over all government powers.47

The real cause for the political and social amorphism of the social organizations of socialist societies consists in the absence of identification of individual organizations with the social stratum which they claim to represent, rather than in their exercise of public power or control over social services. The fact that collective agreements, in fact, constitute a rule of law, or that the very process of negotiation is of public interest and therefore must conform to certain procedures, by itself is not harmful to the feeling of allegiance of the membership. The process of institutionalization of social functions is not contrary

47 Nowe Drogi 11–12 (No. 6, 1957).
to the identification of social organizations with class or group inter­ests.48

In the Soviet system, however, trade unions are organized to conform to their counterparts in public administration. Furthermore, trade unions exercise their functions, such as participation in the administration of the factory, the administration of social services, participation in the institutions handling labor disputes and enforcing labor discipline in the factories, in a manner which offers little opportunity for demonstrating a protective attitude toward their membership. This attitude—bureaucratic deviation—is facilitated by the fact that, as elsewhere within the Soviet system, the representative principle of trade unions suffers.

Furthermore, most trade union functions within the economic system of the Soviet state stem from the external authorization of the state or of the Party. This applies particularly to participation of trade unions in planning processes, in supervisory and inspection activities, and in the administration of public welfare services financed by the state. It is the public authority which involves social organizations in the administrative duties, and the trade unions acting on behalf of the state must assume responsibility for shortcomings in the performance of these services. If trade union legislation is examined in terms of the criteria suggested by the Gurvich concept of frameworks and kinds of law, it would appear that the law of Soviet trade unions contains little of its own legislation. Its functions and social role are determined by legislative activity from without, thus constituting an alien element of legal rules within the trade union framework.49

The central principle of the integration of all public and social authority is state ownership of the means of production. This makes of the management of economic enterprises, the exercise of public power, and renders industrial relations, employment policies, and business transactions a matter of governmental policy.60 Article 1 of

48 Bouère, Le droit de grève 142 (1958) and the literature cited at 142.
50 "The country which has gone furthest in applying the Marxist theory of the socialization of means of production, Soviet Russia, had politically
the draft of the General Principles of the Civil Law Legislation of the USSR and the Union Republics states that:

Soviet civil legislation regulates property relations and related non-property relations for the purpose of strengthening and developing the socialist system of economy and social ownership, creating the material and technical base of communism and satisfying the material and spiritual needs of citizens more and more fully.

Public policy stated in these terms is safeguarded, in addition to the monopolistic ownership of the means of production, by the monopoly of forming juristic persons to organize industrial enterprises, distribution, and service industries and to promote production and control consumption.

With few exceptions in the agricultural sector of the national economy, juristic persons are designed to assume charge of the national economic assets which constitute the property of the state. In their corporate character, they are representative of the legal capacity which is centralized in the institution of the socialist state. According to Article 26 of the Hungarian Civil Code of 1959: "The state has legal capacity. Its legal capacity comprises all rights and obligations which by their character do not attach only to man."

Consequently, socialist rules regarding the establishment of corporations could dispense with all those elaborate provisions which have aimed at protecting the safety of commerce and safeguarding the public interest. A juristic person is created by an administrative act, which assigns to the former its respective duties and means of performance according to the economic plan. The fiction that a corporate body exercises its proprietary rights in the same manner as a physical person is replaced by the reality that a corporate body is a government organization. As a socialist jurist formulated it:

The power aspect of the new legal entities (government enterprises) in the midst of all other legal entities within the framework of the national

and legally not only retained the trappings of sovereignty, but reached new heights of concentrated state power." Friedmann, Law in a Changing Society 299 (1959).

51 Cf. art. 20 of the Draft of the Civil Law Principles of the USSR and the Union Republics. Cf. also Saleilles, De la personnalité juridique (1922); Rumelin, Metodisches über juristische Personen (1891); Michoud, La théorie de la personnalité morale (1906–1909).
economy represents a socially correct solution in the development of a country on the road to socialism.

A government enterprise becomes an indispensable participant in the process of production, and an essential channel for the execution of the national economic plan.\textsuperscript{52}

In this context, the character of business transactions and contractual engagements assumes a new character, which in the West has hitherto been limited to situations involving agreements settling collective standards and conditions of employment. In the socialist legal order, public law character extends to all transactions of the government corporations. Conceived and executed with reference to the provisions of the economic plan, the business activity of socialist enterprises constitutes a legal framework for the coordination of human activity (labor) and natural resources in order to implement a public policy within the "jurisdiction" of each individual economic institution.\textsuperscript{58}

\textbf{THE LEGISLATIVE TECHNIQUE}

Wide distribution of governmental responsibilities between the official agencies of government and the organs of the society also takes place in the field of legislation. While the constitution of the socialist state specifies the authorities holding legislative powers, normal criteria of sources of law in Soviet society mean even less than in traditional constitutional arrangements. Nor are the material criteria infallible. Soviet legal theory, which states that the real source of law is the will of the ruling class and that the force of legal enactment is its true reflection, again is little more than a programmatical phrase.

Although the theory of the sources of socialist law limits the power of lawmaking to those authorities representative of the people's power, i.e., to the Soviets alone, the body of Soviet law includes various


\textsuperscript{53} Vasiliev, Generalni dogovori (1958); Hazard, Law and Social Change in the USSR 50 ff. (1953); Gsovski & Grzybowski, \textit{supra} note 40, at 1413 ff.
enactments from other sources. These sources, although not in form but certainly in content and significance for the public policy of society, represent a type of legislation which sometimes far outweighs legislation derived from formal sources of lawmaking. Pronouncements of leaders and the directives and instructions issued by social organizations and executive agencies of government constitute an important source of regulations, affecting the life of private citizens very much in the manner that a formal law does.54

These various acts are covered by a new term of normative acts which, in the words of a Polish jurist:

[E]ither establish new institutions for the socialized sector of the national economy or introduce important changes in our civil law. Among those of supreme importance are the instructions of the highest authorities of the economic administration of the country. There is no doubt today that these are sources of the civil law and abrogate within the jurisdiction of those authorities the provisions of the civil codes.55

The number of these normative acts is extremely large, and their great proliferation adds to the uncertainty as to the legal situation in the socialist countries. Furthermore, there are no statistics, no adequate compendia with a systematic arrangement of various regulations. According to an estimate made public a few years ago in Poland, the number of normative acts which the central authorities made binding upon the courts was in the vicinity of 10,000 enactments.56

In addition to the normative acts of the highest category, each local administration has the right to issue regulations. These, too, constitute the law, unless found contrary to some higher regulation. Some indication of the size of the legislative output is the growth of various official and unofficial publications, law gazettes, local official gazettes, reporters for special branches of administration, and technical publications containing standards worked out for use in national industries, which have a bearing on the private rights and calculation of wages and either directly or indirectly affect the operation of government. But in addition, it has appeared from time to time that a key

54 Gsovski & Grzybowski, supra note 40, at 41–42.
55 Wolter, Prawo cywilne, część ogólna 49 (1955); 1 Gsovski, supra note 10, at 222–24.
56 Gsovski & Grzybowski, supra note 40, at 730.
regulation, which on occasion had vitally affected legal commerce, had been issued in the form of a circular letter which was never published. Thus, a circular of the Central Board of the Trade Unions of Poland changed the law on collective agreement; and the sale of real estate was prohibited in a circular addressed by the minister of justice to the notaries public.57

It seemed for a while that this practice would be seriously curtailed after the official policy of the socialist countries tended to emphasize a need for restraint in the flow of regulatory activity. However, it is clear now that the practice of normative acts will survive the drive for the reform and reorganization of the legal order in the socialist states. The only practical step in this direction would be to grant binding force only to certain types of enactments. This was the principle of the hierarchy of statutes developed in the nonsocialist countries. Then the courts would be able to reject administrative regulations contrary to, or issued without or beyond statutory authorization. This, however, is a step which would affect vitally the government's ability to implement expeditiously their current line of policy. The need for the continuance of this latter practice was recognized in Article 1 (par. 2) of the Polish draft of the Civil Code (1960), which provided that its force extended to relations between governmental organizations only insofar as these relations were not regulated in a different manner by another statute or regulation issued by the highest governmental authorities. Thus, precedence was afforded to ministerial instructions.

A large bulk of normative acts belongs to the field of economic administration because neither the economic plan nor the system of planned contracts between enterprises and agencies involved in its enforcement are able to provide for all contingencies arising from business activities. Furthermore, factory managers are administrative officers. In consequence, they require authorization to change the techniques or policies which in the West would be dictated by conditions of the market, but which in the socialist economy must be replaced by administrative regulations. In order to keep the economy going, it is necessary that administrative authorities on all levels adjust the premises of the plan and of the standard contractual engagements

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between the socialist business partners, and that they determine more closely business operations either for industrial branches or within each governmental enterprise. Some illustration of the great number of regulations issued in this connection is obtained by examining the legal reform introduced by the General Law of Management of Working Collectives in Public Economic Institutions and Higher Economic Associations of July 2, 1950, in Yugoslavia.\(^58\) In order to bring order into the mass of earlier enactments, a special Executive Order on Bringing into Conformity the Decrees of the Federal Agencies with the new Economic System was necessary.\(^59\) This listed 468 decrees enacted in the period of 1945–1950 as abrogated. In addition, an unspecified number of decrees issued on the basis of those expressly abrogated regulations were declared repealed. At the same time, 176 decrees were still retained on the statute books.

A similar operation was again repeated in Yugoslavia after the enactment of the Constitutional Law of January 13, 1953. Following the reorganization of the Yugoslav Federation, the Federal Executive Council enacted the Executive Order on the decrees of Federal Agencies of September 21, 1953. This terminated the force of 865 decrees.\(^60\)

In both cases, repeals on federal levels were followed by mass repeals of legislation enacted by the individual republics of the Yugoslav Federation. Serbia, for instance, repealed in January and May 1953 some 575 decrees concerning the management of the national economy, still retaining 80 such decrees. In April 1954, Croatia repealed 600 similar decrees, still retaining the imposing number of 194 legal enactments of this type. One can only speculate as to the number of similar regulations on still lower levels of economic administration which all have their own specific spheres of responsibility.

Socialist courts are also engaged in vigorous lawmaking. Although the official theory is that the courts are excluded from the process of lawmaking, the very nature of the legal system in which they operate forces the socialist courts to contribute to the development of socialist

\(^{58}\) Law No. 391, S.L. 22/1952.
\(^{59}\) Law No. 389, S.L. 40/1952.
law in a manner very reminiscent of court practice in the common law countries. A fast tempo of change and a great output of legislative material compel the courts to interpret the legislation in force, either in a manner which brings it closer to the current political line of the regime (although contrary to the express wording of the law), or in a manner which amounts to the virtual repeal of outdated but not yet formally abrogated enactments.61

In addition to providing a more general guidance for the lower courts, particularly when urgent interests of the regime call for immediate support for its policies from the entire mechanism of the state and of social organizations, an institution of directive rulings by the highest tribunals of the law has been created. Its purpose is to restate, in connection with the enforcement of specific legal provisions, those policies of the regime which are contrary to the express wording of the law or to reverse time-honored interpretations of the legal rule. Directive rulings are issued on the initiative of the Minister of Justice, the Attorney General, or the Chief Justice. According to the Polish Judiciary Act of 1950, which in this respect follows the standard provisions found in the judiciary acts of other socialist countries, the purpose of the directive rulings is to determine "concrete tasks of the administration of justice, and the manner of their performance in accordance with the economic, social, and political conditions of the country within the limits of the laws in force." Directive rulings are binding on lower courts, and violation of their terms constitutes an appealable error. In fact, directive rulings formulate governmental policies not contained in the statute. Among the jurists of socialist countries there is a good deal of controversy on the subject. According to some, rulings are new legislation. Others, quoting the provisions of the constitutions, deny that they have such an effect.62

Soviet techniques of lawmaking cannot be interpreted as having no principle by which to determine the legitimacy of legal rules and thereby to bring the disiecta membra of the legal order in a socialist

61 Grzybowski, supra note 9.
state into a single system. The techniques of lawmaking reflect the peculiarities of the social organism and the relationship of its various parts to the problems of public policy by which it lives. Social change and the emergence of modern societies have made obsolete all theories that laws come from a single source. In the France of the early civil code, this theory was based on the idea of the superiority of the statute, which provided a firm guidance to the courts. In the Anglo-American tradition, the courts were the source of the law, and statutes had to be tested in the courts in order to become part of the legal system. Modern life destroyed the fiction of the internal symmetry of the legal order. It was discovered that modern societies live by law from many sources, and that legal systems supplemented by rules from various social centers obtain their cohesive character from the interplay of social forces, which all have an interest in maintaining the social and legal order.

A socialist legal order of the Soviet type is the product of the fast rate of social change, of the great flow of legislative enactments from numerous sources, and of the experimental character of governmental policies. Thus, Soviet law represents not a system, but rather an armory which stores various instruments of policy to be used according to the needs of the day. The content of the legal rule is no longer important. Rather, the question is how it is used. The old law may always be infused with new meaning to achieve the social aim according to the current line. Uniformity of the legal system, normally guaranteed by the formal hierarchy of various statutory enactments, was replaced by the singleness of inspiration which is assured by the place of the Communist Party in both the social structure and the mechanics of government.63

RESPECT FOR LAW IN THE SOCIALIST SOCIETY

The appearance of public authority in any other role than that of a law enforcing agency represents a disturbing factor in legal commerce. Disguised as fiscus, and assimilated almost totally to the private holder of rights, the state enjoys privileges and is free from execution. As an administrative authority, charged with duties and given the power to manage social interests and render services, it is judged in-

competent in the fulfillment of its obligations or negligent in the performance of its duties, according to standards falling far short of those which apply to private persons or corporations in a similar situation. The state cannot go into bankruptcy; and for moral weaknesses, a polity is not answerable in law.

The difference in standards is due to a number of causes. A partial explanation is afforded, however, by the more rigid procedures which a public authority must follow, by the stricter accounting standards which prevail as to financial policy, and by a greater limitation of action owing to the public interests involved. 64

As the state and public authority became more involved in social and economic activity, their impact upon the respect for rule, and generally upon law enforcement, has increased. In open societies, this influence is tempered by the fact that the public management of national economic interests is still an exception, and that public corporations tend to assume the coloring of private economic institutions in order to avoid political control of their economic activities. 65 In the socialist world, this aspect appears in altogether different proportions. This is due to the fact that, as a rule, socialist countries manifest planned economies, the government owning the industrial plant and all the means of production. Standards and methods of law enforcement

64 Gsovski & Grzybowski, supra note 40, at 507; Orlovskii, "Zadatchi pravovoi nauki v svete reshenii XX siezda KPSS," 26 Vestnik Akademii Nauk 5 (No. 8, 1956).


The problem of methods to assure respect for the legal rule on the part of public authority or public corporation represents an important issue in the legal practice and theory today. There is a tendency to follow a course normally effective in relations with private persons or corporations. However, it has also been pointed out that the fact that fines must come from the public budget limits their effectiveness. In this connection see the discussion in Dennings, The Changing Law (1953) at p. 28 of the case of the Yorkshire Electricity Board which was fined for erecting a building without proper license.

65 Friedmann, supra note 42.
and the formal respect for law in socialist countries are primarily influenced by the nature of government operations. In addition, there is the influence of the character of the governmental machinery itself. Its design is to effectuate government purposes according to the standards set up not so much in legal rule as in the directives and inspiration emanating from the party.

In the course of 1958 and 1959, the Polish Fishermen's Association, which has a fishing monopoly in all inland waters in Poland, sued some thirty government enterprises for polluting streams and rivers. The pollution had caused damage to the fishing industry and to the national resources of primary raw material and had violated antipollution legislation. According to statistics submitted to the courts, there were at that time some 700 major industrial establishments (all of them government-owned) which were guilty of such practices. The Association won its cases and proceeded to file some more, but the end result was not the enforcement of the rule of law. The Association was adjudged damages, which were promptly paid, and the enterprises continued in their disregard of the laws in force.66 Obviously, the regime could enforce its own laws in terms of the physical means of enforcement, but was prevented from doing so by higher policy. It was cheaper to pay damages, and even fines, from the budgets of the enterprises and to provide appropriate sums for these and similar contingencies than to engage in large reconstruction and rehabilitation projects. Indeed, this latter could change the plans of individual enterprises and affect the calculation of the cost of industrial construction in Poland on a national scale. In the final analysis, then, the fishing rights of the Association were transformed into the right to sue for damages. Full enforcement was simply not feasible politically.

The cost of industrial construction, however, is not the only reason for these and other manifestations of disregard by governmental authorities of administrative regulations providing for orderly procedures in industrial activity. Industrial expansion is conceived in terms of revolutionary enterprise. As such there is neither time nor room for restriction in the name of vested rights, even though these vested rights are none other than those of the community at large. The Soviet polity, striving to cover in one leap the progress of the

decades, has found it easier to make up for the neglect of the past by re-creating the atmosphere of the industrial revolution in the West, when profit and cheap expansion were the only law.

This is especially apparent regarding the legal force of all those administrative regulations issued by the local authorities. After the 1956 upheaval in Poland, during which a marked tendency toward decentralization of governmental authority had developed, public opinion began to press for greater respect by central authority for local conditions, sanitation, urban development regulations, and building and zoning restrictions. Socialist industrial and urban planners now claim that they have mastered the anarchistic tendencies marking the capitalistic forms of industrial organization, and that the socialist state has found a formula for balancing the various interests which claim precedence in any development program. Under socialism, they claim, it will be possible to avoid the monstrosities created in the period of early capitalist development. In fact, however, as the Polish press has disclosed, industrial ministers demonstrate an attitude quite similar to that of capitalist industrial pioneers in seeking the best locations without regard to local urban development plans.

This attitude of the higher authorities toward the responsibilities and plans of the lower echelons of administration is further complicated by the absence of proper administrative procedures tending to coordinate official actions from various centers. This difficulty, in turn, is compounded by the absence of a strict delimitation of powers between the central and local government regarding the residual prerogatives of the local government. In 1959, considerable uproar was caused by the fact that after the municipal government of a Polish city had reserved a certain area for suburban development, one of the industrial ministries then declared its intention to use the same area for the construction of apartment blocks according to plans kept secret from eyes of the local authority. In the meantime families had built their houses, paved the streets, paid the cost of sewage and other services, planted their lawns and gardens. In spite of this, however, the ministry, using its powers of a supervisory authority, proceeded with the annulment of the deeds issued by the city fathers, evicted individual owners, and proceeded with the construction of its apartment blocks.67

A Polish analyst of the administrative mechanism of the Polish state has traced its shortcomings to two causes. In the first place, administrative authorities have no respect for their own decisions and those of other government departments. In the second, the administrative machinery of the popular state is staffed by two categories of civil servants, each with a different role within the same governmental setup. Those in office on the strength of an electoral mandate enforce the policy, but not the law. Those constituting the professional establishment of governmental agencies, on the other hand, are saddled with the responsibility of finding the law to substantiate the decisions of political leaders. Matters are complicated by the fact that basic policy decisions come to the executive departments from the party centers, which are involved in the planning and supervision of government operations through its members in key positions.68

Thus, respect for legal rule is affected by Party control of the governmental apparatus in two directions. In the first place, the concept of the socialist state and the legitimacy of governmental operations imply an institutional reliance upon Party motivation:

No institution, organization, or person could or should stand above the Central Committee, above the Politbureau. No decision of importance should be made without the Central Committee's consent and approval. This should become an iron law to all...69

Secondly, construction of the legal rule must follow the inner meaning of the socialist law. This, in turn, is always the actual will of the people. As the Polish Supreme Court stated:

Interpretation of the law should not be concerned with its literal meaning but should aim at the realization of its social purpose and take into consideration that it is an expression of the will of the broad social masses.70

While conformity to the policy line is assured, the authority of the law as clear guidance for private parties, courts, and government departments must suffer. This reflects not only on the official life of the state and of social organizations, but, in the final analysis, on the

68 Ibid.
70 PiP 146–50 (No. 7, 1950).
relations between individuals in respect of their private rights, as well.

Insufficient law enforcement regarding private relations in socialist societies is the direct result of a system which sanctifies outside intervention in the performance of government business. The Party exercises influence through public propaganda campaigns, through the personal intervention of Party members with the governmental apparatus, or through Party spokesmen. As a result, the process of government follows channels which cannot be contained within regular procedures defined by the law or within the official edifice of the state. Socialist public order sanctions private deals and the exercise of personal influence by persons in high party positions. Further, this is true not only regarding the shaping of governmental policies, but also regarding their implementation by the government agencies. This result is observed in the role of Party committees at all levels of government operations, in economic administration, and in the factories. The 1957 reform of the economic administration of the Soviet Union was specifically designed to bring the Council of National Economy, which had taken over the functions of the economic ministries, under closer supervision of the provincial Party secretaries.

While this system of operation has obvious advantages with relation to the high degree of response of the governmental setup to Party demands, there are compensating disadvantages; inasmuch as the Party may influence the governmental machinery all along the line, there results great possibility for the abuse of personal power. This disadvantage is compounded by the difficulty of distinguishing between legitimate uses and abuses of influence. While no regime may boast a foolproof system for excluding abuses of power and of official authority, the Soviet order is particularly susceptible to such shortcomings owing to the manner of governmental operations.

Examples of a quite unfortunate state of affairs, in regard to the protection of individual rights in socialist countries, are to be found in all provinces of official activity. There are cases of systematic prevention of criminal prosecution of embezzlers of government property, of refusal to execute sentences passed by criminal courts, of lack of respect for decisions of courts made in civil causes, and of eviction of lawful owners from their apartments. In practically all these cases, the
press had traced failures in law enforcement to the personal influence of important Party members.\textsuperscript{71}

One of the students of Soviet life has thus summed up the reasons for this state of affairs:

Two basic causes seem responsible for the disrespect for laws, courts, and government attorneys as law enforcement agents. One cause is the attitude of party organizations and their leaders that they are above the law. Party members constitute a higher class of citizens, and the Party has its own code of behavior. Its censure and discipline take precedence over court action, and its members are under special protection. This protection extends not only to Party members directly, but also to their families and to nonrelated persons involved in illegal activities which the Party condones.\ldots It seems that Soviet bureaucrats have not been trained to perform duties and functions with a view toward conformity to provision of the law. The reason for this seems obvious. In the past, whenever the law in force and the rights of the individual conflicted with the policy of a government agency, laws and rights gave way to policy. One might even say that whenever a major policy change occurred, it almost invariably involved violation of the laws in force and of the vested rights of the individuals.\textsuperscript{72}

A vast majority of the cases which affect adversely private rights and general law enforcement result from the exercise of Party influence to force the authorities to depart from normal procedures and to disregard express provisions of the laws in force. There are, however, broad areas in which rights and law enforcement suffer owing to their direct connection with the production processes and their dependence on performance. Particularly is this true with regard to industrial relations and the provisions of the labor law.

In Soviet practice, the provisions of laws governing the field of labor relations are translated into reality by means of collective agreements. As everywhere else, conditions of labor are not subject to contractual stipulations, and departures from the standards established in the contractual transaction are permitted under specific conditions and in accordance with the legal rule administered by the public authority.

\textsuperscript{71} Kryvickas, Illustration of the Rule of Law in Lithuania, 6 Highlights 193–204 (1958); Rusis, Law Enforcement in Soviet Latvia, 6 Highlights 273–87 (1958).

\textsuperscript{72} Rusis, \textit{supra} note 71, at 286–87.
At the same time, rights contractually established and formulated in labor law as general standards are made relative by a system of devices. These include the piece rate system, the provision of the wage fund in terms of a share in the general plan of costs and profits of the economic venture, and the cession of the administration of the labor law and of the collective agreements to the trade unions themselves. Thus, trade unions are turned into public agencies which have the authority to depart from the stipulated standards of labor conditions. At the same time, they remain financially interested in the success of the economic venture. In this system, the risk of economic operation is borne by factory crews in the form of the extension of working hours, the violation of provisions concerning overtime pay by means of voluntary production campaigns, and the lowering standards of work safety and hygiene conditions. The relaxation of the administrative regime in Polish factories after the October 1956 upheaval revealed a complicated situation in the national industries of the country whereby factory managers were forced to resort to the systematic violation of the labor law as the only method of efficient administration. Thus, standards of performance realistically determine the conditions of labor and are to be found in the calculations of the economic plan.

The over-all effect of the deep involvement of the entire governmental and social mechanism in economic management is that the attention of the entire society and of law enforcement agencies is directed toward collective achievements rather than in the direction of realizing the individual's status. The very ethos of the legal rule is to emphasize the significance of collective action. By this means, the general welfare is guaranteed in terms of positive gains. This is the function of law enforcement; its role in determining individual rights is de-emphasized. The center of legal order is not the bill of rights contained in the socialist constitutions. It is, rather, the economic plan administered by the Party. In consequence, the litigious aspect of law enforcement is no longer a social technique for bringing about social harmony, but is, instead, adjustment and conciliation with a view toward assuring the realization of social aims.