Law and the Making of the Soviet World

The Red Demiurge

Scott Newton

ROUTLEDGE

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This book is an unconventional reappraisal of Soviet law: a field that is ripe for re-evaluation, now that it is clear of Cold War cobwebs; and, as this book shows, one that is surprisingly topical and newly compelling. Scott Newton argues here that the Soviet order was a work of law. Drawing on a wide range of sources – including Russian-language Soviet statues and regulations, jurisprudence legal theory, and English-language 'legal Kremlinology' – this book analyses the central significance of law in the design and operation of Soviet economic, political, and social institutions. In arguing that it was an exemplary, rather than aberrant, case of the uses to which law was put in twentieth-century industrialised societies, *Law and the Making of the Soviet World: The Red Demiurge* provides an insightful account of both the significance of modern law in the Soviet case and the significance of the Soviet case for modern law.

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Routledge
Taylor & Francis Group
a GlassHouse Book

First published 2015
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon, OX14 4RN

and by Routledge
711 Third Avenue, New York, NY 10017

a GlassHouse Book

Routledge is an imprint of the Taylor & Francis Group, an informa business

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging-in-Publication Data
Newton, Scott, (law teacher)
Law and the making of the Soviet world : the red demiurge / Scott Newton.
pages cm
ISBN 978-0-415-72610-8 (hardback) — ISBN 978-1-315-85613-1 (ebk)
1. Law—Soviet Union I. Title.
KJC510.N49 2015
349.4709'04—dc23
2014022496

ISBN: 978-0-415-72610-8 (hbk)
ISBN: 978-1-315-85613-1 (ebk)

Typeset in Times New Roman
by FiSH Books Ltd, Enfield

To the memory of my mother and father, who among much else instilled in me a lasting fascination with the Soviet world

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Contents

List of abbreviations

AES	actually existing socialism
AO	autonomous okrug, area or district
BC	Building-of-Communism project
Cheka, VChK	All-Russian Extraordinary Commission for the Suppression of Counterrevolution and Sabotage (Chrezvychainaia Kommisia), soon renamed Commission for the Suppression of Counter-revolution, Speculation, and Crimes of Office) (replaced by OGPU in 1924)
CLT	classical legal thought
CPSU	Communist Party of the Soviet Union (replaced VKP(b) from 1952)
DUM	dukhovnoe upravlenie mussul'man, spiritual directorate of Muslims
ISA	ideological state apparatus
ISI	import-substitution industrialisation
Ispolkom	see VTsIK
KZoT	Kodeks zakonov o trude, Labour Code of 1922
NEP	New Economic Policy
NKVD	People's Commissariat of Internal Affairs, 1934–46 (ministry that included the state security directorate)
OGPU	United State Political Administration, 1924–34 (replaced by the NKVD in 1934)
RF	Russian Federation
RKP(b)	Russian Communist Party (bolshevik), renamed after 1925 as VKP(b), All-Union Communist Party (bolshevik)
RSA	repressive state apparatus
RSFSR	Russian Socialist Federative Soviet Republic (1918–1936), Russian Soviet Federative Socialist Republic (1936–1991)
SM SSSR	USSR Cabinet of Ministers (Sovmin, successor to Sovnarkom)
SNK	Council of People's Commissars (Sovnarkom)
Sovnarkom	see SNK
SRKO	Defence Council for Supply of the Red Army

SSR	Soviet Socialist Republic
VTsIK, TsIK	All-Russian Central Executive Committee (also called Ispolkom) until 1923, thereafter All-Union Central Executive Committee
TsK	Central Committee (Party)
USSR	Union of Soviet Socialist Republics
VKP(b)	All-Union Communist Party (bolshevik) (renamed after 1952 as CPSU)
VMN	vysshaia mera nakazania, highest measure of punishment
VS SSSR	Vierkhovnyi Soviet SSSR, USSR Supreme Soviet
VS RSFSR	Verkhovnyi Soviet RSFSR, RSFSR Supreme Soviet
VSNKh	Vysshii Soviet Narodnogo Khoziastva, Higher Council of the Economy

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Introduction

Soviet state and law, Soviet states and law

Soviet law lies well-buried under the wreckage of the Soviet state, which seals it like the Chernobyl sarcophagus. Any proposal to disinter it must come as a surprise to the many readers who are only dimly aware that it ever lived and breathed. Outside the USSR, Soviet law was the arcane province of a few dedicated Western specialists, the legal Kremlinologists. To the extent non-specialists ever gave it a moment's thought, they might have supposed it to consist in nothing more than a draconian code of social and political conformity and a collation of arbitrary and inconsistent executive directives, following the shifting winds of official policy, the General Line of the Party. In the popular imagination, the embodiment of Soviet law is neither judge nor lawyer nor prosecutor, but rather the omnipotent functionary, the *chinovnik* or *apparatchik*, authorised to tyrannise over those below (but to be tyrannised over in turn by those above). The USSR, after all, was the land of the Plan and the Gulag: of the monolithic state control of everything and the ruthless state repression of everybody. The march of Five-Year Plans and the infamous decree criminalising unexcused tardiness at work,[1] 1930s show trials and 1960s dissident trials; these about sum up anything worth noting about Soviet law: a fig leaf for the unconstrained exercise of totalitarian authority in every sphere of life and a minor, bizarre and regrettable footnote to twentieth-century legal history. In this view, Socialist law in the USSR was only marginally less scandalous than National Socialist law in Germany. After all, what the fall of communism has brought to the former Soviet world (and the socialist bloc more broadly) is precisely the Rule of Law – what was once notoriously lacking has now been supplied.

If anything this caricature is more easily maintained today than it could have been at any point during the Cold War – both fostered by the neoliberal triumphalism that has reigned since the Cold War and uncontested by any self-defence from ex-Soviet lawyers/professors or any vicarious defence from foreign

1 Decree 26.06.1940. For ease of reference, throughout the text all Soviet acts are cited by date and type. The Table of Authorities, similarly indexed, supplies full citations, including extended title and issuing authority.

colleagues.[2] All that can now be recalled (and that dimly) is the Soviet (self-congratulatory) and the anti-Soviet (derogatory) propaganda that at the time only served to inflame the rhetoric and obscure the reality. (The echoes of these continue to do so now.) A generation on, after a fairly unremarkable twenty-first-century civilian legal order has been firmly established across (most of) post-Soviet space, it is troublesome (or embarrassing) for anyone to recall that socialist law once made a serious and credible bid to stand as one of the principal families of comprehensive, elaborated, modern legal systems, along with the civil and common law traditions – as the Soviets lost no opportunity to remind comparative lawyers and as every Soviet law textbook proudly proclaimed.

So why disturb the burial site of Soviet law? There is no compelling forensic reason in a post-ideological age: we know why it expired. What value would such an exhumation hold today, other than purely historical? If this were the case, knowledge of Soviet law, for the world at large, would remain the province of specialists only, as it always had done: only now antiquarian specialists, legal historians, rather than the comparative specialists of a former day. And while many other aspects of Soviet life and experience have come in for sustained, scholarly re-evaluation and comprehensive investigation, as a result of the new-found availability of a multitude of formerly inaccessible sources (from state archives to personal correspondence and witness interviews) and the zealous application of contemporary research methodologies and agendas,[3] the world of Soviet law has for the most part been left to moulder in the ground and recede unlamented into oblivion. However, Soviet law may rest, but not in peace. It lies unquiet, haunting the contemporary world as revenant. Soviet law, formidable in life, remains formidable after death.

The USSR, far from a lawless state, was a state made of law, a gargantuan legal artefact, a standing monument to twentieth-century legal positivity and its demiurgic capacity to fashion complex institutional worlds out of the legal building blocks of rules and forms and arrangements. Indeed, the Soviet Union was arguably the most radical experiment in institutional design – political, economic and social – in modern history. Throughout its course, law was the medium of its devising, elaboration and on-going self-modification. Law was omnipresent in Soviet rule, even at its seemingly most wilful, arbitrary and dictatorial. After a

2 With the notable exception of John Quigley's 2007 work, which makes the powerful case for Soviet legal innovation in social provision and protection, gender and class equality, economic planning and industrialisation, and self-determination, and the spur so provided to ensuing Western and international developments. Quigley 2007.

3 See e.g. notable recent studies, based on newly accessible archival and other sources, by Kotkin 1997 (industrialisation drive), Applebaum 2004 (labour camps), Merridale 2000 (memory and repression), Figes 2007 (family life in context of terror), Martin 2001 (preferential development policies), Clark 2011 (cosmopolitan/international culture-work), Hellbeck 2009 (subjectivity and psychology, work on the self).

brief (and largely overstated) flirtation with 'legal nihilism',[4] the Bolsheviks embraced law with unmatched fervour and fidelity, and made it the cornerstone of their theory of the new socialist dispensation.

Gosudarstvo i Pravo, state and law

In Soviet thinking the problem of the state and the problem of law in socialist society were indissociable and mutually implicative. *Gosudarstvo i pravo* (государство и право), state and law, was the distinctive new discipline devised for this twinning: law could not be thought apart from the state (law served the state and was authorised by it), the state could not be thought apart from law (the state spoke and acted, made itself known, through law).

> The nature of the state is the most important question in the science of public law. The theory of the state is the basis not only of the science of state law but also of law in general, inasmuch as a scientific understanding of law is impossible without a correct understanding of the state. Law and state cannot be studied separately and apart from each other. Law draws its force, and obtains its content, from the state.[5]

Gosudarstvo i pravo makes a fitting motto for the analysis essayed here. For 'state and law' is not ideological eyewash but denotes the real link between the structures of economic and political authority, on one hand, and twentieth-century legal normativity, on the other. This book makes bold to correct the formulation by pluralising it: not Soviet *state* and law as the guiding enquiry, but Soviet *states* and law, in recognition of the multiple roles of law in shaping the multiple faces of the Soviet state:

1 Law ushered the Bolshevik state into being in the first place, and translated its revolutionary/redistributionist policies into practical application. Law operationalised the October Revolution. On the revolution's first morning, the very first actions of the newly installed regime – the Decrees on Peace, Land, and the Establishment of the Workers' and Peasants' Government – were legal in form and force.[6] Throughout the turbulent years of War Communism, Sovnarkom (the Council of People's Commissars – the infant

4 Legal nihilism was a term used to condemn the early Marxist theory of law (elaborated by Evgenii Pashukanis and other avant-garde legal thinkers of the 1920s) that held law to be bourgeois in form and origin and hence not fit for socialist purpose.

5 Vyshinksy 1948 p.5. The principal and authoritative organ of Soviet jurisprudence was known *as Sovetskoe Gosudarstvo i Pravo* (from 1927 to 1939 as *Sovetskoe Gosudarstvo i Revolutisia Prava*, Soviet state and revolution of law). It is emblematic of the emphatically statist concept of law in Soviet ideology.

6 Decrees 26.10.1917, 08.11.1917.

Soviet government) chartered subordinate executive agencies in all sectors, nationalised industry, organised and directed economic activity, raised revenues and provided public services, all through the promulgation of authoritative public acts. Law chartered and regulated the grim panoply of Tartarean agencies for coercion, repression and surveillance serving paramount state interests: the protocols of the NKVD *troikas* (three-man panels) that in 1937–38 sentenced hundreds of thousands to death or the labour camps (themselves a legally established and administered institutional complex) were meticulously taken, recorded and archived, in conformity with special legislation.[7] When the grain necessary for their survival was forcibly procured from the Ukrainian peasants in 1932–3, leaving them to starve in their millions, it was done under colour of legal authority.[8] Law served as foundation for the Soviet emergency or security state.

2 Law supplied the elaborate structure of enabling rules (as well as constraining ones) that granted Soviet legal actors, both natural and juridical, the capacity to enter into, carry on and terminate legal relations of multiple sorts one with another, to bear obligations to one another, and to exercise rights in legal objects, ranging from things to companies. Soviet state enterprises made binding supply and delivery contracts with one another, while citizens owned cars and houses (though not land or factories or companies) and sued for violations of legal obligations, tortious or contractual. Law served as foundation for the Soviet civil state.

3 Law supplied the language of command and control by which the Soviet authorities launched and carried through the most extraordinary, pharaonic and brutal programme of directed industrialisation in economic history. Great mining concerns and homely corner shops alike were established as enterprises by authorised state bodies, in accordance with the law. Those bodies themselves, and the kaleidoscopic and constantly shifting whirl of economic institutions from Gosplan to the *glavki* and trusts, existed in the first place and discharged their functions as specified by law. Law undergirded the massive machinery of the Soviet state economy and its operation: the multitudinous components of the Five-Year Plans, and the myriad planning acts and subsidiary instructions, all of which carried legal force. Law served as foundation for the Soviet developmental state.

4 Law gave Soviet citizens a peerless array of social entitlements – to cradle-to-grave health care, to disability compensation and pensions, to free higher education and vocational training, to holidays, sanatoria and rest cures, to special payments and schemes, and to much else. Women's participation in the labour force was buttressed by a range of special benefits and support, which effectively compensated reproductive labour and connected it in one seamless state web with the productive sector. The Soviet citizen had law at

7 Order 30.07.1937 ('Order 00447'); see Chapter 2, pp. 64–6.

8 Resolution 07.08.1932 (the 'Law of Three Spikelets'); see Chapter 2, p. 60.

her back when she visited the dentist, received extended maternity leave or took home a premium for working in the Far North. Labour law and collective farm law endowed industrial and agricultural workers respectively with elaborate rights and protections (to wages or production share, to limitations in working hours, to adequate working conditions). At the same time law furnished elaborate measures for social control, to ensure conformity of behaviour, expression and thought. It informed multiple processes of socialisation and structured the formation of socialist citizens in accord with officially endorsed and promulgated values, virtues and standards, and then monitored and enforced their compliance. Law served as foundation for the Soviet social state.

5 It was under law that the Soviet state itself was a union, a multi-tiered, uniquely complex federation of dozens of constituent, ethnically-defined, autonomous jurisdictions or homelands, encompassing a titular majority and non-titular minorities. Law laid down both mental and geographic boundaries. It set the terms for cultural self-understanding and political self-determination, as well as eligibility for important social resources. It defined the nationalities stamped in passports and marked on lives, qualifying those who bore them for privileges (preference schemes for education or employment – e.g. 'backward' minorities such as the Yakuts in the 'Affirmative Action Empire'[9]) or disabilities (deportation *en masse* on grounds of political disloyalty/unreliability, e.g. Chechens or Volga Germans in wartime). Law was present not only outside, everywhere in the multicultural world that the Bolsheviks made and Soviet people inhabited, but inside as well, in the very identities that made those people Georgian or Uzbek or Tuvan as well as Soviet. Law served as foundation for the Soviet (multi)cultural state.

Law assumed these manifold dimensions from the outset: the scaffolding for the construction of socialist society was to be formal-legal in Weber's sense.[10] For the embryonic USSR, the great debates about the shape of the first proletarian society revolved around the constitutive role of law in modern political and economic orders. Law was the Soviet system's navel, securing and sealing it, but the point of its greatest vulnerability, from which it all threatened to unravel. In the grand Soviet experiment the definitive measure and the surest indicator of what was

9 Martin's term for the broad array of preferential educational, training, employment and social policies and schemes intended to bring all the constituent peoples of the USSR to a common 'civilisational' level of socialist modernity. See generally Martin 2001 and see Chapter 8 below pp. 218–9.

10 Weber distinguished the form and function of law in Western Europe (the countries that had codified Romanist civil law, pre-eminently France and Germany) as a historically contingent development that fortuitously enabled the growth and spread of capitalist economic relations. Formal-legal rationality permitted legal norms to regulate social behaviour generally, autonomously and logically (deductively) at a highly complex and encompassing level. See Trubek 1972.

conservative and what radical, what continuity and what rupture, what inherited and what innovated, has always been law: hence its turbulent dialectics, its swerves and its stakes. The fortunes of law are the fortunes of the Soviet project, the 'light cone' of its complex trajectory describing:

- an initial, vehement, leftward lurch under War Communism and the accompanying repudiation of law as necessary ordering principle in socialist society (elaborated with greatest conceptual rigour and theoretical *élan* by Evgenii Pashukanis);
- a following, rightward swerve tactically reintroducing civil law and a zone of private right in the context of the New Economic Policy;
- a subsequent, steep swing leftward again in the context of the First Five-Year Plan and the advent of state monopoly of all investment and consumption decisions ('Economic Law');
- another rightward correction of 'socialist legality' in 1936 (especially as canonically formulated *contra* Pashukanis by Andrei Vyshinksy) and its endorsement of administrative, civil, criminal and family law (personal rights, legal personality and contractual agency/liability of state enterprises); and
- a series of further, sequential shifts leftwards (privileging economic law in the interests of greater consolidation of central control and market displacement) and rightwards (privileging civil law in the interests of decentralisation and market approximation) until *perestroika* (a legal programme before it was anything else) and transition.

Unger posed the conundrum of all modern societies (which he classified in three types, post-liberal, traditionalistic and revolutionary socialist) as 'the reconciliation of freedom and community…[the harmonisation of] a sense of a latent or natural order … with the capacity to let the will remake social arrangements'.[11] In his view, law holds a privileged place as the means through which this dialectic is to be actualised, and at the same time the register in which it is most legible. Law is where the balance struck between freedom and community, policy instrumentalism and principled constraint, horizontal and vertical co-ordination, inertia and reinvention obtaining in any modern society can be most readily read off.

11 Unger 1977, p. 266. Unger distinguishes three principal types of law: customary law, bureaucratic or regulatory law and 'legal order', the last a term he reserves for modern states and consisting of 'a separate body of legal norms, a system of specialized legal institutions, a well-defined tradition of legal doctrine, and a legal profession with its own relatively unique outlook, interests, and ideals' at p. 54. Although for Unger these types emerge successively over the course of history, and come to characterise societal epochs in a kind of evolutionary sequence of supercession, they co-exist and interpenetrate in all three variants of modern societies. Moreover, and most critically for the thrust of Unger's argument, in the shift from liberal to modern societies there is a renewed prominence of bureaucratic/regulatory law against the 'rule of law or legal order'.

What sets the revolutionary socialist type of society apart from others is that it strikes this balance decisively towards the pole of 'remade social arrangements'.[12]

Unger's problematic confronted the Bolsheviks in a uniquely urgent form: the task of devising or inventing a society in far more comprehensive mode than the Jacobins had imagined 125 years earlier. What the French revolutionaries had dreamed, what the American revolutionaries had attempted in the political sphere alone, the Bolsheviks sought to realise across the board: to institutionalise a utopia, not merely a form of government, but an entirely new society, furnished with novel economic and social institutions as well as political ones: not just renaming the months, but fitting out a brave new world of governance, production and distribution, and social relations all at once. The Bolsheviks justifiably understood themselves as essaying a Promethean or demiurgic, world-creating, endeavour.

Never before had so much, so many of the dimensions of the standing societal order, seemed to be up for grabs at the same time. The Bolsheviks were indeed revolutionary, not in the pejorative sense as schemers or plotters, nor even in the 'professional' sense as insurgents or rebels, but in a thorough-going sense as would-be societal engineers. As Trotsky observed pithily, a revolution in the forms of property does not solve the problem of socialism but only poses it.[13] The solution of socialism would require a prodigious labour of institution-building. And for Bolshevik engineers and builders, the tools of trade were legal ones, as they quickly came to realise – after a brief, unhappy flirtation with the belief that they could intervene directly in social and economic processes and dispense with the medium of law (formalised norms, specified procedures and administering institutions).

No one before the Bolsheviks had ever entertained the possibility, not merely of a suspension of existing legislation in the face of a national emergency, but of a rejection of law altogether as a necessary ordering principle in industrial society. In point of fact, the antinomianism of the War Communism era was never more than a hope or aspiration, and certainly not a programme (law was emphatically present in the string of decrees and the breathless ad hocery of an emergency regime, as discussed below in Chapter 1). But having contemplated,

12 Revolutionary socialist societies exhibit a distinctive dialectic of 'the conflict between the imperatives of industrial organization and political centralization, on one side, and the promise of self-regulating community, on the other'. This dialectic is in turn reflected in a dialectic of modes of law, 'a law of bureaucratic commands and a law of autonomous self-regulation', *ibid.,* p. 233. What Unger seems to miss here in his apparent identification of the latter with an 'emergent quasi-customary law of communal organizations' is the persistence in the socialist legal order of significant individualistic, private-right elements. As argued below, the avowedly collectivist aspects of socialist law were marginal in their functionality. Residual private rights seem to have played a much larger role in the maintenance of the Soviet legal order than the introduced communal or collectivist forms. The fortunes of Soviet law suggest a rather greater proximity of post-liberal and revolutionary socialist types of law.

13 Trotsky 1937, Chapter 2.

however fleetingly, such a *tabula rasa*, the Bolsheviks were in a unique position to calibrate the precise degree to which and the precise manner in which law was to be brought back in. No one before the Bolsheviks had ever been required to grapple in quite so immediate and practical a way with these metajuridical, speculative issues. That is why the heart and soul of the Bolshevik enterprise were never more starkly and dramatically at stake than in the seemingly metaphysical great debates of the 1920s about the place of law as ordering principle in a socialist society (treated in Chapter 4).

Utopian institutionalism

Historically, the revolutionary modernity of the USSR has been distinguished first and foremost in its cultural register, its repertory of representations. Susan Buck-Morss has compared the parallel utopian projects of Soviet and American modernity in the 1920s,[14] the millenarian promise of industrialisation. But she approaches the topic as a critic of visual culture, not as a student of institutions. As a result, her account runs only through the end of the revolutionary decade after 1917, and is concerned with representation and ideology. What is essayed below can be understood as a study of the neglected underside of revolutionary modernity, the inglorious counterpart of utopian representation and ideological elaboration: institutional design and operation using legal tools and techniques, a matter of rules, procedures, organisational hierarchy and structure, and forms of power. Not the arresting imagery of revolutionary graphics, not the glories of Constructivism in architecture, Futurism in verse, or montage in cinema, conceived by giants like Tatlin, Mayakovsky and Eisenstein, but the dry provisions of the 1922 Russian Socialist Federative Soviet Republic (RSFSR) Civil Code and the exhaustive quantification in the 1927 First Five-Year Plan, the work of faceless and nameless functionaries – these are the objects of concern here.

For this is a study of the chassis or working machinery of Soviet society, rather than its streamlined body: infrastructure not in crude materialist terms, as materially *determined* (relations of production), but rather in 'refined' materialist terms, as materially *designed*. If law has been the least visible and glamorous aspect of Soviet revolutionary modernity, it has nonetheless proved as defining (if not as enduring) as its representations. Both equally are evidence of the breadth and scope of the Bolshevik project and the sweep of the revolutionary imagination. Boris Groys develops this analogy explicitly and forcefully, and elaborates the theme of the world-creating demiurge (mythologically personified first by Lenin and then Stalin).[15] The Soviet demiurge was equally manifest in all spheres of

14 She has elaborated the utopian cultural logic of the initial phase of the Soviet experiment through a study of the imagery of the avant garde (Buck-Morss 2000); Boris Groys mounts an analogous analysis for the Socialist Realism that, in his argument, succeeded and dialectically subsumed it (Groys 1992).

15 Groys, *ibid.*, pp. 56–84.

collective fashioning (whence the USSR's eligibility for characterisation as either a *Gesamtkunstwerk* or a totalitarian dystopia, or both). The demiurge was emphatically a law-giving and institution-building one: the laws and institutions regulating and constituting the Soviet political, economic, social and cultural systems can also be viewed from an artistic or aesthetic perspective, as achievements in design.

But demiurgic ambitions and capacities are never exercised *ex nihilo* and neither artistic nor legal-institutional slates are ever really blank. And much as Buck-Morss argued that Soviet utopianism could be fathomed only in comparative context, as drawing on, deploying and adapting a whole set of circulating tropes and images characteristic of early twentieth-century European culture – the modern imaginary – so Soviet institutionalism must be grasped comparatively, as drawing on, deploying and adapting a corresponding set of circulating legal-institutional concepts and forms characteristic of twentieth-century European politics and economics – the legal-institutional imaginary. As a radically applied art, Soviet legal engineering was necessarily rather more constrained and conditioned than the 'purer' arts of representation.

For if there is much that is innovative and creative in the Soviet project, there is also a great deal that remains familiar, traditional, inherited, and it is here too that one is led to ponder the simultaneous centrality of law in modern societies and its contradictions (Unger's subject), its rationality and its arbitrariness, its reach and its limits. The new world constructed by the Bolsheviks was built from existing materials, and the persistence of the old in the new ('path-dependence' or the force of historical constraint) is nowhere in greater evidence than in the revolutionaries' instrumentalisation of law. This present study is therefore dedicated equally and frankly to the boundless energies and aspirations driving the Soviet legal-institutional imagination, its utopian or aesthetic impulse, and to the very considerable bounds imposed on it by form (legal rationality or logic) and context – bounds discovered or revealed over the long course of its actualisation in Soviet state and law (or the several Soviet states and law).

The story of Soviet law might be exemplary as well in its narrative arc. The Soviet revolutionary dynamic appears to describe a familiar trajectory (familiar at least since 1789) from initial excess to subsequent moderation, from intoxication to sobriety, from a contempt for bounds to an eventual reckoning and reconciliation with them. For Groys the antinomian excesses of the artistic avant garde ultimately came to represent a revolutionary siding, a spur off the trunk line of Socialist Realism as the proper self-image of the new socialist society. So too can 'legal nihilism' be regarded as a diversion, however compelling, from the main line of 'socialist legality', the officially endorsed philosophy of law endorsed in the 1930s by Pashukanis's nemesis, Vyshinksy.[16] Nonetheless, the course of

16 'Soviet state activity is carried into effect on the basis of socialist legality, its most important principle. This is especially clear, and was brilliantly expressed, in the great Stalin Constitution, which elevated the authority of the Soviet law to an unprecedented height. All

Soviet law, as indeed the course of twentieth-century law *tout court*, is only deceptively linear (a linearity overdetermined by the General Line and the Short Course[17]). As suggested above, it describes a much more complex curve, with multiple turning points and vectoral shifts – a dialectical set of 'adventures' (in Merleau-Ponty's sense, unanticipated twists and turns, surprises and anomalies traversed by the cunning of history or the quirks of its agents).[18]

In regarding Soviet law as 'temporary to the highest degree' Kirchheimer underscored the pronounced Bolshevik tendency to instrumentalise law for rapid policy shifts – so that law acquired a provisional if not improvisational, ad hoc quality (and of course a concomitant arbitrariness).[19] The Soviet state began to rule by edict and decree at an early stage, to respond to emergent situations with spontaneous decisions, to craft spur-of-the-moment solutions to breaking problems. (This improvisational quality, celebrated by Lenin himself – the Bolsheviks were forced to improvise a government after all – could also manifest itself as dictatorial whimsy and homicidal caprice.) Observers of the nascent Soviet system (like Kirchheimer querying the fate of law) were fascinated, even hypnotised; they could not see past the cyclopean administrative apparatus. Soviet law appeared to have successfully scuppered generality and autonomy (the privileged and distinct attributes of law-making and law-application) and recast itself as pure, untrammelled, administrative decisionism.

> administrative acts in the USSR must be in conformity with law. The principle of revolutionary legality penetrates the activity of all the links of our administration from top to bottom, and the significance of this principle, always acknowledged by the Soviet state, was still more brilliantly expressed, as we have seen, in the Stalin Constitution. This raises still higher the authority and force of Soviet statutes.
>
> On the basis of acts of the USSR Supreme Soviet and its Presidium, the Council of People's Commissars of the USSR issues its orders and directives. On the basis of all these acts, the People's Commissariats operate. The orders and instructions of People's Commissariats are binding upon organs subordinate to them. Thus an unbroken series of acts is here formed, each of which has complete force insofar as it is issued in conformity with operative laws and the acts of superior organs emanating therefrom.'
>
> Vyshinksy 1948, pp. 369–70

17 The 'General Line' was the orthodox and authoritative course of policy elaborated by the VKP(b) – the All-Union Communist Party (Bolshevik), after 1952 the CPSU, Communist Party of the Soviet Union, including of course the line of its own development set out in the *Short Course.* Central Committee of the VKP(b) 1939.

18 Merleau-Ponty 1973. For Merleau-Ponty of course the Soviet adventure was more misadventure, a falsification/betrayal of the dialectic and arrest of its movement, pp. 59–74. But a critical-legal analysis can read Merleau-Ponty against Merleau-Ponty to identify further, *overlooked*, Soviet dialectical adventures.

19 'Soviet law, far from being meant for eternity, is temporary law to the highest degree. Soviet law does not stand in need of a *clausula rebus sic stantibus* since it is itself the law of the *clausula rebus sic stantibus.*' Kirchheimer 1928, p. 21. Kirchheimer celebrated the 'unshackled' quality of Soviet law, its responsiveness to momentary requirements and rapidly changing circumstances, its immediacy and lack of constraint by precedent or any requirement of consistency; in short, its freedom from formal-legal rationality of the Weberian sort.

Indeed, in the views of such early enthusiasts this was a strength, manifesting the radicalisation of the legal order of modernity, an unshackling of law for the purpose of pure (progressive) public policy, to realise social value-democracy, i.e. to correct social inequality in the interest of the deprived majority. What they missed of course was the persistence amidst such decisionism of the legal system as such, of a modern legal order with its characteristic discursive interiority as an essential and ineradicable aspect of the socialist experiment. Socialist legality was very much a hybrid affair, and it is the persistence of a modern legal order amidst the revolutionary excess and emergency tumult that demands to be explained. Socialist legality was not merely the state's own survival mechanism kicking in, its tactical or even strategic self-restraint after a calculated and necessary (productive) interval of perilous volatility. The Soviet state and its political class never surrendered the element of law even at the height of discretionary abandon.

Mid-century law-and-development coined the term 'legal instrumentalism': law as privileged fulcrum for directed and accelerated political and economic transformation or 'modernisation'.[20] But the USSR had already demonstrated as never before or since both the reach and the limits of legal instrumentalism. On one hand, a departure radical and novel, a twentieth- not an eighteenth-century *novus ordo seculorum,* but on the other a tried-and-true toolkit. Ironically for a society that, at least conjecturally, proposed to replace law altogether as a mode of collective ordering (on the expectation that while the government of men needed rules and enforcement, men requiring to be bound, the administration of things under communism – when it arrived – would do without them, as things would require only to be rationally used or allocated), the USSR came to place Archimedean reliance on the law to realise the revolutionary project.

In devising and working out the Soviet economic system, Stalin's technocrats – and his lawyers – rose to the design and implementation challenges (albeit in anything but a methodical way). The result must remain as stupendous an engineering achievement in the institutional realm as the White Sea Canal and Magnitogorsk in the physical (and indeed the whole vast archipelago of new Soviet industrial plant stretching across Eurasia), and a standing provocation as well: Stalin did it, although it was later undone or disintegrated, and precisely as a remarkable datum of institutional and legal history the Soviet economic system merits continued study and analysis. A stark way of putting this is to claim that Stalin continues to be sold short, by right and left alike. The full revelations of Stalinism's brutality and excess and the vicissitudes of *fin-de-siècle* history have conspired to cleanse the institutional record of a realised utopian project of any value except a negative cautionary one.

The scale of the legal achievement is not limited to erecting normative scaffolding, although the legal-technical achievement merits due acknowledgement.

20 Trubek and Galanter 1974.

The recomposition of right at the base of the Soviet conception of property (socialisation of the means of production) both undergirds and enables everything else in Stalinist industrialisation, and constitutes the originary and fateful departure of 'socialist law'. It is a legal milestone no less than the nineteenth-century codification of bourgeois property rights, a juridical and conceptual *factum* or deed with immense societal consequences. However far the Soviet project fell short of the eradication of classes and class inequality,[21] it did produce perhaps the most egalitarian industrial society ever. The elimination of private ownership of the means of production remains a breathtaking and unexampled demonstration of the *puissance* of law. It was the Red Demiurge's original fiat, clearing space for the creation and elaboration of a whole institutional world. The story that seeks to be told or retold of Soviet law is the exemplary story of the twentieth-century political and legal imagination – or rather the exemplary story of the extent to which the twentieth-century political imagination is simultaneously and inescapably legal. With apologies to J.L. Austin, how to do (new and different) things with law and institutions is one way of construing the entire political, economic and social course of twentieth-century societies. It is also the really compelling lesson of the Soviet adventure.

If law had been as central to the Soviet project as just claimed, and as exemplary of the story of law in industrial modernity, why has Soviet law sunk so definitively into oblivion, as much in its homeland as outside, vanished so tracelessly as an object of interest or study, on the left as on the right, equally for unreconstructed or reformed Marxists as for triumphalist Hayekians? Perhaps Soviet law has all along been misprised by all concerned. Notwithstanding the centrality of the USSR as political and economic project virtually from the beginning to the end of the century just passed, neither the right nor the left appear to have grasped, much less done justice to, its implications for the role of law. Ironically, this misprision seems more pronounced on the part of critics and commentators on the left. If for the right the Soviets did not so much instrumentalise law as pervert it (precisely by robbing it of any autonomy from the state), for the left the very resort to law was a contradiction and a flaw.

Soviet law viewed from the right: condemnation and legal Kremlinology

The standing impulse on the right, from the outset and for as long as the Soviets prosecuted their economic, social and political project, was to condemn and denounce as a ruse and a lie, to expose as a gigantic fraud: a thoroughgoing historical retrogression masquerading as progress, a ruthless tyranny masquerading as a democracy and arbitrary command masquerading as law. Like the Holy

21 *Inter alia* it institutionalised power differentials between the political class and everyone else, i.e. made the political class a privileged social class; this argument is developed most forcefully (albeit for Yugoslavia) by Milovan Djilas. Djilas 1957.

Roman Empire, the Union of Soviet Socialist Republics was a compound misnomer, neither Soviet nor socialist (nor a 'union of republics'): conciliar government was wholly deceptive (authority was in the hands of the Party not the councils or soviets) and socialism meant its opposite, state control over society not social control of the state (and a formal veneer of federalism disguised a hyper-centralised unitary state). Much as *Animal Farm* savaged the institutionalised code of hypocrisy by which 'totalitarian' regimes systematically reverse semantic polarity, the right treated the claims advanced by the Soviets and their whole scheme of self-description as fundamentally mendacious. 'Socialist law' was simply the most egregious such exercise in mendacity. When Roepke claims socialisation really always means nationalisation (as for that matter does collectivisation), and that state socialism is really a kind of nationalism,[22] the legal constructions of the Soviet Union are shown up for what they transparently seem to be: clumsy pretexts, implausible dodges of one sort or another, 'fictions' as argued emphatically by Ioffe after his defection.[23]

As long as Soviet law was regarded as a contradiction in terms, mainstream comparative law was prevented from accommodating and subsuming it within standing categories, indeed from treating it as a subject worth studying in the first place. Ironically though perhaps predictably, given the existential stakes at play in the Cold War (a prospectively apocalyptic confrontation between systems that purported exhaustively to divide the globe and the future between them), it was the USA that proved the principal site of a fully formed school of Soviet law. It is perhaps no accident that the American tradition of sociolegal awareness spawned the major sustained effort to engage with the specifics of Soviet law and institutions. Commencing with the work of John Hazard (himself a student of Pashukanis, albeit briefly, on the point of the latter's arrest in 1937) and those he trained, 'legal Kremlinology' (a coinage of the present author) had ultimately to make and fight the case for Soviet law in the teeth of suspicion and disbelief and the political and intellectual consolidation of anti-communism in its American fortress.[24] It confronted and resisted the determination on the right to 'pierce the

22 Roepke 1954, pp. 236–9.

23 Ioffe 1985, pp. 4–17.

24 Although the socialist legal experiment fascinated a certain segment of European scholars, it was North America that became the redoubt of Soviet law studies. Notable Western students of Soviet law could be found among civilian comparativists in later years (Feldbrugge in the Netherlands, Ajani in Italy), but as a canonical comparative discipline Soviet law was by and large an American invention and pursuit – oddly enough, since the USA was not an especially favourable climate for comparative law (though it was for comparative social scientific disciplines, such as comparative politics). Indeed, Soviet law can be argued to have become almost the type or default comparative legal discipline in the USA, and really only in the Cold War (1946–89) phase of exaggerated rivalry: the legal comparison was the principal one worth worrying about chiefly because the corresponding geopolitical comparison was paramount. In the UK, where a rather more sympathetic, less tendentious view of Soviet institutions prevailed, Soviet law was a collateral branch of Soviet studies at centres like the School of Slavonic and East European Studies (University of London) and the University of Glasgow Institute of Soviet

veil' of Soviet law, to reveal it as a mask for totalitarian power, as Soviet dissidents/defectors have typically done.[25]

For both critics and defenders beyond its borders, the USSR's reputation as industrial society's Great Experiment and the twentieth century's premier social laboratory declined after the revolutionary tumult of its first decades subsided. Yet the critics confronted the legal-institutional aspects of that experiment far more forthrightly and seriously, and with more sustained and careful attention. At a forbidding and bleak Cold War moment one of Hazard's own students, Harold Berman, wrote imaginatively and counter-ideologically of the 'challenge of Soviet Law'.[26] Only in the USA could the challenge of Soviet law be formulated and appreciated as just that, a challenge extending to the social and political rationale for the particular configuration of the legal order in liberal and socialist societies alike. The Cold War bred not simply ideological antagonism, but societal and cultural (artistic and scientific) agonism, that is, competition. Soviet claims and achievements, whether in rocket science or social policy, concentrated the attention of US scholars and politicians alike, and required of them a response and a justification: as Sputnik was perceived as a show of Soviet technological ingenuity and by extension a purported verification of Soviet truth-claims in general (for the superiority of the system), so, albeit less spectacularly, Soviet law was perceived as a show of Soviet social and political ingenuity and an analogous verification.[27]

The study of Soviet law enabled the 'Soviet function' to be normalised in the mathematical sense, eliminating the anomalous values of Marxist theory that so confounded and disturbed the capitalist world into which it had erupted. A sober estimation of socialist legality, once it had taken root, robbed the USSR of utter strangeness. The important early contribution of Hazard and his followers was to have de-exoticised, demystified and de-demonised the Soviet world. Law permitted the Soviet system to be read readily off the same institutional scale as other twentieth-century industrial societies. At least initially, no partisan (i.e. Marxist or

and East European Studies, founded by the Marxist Rudolf Schlesinger (whose *engagé* scholarship is without parallel in US legal Kremlinology). (See Schlesinger 1945.) Among the principal American Soviet law scholars were John Hazard, Harold Berman and a later generation trained by Berman including Peter Maggs, John Quigley and William Butler (the present author was Berman's student as well, rather later in the day).

25 Ioffe stands as a crucial hinge figure in the history of the Western study of Soviet law, inasmuch as he was the most significant native informant/defector He crossed over from the interior discourse of Soviet jurisprudence itself to the exterior discourse of legal Kremlinology, becoming one of its most outspoken and prolific scholars. Other *émigrés* such as Nicholas Timasheff and Vladimir Gsovski (a former Soviet judge, later Chief of the Foreign Law Section of the US Library of Congress) had preceded Ioffe by a generation but no one approached him in his commanding stature in (successively) the mature Soviet and US legal academic worlds. Common to *émigré* scholars was a deep and abiding scepticism about Soviet law and institutions.

26 Berman 1949, p. 223.

27 Quigley elaborates the 'challenge of Soviet law' definitively and comprehensively in his recent volume, a retrospective testament of liberal US legal Kremlinology. Quigley 2007.

Marxisant) social-scientific or social-theoretic perspective could have made the case for the 'normality' of the Soviet system credibly, nor would it have had any interest in doing so (for normality or uniformity as between bourgeois and socialist societies would have undermined the revolutionary premise of radical rupture). Likewise, ostensibly non-partisan social-scientific or social-theoretic perspectives (e.g. mainstream economics or political science) would have had difficulty without sacrificing, distorting or forcing cherished categories such as price, or market, or interest group or constituency (admittedly, a difficulty overcome subsequently). Comparative jurisprudence proved singularly capable at the time of recognising the evident uniformity of its categories across systems. It countered the argument that rights and rules in Soviet law were a nullity or mere ideological ruse by mapping forms and functions and revealing analogies and divergences across Soviet and Western law (similar forms could discharge distinct functions, analogous functions could be served by disparate forms).[28]

Now this normalisation-through-law, sought by sympathetic, critically or simply fair-minded external students of the Soviet system, was fiercely resisted (at least officially or publicly) by Soviet legal thinkers and ideologues themselves. For them especially, any hint of legal uniformitarianism was deeply destabilising and delegitimising. For that reason the advances of Western students of Soviet law were never welcome, however flattering they might have appeared. The conversation between Soviet legal theorists and Western colleagues that was initiated in the 1920s and carried on in lively fashion, only to be summarily cut off in the 1930s by *Diktat* and intimidation, was never resumed afterwards (at least not publicly, in the literature). As a result, legal Kremlinology was very much a hermeneutic affair, an attempt by strangers to open a closed text from an alien tradition, which remained (again, at least publicly) mute.

If it was the great merit of legal Kremlinology thus to restore the interiority of legal logic and discourse to the world of Soviet law, it performed the further service of tracking, analysing and publicising the on-going development of Soviet

28 The legal Kremlinologists were not the only such 'normalisers'. From the announcement of the Soviet rupture right across the following seven decades of its defiant duration, and indeed even after its abrupt suturing, a markedly heterogeneous lot of sceptics have sought to accommodate the Soviet exception. In disregarding or downplaying its grandiose ideological claims and in attending to the substance of its institutions and practices, they have sought to recapture and domesticate the wild beast of Bolshevism, suddenly and spectacularly at large across the civilised landscape of twentieth-century, bourgeois, European society. If the legal Kremlinologists, normalised on behalf of the inescapability of a legal order as a *sine qua non* of a contemporary industrialised state, others invoked different schemata. The Frankfurt school normalised on behalf of the 'administered society', as did their heirs on the New Left in the 1960s and 1970s (Marcuse, Althusser). Later Soviet legal civilists (Ioffe) implicitly normalised on behalf of the universality of civil legal relations, though barred from making a public case. Others (Derlugian 2003, Erlich 1950) normalised on behalf of the developmental state and its accelerated, forced, programmatic modernisation. Roosevelt (see Chapter 4, fn. 33) normalised on behalf of the social state. Recent scholarship has normalised on behalf of alternative, socialist modernity: Kotkin 1997.

law, belying the myth that Soviet law was fixed and frozen (or the contrasting myth that Soviet law was wholly arbitrary and obedient to no structural regularity, only the whims of the leadership). In doing so, the legal Kremlinologists disaggregated the study of Soviet law into the study of Soviet laws, that is, particular rules, procedures and aspects of institutional design and function. Over time they further domesticated or normalised Soviet law by demonstrating the way in which its web of rules supplied a complex, changing context for risk calculation and bargaining by the economic and social actors who were its addressees (the core legal realist insight[29]), a conditioning environment of incentives and disincentives, rather than the caricatural straitjacket of commands and prohibitions.

But even as they valorised the claim of Soviet law to be considered law and normalised it, they interpreted it against its avowed socialist purposes. For to whatever extent exponents of legal Kremlinology practised a 'hermeneutics of generosity', exemplified most clearly by Berman,[30] the school as a whole seemed framed (*inter alia*) to score the ideological point that the Soviet recourse to law in the first place amounted to a tacit vindication of liberalism and the inescapability of right in any modern society.[31] If the 'first line of defence' against the claims of socialist legality was the crude anti-Sovietism of the Hayekians with their insistence on the real lawlessness of the USSR, the more sophisticated secondary line of defence was the argument of the legal Kremlinologists that the very embrace of law in the USSR, its law-boundedness, belied Soviet claims to have transcended, or evolved beyond, liberal, rule-of-law states, and to have fashioned a new and superior legal order (much less a post-nomian order). Indeed, the Soviet legal order was found defective or devolved in critical respects by most of the legal Kremlinologists.

29 Kennedy 1991, pp. 328–30.

30 Berman's *Justice in the USSR* painted a comprehensive and largely sympathetic (non-judgemental) account of Soviet law, identifying its chief distinctiveness not in its repressiveness (as was typical for the time and place and characteristic political allegiance) but in its paternalism (Berman's theory of 'parental law'). Berman 1963. The book's even-handedness at the time of original publication in 1950 aroused suspicion and provoked rejection. Berman's mentor John Hazard had been examined by the US House of Representatives Un-American Affairs Committee (Partlett 2008, pp. 22–3). On the other hand, the book was subject to criticism as too culturalist/psychological and insufficiently materialist in its approach: Schlesinger 1951, p. 985.

31 Fuller 1948–9 offers a fair specimen (p. 1165):

> In the process of attempting to operate a great governmental machine, the Soviet leaders have rediscovered some ancient truths. They have learned that the state without justice is impossible, or at least that it is impossible unless people believe that the state is attempting in some degree to render to each his due. They have also seen that some respect must be paid, sooner or later, to the principle of legality; men must know, or think they know, where they stand under the law and before the courts. The despised bourgeois virtues turn out, in the end, not to be mere copybook maxims, but indispensable ways of getting things done, rooted in the very nature of the human animal.

In practice, this meant that the academic enfranchisement of Soviet law, its acceptance into the field of viable comparison of modern legal systems (whether or not accorded the status of a separate family of 'socialist law'[32]), would be secured at the price of a tendentious evaluation or hierarchy: Soviet law would be regarded as aberrant or at best anomalous, peculiar, off the main line of modern legal evolution and increasingly anachronistic and less developed. As civil and common law systems grew more and more sophisticated and complex over the twentieth century, in order to accommodate the commensurate increasing complexity of social and economic life, Soviet law would remain artificially 'simplified', if not arrested or stunted, in its development.[33] But if the right took Soviet law seriously enough and endeavoured to do it rough justice, the left by and large failed to do it any justice whatsoever.

Soviet law viewed from the left: disregard and 'actually existing socialism'

The eastward shift in the centre of revolutionary gravity between the Second and Third Internationals marked Soviet Russia's ascent to the leadership role in the worldwide movement, as surprising as it was swift and certain: the darkest of European horses was in fact first past the post. From 1919 forwards, Moscow was the uncontested capital of the revolutionary left, a status that was only confirmed and consolidated with the collapse of revolutionary hopes anywhere else on the European continent by mid-decade. Everything about the world's first toilers' and peasants' state was an object of consuming fascination on the left (as of derision, contempt or anxiety on the right): for Steffens and many others, the future was not merely to be glimpsed, it could now be visited and observed – and observed to work. How in fact it worked – the emergent institutional arrangements – came in more for general approbation, however, than detailed study. This inattention owed partly to the policy maelstrom of War Communism and the rapid proliferation of novel agencies with overlapping remits (the first growth of the acronym jungle of Soviet bureaucracy), making any coherent operational sense of the nascent economic system difficult to apprehend for participants, let alone outsiders. It was also partly owing to the lack of technical expertise or even curiosity on the part of many otherwise informed observers on the left: the Bolsheviks, unlike anyone else in the Comintern, were having to shoulder the work of governing, the daily inglorious grind of administrative decision-making, in which they rapidly acquired acumen.

Respecting law, the great debates over the role and future of law that marked the birth of Soviet jurisprudence in the 1920s reverberated internationally and

32 The question of familial status for socialist law does not appear especially compelling: why that question was so energetically contested is a more interesting topic, at least for a critical view. See Partlett 2008, Chloros 1978.

33 See discussion Chapter 6, pp. 279–80.

provoked much interested engagement. But they did not give rise in the short term to any close and sustained study of the actual operation and function of legal ordering in Soviet society. Soviet law (as opposed to Soviet legal theory) did not become an active field of inquiry in extramural legal scholarship (European comparative law) until much later. Marxist lawyers in the West, who might have been thought to take particular interest in the subject (by virtue of their combination of sympathy, insight and expertise), never came to grips with the specifics. They were transfixed (at least initially) by the cascade of Bolshevik decrees,[34] tending to stop short of any deeper analysis of the system of economic regulation under construction and its reliance on a host of established public law techniques (planning allocations, state enterprises, dispute resolution, etc.) or of the complex interplay between that system and the civil legislation brought in under, and left in place after, the New Economic Policy, NEP.

Once the revolution within the revolution had occurred, the great rupture–*vielikii pierielom* (великий перелом) – of industrialisation and the Stalinist system took shape, the Soviet experiment lost much of its revolutionary lustre. For many on the left, the particular institutionalisation of socialism accomplished in the USSR ceased to be the only desirable or imaginable one (if it ever had been), even while its prestige and authority remained robust to challenge (no one had a credible or practicable alternative blueprint to put forward), at least for the two decades after the Second World War. After the New Left succeeded the Old, Stalinism (or rather the Sovietism that survived Stalin) was deprived of any lingering call on leftist sympathies or (what is perhaps more important) attention or consideration.

The conventional narrative adopted on the critical left inevitably became some variant of the Trotskyist, the *Revolution Betrayed*. It was a tale of degeneration or deformation: revolutionary plasticity and liberation degenerated into rigidity and repression. In this account, a similar trajectory of collapse can be followed in any one of a set of parallel registers: political (the inexorable narrowing of the circle of political participation in decision making, from workers to workers' parties to Bolshevik factions to prevailing faction to politburo to General Secretary, from society to Stalin), social (radical experimentation in gender roles and relations to resurgent, patriarchal puritanism), cultural-aesthetic (eclecticism of avant garde to conformity of Social Realism), economic-industrial (pluralism of models and actors to monolithic centralised economy).[35]

It was straightforward to carry the betrayal story over to the case of law, as one of collapse and capitulation, of the failure of promise and the betrayal of hopes. O what a falling-off was there: from shining revolutionary morning to dreary bureaucratic day. To the extent that leftist critics considered Soviet law, it was

34 Cf. Renner 1949, p. 260: 'This idolatry of legislation, "decretinism" as it has been called, is by no means confined to the Bolshevist revolution, but there it was especially pronounced and has led to disastrous consequences.'.

35 See e.g. Althusser 1971, pp. 127–88.

largely in these terms, as a component of what Althusser (albeit with bourgeois not state socialist states in view) termed the RSA, Repressive State Apparatus.[36] Once it was appreciated that the Bolshevik project would not advance beyond state capitalism, but would instead merely intensify and radicalise it, the fate of Soviet law seemed sealed and any reason to study it dissipated. Law in the USSR would serve as privileged instrument of social control and economic co-ordination, pretty much as it did in the bourgeois regimes whose tools were borrowed shamelessly but whose premises were rejected or denied categorically. Socialist legality was the justificatory rhetoric of conformists and disciplinarians, of petty enforcers and faceless bureaucrats, anti-revolutionary and anti-emancipatory in its essence and altogether unappealing.

It was Pashukanis who captured the left's imagination (and set the terms to its knowledge of and engagement with Soviet law, as he did for many non-Marxists as well: see discussion in Chapter 4 below). The left had scant regard for the odious figure of Vyshinsky or the long line of workaday Soviet law authorities, as little congenial to the currents of Marxist thought in the West as any home-grown legal professoriate. Pashukanis, though, was the Trotsky of legal theory, the prophet dishonoured in his own country, with whose downfall the spark of a genuinely Marxist jurisprudence was extinguished and the promise of a revolution in the role and place of rules and procedures in the only Marxist state was dashed. Pashukanis like Trotsky offered the critically minded left a saving heresy, an alternative revolutionary doctrine, insidiously thwarted though truer to Marxism, a road not taken for the law.

Yet this left-wing disregard of – or disdain for – Soviet law and institutions is puzzling. 'Actually existing socialism', (AES) that half-apologetic, half-derisory form of words settled on in leftist discourse in the West as the default referent for state socialist societies in the Other Europe, must have meant, whatever else, socialism *qua* system, institutionalised and operationalised. But it was precisely the institutionalisation of socialism that was understood in Western Marxism to be deficient and deformed, a travesty of programmatic Marxism, and therefore unworthy of study (save as negative object lesson – how not to do socialism), to speak nothing of emulation. It is the premise of this book, however, that it was institutionalised socialism – as a distinct and characteristic set of legal-institutional arrangements – that merited *and continues to merit* political and scholarly attention in equal measure.

For AES, here approached as the culminating achievement and instantiation of Soviet law, was the only fully worked-out alternative to capitalist industrial modernity. For that reason, however blemished in its lifetime and however discredited once and for all by its ignominious and precipitous demise, it cannot have forfeited its claims on our imaginative sympathies and our self-understanding as participants in and shapers of the 'project of modernity'. If anything, the

36 *Ibid.*, p. 126.

institutional deficiencies and flaws of the monosystemic world inherited after the collapse of the Bloc can only be confronted and addressed once we have come to terms with AES.

Communism on the left was understood and analysed as a political project, not a legal-institutional project. The vicissitudes of Soviet law, plan and institutional arrangements were the province of specialists operating within a particular strategic context (the legal Kremlinologists) rather than political theorists – or activists, for that matter. AES was rarely acknowledged and even more rarely analysed as a set of (highly specific and standardised) institutional arrangements. The past and continuing failure of engaged or critical enquiry on the left to do any sort of justice to the USSR as an institutional project strikes one as a singular and baffling omission. Etienne Balibar has remarked on the perils of forgetting the communist adventure as an emphatically and characteristically European endeavour.[37] But even in their heyday the proponents of Eurocommunism took little interest in the specifics of Soviet institutional design and dynamics. And it is part of the inspiration of this book to recover the specifically Soviet contribution, not just politically as European project, but institutionally as project of modernity and legally as civilian project – an undertaking deploying to stunningly novel use and purpose the familiar tools and concepts of Romanist law (among much else).

Towards a new critical evaluation: the approach and plan of this study

This account of Soviet law takes an avowedly critical-legal approach, which seeks to revise, realign and redefine the terms and categories that theorists and practitioners, outsiders and insiders, scholars and partisans, apologists and opponents, left and right, West and East, have historically brought to bear on the subject. It emphatically does not purport to break new archival ground, nor does it pretend to the scope, sweep and comprehensiveness of the classic treatises, or the compendiousness and scholarly authority of the summary distillations and monographs in the field, either by the comparativists of the legal Kremlinology school or the doyens of Soviet jurisprudence. Rather, it is a modest exercise in reframing and reconceptualising, based on readings of select Soviet and Western legal commentators and theorists (in Russian and English), general works of legal, political and economic theory and analysis, the Soviet legal *corpus* itself and specialised treatments of Soviet economic and political history. The aspirations behind this study are both modest and radical: a revision or reappraisal of a well-ploughed field, but a global shift in perspective, not just on Soviet law itself, but on its significance as twentieth-century exemplar.

Anyone hoping to make any sense of Soviet history and affairs generally, including law, seems caught on the horns of a dilemma – between the urge to

37 Balibar 2003, pp. 78–100, 'Europe after communism'.

exceptionalise (positively or negatively, to treat as angelic or demonic) and the urge to normalise (see footnote 28 above). The USSR either constitutes a solution of continuity with pre-existing patterns of societal organisation or not. This dilemma strikes a critical-legal perspective as misconceived or grasped at the wrong level, not just a matter of scholarly judgement or political prejudgement, of sympathy or scepticism, of left or right (each of these criteria/motivations is indeterminate and can favour either norm or exception). For a critical-legal perspective, the normal-*versus*-exceptional is an aporia internal to, not a dilemma external to, Soviet (as any) law.

This aporia is not a function of Russia's fabled and perennial unknowability (Churchill's resonant but culturalist 'riddle wrapped in an enigma inside a mystery'), but rather of the logic of twentieth-century legal ordering itself. The twentieth-century, post-liberal state is the precipitate of the twin secular trends of purposive or policy-oriented over formal reasoning and open-ended, indeterminate standards over clear rules.[38] The socialisation of capitalist as much as professedly socialist industrial states was accomplished by the deformalisation and materialisation of law, the cession or delegation of rule making and adjudicative competence to administrative bodies, and the accompanying shift in centre of gravity away from constitutional governing structures.

The predominance of imposed over bargained legal arrangements, of policy-dependent vertical over agent-dependent horizontal co-ordination, is twentieth-century law's signature, not just that of Soviet law. What distinguished the Soviet case was scale and consequence: the socialisation of the state through the materialisation of law was nowhere carried to greater lengths and developed to greater effect: a state constructed by and out of policy to serve as a gigantic policy engine driving history forward, the ultimate Oakeshott 'enterprise association'. It is difficult to imagine a society in which legislative and adjudicative functions were more comprehensively 'bureaucratised', or 'administrativised'. Nonetheless, the Soviets did not (any more than any other twentieth-century industrialised society could have aspired or sought to) *resolve* a dialectic, they *sustained* or *instantiated* one. It is a standing temptation to seek the real history of Soviet law outside the formal institutions of the justice system, either in anti-formal bodies like the NKVD *troikas* or Party structures, or in anti-formal interventions of formal bodies. But the 'real history' is more complex: far from embracing anti-formalism and eschewing formalism altogether, the Soviets continued to oscillate between them.

The magnitude of this oscillation might have been singular, but the presence of it was not. If the exceptional or anti-formal (the foreground intervention) came relentlessly to stalk the normal or formal (the background rule system), in cases ranging from the New Deal to the Gaullist state, then the Soviets were not anomalous. Soviet socialist exceptionalism was itself a manifestation of a 'new

38 Unger 1977, p. 192ff.