CHAPTER 6
Soviet Theory of Private Law: Sources of Law

I. SOVIET THEORY OF PRIVATE LAW

1. Dogmatic Trends Under New Economic Policy

The new attitude toward law in general which evolved after 1936 and is discussed in the preceding chapter, was of far-reaching consequence for the soviet private or civil law. It condemned the doctrine of the so-called "economic law" or "administrative economic law" which had been offered as a socialist successor to the capitalist private law or civil law and was the doctrine generally accepted after 1930. This doctrine of "economic law" was inspired by the discussion at the first convention of Marxist jurists in 1930, of the legal problems raised by the obvious conclusion of the New Economic Policy and the transition to the First Five-Year Plan, whose immediate goal was socialism.

The New Economic Policy after 1922 not only brought a revival of private enterprise and property rights under the Civil Code but also awakened legal thought which had been dormant under the period of Militant Communism (1918–1921). Textbooks, monographs, and law reviews appeared, one of these, Law and Life, being edited by lawyers loyal to the regime but non-Marxists. The provisions of the new Civil Code were repeatedly explained and interpreted by the meth-
ods of traditional jurisprudence,\textsuperscript{1} and the teachings of
the most advanced Western European legal writers, Duguit, Renner, and Hedemann.\textsuperscript{2} The traditional juris-
prudence was offered to the young soviet law as an
"instrumentality without a face" (bezlikiy instrumentariy), a mere device for systematization and explana-
tion.\textsuperscript{3} It was more or less generally accepted that soviet

\textsuperscript{1} Gintsburg, I Course 106, classed the majority of the following works
(all in Russian) with those employing the dogmatic method:

Shreter, The System of Industrial Law (1924); \textit{id}., Domestic Trade
(1926); \textit{id}., The Soviet Economic Law (1928); Gordon, The System of the
into French as \textit{Le Système du droit commercial des Soviets} (Paris 1933),
completely out-of-date when published; Volfson, The Textbook of Civil Law
(1st ed. 1924, 4th ed. 1930); Mitiilino, The Commercial Law of the Soviet
Republics (in Ukrainian 1928); Magaziner, The Soviet Economic Law
(1928); Ashknaizi, The Fundamentals of the Economic Law of the U.S.S.R.,
(1926); Volf, The Fundamentals of Economic Law (1928); Pobedinsky,
Course of the U.S.S.R. Commercial Law (1926); "Commentaries to the Civil
Code," published by the law review (noncommunist) Law and Life, Vin-
aver and Novitsky, editors, also by Soviet Law, Prushitsky and Raevich,
editors. To an extent, here also belong the commentaries by Goikhbarg
and Koblencts (1st ed. 1924, 3d ed. 1926), and by Malitsky (1st ed. 1924,
3d ed. 1927). See also Varshavskii, Torts (1929); Kantorovich, The Basic
Ideas of the Civil Law (1928); and monographs: by Agarkov, The Doc-
trine of Securities (1927); Volf, The Basis of the Economic Law (1928);
Elyasson, The Law of Checks (1927); Grave, Commercial Institutions
(1927); Martynov, Governmental Trusts (1924); Ashknaizi and Martynov,
The Civil Law and the Regulated Economy (1927); Landkof, Commercial
Legal Transactions (1928); Symposia: Problems of Industrial Law (1925
and 1928); Syndicates and their Internal Relations; Soviet Industrial Law
(1928); Problems of Commercial Law and Practice (1926).

\textsuperscript{2} For Duguit's works, see Chapter 9. Hedemann, Fortschritte des Zivil-
rechts im XIX Jahrhundert, 3 vols (1910–1935); \textit{id}., Schulrecht (1921); his
pamphlet, Grundzüge des Wirtschaftsrechts (1922), and another were trans-
lated into Russian and printed in the Soviet Union in 1924. It is interesting
to note that under the Nazi regime, Hedemann became the leading authority
on civil law and drafted a new civil code: Das Volksgesetzbuch (1942), \textit{cf.}
Zur Erneuerung der Bürgerlichen Rechts (1938), Schriften der Akademie
für Deutsches Recht, Gruppe Rechtsgrundlagen, No. 7; Karl Renner (Presi-
dent of Austria), Die Rechtsinstitute des Privatrechts und ihre Funktion
(1929), originally published under the pseudonym Josef Karner in 1904 in
the series Marx-Studien, also translated into Russian. Among the soviet
writers, the Duguit doctrine of the social function of rights was especially
propagated by Goikhbarg, Malitsky, and Volfson.

\textsuperscript{3} Shreter, The Soviet Economic Law (in Russian 1928) 33.

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private law represented a "combination of two elements fundamentally opposed but coexisting by necessity": the elements of capitalist law in the private sector of commerce and small industry and of socialist law in the socialized sector, i.e., the economic sphere controlled by the government, comprising banking, large-scale industry, and foreign commerce. The private sector was the realm of private rights, free contract, economic autonomy. In the socialized sector planning and governmental regimentation ruled.

Under the Five-Year Plan, from 1928 on, the socialized sector began to grow at the expense of the private. The sphere left to private rights shrank. Since a new federal civil code was contemplated, this presented a series of legal problems.

2. Theory of "Economic" Law

In line with the general trend toward socialism, the slogan "fight for Marxian doctrine in law" was adopted by Pashukanis, Gintsburg, Dotsenko, and others. Stuchka proposed a compilation of two codes: one with elements of "capitalist" law regulating the remnants of private rights and free contract, doomed to wither away, and another for the socialized sector of government-controlled economy.

The trend toward "economic" law, which was victorious at the conference, was definitely inspired by the

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5 Stuchka, 3 Course 4 et seq.
6 See Chapter 9, II, and Chapter 16.
Marxist idea of economy as the primary law-creating factor, which has been considered above.  

The partisans of this trend of ideas identified private law primarily with property law and reduced all private rights to property rights. Since under socialism government property must prevail, it was considered that, instead of private or civil law, an "economic" or, more precisely, an "administrative economic law" must be contemplated. This "economic" current more or less completely ignored the fact that private law deals with other rights than property rights, e.g., rights arising from domestic relations. As was justly pointed out by later soviet critics, human beings under the "economic law" as thus construed are treated as mere "consumers of goods" in a socialist system of production. But at the time when the doctrine enjoyed official recognition, a two volume course in "economic law," instead of "civil law" or "private law," appeared. Economic law was therein defined in one passage as "a special form of policy of the proletarian State in the province of organization of socialist production and soviet commerce," and elsewhere as "the application of revolutionary legality to the organization of socialist production and soviet commerce (economic connections)."

8 See supra, Chapter 5 at notes 33–35.
9 Gintsburg, 1 Course 34; id., Collection of Materials on Administrative Economic Law (in Russian 1931) 10; The Soviet Economic Legislation, 2 vols. (in Russian 1934); Stuchka, 1 Course 9.
10 Zavadsky, a Russian refugee jurist, pointed out the fallacy of such a narrow concept of civil law in 2 The Law of Soviet Russia (in Russian, Prague 1925) 6. An identical view was at length stated in 1 Civil Law Textbook (1938) 9; but 1 Civil Law (1944) again conceives the civil law as law pertaining to property and excludes domestic relations as such from civil law. 1 Civil Law (1944) 10 et seq. See also infra, notes 24–26.
11 1 Civil Law Textbook (1938) 42.
12 Gintsburg, 1 Course 6, 18.
3. Reversion to Civil Law

This whole trend was condemned in 1937, together with the term "economic law." Since then the soviet jurists have come to recognize the necessity of civil law and private rights in their socialist State and in their legal philosophy. Moreover, certain common institutions, such as inheritance and the family, have appeared in a new light and obtained, through new legislation, features more akin to the traditional law of inheritance and domestic relations. But neither the shift in theoretic attitude to civil law nor the changes in civil legislation have equally affected all fields of civil law. Inner conflicts and contradictions in the soviet legal system, so bluntly brought out in the teachings of Pashukanis and the "economic administrative law" school, have not ceased to exist. Dualism in the soviet law of contracts and property law is more distinct than ever, although this is denied by the soviet legal theorists of the present time, who insist that there is only one harmonious and single socialist civil law in the Soviet Union. Their task is to embrace in one theory a situation implying mutually opposed elements, comprising for instance, one law of contracts and property for citizens and another for government trading agencies. The successive attempts made in this direction have not brought about realization of this aim. Various authors have voiced different opinions, and two officially recog-

13 See Chapter 4, I, and Chapter 17, Inheritance Law.
14 See Chapters 12, 13 and 16.
15 See passage quoted infra, at note 26.
16 Godes, "Subject Matter and System of Soviet Civil Law" (1939) Soviet Justice No. 1; Genkin, "The Subject Matter of the Soviet Civil Law" (1939) Soviet State; Bratus, "Concerning the Subject Matter of the Soviet Civil Law" (1940) id., No. 1; Arzhanov, "Subject Matter and Method of Legal Regulation in Connection with the Problem of System of the Soviet Law"
nized textbooks on civil law that appeared in 1938 and 1944 offer each a different construction. The difficulty is rooted in the fact that the soviet theories of the past were disavowed, because of the practical danger implied in the conclusions at which their authors arrived. But the premises from which the conclusions were drawn, i.e., the Marxian philosophy seeking to explain law in terms of economics and the omnipotence of the State in regulating social life and rights, retain their full authority. The downfall of Pashukanis' theory and economic law was caused by their potential danger for the authority of soviet legislation as a means of social control rather than their theoretic fallacy or error as an observation of the trends in soviet legislation. The soviet leaders were not prepared to let the soviet jurists declare protection of private rights to be a capitalist element in the law of a socialist state. Nor could a plain identification of law with policy, advocated by the partisans of "economic law" (see supra) promote observance of the soviet laws by judges and administrative officers. It is characteristic that, in criticizing the theory of economic law, the recent soviet writers invariably quote the following statement made by Vyshinsky in 1937:

Substitution of the so-called "economic law" for civil law is a valuable service to the enemies of Communism, to the slanderers who tell tales that Communism presumably suppresses personality, and recognizes no other categories than society, economy, production. 17

(1940) id., No. 8/9; Mikolenko and Bratus, "Subject Matter and System of the Soviet Socialist Law" (1938) Soviet Justice No. 16. For a survey of these opinions in English, see Schlesinger, Soviet Legal Theory (London and New York 1945) 251-256.

17 Vyshinsky, "About the Situation on the Front of Legal Theory" (1937) Socialist Legality No. 5, 37.
Therefore the soviet jurists have to find an interpretation of soviet law showing the realization of Stalin's contention that: "Socialism does not deny but combines individual interests with the interests of the collectivity. Only a socialist society can afford the most complete satisfaction of such personal interests." But this must be done without affecting the authority of the provisions restricting private rights.

4. Recent Trends

With the recognition of full authority of laws and restoration of the term civil law, legal technique and logics had to be admitted in dealing with legal problems. But the supremacy of plan over contract, of government ownership over private, and similar premises of disavowed theorists still remain the basis of legal theory.

The authors of the textbook of 1938 scorned the economic law doctrine as neglecting private rights and giving a narrow conception of civil law confined to property relations. They definitely included the domestic relations in the sphere of civil law but do not present any clear definition of what civil law in the soviet State is. Instead, the subject matter of civil law is outlined as a branch of legal studies. According to the textbook, the study of civil law in the soviet State should embrace "the rules regulating the civil legal relations of the socialist society." The characteristic feature of these relations in contrast to legal relations pertaining to other fields of law is that "a certain freedom, independence, and initiative is recognized to some de-

19 1 Civil Law Textbook (1938) 12.
gree to all participants in these relations.” 20 But the authors are also fully aware that soviet law in many instances denies such freedom to the participants in such legal relations as could be otherwise considered civil, e.g., in relations of contract and property. Thus, the authors state that there is a series of social relations in the Soviet Union that “have an in-between character. The State may regulate these relations either in a civil law or in an administrative law manner.” 21 It is characteristic that the whole discussion of civil law is centered not on the protection of rights but on a looser concept of regulation of legal relations. But no less characteristic is it that, in discussing individual points of the soviet civil law, the textbook displays in many instances a pragmatic and, one may say, dogmatic attitude along traditional lines, e.g., in the treatment of torts as discussed in connection with the pertinent problems. 22 Thus, the technique of the traditional civil law is used, but its spirit and ideological background continues to be rejected by the soviet jurists.

In any event the most recent textbook of 1944 again offers a new theory. In contrast to its predecessor, the textbook directs the main attack not against the theory of “economic law” but against the theory asserting the dual nature of soviet law—one law for the socialized sector and another for the private. Likewise, plan and free contract must not be treated as opposing elements but in a harmonious blend in soviet law. 23 In a way, the textbook denies the existence of any civil law as private law in the Soviet Union. Thus it is stated:

20 Id. 10.
21 Ibid.
22 See Chapters 14 and 15 on Torts.
23 1 Civil Law (1944) 9 et seq.
Under socialism, civil society is no longer set apart from the political organization of the society—the State; there is a unity of political and economic direction; public and private interests are combined: all of which excludes the possibility of subdividing socialist law into public and private—civil law. The united, single soviet socialist law is subdivided into several branches depending upon the circle of social relations that it regulates.24

In full agreement with the theory of economic law, the textbook considers property relations to be the field regulated by soviet “civil” law. But it emphasizes in contrast to that theory, that the property relations of soviet citizens cannot be treated separately from the property relations of governmental organizations and the State as a whole. Again, it admits the existence of certain nonproperty values, whose protection belongs also to the sphere of civil law, e.g., the right to a personal name. The textbook is not quite satisfied with the term “civil law,” and objects to the term private law. It stresses that in the capitalist society civil law is the law protecting private interests, and that it allows an amount of freedom and autonomy in contrast to administrative, criminal, and other branches of public law in which mandatory rules of law are predominant.25 No such criteria may be used for the definition of soviet “civil law,” which term, according to the textbook, acquires in the soviet setting a “conventional meaning,” which is as follows:

The soviet civil law is a branch of a single system of soviet socialist law that consists of rules determining the legal status of organizations and citizens in their capacity as participants in property relations of the socialist society and regulating these relations as well as rights of citizens in nonproperty values inseparable from the person.26

24 Id. 4.
25 Ibid., also et seq.
26 Id. 10, 11.
The rights in "personal nonproperty values" is explained to mean the rights to a personal name, to protection of health and honor, and to copyright. Thus, as before, it is attempted to construe the notion of "civil law," evading the fundamental problem of private rights. The "conventional meaning" of civil law thus offered makes it difficult to separate civil law from allied fields. Property relations come under a variety of rules of law. Again, under the government monopoly of commerce and industry, it is difficult to draw a line between the sphere of administrative law governing the governmental trading agencies and the civil law. The textbook proposes without much clarity to assign to the sphere of administrative law:

Relations arising out of acts of an organizational and constitutive nature and determining the basis upon which civil relations are formed. Secondly, to the administrative law should be assigned relations which arise between the organizations, as well as between the organizations and the citizens, in connection with the issuance of acts of planning which determine property relations.\(^{27}\)

The textbook also separates from civil law, land law, labor law, the law of collective farms and, in a somewhat hesitating manner, that of domestic relations.\(^{28}\) In fact, however, in presenting the material, the textbook in one way or another enters all these fields. Similarly to the textbook of 1938, the textbook of 1944 also offers in many instances a sound legal treatment of individual problems and makes liberal use of fragmentary traditional legal concepts. Thus, on the one hand, the soviet theory of private law seems to revert to the theory of economic law. On the other hand, a dogmatic

\(^{27}\) Id. 11.  
\(^{28}\) Id. 12, 13.
analysis in the presentation of individual legal institutions is in evidence in the 1944 textbook and in recent soviet writings on private law, this in larger measure than was the case some ten years ago.\textsuperscript{29} But the version, dogmatic or pragmatic, is not crystallized in a philosophy of private law. The nature of present soviet legislation, with its many restrictions on private rights, does not stimulate broad legal constructions. The use of dogmatic analysis, by methods similar to those used in nonsoviet jurisprudence, is confined to very narrow and technical problems, and it does not carry with it the spirit of private law. It does not make soviet law more private or civil in character. A passage from the recent soviet treatise on labor law of 1946 illustrates how a legal analysis of narrow clauses may easily lead to hair splitting. The author analyzes the legal consequences of sleeping on the job by an employee. This particular question would come, in a nonsoviet jurisdiction, within the field of private law, viz., master and servant or contract of employment. The Acts of December 28, 1938, and of January 9, 1939, declared tardiness for over twenty minutes, or repeated tardiness, a mandatory reason for dismissal. Loitering on the job was also declared subject to disciplinary penalties. But the Edict of June 26, 1940 and the Act of January 18, 1941, declared absenteeism an offense subject to punishment in court. An employee, says the statute, is considered absent if he is late for work without a good reason; late from lunch for more than twenty minutes; leaves more than twenty minutes ahead of time; or is, in a similar way, tardy for less than twenty minutes, but thrice within one month, or four times within two

\textsuperscript{29} See 1 Problems of the Soviet Civil Law (in Russian 1945); also Transactions (Uchenye Zapiski) of various law institutes, printed after 1939.
consecutive months; or if he appears at work in a state of intoxication. This was the legal problem discussed by soviet writers and the Supreme Court: 30

The question whether loitering on the job or sleeping during working hours should be considered absenteeism came up in judicial practice several times. Legal writers answered this question in various ways. Some thought that "there is no reason to exclude . . . loitering on the job from the concept of absenteeism," 31 while others were of the opposite opinion. 32

From the comparison of Sections 21 and 26 of the Standard Rules of Internal Order, it becomes evident that loitering on the job, regardless of how long it lasts and how often it occurs, entails a disciplinary penalty and not punishment in court. Sleeping during working hours is a form of loitering on the job and therefore should not be considered absenteeism. This conclusion is supported by the following ruling of the Trial Criminal Division of the U.S.S.R. Supreme Court: "Insofar as sleeping on the job is a violation of labor discipline, not connected with the absence of the worker from his post but, on the contrary, necessarily presumes his presence there, such an offense may not be qualified as absenteeism. Being a kind of loitering, sleeping during working hours, if it did not and could not cause serious harm, must be visited by disciplinary penalty." 33

Such problems or their unimaginative legalistic treatment cannot stimulate development of jurisprudential principles.

The events of the postwar period brought about the possibility of a new revision of soviet legal theory. The Resolution of the Central Executive Committee of the

30 Aleksandrov, joint author, Soviet Labor Law (in Russian 1946) 279, 280. See also Chapter 22, pp. 819 et seq., 829 et seq.

31 Here the author refers to Dubovsky, "Concept of Absenteeism" (1941) Soviet Justice No. 1.

32 Here the author refers to Moskalenko, "The New Rules of Internal Order" id., No. 11.

33 U.S.S.R. Supreme Court, Criminal Trial Division Decision, 1943 (1943) Judicial Practice of the U.S.S.R. Supreme Court No. 4, 14.

Communist Party of August 14, 1946, criticizes the ideological character of present soviet literature, art, and social sciences, including jurisprudence. It calls for the clearing from these fields of foreign influences and for better observance of communist ideological purity. However, criticism of soviet jurisprudence is this time couched in very general terms. No particular writer and no specific theory is condemned. The principal jurisprudential center, the Law Institute of the Academy of Science, is blamed primarily for the failure to produce certain work and not for disseminating the wrong kind of theory. The Institute, it is said, "did not offer any serious scholarly work concerning the theory of soviet State and Law" and international law; it did not criticize the bourgeois theories of State and did not elaborate the theory of "the new type of democracy" which developed after the war in Eastern Europe under the aegis of the Soviet Union. It seems that the leadership of the Institute was somewhat lost in determining what is now wrong with soviet jurisprudence and in its turn confined itself to some general statements which imply, however, the possibility of a new dominance of social and economic policies over legal reasoning in soviet law. Thus, the editorial in the law review of the Institute discussing the situation, emphasizes that jurisprudence is the most political branch of science. Therefore:

The main requirement mandatory upon the scholarly work of the jurists is to be on the level of the demands of the Marx-Leninist doctrine of State and Law and to manifest intolerance of any distortion of this doctrine, of alien doctrines and influences. . . . Any manifestation of juridical formalism

See Chapter 4 in fine.

(1946) Bolshevik No. 15, 6-7.
which pulls back to bourgeois jurisprudence is especially inadmissible. 36

The whole program lacks clarity. On the one hand, the absence of an up-to-date work stating the doctrine of the soviet State and law is recognized, and on the other hand, the soviet jurists are called on to conform with this doctrine which, as is shown supra, is under constant revision. The attack on juridical formalism may not bring about any restriction on dogmatic analysis of soviet institutions. Because no definite ideological faults in jurisprudential writing were pointed out, it may well happen that soviet jurisprudence will continue in the same direction, borrowing legal technique from the nonsoviet jurisprudence but rejecting its spirit and broad principles.

5. Private Versus Public Law in Soviet and Nonsoviet Law

The soviet jurists are indeed not alone in facing difficulty in the delineation of public and private law in their State. Though old terms, inherited from Rome, public and private law are by no means well defined and uniformly understood in the European and modern Anglo-American jurisprudence. 37 The soviet theories described above are not as original as they may appear at first sight. They are rather, reflections of certain opinions voiced in the nonsoviet jurisprudence beginning with the late nineteenth century when the traditional concepts of public and private law formulated by the Roman jurists began to be challenged. Public law was

36 "Facing Important and Responsible Tasks" (1946) Soviet State No. 10, 2, 4.
for the Roman jurists, using the paraphrase of Roscoe Pound,\(^{38}\) that part of law which had to do with the constitution of the Roman State and private law with the interests of individuals, *publicum jus est quod ad statum rei romanae spectat, privatum quod ad singulorum utilitatem.*\(^{39}\) The modern Romanist view has been formulated by Roscoe Pound thus:

"Private law had to do with adjusting the relations and securing the interests of individuals and determining the controversies between man and man, while public law had to do with the frame of government, the functions of public officials, and adjustment of relations between the individuals and the State."\(^{40}\)

But modern critics of the Roman concept no longer think that the protection of private interests is the specific sphere of civil or private law, while public law deals with public interests. Is the State, they have questioned, really disinterested in the construction to be given to family, ownership, and inheritance, all of which are undoubtedly institutions of private or civil law, and did it ever refrain from their regulation? On the other hand, it is argued, contracts for war supplies are obviously made by a government agency in pursuit of public administration, but are nevertheless within the purview of civil law. Thus, some writers have turned from the character of the parties in interest to the subject matter regulated or to the method of initiating judicial action to find a criterion for delimiting the proper spheres of private and public law.\(^{41}\) Long before the soviet advocates of "economic law," some conservative

\(^{38}\) Ibid.

\(^{39}\) Institutes I, 1, 4; also D I, 1, 2.

\(^{40}\) Roscoe Pound, *op. cit.*, particularly refers to Dernburg, 1 Pandekten (8th ed. 1911). Section 16, p. 34.

\(^{41}\) I. Pokrovsky, Basic Problems of Civil Law (in Russian 1917) *et seq.*
writers considered relations involving property to be the theoretically proper sphere of civil or private law.\textsuperscript{42} Others laid stress on the fact that, in civil law cases, judicial action, as a rule, is commenced on private initiative, while in public law, criminal law in particular, suit is brought at the instance of public authorities.\textsuperscript{43} Against these opinions, it has been correctly pointed out that the civil relations of guardian and ward or parent and child, cannot be reduced to property relations. Likewise, some civil suits may be initiated by authorities, and contrariwise there are criminal actions on private complaints. This has induced other writers to look for the criterion of delimitation in the method of legal regulation, i.e., of providing rules to govern disputes arising in a particular field of law.\textsuperscript{44}

The last named line of thought became well developed in the Russian jurisprudence and was formulated just before the Revolution with great vigor and force by Professor Joseph Pokrovsky.\textsuperscript{45} His teachings in fact form the background of the discussion of the problem of private law by the soviet jurists. Without directly referring to these teachings, the soviet jurists either follow Pokrovsky’s ideas or, when departing from them, seek to justify this departure. For this reason an expose


\textsuperscript{43} Thon, Rechtsnorm und subjectives Recht (1898) 108–146; Rudolf von Jhering, Geist des Römischen Rechts, Part III (4th ed. 1888) Section 61; Duvernua (Duvernois) 1 Lectures in Civil Law (in Russian 1898) 28 \textit{et seq.}; Gambarov, 1 Course in Civil Law (in Russian) 50.

\textsuperscript{44} Radbruch, Grundzüge der Rechtswissenschaft, (1914); \textit{id.}, Rechtswissenschaft (3d ed. 1932) 122 \textit{et seq.}; Rudolf von Stammler, Wirtschaft und Recht (5th ed. 1924); \textit{id.}, Theorie der Rechtswissenschaft (1917) 402 \textit{et seq.}

\textsuperscript{45} Pokrovsky, \textit{op. cit.}; prior to this work, Petrazicki, 2 Theory of Law (in Russian 1910) 647 \textit{et seq.}
of his doctrine seems to be indispensable in a study of
the soviet theory of private law. Pokrovsky states:

The general purpose of law is to regulate mutual relations
of men. If we look more closely at the methods and fashions
by which such regulation is accomplished, the following major
difference is observed. In some fields, the relations are regu-
lated exclusively by commands emanating from one state cen-
ter, the government authority. It determines by its rules the
juridical position of each individual, his rights and duties
toward the entire organism of the State and toward other in-
dividuals. Provisions determining the position of each indi-
vidual in a given sphere of relations may emanate only from
the government authority and no private will, no private agree-
ment, may change this position (the Roman jurists used to
say: *publicum jus pactis privatorum mutari non potest*). The
government authority regulates all these relations on its own
initiative, exclusively by its own will and therefore cannot
admit in this sphere any other initiative or will. Hence, the
rules emanating from the government authority in such sphere
are of a mandatory, compulsory nature (*jus cogens*); the rights
granted are also in the nature of duties: they must be exercised
because nonexercise of rights appears as a failure to discharge
duties connected therewith (laxity in office). . . .
This method of legal centralization is the essence of public
law. . . .

An altogether different method of legal regulation is used
in the fields assigned to the sphere of private or civil law. Here
the government power abstains on principle from direct and
authoritarian regulation of relations; here the government au-
thority does not visualize itself to have the position of the only
determining center but, on the contrary, leaves the regulation
to a multitude of other small centers visualized as independent
social units, as holders of rights. In the majority of cases,
the individual human being appears as such a center, but there
are also artificial entities, corporations and endowments, in
other words, legal entities. All these small centers are pre-
sumed to exercise their own will and initiative; that is to say,
the regulation of their mutual relations is left to them. The
State does not seek to determine these relations itself but takes
the position of an organ protecting whatever is established by
individuals. The State does not direct a private person to
become the owner or heir or to marry; all this depends upon the will either of one private person himself or of several of them (parties to a contract); but the State will protect the relation established by a private will. If the State gives a determination, as a rule, this is done only in case private persons fail, for some reason, to make their own dispositions, that is to say, it is done to fill a gap. Thus, for example, the State establishes the rules of succession to be applied in absence of a testament. Therefore, the rules of private law have for the most part a subsidiary or optional and not mandatory character and may be set aside or replaced by private dispositions (jus dispositivum). Hence, a private right is a right pure and simple and not a duty: its holder is at liberty to use or not to use it; nonexercise of a right is not a violation of law.

Thus, while public law is a system of centralized legal regulation of relations, private law is a system of decentralized legal regulation; by its very nature, it requires for its existence the presence of a multitude of autonomous centers. While public law is a system of subordination, private law is a system of co-ordination; while the former is the sphere of power and subjection, the latter is the sphere of freedom and private initiative.46

Civil law as a decentralized system of legal regulation is based by its very structure on the presumed existence of a multitude of small centers, autonomous organizers of life in the spheres included in civil law. These centers are the holders of rights. For the realization of freedom and initiative, which constitute the main purpose of civil law, these holders of rights are granted so-called private rights (right of ownership, right to demand performance of an obligation), the very essence of which consists in the possibility, secured by law, to act on the basis of free will.

Thus, the concept of a holder of rights and private rights belonging to him is the logical prerequisite of any civil law; without these concepts civil law is unthinkable. . . . . The number and the scope of rights to be granted to the individuals may be disputed, but the idea of a person as a holder of rights and the idea of private rights itself should not be questioned.

46 Pokrovsky, op. cit. 8–10.
47 Id. 84.
Aboriginally and by its very structure the civil law has been the law of an individual, the sphere of his freedom and self determination.48

Pokrovensky stresses the fact that the dividing line between the sphere of private law and that of public law, as he conceives them, did not remain unchanged in various epochs. In the early stages of civilization, even in ancient Rome, crime and punishment were a matter of civil action and consequently criminal law was private law.49 Vice versa, the religious life of the community tended in the nineteenth century to become a sphere regulated in a private law style. Nor could the dividing line be drawn with precision at any moment of development in a given legal system. It would be more accurate to say that private law is characterized by the predominance of decentralized regulation, while centralized regulation dominates in public law. It may be observed that the salient point of Pokrovensky’s analysis lies in his conclusion that recognition of private rights is the basis of civil or private law. Here his theory of private law comes close to the Anglo-American concept of law as explained by Roscoe Pound in his contribution to the problem of private versus public law.50

Coming back to the soviet discussion of the problem of civil law in the soviet State, one is bound to conclude that the soviet theories appear to be inspired by one opinion or another, expressed before in the nonsoviet jurisprudence. The recent soviet writings bear unquestionable trace of the influence of Pokrovensky’s analysis. His theory of decentralized regulation, as the specific

48 Id. 309.
49 Id. 11.
50 Roscoe Pound, op. cit., note 37, 475: “Rights, that is legally recognized and delimited interests, secured by the law, are a means of co-ordination. . . . Rights stand in the way of subordination.”
method of civil law, was in fact accepted by the textbook of 1938.\textsuperscript{51} When the 1944 textbook denies the necessity of a distinction between private and public law in the soviet law, such distinction is conceived there in the light of Pokrovsky’s theory. Having rejected his criterion, the textbook has chosen again the doctrine of property relations as the sphere of soviet civil law, previously advanced in nonsoviet jurisprudence. Again the objections to the terms, civil law and private law, are based on Pokrovsky’s explanation of the terms.\textsuperscript{52} One point in his doctrine is, however, avoided in the recent soviet constructions. It is the importance attached by him to the concept of private rights as the basis of civil law. This very point furnishes also an explanation of the constant fluctuation in the soviet theory of soviet law. It is rooted in the precarious status of private rights in the Soviet Union.\textsuperscript{53} So long as the soviet statesmen and jurists refuse to recognize private rights as natural innate rights of human beings and see in them a grant by the government and the soviet law provides rather for their restriction than their free exercise, any attempt at a constructive soviet theory of private law is deprived of sound foundation.

\section*{II. Sources of Soviet Private Law}

1. Soviet Theory of Sources of Law

The present day soviet doctrine of the sources of private law and their interpretation is more akin to traditional views than it was during the period of experimentation when new theories were being formulated.

\textsuperscript{51} Cf. supra at note 20.
\textsuperscript{52} Cf. supra at notes 25 and 41, 42.
\textsuperscript{53} See Chapter 9.
In discussing at that time the sources of soviet law, the soviet jurists could not pass over the following statement by Stalin:

It must not be forgotten that we are a ruling party, not an opposition party . . . In the case of a ruling party . . . such as our Bolshevik Party is, the slogans of such a party are not mere (agitational) slogans, but much more, for they have the force of practical decision, the force of law, and must be carried out immediately.

Thus, the textbook on "economic law" of 1935 made a bold attempt to indicate the sources of the soviet law with a striking departure from the tradition of civil law countries and common law as well. Extralegal sources, such as decisions of the Communist Party and Marx-Lenin doctrine, attain almost a priority over legal sources. A nonsoviet jurist will undoubtedly find rather confusing the suggestions given:

The basic and, in the last analysis, the only source of the soviet law is the dictatorship of the proletariat . . . The sources of the soviet law are: decisions of the organs of the Party, joint decisions of the Party and the government, statutes, decisions of the courts and the arbitration commissions, decisions of the central organizations of the trade-unions and the co-operative organizations. The Communist Party is the main instrument of the dictatorship of the proletariat . . . Therefore, the decisions and the directives of the Party are the most important (although not the most voluminous) sort of sources of the soviet law, and of the civil law in particular. It is true that the Party decisions are directly binding upon the members of the Party only. However, insofar as the Party directs all the toilers in the country and in the cities in their struggle for socialism, and insofar as the Party leadership is secured by all the soviet, professional, co-operative, and other public organizations of the soviet State without any exception, Party decisions acquire a common obligatory character . . . Resolutions of the organs of soviet power or laws are the most

54 Stalin, Speech of April, 1929, Problems of Leninism (English ed. Moscow, 1940) 273, italics in the original.
voluminous category of the sources of soviet law. Marx-Lenin doctrine is not an official source of law, and yet it must be used in the most extensive way in the process of legislation (in lawmaking), as well as in application of the law (by the courts in particular). The role of custom is reduced to a minimum within the proletarian State under the revolutionary reconstruction of all social relations.55

The textbook of 1936 draws a distinction between the sources of law in a broader sense and in a narrow (technical) sense, and shows the transition to acceptance of the traditional concepts:

Inasmuch as we treat soviet private law as a special form of policy of the proletarian dictatorship, it is apparent that the source of that law in a broader sense is the dictatorship of the proletariat, that is, the soviet State. In this connection, it is necessary to emphasize the decisive importance of the directives of the Party for soviet private law . . . The directives of the Party on economic questions determine the contents of the soviet economic and civil legislation. "The soviet law is not a dead dogma, it is a living and operative expression of the will of the Party and the government imbued with the spirit of the fight for socialism." (Pravda, August 7, 1934.) In recent years, joint directives of the Central Committee of the Party and of the Council of Peoples' Commissars have been issued . . . These resolutions appear as both Party directives and soviet law.

The revolutionary theory of Marx-Lenin-Stalin is of the utmost importance for soviet private law. However, from these sources of law in a broad sense, the sources of law in a narrower (technical) sense must be distinguished, i.e., propositions (rules) expressing the content of law. Such sources of soviet private law are: (a) statutes; (b) decrees of local authorities (executive committees and soviets); (c) orders and regulations issued by individual government departments, etc.; (d) decisions of the courts and arbitrators deciding disputes between governmental enterprises.56

The textbook of 1938 starts with the same extralegal

55 Gintsburg, 1 Course 121, 122, 128.
56 Rubinstein 30.
propositions as its predecessor but omits the discussion of the role of Party decisions and, for all practical purposes, looks for the sources of law where the nonsoviet jurist would look:

The only source of soviet socialist law is the dictatorship of the proletariat. There is no succession whatsoever between the soviet revolutionary law and the law of the overthrown capitalists' and landowners' regime. Likewise, one cannot speak of any borrowing in the field of law by the socialist State from the capitalist states. In contrast to capitalist relations, which were formed in the womb of feudalism, socialist relations came into being only under the dictatorship of the proletariat. It is in this sense that we say that the dictatorship of the proletariat is the only source of socialist civil law that shapes and consolidates socialist production. However, the term "sources of law" is used to denote other concepts also. Most frequently by sources of law we mean those forms in which law is expressed, such as statutes, decrees, customs, court decisions, etc.

Undoubtedly, a nonsoviet jurist, who might be somewhat lost at the beginning of the passage, would feel quite at home in the traditional categories and concepts to be found at the end.

The 1944 textbook follows in the main, the same line of thought:

The will of the ruling class is the source of law in the substantive sense. The dictatorship of the working class is the source of the soviet law in general and the soviet private law in particular. There are no antagonistic classes in the U.S.S.R. but only friendly classes of workers and peasants; therefore, the will of the working class serves as the will of the entire soviet nation. By sources of law in a formal sense, the forms are meant in which the rules of law in force are expressed. In speaking below of the sources of soviet law, we have in mind only the sources of law in the formal sense,

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57 Civil Law Textbook (1938) 44; Golunsky, Theory 173 et seq.
i.e., we shall describe the forms in which the soviet private law finds its expression.\textsuperscript{58}

After a survey of sources of capitalist law, the textbook groups the soviet sources under the topics: legislative enactments, customs, judicial practice, and rules of everyday life of a socialist community.\textsuperscript{59}

Thus, with the exception of the last named group, the sources of soviet law in a "formal" or "technical" sense may be reduced to the traditional categories—statutes, custom, and court decisions—which are discussed \textit{infra}, under these topics.

The "rules of everyday life of a socialist community" were first mentioned in Section 130 of the 1936 Constitution; they appear in the Judiciary Act of 1938 and in the definition of law by Vyshinsky quoted in Chapter 5.\textsuperscript{60}

From the discussion to be found in the soviet writings, it transpires that this term is a kind of soviet equivalent to good morals and usage.

It is interesting to note the attitude of the soviet legal writers to so-called autonomy in private lawmaking. Several European scholars have pointed out that in modern life rules and regulations issued within a certain sphere by corporate bodies or certain agreements between organized groups, notably collective bargains, are recognized by the State as having the force of law.\textsuperscript{61}

In such instances, one may speak of a delegation of specific legislative powers. The Italian Civil Code of 1942 mentions such rules under the name of "corporate

\textsuperscript{58} 1 Civil Law (1944) 27.
\textsuperscript{59} \textit{id.} 29, 33, 34, 35.
\textsuperscript{60} See Chapter 5, note 66. For discussion of this category, see also Chapter 9, I, 8 in fine.
\textsuperscript{61} Regelsberger, 1 Pandekten (1893) 105; Cosack, 1 Lehrbuch des Deutschen Bürgerlichen Rechts (5th ed. 1910) 154; \textit{id.} (7th ed. 1922) 18, 147; Oertmann, Rechtsordnung und Verkehrssitte (1914) 5 et seq.
rules” (*norme corporative*) among the sources of law. Here belong, according to the Code, rules and regulations issued by corporate bodies within their jurisdiction, collective agreements and determinations by the labor court when and where they are not in conflict with statute (*legg*i). At present, the soviet jurists deny any such private lawmaking in the soviet State. However, it may be mentioned in this connection that the function of a department of labor is exercised by the Central Board of Trade-Unions in the Soviet Union. Orders issued by this Board in this capacity certainly constitute a part of the soviet statutes on the same level as other departmental orders (see *infra*).

2. Interpretation of Law

The recognition of the authority of law in the soviet legal theory that occurred around 1936 was followed by a change in the attitude of the soviet jurists to the interpretation of law. Up to that time, and in the thirties in particular, the soviet jurists did not cease to look for a particularly soviet and Marxian approach to statutory provisions and sought a new method of interpretation and application of soviet law. The passages from the textbooks of 1935 and 1936 quoted *supra* bear traces of the quest for socialist legality discussed at length in Chapter 5. The student of soviet civil law, the judge and the lawmaker, are there directly advised to resort to Marxism-Leninism-Stalinism and the directives of the Communist Party when applying and inter-

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62 Italian Civil Code of 1942, Introductory Provisions, Sections 1–5. Reference to “*norme corporative*” was stricken from the Code by the Decrees of January 20, 1944, No. 25 and September 14, 1944, No. 287.

63 1 Civil Law (1944) 34.

64 See *supra*, notes 55 and 56.
preting soviet law. The textbook of 1938 still insisted that “for the application of soviet laws knowledge of Marxism-Leninism, which is their theoretic foundation, and ability to employ the materialistic dialectics are necessary.”

The textbooks of 1944 and 1945 contain no such references in their discussions of the interpretation of soviet laws. The textbooks explain instead the traditional methods of legal interpretation developed in civil law jurisprudence and traceable back to commentators on the sources of Roman law. “We call interpretation of the law,” states the textbook of 1938, “the determination of the true content and meaning of a legal provision in connection with a given concrete (factual) relation.” Likewise, according to the textbook of 1944, the interpretation of laws is defined as “clarification of the meaning and content of the law necessary for its application.” The textbooks set forth the traditional methods. Thus we find the grammatical method which seeks to establish the literal meaning of a provision, the logical method which operates with analysis of the concepts involved; the systematic method which seeks to fix the meaning of a provision in conjunction with other provisions and its place among them, and, finally, the historical method, used when, in order to clarify a provision, a resort is had to the historical conditions under which the law was enacted. There also, the analogy of law (analogia prava), that is filling the gaps in legislation, discussed supra in Chapter 5 and infra 3, and statutory analogy (analogia zakona),

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65 1 Civil Law Textbook (1938) 53.
66 Id. 52.
67 1 Civil Law (1944) 38.
68 Id. 38, 39.
the application of a statutory provision to a case similar to that covered by the statute, are mentioned.\textsuperscript{69} It may be stated that the soviet discussion of analogy in the interpretation of private law does not differ from the doctrine of civil law countries. But soviet law departs from this doctrine in allowing the use of analogy in the application of penal statutes. From the liberal movement in the criminal law of the eighteenth century evolved a doctrine in European jurisprudence that barred the application of a penal provision by analogy. It called for a strict construction of penal statutes: a penal clause could be applied only to acts specified in the clause. The idea was to protect the citizen from arbitrary prosecution by precluding the imposition of a penalty by the court for an act not specified in advance by the statute as forbidden under penalty. This principle was expressed in all the European criminal codes.\textsuperscript{70} However, the soviet criminal codes, those of 1922 and 1926, now in force, did not follow the principle. Both expressly provide for the imposition of a penalty for acts not identical with the crimes specified, but closely resembling them.\textsuperscript{71}

Regarding the interpretation of the civil statutes, two restrictive rules should also be mentioned. Both are based upon the provisions of the Law Enacting the

\textsuperscript{69} Id. 40. Also op. cit., note 65 at 54.

\textsuperscript{70} This was also true of the German Criminal Code of 1870, Section 2, until it was amended under Hitler on June 28, 1935, Reichsgesetzblatt, I, 839. See Gsovski, The Statutory Criminal Law of Germany (1947) 3 et seq.

\textsuperscript{71} The R.S.F.S.R. Criminal Code of 1926, which is in force, provides as follows:

16. If a socially dangerous act [this is the term of the Code for crime] is not directly specified by the Code, the basis and limits of punishment for it shall be determined by applying the sections of the Code which specify the crimes of the kind closely resembling the act.

Similar provisions are contained in Section 10 of the Code of 1922.
Civil Code and deviate from nonsoviet concepts. One rule, designed to interrupt the continuity of the prerevolutionary law, prohibits the interpretation of soviet laws on the basis of prerevolutionary laws and court decisions (Section 6) and is discussed in Chapter 8.

The other rule was intended to exclude a liberal interpretation, by the courts, of the clauses in the soviet Civil Code recognizing private rights so as to benefit capitalist elements. The framers of the soviet Code did not spell out this aim but put it in the form of a rule respecting "extensive interpretation" of law, as follows:

5. Extensive interpretation of the R.S.F.S.R. Civil Code is permitted only in case it is required for the protection of the interests of the workers' and peasants' State and the working masses.

The meaning of the term "extensive interpretation" is explained by the soviet textbook of 1938 as follows:

In the course of the application of a law, the court may arrive at the conclusion that the true meaning of the law must be conceived in a broader sense than its literal terms. This is what we call extensive interpretation.\(^{72}\)

The explanation in the textbook of 1944 is similar:

In the course of clarifying the meaning of the law for the purpose of its application, it may be established that the literal content is narrower than that circle of relations to which the legislature considered it expedient to apply a certain rule of law. Such interpretation is called extensive.\(^{73}\)

This definition does not depart from the standard meaning of the term in civil law countries and is close to our notion of "liberal" interpretation.\(^{74}\) The novelty

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\(^{72}\) Civil Law Textbook (1938) 52.

\(^{73}\) Civil Law (1944) 38, 40.

\(^{74}\) "Extensive interpretation . . . adopts a more comprehensive signification of the word. . . . The civilians divide interpretation into: . . . extensive, whenever the reason of a proposition has a broader sense
of the soviet rule is in the restriction placed upon liberal interpretation. The real purpose of the proviso of Sections 5 and 6, the only sections dealing with interpretation, is to restrict the recognition granted by the Civil Code to only those private rights which are expressly stated in the Code. The framers of the Code wished to bar the extension of guarantees implied in the Civil Code to private rights not foreseen by the Code. In explaining this section, the earlier soviet textbook of 1934 refers to the following opinion expressed during the debate over the Code in the Central Executive Committee:

It must be stated that this Code is the maximum which is given to capitalism, and we do not intend and do not wish to go any further. 75

In 1927 Malitsky commented thus:

The capitalist jurisprudence and court decisions . . . have declared, as a general rule of the application of law in private law in contrast to public law, that “whatever is not prohibited is permitted.” This principle of interpretation is not applicable to the soviet Civil Code, because the purpose of the Code is not to stimulate a free and diversified development of private business. On the contrary, its purpose is to create a limit within a firm frame not to be exceeded, “to draw a limit between the satisfaction of the justified needs of every citizen connected with modern business and such abuses of the New Economic Policy as are legalized in all countries but which we do not want to legalize” (Lenin’s speech in the debate on the Civil Code). The double nature of the Civil Code, representing a combination of two systems of ownership—communist and capitalist—admits extensive interpretation of the than its terms, and it is consequently applied to a case which has not been explained. . . .”


75 Bulletin of the Fourth Session of the Ninth All-Russian Central Executive Committee (in Russian 1922) No. 3, 16, quoted from Gintsburg, 1 Course 133.
principles and individual provisions of the Code only in the
direction of the development of the communist elements.

However, the R.S.F.S.R. Supreme Court instructed
the soviet courts that resort to Section 5 “is an extreme
measure, and its application must always be duly moti­
vated in the decision.”

As a matter of fact, effects of the restriction on pri­
vate rights intended and implied by Section 5 are hardly
to be found in the soviet court reports. This provision
had a fate similar to that of Section 1 of the Civil
Code, a fate explained in Chapter 9, I, 8.

The textbook of 1944 states the provisions of Sec­
tion 5 without comment.

The soviet textbooks do not contain any statement
on the authority of jurisprudential writings (French
doctrine) in soviet courts, although the role of such
writings in the formation of the law of capitalist coun­
tries is described.

3. Statutes

The 1938 and 1944 textbooks definitely recognize “the
soviet statutes as the primary source of soviet private
law.” The 1938 textbook considers this to be the
direct consequence of “the very nature of the soviet pri­
ivate law as the will of the dictatorship of the proletariat
directed toward the socialist construction of social re­
lations,” while the 1944 textbook refrains from any
explanation. As has been mentioned elsewhere, a soviet
statute may originate in many ways. Under the 1936

76 Malitsky 22–23.
77 R.S.F.S.R. Supreme Court, Letter of Instruction No. 1, 1927; Nak­
himson, Commentary 4.
78 1 Civil Law (1944) 40.
79 Id. 28, 29.
80 1 Civil Law Textbook (1938) 46; Golunsky, Theory 174 et seq.
Constitution, only the acts of the Supreme Soviet are called laws, and the acts of other supreme soviet authorities are supposed to be issued within the limits of such laws. But the practice established under the 1923 Constitution is still continued. At that time, the Congress of Soviets, its Executive Committee, its Presidium, the Council of Ministers (prior to 1946 People’s Commissars), and the Council of Labor and Defense, issued enactments called by various names but having binding force equal to that of a statute. At present, laws passed by the Supreme Soviet, edicts (ukases) of the Presidium, resolutions of the Council of Ministers, resolutions of the Economic Council, as well as acts of individual ministers (prior to 1946 people’s commissars), enact provisions tantamount to legislation. As a soviet writer remarked, “The boundary line between ‘laws’ and other sources of law has not necessarily been kept in our civil legislation. Not only directives of the supreme agencies of government but also resolutions of the local authorities and directives of individual government departments are called laws, decrees, resolutions.”

In any event, in deciding a case, the soviet civil court is instructed to resort to the legislative enactments and decrees of the central government, as well as to ordinances of the local authorities enacted within their established jurisdiction. Thus, the court may examine the validity of an ordinance of a local authority but may not question the validity of an act of an agency of the central government. In the absence of a law or decree directly bearing upon the case, the court must resort to

81 See Chapter 2, V, 2, where the examples of legislation by the Presidium are given.
82 Rubinstein 31.
“the general principles of soviet legislation and general policies” of the government. A Party directive may be cited by the court as the expression of such policies. The soviet court may not refuse to apply a law or an ordinance directly bearing upon the case, suggests the soviet textbook, and, if it has to resort to the general meaning of legislation or to general policy, the court must, according to the instruction of the R.S.F.S.R. Supreme Court, indicate plainly the statutory provisions or the policies of the government upon which it founds its decision. The role played by the soviet courts in the formation of soviet law is discussed infra, under Chapter 7.

4. Publication of Statutes: Secret Statutes

Under the imperial law as in force on the eve of the Revolution the rule was that “a legislative enactment shall not be enforced prior to its promulgation.” The promulgation was effected by the Ruling Senate, the Supreme Court, by printing in the Collection of Laws and Decrees of the Government, a periodical issued since January 1, 1863. The Senate had the power to withhold the publication of a legislative enactment “if the manner in which it was passed does not correspond

84 Id., Section 4. See Chapter 5, I, 3 at note 18.
85 1 Civil Law Textbook (1938) 53.
86 R.S.F.S.R. Supreme Court, Civil Appellate Division, Letter of Instruction No. 7 of 1926, quoted in Volume II, comment to Section 4 of the Code of Civil Procedure.
87 Constitutional Laws (Svod Zakonov, Volume I, Part One, 1906 ed.): 86. No new law may be issued without the approval of the State Council and the State Duma and shall not go into force without the ratification by His Majesty the Emperor.
91. The law shall be promulgated for the knowledge of all by the Ruling Senate in a manner established by law and shall not be enforced prior to such promulgation.
88 Sobranie Uzakonenii i Raspioriazhenii Pravitel'stva.
to the provisions of the Constitutional Laws” 89 and thereby preclude the enforcement of such enactment.

Prior to the establishment of a representative regime in Russia in 1906, a clause in the Constitutional Laws provided somewhat vaguely for a possibility of some laws being kept secret. However, this clause was omitted from the text of the Constitutional Laws as re-edited in 1906 and the requirement of publication of laws was stated without any exception.90

After the soviet regime was established the Collection of Laws and Decrees of the Workers’ and Peasants’ Government 91 began to be published. Its title and the issuing body have varied, but as yet there has been no grant of power to check the constitutionality of the

89 Lex cit. supra, note 87:
92. A legislative enactment should not be promulgated if the manner in which it was passed does not correspond to the provisions of the present Constitutional Laws.

90 Constitutional Law as edited in 1857 and 1892 carried the following provisions:
56. The laws shall be generally kept at the Ruling Senate. Therefore, all laws, even if they are contained in the personal orders by His Majesty given directly to a particular person or office must be deposited in copies by such persons or offices with the Ruling Senate.

Note: Thereupon is based the general regulations by virtue of which a copy of any personal edict of His Majesty given to a particular person must be reported to the Ruling Senate except for edicts subject to a special secrecy.

When the Constitutional Laws were re-edited in 1906, Section 56 became Section 90 with the following text and the note to it was omitted:
90. The laws shall be generally kept at the Ruling Senate. Therefore all the laws must be deposited in the original or in certified copies with the Ruling Senate.

See also Lazarevsky, The Russian Constitutional Law (in Russian 1913) 616.

91 Sobranie Uzakonenii i Rasporiazhenii Raboche-krestianskago Pravitel’stva R.S.F.S.R. After the formation of the Union the federal acts continued to be published in this collection up to July 1, 1924. They appeared also in Izvestiia and in Ekonomicheskaia Zhizn. But a Vestnik (Messenger) was also founded in 1923 and twenty issues of it appeared in 1923 and 1924. Beginning with September 13, 1924, it was superseded by Sobranie Zakonov i Rasporiazhenii S.S.S.R., a collection of federal laws dated from July 4, 1924.
issuance of a law. Moreover, two acts passed before the adoption of the 1936 Constitution and regulating the publication of the soviet enactments did not require that all the laws be published to become effective. In other words, they expressly provided for a possibility of withholding legislative acts from publication, that is to say, for secret laws. Acts issued prior to the official formation of the Soviet Union in 1923 may be omitted because they were superseded by the Acts of August 22, 1924 and of February 5, 1925.92 Section 1 of the Act of August 22, 1924, states that the acts passed by the government bodies which at that time exercised legislative and supreme executive power, viz., the Central Executive Committee, its Presidium, the Council of People's Commissars and the Council of Labor and Defense, must be published in the Collection of Laws and Decrees, Izvestiia, or Economic Life, however, with the exception of the acts "specified in Section 2" of the said act. This section and Section 3, which also deals with the nonpublication of laws, read as follows:

2. The following shall not be subject to publication in the Collection of Laws and Decrees of the Workers' and Peasants' Government of the Union S.S.R.:

(a) Acts which are withheld from publication by a special order of the Central Executive Committee, its Presidium, the Councils of People's Commissars and of Labor and Defense and their chairmen, the secretary of the Central Executive Committee and the chief of the office of the Council of People's Commissars or the Council of Labor and Defense of the Union S.S.R.;

(b) Resolutions of administrative and economico-administrative nature passed by the Central Executive Committee, its Presidium, the Council of the People's Commissars and the Council of Labor and Defense, the

92 U.S.S.R. Laws 1924, text 71; id. 1925, text 75.

[Soviet Law]
publication of which is recognized superfluous in a manner provided for in Section 3 because they are of no general significance.

3. A resolution shall be classed with the category (b) of Section 2 by the secretary of the Central Executive Committee regarding the resolutions of this Committee and its Presidium, and by the chief of the office of the Council of People's Commissars or the Council of Labor and Defense regarding the resolutions of these Councils.

4. In the minutes and on the originals of the resolutions, the copies of which or excerpts from which are distributed, an inscription shall be made stating whether it is subject to publication under Section 1 or not subject to publication under Section 2, viz., “subject to publication in the Collection of Laws” regarding decrees and resolutions specified in Section 1; “not subject to publication” regarding decrees and resolutions specified in subsection (a) of Section 2; and “its publication is not required” regarding the resolutions specified in subsection (b) of Section 2.

Again the Act of February 6, 1925, which defines the date on which a law goes into effect in instances where no such date is specified by the law itself, expressly provides for the existence of secret laws in the Soviet Union. These provisions are as follows:

1. Resolutions of the Central Executive Committee, its Presidium, the Council of People's Commissars and the Council of Labor and Defense published in the Collection of Laws and Decrees of the U.S.S.R. Workers' and Peasants' Government, in Izvestiia TSIK of the U.S.S.R. and VTSIK and in the newspaper Ekonomicheskaia Zhizn, shall take effect in the capitals of the constituent republics and their counties on the day when the publication is received by the central executive committee of the republic; in the provincial cities as well as the counties of such cities on the day the publication is received by the provincial executive committee; in all other cities and counties on the day when the publication is received by the county executive committee.

5. Resolutions not subject to promulgation shall have binding force from the moment they are received by offices to which they are communicated.
Under the new Constitution of 1936 the place of the Central Executive Committee and its Presidium is taken by a bicameral Supreme Soviet and its Presidium. The Council of Labor and Defense came to an end but later an Economic Council was established. The Council of People’s Commissars remained and in 1946 its name was changed to the Council of Ministers. However, the Supreme Soviet alone is designated by the Constitution as a legislative body. Only its acts are technically called laws and the Constitution states that they are considered in effect when passed by both houses.\textsuperscript{93} Thus no promulgation is required for their effect. Since the enactment of the 1936 Constitution, two periodical publications containing statutes have been issued: *Vedomosti* (Messenger) of the Supreme Soviet, in which only the acts of this Soviet and the edicts of its Presidium are printed, and the former *Collection of Laws and Decrees* under the changed title of *Collection of Resolutions (Postanovlenii) and Decrees*, which contains only the acts passed by the Council of Ministers and by the Economic Councils.

No new legislation was enacted concerning the publication or nonpublication of laws, but the practice of withholding of certain acts from printing in the above publications continues. Thus, beginning with the trial of Germans who committed atrocities and their Russian collaborators, that took place in Krasnodar on July 14 to 17, 1943,\textsuperscript{94} several sentences were rendered and made public, condemning to the death penalty by hanging and not by shooting as provided for in the Criminal Code,

\textsuperscript{93} U.S.S.R. Constitution of 1936, Section 39.

\textsuperscript{94} The Trial in the Case of the Atrocities Committed by the German Fascist Invaders and Their Accomplices in Krasnodar, July 14–17, 1943 (Moscow 1943) 40.
Section 21. The collaborators were sentenced to “penal servitude” (Katorga) and not simply to imprisonment, as is also provided in the Criminal Code. In all these instances the sentences referred to crime and penalties “provided for in the Edict of the U.S.S.R. Presidium of April 19, 1943.” However, no such edict was printed in 1943 nor in any subsequent year in Vedomosti. An exposé of the provisions of the edict is to be found in the textbook of criminal law, special part, 1944. Likewise, the Edict of June 22, 1944 (see Vol. II, No. 9) dealing with the nationality of members of the Polish army formed in the Soviet Union refers to the Edict of November 20, 1939, by which the nationality of residents of Polish provinces incorporated into the Soviet Union in 1939 was defined. However, the edict referred to was never printed in Vedomosti. Likewise, several acts of the Council of Commissars, not to be found in the Collection of Resolutions and Decrees, also are referred to, quoted, or are printed elsewhere.

Thus it may be stated that the earlier soviet statutes expressly provide for a possibility of secret statutes, that is to say, statutes officially withheld from publication, and that recent practices give ample examples of withholding of important statutes from printing in the official law gazettes.

5. Custom

The soviet jurists have professed a distinct contempt for customary law, which in their eyes represents the

95 Criminal Law, General Part, Goliakov, editor (in Russian 1943) 228; id., Special Part (in Russian 1944) 44.
96 E.g., Decree of the Council of People's Commissars of July 2, 1941, Concerning the Military Training of Civilian Population and several decrees of the same body affecting wages. See Chapter 22, III.
mentality of the old world. However, customary law had to be admitted in certain fields. Stuchka, one of the first Commissars for Justice and for a time a leading authority on private law, wrote in 1927 as follows:

It seems to be obvious that the awakening proletariat must take a negative attitude towards the old customs. Yet the question appeared to be more intricate than one would expect. We overcame the written law of the old regime easily, and yet the old law was quite persistent in the form of customary law. It still dominates amidst the peasants, though it is losing its power; we recognize it there insofar as it is irrelevant to our revolutionary law and insofar as the peasants do not want to give it up voluntarily [written prior to the collectivization of agriculture, V.G.]. We admit customs to some extent in commercial transactions, but this is done for purely practical reasons. We leave to them a limited sphere in civil law, viz., we permit reference to the abrogated laws, but only in the interests of the toilers or the State. There is no place for the old custom in labor relations and in the sphere of public economy. Nor is there a place for it in theory, because our revolutionary law is deduced from the development, i.e., from the dynamics, of economic relations and from the revolutionary decree as an organized form of the bearing which the vanguard of the labor class, i.e., the soviet government, exercises upon social relations on a nationwide scale.97

The same cautious attitude, but a more definite formula, is to be found in the textbook of 1938:

Under the soviet legislation, custom cannot in itself constitute an independent source of law. Custom may apply only in instances expressly provided for by statute, with the proviso that such custom is not contrary to law.98

A sober and pragmatic attitude is shown in a recent

97 Stuchka, 1 Course of Civil Law (in Russian 1st ed. 1924, 2d ed. 1931) 188. Likewise, Gintsburg stated in 1935:
The importance of custom within the proletarian State under the revolutionary reconstruction of all social relations is reduced to a minimum. Gintsburg, 1 Course 128.

98 1 Civil Law Textbook (1938) 46.
monograph by Golunsky, who foresees the possibility of the development of a soviet customary law:

The question of the significance of customs in a socialist society is complex. On the one hand, a number of customs representing the remnants of feudalism and tribal organization are undoubtedly incongruous with the socialist concept of law. . . . Against such customs our socialist law has carried on an incessant struggle. . . . But there is no doubt that, on the basis of the new socialist conditions of labor and life, a number of new customs and rules of community life will be created, and these shall have a different meaning. In many instances, customs serve as a necessary supplement to the statutes. . . . It is obvious that it would be impossible to exclude such customs and rules of community life. . . .

Only the sanction of the government power transforms a custom into a rule of law. This sanction may be given in various forms: in the form of a statute, in the form of a court decision, and in the form of a regulation by a local soviet. Under such sanction, the customs of our soviet people are transformed into a part of our socialist law, without losing thereby the nature of customs.99

The textbook of 1944 enters into more detail and makes suggestions reminding one of the imperial legislation concerning customs in peasant and commercial matters. The general rule is, according to the textbook, that “custom may not repeal the statute or be contrary to the statute.” Like the rules of statutory law, the rules of customary law may be of a mandatory or optional character (jus dispositivum), that is to say, they may exclude any contrary agreement of the parties or apply only in the absence of such agreement. Custom is effective only in the absence of a statutory rule, mandatory or optional; an optional statutory rule has priority over custom. If the statute expressly refers to the custom, then the customary rule takes effect even against the will of the parties. But in the absence of any rule

of law and any agreement of the parties, a customary rule may apply, according to the textbook, even if the statute does not refer to custom. Undoubtedly, this discussion shows a more favorable attitude to custom in the theoretic writings.\textsuperscript{100}

In any event, thus far there have been only a few instances where the soviet statutes refer to customs. Thus, under Sections 89 and 90 of the U.S.S.R. Maritime Code of 1929, in the absence of an agreement by the parties to a shipping contract, the time necessary for loading, the stay in harbor, and the amount of payment are determined by the terms and rules customary in the port concerned.\textsuperscript{101} The customs of the main ports of the U.S.S.R. have been described and certified by the All-Union Chamber of Commerce and are each known as the customary law of such and such a port (Leningrad, Murmansk, Odessa, and the like).\textsuperscript{102}

Sections 8, 55, and 77 of the R.S.F.S.R. Land Code also refer to local custom. Sections 8 and 55 instruct the village communes (mir) to apply local customs in the management of communal affairs, in addition to the Land Code and other statutes, provided such customs are not contrary to law. Since the liquidation of the village communes, it has been an open question whether the collective farms and village soviets which took their place may also apply local customs.\textsuperscript{103}

6. Court Decisions

The significance of judicial decisions as a source of law is discussed in the following chapter.

\textsuperscript{100} 1 Civil Law (1944) 35.
\textsuperscript{101} U.S.S.R. Laws 1929, text 366.
\textsuperscript{102} 1 Civil Law Textbook (1938) 50.
\textsuperscript{103} Id. 51. For translation of Land Code, see Vol. II, No. 31.