SOVIET CIVIL LAW AS LEGAL HISTORY: A CHAPTER OR A FOOTNOTE?

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This conference, convened to honor professor Feldbrugge, is historic also in that it provides a workshop for its Eastern European participants presently engaged in devising market economy civil codes. Lest euphoria cloud our judgment, a critical question must be asked: just how much will the new legality actually part company with the old, and even when new systems are constructed, will old *mentalités* retain a dominant presence? It is in this context, one of legacies and influences, that the old Soviet civil law is examined – as legal history.

The assumption here is that those who survey the broad range of legal history ought to take seriously the Soviet civil law experience and record it as a significant chapter in Western legal history. Although the Soviet Union lasted less than three-quarters of a century and met with a sorry finale, its impact on the world community was, and remains, enormous. Initially, throughout the 1920s, Bolshevism as an ideological spur to revolution was perceived as a threat to the very unstable state system which emerged after World War I. Hardly had the fears of Bolshevik insurrections or subversion subsided, then the world was confronted by a Soviet war machine, proven in battle and dominant in half of Europe.

It follows that the law of this power, whether the nihilist law of the early period or the more conventional corpus of a later, beckons historical assessment – for law and power, legal culture and political culture have been inextricably linked in history. As the Soviets variously transmitted their political culture, they did the same with their law, imposing it, as in Eastern Europe or exporting it, as in China.

Soviet civil law, even more than the civil law of most regimes, has also proved immensely informative about domestic affairs. It provided, according to Feldbrugge, "an organizational framework for society, a ground-plan, a chart, a skeleton."[1] This societal framework had validity despite a pervasive "second economy," which contradicted many of the tenets encompassed in the civil law itself.

1. F.J.M. Feldbrugge, "The Study of Soviet Law", 4 *Rev.Soc.Law* 1978 No.3, 205. Speech delivered 16 August 1978 on the twenty-fifth anniversary of the Documentation Office for East European Law. Professor Feldbrugge's broader interest in Soviet law is especially evidenced by his latest publication, *The End of the Soviet System and the Role of Law*, Dordrecht, Martinus Nijhoff 1993, which is both a treatise on Russia's new legal system and a review of the Soviet system from which it emerged.

G. Ginsburgs et al. (eds.), The Revival of Private Law in Central and Eastern Europe, 45–62.

The nature of the Soviet legal framework has been variously described, but in no instance better than by Eugene Huskey.[2] His several Soviet law designations (nihilist, statist, and legalist) and accompanying periodization do more than simply lay out a structure. Such a framework utilizes Soviet civil law to provide new levels of understanding of both the domestic and international dimensions of Soviet history. It explains aspects of Soviet society, economics, politics, and culture as well as accounts for early Bolshevism's and later the Red Army's destabilizing of a vulnerable European state community.

In this essay I offer four reasons that Soviet civil law constitutes an important chapter in what we term Western legal history:

1) Soviet civil law as an illustration of continuity and change in the framework of legal history. Soviet civil law represented at once the continuity of the Roman law tradition and change from it in the form of a Western ideological wrapper of Marxist socialism. In coloring both the substance and rhetoric of the law, Marxism bestowed upon it a utopian/social engineering dimension – a purpose consistent with Western social criticism – and the aura of one of the grand socio-political experiments of all time.

2) Soviet civil law as revolutionary law. Because political upheaval was the source of Soviet civil law, it injected into that law a shrill nihilism and a lasting populism – socialist/revolutionary elements which both identified it with the kinds of law spawned by previous revolutions and yet made it unique.

3) Soviet civil law as economic law. No civil law system incorporated economic factors to the degree undertaken by the Soviets. Although their planned economy gave rise to stultifying controls and bureaucracy which led to the USSR's undoing, this same economy also fostered a civil law quite unlike any which had hitherto existed.

4) Soviet civil law as conservative law. The irony here is that a law nurtured by revolution became the bulwark of a statist regime. Because Soviet codes and statutes were designed to instill order in a regime exhausted by revolution and civil war and destabilized by disparate nationalities, civil law both braced a great power and became an instrument for repression and colonialism. In a reformist mode at regime's end, Soviet civil law incorporated features distinctive of bourgeois law.

2. Eugene Huskey, "A Framework for the Analysis of Soviet Law", 50 *The Russian Review* 1991, 54-55.

I. Soviet Civil Law as Continuity and Change in the Framework of Legal History

One of the most demanding of a historian's undertakings is that which engages and draws distinctions between continuity and change. The theme is applicable to Soviet law because this creature of revolution also had its roots in an earlier legal tradition, that of Rome, having branched from the main stem in the manner of other civil law systems. That it acquired characteristics distinctive of Roman civil law invites comparison with another Roman offspring, the canon law.

Although Soviet authorities vehemently denied the derivativeness of their law – Marxist ideology tolerated no competing sources – some reputable scholars thought otherwise. Olympiad Ioffe found no lack of Soviet civil law elements in both old and modern Roman codes – the latter usually German, although sometimes French and Swiss. Much from the *Bürgerliches Geseztbuch* (*BGB*) of 1896 had been incorporated in the tsarist draft codes of 1903 and 1905 before absorption in the 1922 New Economic Policy (NEP) code and the later Soviet ones. Some aspects of the law, like that of succession, were initially rejected by the Soviets but subsequently incorporated; others, like the rights of ownership, were included in Soviet law from the beginning.[3]

Although silent about Soviet indebtedness to Roman civil law, Darrell Hammer did affirm and document late imperial Russia's solid Roman ancestry. Dismissing notions of an eleventh- or sixteenth-century Russian Reception, he like Ioffe settled on nineteenth-century Germany and its *Pandektenrecht*-inspired *BGB* as its principal source.[4] The words "Justinian never set foot in France" as uttered by the seventeenth-century legal comparativist Bernard Automne seem applicable, if modified accordingly, to the Roman-Soviet connection.[5]

3. Olympiad S. Ioffe, "Soviet Law and Roman Law", 62 *Boston University Law Review* 1982, 701-728. See also, John Quigley, "Socialist Law and the Civil Law Tradition", 37 *American Journal of Comparative Law* 1989; Quigley, "The Romanist Character of Soviet Law", *The Emancipation of Soviet Law* (F.J.M. Feldbrugge, ed.) No.44 *Law in Eastern Europe* (F.J.M. Feldbrugge, ed.) Dordrecht, The Netherlands, 1992, 27-49; and Feldbrugge's dissent from Quigley's views in the introduction to the same volume: "The statement that Soviet law belongs to the civil law family has very little information value to a continental European lawyer." (p. XV). For more on interconnections between late Imperial Russian (and implicitly aspects of Soviet civil law) and Roman law, see William G. Wagner, *Marriage, Property and Law in Late Imperial Russia*, Oxford 1995 – a work which appeared only after this paper was written.
4. Darrell Hammer, "Russia and the Roman Law", 16 *The American Slavic and East European Review* 1957, 1-13.
5. As quoted in Donald R. Kelley, *The Human Measure: Social Thought in the Western Legal Tradition*, Cambridge MA 1990, 203.

To argue that Soviet civil law was part of an unfolding of Roman civil law requires comparing the Soviet evolution with that of other progeny of ancient Roman law – that is, placing it in a larger historical context. Civil law had already undergone transformations during the Roman Republic and Empire – long before Justinian imposed cohesion by codification in the sixth-century A.D.. That emperor's undertaking was, in any case, selective and bore as much the mark of novelty as of continuity. Oddly, Justinian's version of the Roman law, while immediately ascendant in Byzantium, remained largely unknown in a sleeping West for half a millennium (the sixth through the eleventh centuries) when law of a Romano-German kind prevailed.

The real "unfoldings" – those resembling the Soviet civil law's branching from the Roman – began in the eleventh-century when the good doctors of Bologna breathed new life into Justinian's *Corpus Iuris Civilis*.[6] From that time hence Roman law underwent periodic change and metamorphosis, from the Glossators of Bologna, the so-called Post-Glossators or Commentators in late thirteenth- and fourteenth-century Italy and France, and the Canonists beginning with Gratian in the twelfth-century. Not only did these groups spin off new forms of Roman law but that law sometimes coalesced with custom and feudal law to produce a durable medieval hybrid called the *ius commune*.

Modern times also produced forerunners of the Soviet variation of the Roman. The sixteenth-century renewal of law in Germany, the Reception, recharged politics as well as law in that land. Meanwhile, on both the Continent and in England humanists taught legalists new methodologies and intriguing ways to view man and his world. Roman law and the lands which it conquered were never again the same. The flowering of Netherlandish culture in the next century produced Dutch Elegant Jurisprudence and Natural Law proponents whose genius resulted in relabelling the law "Romano-Dutch", which stuck until the French Revolution.[7]

Codes of law in eighteenth-century Bavaria, Prussia, Austria, and especially that engineered by Bonaparte pre-figured similar Soviet undertakings in purpose, innovation, and borrowings from the past. Although these Enlightenment codes embodied historic Roman elements, each, particularly Napoleon's, parted ways from prevailing Romano-Dutch law. German civil

6. This revival of Roman law became part of that intellectual phenomenon now embodied in the title of Charles Homer Haskins' classic, *The Renaissance of the 12th Century*, Cambridge, MA 1927. Soviet law, on the other hand, has not as yet been accorded a chapter in general legal histories. Cf. O.F. Robinson, T.D. Fergus, and W.M. Gordon, *An Introduction to European Legal History*, Abingdon, Oxon 1985.
7. H.R. Hahlo and Ellison Kahn, *The South African Legal System and its Background*, Cape Town, 1968 contains a useful approach to Roman law from the "Roman-Dutch" perspective. See also G.C.J.J. van den Bergh, *The Life and Work of Gerard Noodt (1647-1725): Dutch Legal Scholarship between Humanism and Enlightenment*, Oxford 1988, which surveys Dutch law during the fertile period of Noodt's lifetime.

law of the Reception was also substantially altered in the nineteenth-century. Spurred by Savigny and the Historical School and later Pandectists, German civil law was cloaked in new Roman garb and appeared by century's end as the *BGB*.[8] This German code, initially adapted to Russian needs by tsarist legal practitioners and scholars, subsequently guided those who drafted Soviet civil codes.

That Roman civil law elements were incorporated into Soviet law identifies it with these other Roman variations which evolved over the past millennium. Codification of civil law in the USSR, beginning as early as 1922 but continuing until the regime's dissolution, resulted in Soviet adherence to civil law basics – a centralized court system with a weak judiciary and exalting legislation as a source of law.[9]

In light of Roman civil law's tortuous historical progression, was the Soviet version simply another variable, or did it possess a unique status such as that accorded the Canon law? That they both embraced an ideology of utopianism suggests comparability. Both were creatures of hierarchically-structured political entities with established claims to universalism; both developed elaborate schemes to control human nature for a perceived higher purpose, whether a classless society of this world or salvation in another. Both hierarchies buttressed their political structure with ideology, bureaucracy, and a regime of law. R.H. Tawney's observation that "the last of the Schoolmen was Karl Marx" was not far off the mark and takes on added meaning when one measures the similarities of purpose of Soviet civil and Canon law.[10]

The projection of a moral commonwealth had special implications for Soviet law. The leadership employed its Marxist version of Roman civil law to engage its people in communist utopia's coming. Law – "parental law" as conceived by Harold Berman – was designed to change, more importantly, control, human nature. It fostered socialist morality by treating "the individual as a child or youth, as a dependent member who needs to be trained and guided in the interests of the whole as conceived by the state." Furthermore, Soviet law is concerned with the relationships of the parties apart from the voluntary acts by which their alleged rights and duties were established; it is concerned with the whole situation, and above all, with the thoughts and

8. Two recent works shed light on nineteenth-century German legal culture: James Q. Whitman, *The Legacy of Roman Law in the German Romantic Era*, Princeton, N.J. 1990 and Michael John, *Politics and the Law in Late Nineteenth-Century Germany: The Origins of the Civil Code*, Oxford 1989.
9. See John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, Stanford, CA 1969.
10. R.H. Tawney, *Religion and the Rise of Capitalism*, New York, 1958, 8th printing after 1926, 39. See also *The Code of Canon Law*, English translation, Grand Rapids, MI 1983.

desires and attitudes of the people involved, their moral and legal conceptions, their law-consciousness. Soviet law thus seeks not simply to delimit and segregate and define, but also to unite and organize and educate."[11] The creatures of this educational process were the citizens of the future communist polity.

The same notion was expressed by those who wrote about utilizing Soviet law for purposes of social engineering, what Robert Sharlet called "an instrumental conception of law used by the ruling elite to direct, control, regulate, and limit social change in the USSR".[12] As John Hazard noted, the Soviets even incorporated their program of social engineering in their basic law, the Constitution of 1977.[13] Because, as one writer has argued, utopias connote "order and social necessity" and project "totality, order, and perfection" in order "to solve the collective problem collectively," they are inevitably totalitarian.[14] Soviet citizens, in this regard, were expected to conform to this prescription for utopia, one essentially embodied in the "moral code for the builder of Communism". Ironically, the Soviet utopian process – uniquely galvanized by civil law through its legislation and codes – always contained within it the seeds of moral degradation. During the Soviet period there was pervasive selfishness and corruption as well as excesses resulting from state control. Even post-Soviet attempts to preserve the high moral tone of Soviet civil legislation are frequently nullified by instances of gross free market behavior and mafia-style gangsterism. Despite the ultimate failure of Soviet socialism, it nonetheless stands as a notable utopian effort buttressed by law, and equalled in magnitude only by a comparable papal undertaking.

Accepting the parallelism of socialist and Canon law in the family of Western law and legal systems essentially conforms to the classification devised by René David, who gave socialist law equal footing with Roman, Anglo-American Common, and Canon law.[15] Obviously, it was Soviet civil law which provided the model for his socialist law.

11. Harold Berman, *Justice in the U.S.S.R. An Interpretation of Soviet Law*, revised edition, Cambridge, MA 1963, 283, 380.
12. Robert Sharlet, "Legal Policy under Khrushchev and Brezhnev: Continuity and Change", in: *Soviet Law after Stalin*, Part II: *Social Engineering Through Law*, (D.D. Barry, G. Ginsburgs, P.B. Maggs, eds.), 20 (II) *Law in Eastern Europe* (F.J.M. Feldbrugge, ed.), Alphen aan den Rijn, The Netherlands 1978, 319.
13. John Hazard, "A Constitution for 'Developed Socialism'", *Ibid.*, 28.
14. J.C. Davis, *Utopia and the Ideal Society: A Study of English Utopian Writing 1516-1700*, Cambridge 1981, 38.
15. Cf. René David, *Les grands systèmes de droit contemporains*, Paris, 1969, or in its English translation, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law*, New York 1978.

II. Soviet Civil Law as Revolutionary Law

The suggestion here is that Soviet civil law acquired historical significance because it was a creature of revolution. While other revolutions had similarly spawned legal nihilism and populism, these two elements under Bolshevism became uniquely a class act, so to speak, by their pairing with twentieth-century socialism.

The title for this section immediately evokes Harold Berman's study of "Law and Revolution". He counted six revolutions which "produced a new or greatly revised system of law"[16] in the context of the Western legal tradition: the eleventh-century papal one which revitalized Roman and Canon law; the Lutheran upheaval which facilitated the Reception of the Roman law in sixteenth-century Germany; seventeenth-century English revolutions which "restored" the common law; the American interlude which led to a parting of ways with Great Britain in the establishment of a unique system of federal and state courts; the French Revolutions which eliminated the antiquated laws and administration of the *ancien regime* and produced the Napoleonic Codes; and, finally, the Russian Revolution which introduced a socialist law based on collectivism and a planned economy. "Each revolution," according to Berman, "represents the failure of the old legal system that the revolution replaced or radically changed."[17]

Certainly, one measure of law's continuity and change – particularly change – in history, is this interplay with revolution. For that reason it is fairly easy to shift the discussion from perceptions of Roman continuity in Soviet civil law to perceptions of change as exemplified by Soviet encounters with legal nihilism, the undiluted product of revolution. Nihilists who advocated but often stopped short of a total abrogation of the law, like instrumentalists, saw great opportunities for social engineering in a flexibly-applied law. Each regarded itself as agent of societal betterment; they differed only on means.

When Lenin observed before the Bolsheviks took power that "a law is a political instrument; it is politics" he signified his intent to harness law for the socialist revolution, thereby voicing a revolutionary's suspicion of lawyers.[18] Flexible and simple revolutionary law and procedure allowed for both the kind of manipulation and control required for remodelling a society and for dispensing with professionals, always suspect as counter-revolutionaries.

16. Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, Cambridge, MA 1983, 20.
17. *Ibid.*
18. As quoted in John Hazard, *Communists and their Law: A Search for the Common Core of the Legal Systems of the Marxian Socialists States*, Chicago 1969, 69.

Within a month of their seizure of power in 1917, the Bolsheviks produced a simplified system of revolutionary tribunals and local people's courts to replace the dissolved tsarist judicial system.

Bolshevik legal nihilism – that is, the law's "withering away" (*otmiranie prava*) along with railings against lawyers and cries of "judicial tyranny" – was remarkably consistent with that of revolutionaries of other times and places. Just as Bolsheviks in 1917 abolished the bar and courts, so had Jack Cade's rebels in fifteenth-century England promised to kill all the lawyers, destroy the Inns of Court, Parliament, and even the records of the realm. Two centuries later Englishmen – caught up in civil war – dissolved the prerogative courts of the crown and even considered abolishing the common law.[19] In 1793 the French *sans-culottes*, who promulgated the Statute of 3 Brumaire of the Year II (24 October), also aimed at elimination of formal judicial procedure.[20] The notion that French Revolutionaries sought to redistribute land has recently emerged to tint red a revolution usually depicted as bourgeois.[21]

An "anatomy of revolution" suggests that a pattern of reaction follows leftward revolutionary swings.[22] Just as England returned to old ways after Cade and a monarchical restoration after Cromwell, and France to an emperor after Robespierre, there appeared a NEP after Bolshevism.[23] In each of these restorations conventional law also won renewal. The common law (if not the prerogative courts) survived Cromwell, while in Napoleonic France a statute of 17 Ventôse of the Year VIII (17 March 1800) re-established the judiciary. The Code of 1806, its revolutionary elements notwithstanding, represented even more a restoration of old modes of law.[24] In the Soviet Union, Stalin's re-instatement of law after the bout with nihilism made Trotsky's "Soviet Bonapartism" label doubly apt.[25]

19. See Barbara Shapiro, "Law Reform in Seventeenth-century England", 19 *The American Journal of Legal History* 1975, 280-312.
20. R. C. Van Caenegem, *An Historical Introduction to Private Law*, transl. D.E.L. Johnston, Cambridge 1992, 11.
21. P.M. Jones, "The 'Agrarian Law': Schemes for Land Redistribution during the French Revolution", *Past and Present* No.133 1991, 96-133.
22. Cf. Crane Brinton, *An Anatomy of Revolution*, New York 1965.
23. Berman did record this rhythm of revolution and reaction and its consequence for law and lawyers in his half dozen revolutions: "Eventually...each of the great revolutions made its peace with the pre-revolutionary law and restored many of its elements by including them in a new system that reflected the major goals, values, and beliefs for which the revolution had been fought. Thus the new systems of law established by the great revolutions transformed the legal tradition while remaining within it." See *Law and Revolution*, 29.
24. Cf. R.C. Van Caenegem, *op.cit.* 11.
25. Leon Trotsky, *The Revolution Betrayed: What is the Soviet Union and Where is It Going?*, translated by Max Eastman, Garden City, N.Y. 1937, *passim*.

Despite conservative Soviet civil law's winning the day, the story of two decades of legal nihilism in the USSR merits a brief retelling because it was genuinely revolutionary and provided the most creative exercise in legal theory of the Soviet period. Ever consistent with classical Marxism, nihilism also gave an enchanting bloom to socialist legal theory, however brief.[26]

Lenin's retreat into the NEP and restoration of the codes and a legal system astonishingly like those swept away by the revolution unleashed the fury of legal nihilists: Evgeny Bronislavovich Pashukanis, Piotr Ivanovich Stuchka, and Nikolai Vasil'evich Krylenko, who devised a *revoliutsiia prava* to chart law's demise.[27] The centerpiece in their repertory was Pashukanis' "commodity exchange" theory of law as laid out in his *Obshchaia teoriia prava i marksizm* (1924).[28] Enthusiasm for legal nihilism peaked, especially among Marxist intellectuals and even some officials, by the late 1920s; nihilists, however, misjudged their opposition, for Stalin, once in control, destroyed them within a decade.

The nihilist interlude, although of short life, was symptomatic of a pervasive and recurring populism in Soviet civil law. The law of property was especially susceptible to overhaul. Although land was immediately nationalized in 1917, the economic calamity which precipitated the NEP and with it the Civil Code of 1922, slowed or even reversed the process. Private property again came under nihilist attack after the economy had improved and Stalin triumphed. But, as Zigurds Zile observed, non-state property remained in a precarious state throughout the entire Soviet epoch whatever the reprieves given to it.[29]

Inherited and intellectual property, both of which had drawn deep antipathy from Marx and early Marxists, posed special dilemmas for Marxists once they had opted to govern.[30] Abolition of laws of inheritance in 1917 was, however, followed by official mellowing: eventually, inheritance with re-

26. Although Soviet legal nihilism and nihilists have been the subject of numerous books and articles in recent years, they have only begun to receive recognition in general histories. In this respect, the generalist John Kelly's pronouncement of Pashukanis as "the only significant Soviet lawyer to offer what could be called a theory of law [commodity exchange]" merits our attention, *A Short History of Western Legal Theory*, Oxford 1992, 372).
27. Many of the articles which have appeared about the nihilists over the past decade have been reprinted in Piers Beirne, ed., *Revolution in Law: Contributions to the Development of Soviet Legal Theory, 1917-1938*, Armonk, N.Y. 1990.
28. See especially Robert Sharlet, "Pashukanis and the Withering Away of Law in the USSR" in *Cultural Revolution in Russia, 1928-1931*, (Sheila Fitzpatrick, ed.) Bloomington 1978, 169-188 and Piers Beirne and Robert Sharlet, *Pashukanis: Selected Writings on Marxism and Law*, London, 1980.
29. Zigurds L. Zile, "The Taking and Precariousness of Non-State Property in Soviet Law", 12 *Rev.Soc.Law* 1986, 203-272.
30. See John Hazard, *Communists and their Law*, 223-242.

strictions was allowed. A similar compromise was reached regarding intellectual property: ways were devised to motivate and reward genius without indulging self-aggrandizement.

Despite Pashukanis' harangues, the Soviets chose not to abandon Romanist precepts in contract law, especially as applicable to individuals. Naturally, adjustments were made in accommodating contract law to state enterprises, whether between these entities or between individuals and enterprises. When stalled pre-contract negotiations, contract disagreements, or breaches between enterprises occurred, what was sometimes portrayed as a populist solution – a tribunal network called State Arbitration, or *Gosarbitrazh* – was invented outside the court system to resolve such impasse. But calling it arbitration did not make it so: the designation for these tribunals had justification only in their separation from the court system and a nihilist infatuation with the notion of their being bodies of arbitration rather than adjudication.

On the other hand, it is not surprising that nihilists fantasized about arbitration which as a procedure has long been perceived both historically and anthropologically as operating on a middle ground between violent self-help and sophisticated court procedure. Unlike the courts, which supposedly strive for justice, arbitration seeks the restoration of peace and harmony.[31] While this image may well have suited those who fashioned *Arbitrazh*, the institution they created was not arbitration as we know it.

Populism initially figured prominently in Bolshevik conceptions of tort law.[32] Although revolutionaries had expected social insurance to replace a conventional law of torts in providing for accident victims, they acquiesced in the face of severe economic pressures to a return to the codes. Even so the 1922 Civil Code, which excluded a fault requirement, contained elements of "soak the rich" populism. Defendants had to pay if they could afford to do so whether an actionable wrong had been committed or not. As time passed, so did most tort populism. Ideologues did succeed in preserving a "duty to rescue" provision, a nod to New Soviet Man morality, but not unique to Soviet civil law.

31. Thomas Kuehn, *Law, Family & Women: Toward a Legal Anthropology of Renaissance Italy*, Chicago 1991, used Renaissance Italy as his laboratory for the arbitration process. He observed that "historians utilizing these anthropological insights have stated that the more flexible, less rule-bound procedures of arbitration could 'perform functions to which the courts could not aspire: they could settle feuds, make peace and restore harmonious social relations between disputing neighbors'" (19-21).
32. See *Governmental Tort Liability* (D.D. Barry, ed.), No.17 *Law in Eastern Europe* (F.J.M. Feldbrugge, ed.), Alphen aan den Rijn, 1970 and Donald D. Barry, "Soviet Tort Law and the Development of Public Policy," 5 *Rev.Soc.Law* 1979 No.3, 229-249. See also John N. Hazard, *Managing Change in the USSR: The Politico-Legal Role of the Soviet Jurist*, Cambridge, 1983, 137-152 and Hazard, *Communists and their Law*, 381-416.

Although populism receded in importance in the aftermath of the revolution, a few of its elements became entrenched in the Soviet legal system. It was reflected in the tiers of courts where non-professional people's assessors joined a judge in rendering a decision. This dramatic gesture of reducing the weight of professional opinion was at odds, of course, with reality: assessors' opinions counted for very little.

The most notable recurrence of populism came after Stalin, during the Khrushchev era. Despite the very considerable achievement in completing Fundamental Principles and union-republic codes, this General Secretary encouraged citizen participation in the non-professional comrades' courts, the voluntary people's guards, people's control, and as social prosecutors and defenders. Although the impact of these institutions did not measure up to their fanfare, such instances of legal populism made Soviet civil law distinctive.

Burgeoning late Soviet needs for trained legal personnel stemming from the increased importance of economic law should not obscure the near success of nihilists in eradicating the civil law and eroding legal education. Their ranting against both civil law and its professionals in the early and mid-1930s was crucial in keeping law institutes at a reduced number and deleting civil law from their curricula. Even though law and legal education regained respectability later in the decade under Stalin's statist guidance, the threat of war and then war itself further deflected attention from civil law.

Although Khrushchev's partial return to populism in the aftermath of Stalin caused a flurry of excitement, Brezhnev scrupulously avoided furthering such ventures while allowing Khrushchev's to stand. Their survival demonstrates the support which they engendered and suggests a continuing tension between revolutionary and conservative civil law even in the twilight of the Soviet regime.

This durability of Soviet civil law's aura of revolution – admittedly more rhetorical than real, more formal than substantive – accounted for much of its attraction to scholars and to socialist law-makers elsewhere. As a phenomenon of legal history it will prove no less intriguing, especially when studied in the context of the anti-communist revolution which ended it. This event merely accelerated the absorption of bourgeois elements into the touted revolutionary law during the Gorbachev period.

III. Soviet Civil Law as Economic Law

The overlap in this section with that on revolutionary law is obvious; however, the need to distinguish between ideology and instances of nihilism and populism, on the one hand, and the broad-based law as it pertained to

economic factors, on the other, is equally obvious. Here socialist civil law is defined as fundamentally a reaction to the excesses of industrial capitalism and peasant landlessness.

The legacy of the French Revolution is said to have been one of nationalism and liberalism, economic no less than political. The Russian Revolution negated this liberalism: instead, it spawned collectivism to counter the abuses of capitalist individualism, those abuses as presumed to have sprung from private ownership of capital. It became a priority with the 1917 winners in Russia to substitute public for private ownership of land and capital and, more importantly, find ways to make public ownership work. The linchpins of the new Bolshevik/Soviet economy (public ownership and state planning) had eventually to be reflected in the law. As Lenin lectured those responsible for drafting the Civil Code of 1922: "Everything pertaining to the economy is a matter of public and not private law."[33]

William Butler, in commenting on the "stupendous" amount of legislation enacted to regulate the Soviet economy, observed that "the total number of normative acts at all levels concerned with socialist economic relations exceeds all other normative acts together."[34] Although industrialization had been a consuming issue with nihilists in the 1920s, it was 1930s planning, not the civil codes, which spurred creation of very special apparatuses and their respective law. This was true for arbitration, planning, administration, finance, enterprise, property, and contract: the law which developed around these bestowed a uniqueness on Soviet civil law.

It was, in fact, this sizable portion of civil law legislation outside the civil law codes which fired the notion – especially, after the enactment of civil codes in the early 1960s – that civil law should best be limited to citizen relations and that the economic bundle should be incorporated into an economic law of its own. Although economic law never passed beyond the draft stage, its presence was widely felt. Many (those who wrote textbooks and those who taught in the law schools and institutes) often pretended that a separation had taken place. The 1977 Constitution was a case in point. The second chapter, entitled "The Economic System", enumerated the essentials, beginning with the article of faith that "the economic system of the USSR develops on the basis of ownership by Soviet citizens and collective and state ownership."[35] Chapter 7's "Basic Rights, Freedoms and Duties of Citizens of the USSR" was heavily loaded with economic rights. These included the right to work, as "ensured by the socialist economic system", "to rest and

33. Quoted from Harold Berman, *Justice in the U.S.S.R.*, 98.
34. William E. Butler, *Soviet Law*, 2nd ed., London 1988, 242.
35. See Soviet Constitution as printed in Donald Barry and Carol B. Barry, *Contemporary Soviet Politics: An Introduction*, Englewood Cliffs, N.J. 1991, 3rd ed., 336.

leisure", "to health protection", "to maintenance in old age" and sickness, "to housing", "to education", and more. Social democracy, while not unique with the Soviets, was given an unparalleled prominence in this document.

Highly inventive state planning law, which fostered complex enterprise relations, resonated populism in its hardy condemnation of capitalism and bourgeois law, but in real life state planning was an unmanageable bureaucracy destined to bring the Soviet economy to its knees. The economic rights, moreover, fell woefully short of the rhetoric proclaiming them. Welfare statism at present faces a bleak future everywhere;[36] it remains to be seen, however, whether its socialist components are in permanent eclipse or whether new forms of industrial policy will resuscitate notions articulated in Soviet economic law.

IV. Soviet Civil Law as Conservative Law

Conservatism and nationalism – not utopia and revolution – eventually became, along with economics, the hallmarks of Soviet civil law. Just as the Napoleonic civil code embraced conservatism and nationalism so did the civil codes of the USSR.[37] In France legislation reigned as the supreme source of law; judges were given little latitude in interpreting the code, which was presumed to be self-explanatory. The Soviets, like good Romanists, had similar worries about judges and judge-made law. That Soviet judges were poorly paid, frequently women, and easily manipulated by Party members was but another way of stating the lowliness of their profession. Arguably, the determination to relegate judges to the depths and extol the virtues of legislation constituted more than mere emulation of civil law practice: control of the sources of law ultimately spelled social control.

Legislation insured a judicial certainty impossible in judge-made, or case, law.[38] Such periodic pruning and compiling frequently occurred in legal history. The Soviet undertaking did not simply follow the tradition of a

36. See "Europeans See an End to Long-Guaranteed Social Welfare 'Rights'", *Washington Post* 4 April 1993.
37. Feldbrugge long ago emphasized the static and dynamic potential of Soviet law, suggesting that there is little in present-day Soviet legislation which embodies an articulate plan to create a fundamentally different society. The infrequent pronouncements of political leaders concerning law point in the same direction. Where law is concerned, the evidence suggests that, although it would be imprudent to talk about stagnation or petrification, marginal improvement of the *status quo* has replaced revolutionary zeal and dynamism. From "Soviet Views on Law and Social Change: A Note" in *Codification in the Communist World*, (D.D. Barry, F.J.M. Feldbrugge, and Dominik Lasok, eds.), No.19 *Law in Eastern Europe* (F.J.M. Feldbrugge, ed.), Leiden 1975, 119.
38. William E. Butler has written extensively on Soviet legislation. See the chapter on "Sources of Soviet Law" in his *Soviet Law*, 40-63. David Sugarman offers a good historical context

Justinian or Bonaparte but also that of the nineteenth-century Russian legal reformer, Michael Speranskii. Legal scholars, a standard fixture in old Rome and Romanist countries, adapted nicely to what the Soviets devised; they also proved more manageable than judges possessed with real power.

The Soviet civil law (legislation, all-union Fundamental Principles and union republic codes and constitutions) culminated a logical process that not only led to systematizing the law but employing the same law to enhance state control over a diverse citizenry and republics. The success of such controls depended on the linkage of law and the legal system with the Party and bureaucracy. Supporting this proposition is the formal verbiage of "Sources of Soviet Civil Law":

> The USSR is a federal state which consists of sovereign states – the union republics. Therefore, the sources of Soviet civil law consist both of all-union as well as republic normative acts. In their totality they constitute the entire body of Soviet civil legislation. The development and improvement of civil law in our country is directed by the Communist Party... A special place among the sources of civil law is held by the fundamental laws of the Soviet state – the Constitution of the USSR and the constitutions of the union republics. In them are secured: the leading role of socialist ownership of the means of production in the economic system of the USSR...[39]

The use of Fundamental Principles and codes by the Soviets to create a national law buttressing the power of the state approximated Bonaparte's purpose for his codes. Soviet employment of law to stabilize an ethnically-disparate empire, moreover, followed the prescription of the late eighteenth-century Habsburgs whose legal reforms for their multi-national state were embodied in the motto "one state, one code".[40] Such a program for controlling diverse peoples governed Soviet policy until the failure of the power mechanism – that combination of party, bureaucracy, military, and codes – caused the house of cards to collapse.

for "legislative positivism, the Utopian ideal of a complete legislative code" under "Law" in *The Blackwell Companion to the Enlightenment* (John W. Yolton, *et al*, eds.), Oxford 1991, 276.

39. "Soviet Civil Law", (O. Sadikov, ed. and W.B. Simons, transl.) 21 *Soviet Statutes & Decisions*, 1984 No.1, 21.
40. R. Van Caenegem, *op.cit.* 125. See also F.J.M. Feldbrugge, "'Does Soviet Law Make Sense?' Rationality and Functionality in Soviet Law: An Epilogue", *Soviet Law after Stalin*, Part III: *Soviet Institutions and the Administration of Law*, (D.D. Barry, F.J.M. Feldbrugge, G. Ginsburgs, and P.B. Maggs, eds.), No.20 (III) *Law in Eastern Europe* (F.J.M. Feldbrugge, ed.), Alphen aan den Rijn, The Netherlands, 1979), 399-400.

That the Soviets had a keen political interest in the workings of their civil law is further evidenced by the conservative role assigned to their codes and constitutions. Feldbrugge articulated this notion when he discussed the "organizational framework" which law provides for society, and added that "In this sense it appoints, defines, and fixes; it is static."[41] This seems almost a restatement of the aphorism that "with time codes make themselves; strictly speaking nobody makes them."[42]

In the same way that the French Code of 1804 drew on medieval customary and Roman law and seventeenth- and eighteenth-century ordinances, Soviet codes, as noted above, bespoke both form and substance of pre-Revolutionary models. Like the French, the codes were positivist, dispelling all illusions of a regime of citizens. For a time the Soviet codes masked Stalin's villainies, but eventually they were a conspicuous element in what Brezhnev labelled a society of "mature socialism". Either way, they had lost their charismatic and revolutionary appeal.

Although it is not unusual for centralized/bureaucratic states to exercise their police power through criminal law, we generally exempt civil law as an instrument of state power.[43] Alan Watson thought as much when he said that

> the lesson of history is that over most of the field of law, and especially private law, in most political and economic circumstances, political rulers need have no interest in determining what the rules of law are or should be [...] Rulers and their immediate underlings can be, and often have been and are, indifferent to the nature of the legal rules in operation. This simple fact is often overlooked; indeed, it is habitually denied [...] It demonstrates the general accuracy of the proposition that the government is usually unconcerned with the precise nature of most of the legal rules in operation.[44]

Lenin's belief that "all law is public", which in itself is a ringing definition of socialist law, challenges Watson and articulates one of the most unique features of Soviet civil law – its inseparability from politics.[45]

Just as Khrushchev and Brezhnev perceived civil law codes as providing cohesion for a multi-ethnic Soviet Union, lawyer Mikhail Gorbachev had the same ends in mind but altered the means. Worrying about the dire consequences of a desperately sluggish economy inherited from Brezhnev, he

41. "The Study of Soviet Law", 205.
42. As quoted by R.C. Van Caenegem, *op.cit.*, 8.
43. Cf. Hsi-Huey Liang, *The Rise of Modern Police and the European State System from Metternich to the Second World War*, Cambridge 1992.
44. Alan Watson, *Roman Law & Comparative Law*, Athens 1991, 97.
45. As quoted in John Hazard, *Communists and their Law*, 77.

undertook to use law, as specified in his blueprint for economic and general reform in 1986, to arouse a regime in crisis.[46]

When events began to overtake him, Gorbachev resorted to more dramatic measures – measures that incorporated legal reform with earlier measures to overhaul society and the economy through extensive legislation. In this enterprise – *pravovoe gosudarstvo*, or the "law-governed state" – he won endorsement from reformist leaders in the legal profession.[47] Gorbachev, however, had embarked on a process and imposed on civil law substance sharply at variance with the socialist tenets charted in the Soviet Union up to that time. A "law-governed state" – virtually identical to bourgeois German *Rechtsstaat* and Anglo-Saxon "rule of law" – had long been denounced by nihilist and statist alike.

Certainly *pravovoe gosudarstvo* was an emphatic rejection of revolutionary approaches to law: Christine Sypnowich in 1987 regarded law as a necessary pre-condition for socialism. Three years later Evgenii Smolentsev, Chairman of the Supreme Court of the USSR, wrote about the necessity of a law-governed state without even mentioning Marxism.[48] In the end Soviet civil law seemed on the verge of peeling its Marxist wrapper and rejoining the Roman, or at least bourgeois, civil law system.

The lesson here is plain: the *élan* of revolutionary law is a short-lived phenomenon; conversely, restored law inevitably is of a conservative mode, even when it melds with revolutionary elements to produce, as Berman has noted, something quite new and durable.

Conclusion

Whatever claims are made for socialist civil law on the larger stage, in the past Soviet Union or in China today, they must be tempered with the perception of law in the Soviet successor states. Although portions of the Soviet legal legacy remain embedded in the laws of the Commonwealth of Independent States, law, generally, keeps a low profile in the everyday life of Russians today. That this is the case suggests that past Soviet lawlessness, whether learned in the camps or in the "second economy", the numbing propaganda of Socialist Legality, and the best efforts of Parental Law created a nation of cynics regarding the law. We have only to consider the minimal

46. For this see *The Impact of Perestroika on Soviet Law*, (Albert J. Schmidt, ed.), No.41 *Law in Eastern Europe* (F.J.M. Feldbrugge, ed.), Dordrecht, The Netherlands 1990).
47. See *Toward the "Rule of Law" in Russia?: Political and Legal Reform in the Transition Period*, (Donald Barry, ed.), Armonk, N.Y. 1992. Note, in particular, Harold J. Berman's interpretative chapter, "The Rule of Law and the Law-Based State with Special Reference to the Soviet Union."
48. As quoted by John Kelly, *op.cit.*, 401-402.

interest in current pursuit of Party crimes, the trial of the coup leaders, and the astonishing rise of gangsterism in Russia.[49]

Present concerns about the desperate state of the economy particularly sap interest in the substance of the civil law. Although collectivist elements remain in the codes, the dynamics of capitalistic enterprise and the realities of the economy subvert them in practice. The predatory environment of the Russian market place today seems to signify a rejection of all that "parental law" and its handmaiden socialist morality were invented to achieve.[50] Still, those demonstrators who carry Stalin's portrait show a longing among some for the security blanket which parental law seemed to provide.

The lack of public concern for the law in the aftermath of Socialist Legality may be one of the great failures of the Soviet era. Its constitutions, all-union Fundamental Principles, union republic codes, diverse legislation, and feverish efforts to educate or "parent" a citizenry about law, notwithstanding, Soviet law did not take root in or foster a deep legal culture. For that reason the "rule of law" ideology may have been more a pious hope than potential reality. It was simply too little, too late.

Cataloging Soviet and post-Soviet failures does not, however, eradicate the history of the past three-quarters of a century. A Soviet Union with a novel system of law did, in fact, exist. This nominally socialist state was structured in accord with the most powerful ideological legacy of nineteenth-century industrialism. Its civil law embodied this ideology in both its verbiage and broad-based economic law, which were grafted onto a centuries-old Roman law.

Because the Soviet Union was a superpower, what it created in the way of a legal system and the manner in which that legal system helped prop up a fundamentally weak state structure is enormously important. Feldbrugge on the twenty-fifth anniversary of the Documentation Office for East European Law in 1978 observed that a functional view of law as an important element of the socio-political system of the Soviet Union may "help to explain wide trends and fundamental attitudes which pervade many aspects of legislation and law application. Illuminating the contact zone between law and society in the USSR, it may also supply invaluable information on this society."[51]

49. This lack of public interest was evident in the minimal reaction to the 1994 amnesty of both August 1991 and October 1993 defendants. See Donald D. Barry, "Amnesty under the Russian Constitution: Evolution of the Provision and its Use in February 1994", I *The Parker Journal of East European Law* No.4 1994, 437-461.
50. To date only one work has explored the relationship between equity and efficiency in the post-Soviet Russian state. See Dušan Pokorný, *Efficiency and Justice in the Industrial World: The Failure of the Soviet Experiment*, Vol.1, Armonk, N.Y. 1993.
51. F.J.M. Feldbrugge, "The Study of Soviet Law," *op.cit.*, 213.

That this socialist civil law enterprise in the USSR mirrored and articulated ideological complexities of the century ending – the grand contest between communism and capitalism – establishes it as an important chapter in legal history. That this same chapter may preview complexities of the century beginning leaves open the question of its significance. As Russians remake their civil codes, it bears watching whether Soviet civil law, as Maitland said of the forms of action, will rule [them] from its grave.[52]

52. Frederick William Maitland, *Forms of Action at Common Law*, Cambridge 1962, 2.