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RUSSIAN LAW
IN COMPARATIVE LEGAL STUDIES



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Russian law and the Russian legal system continue to seek an established place in the constellation of world legal systems. During the nineteenth and early twentieth centuries — the formative period of modern comparative law — Russia and her legal system were basically unknown to European comparatists and by default were commonly grouped together with the legal systems of continental Europe.

The dissolution of the former Soviet Union (1922—1991) and its legal system (1917—1991) and the re-emergence of the Russian State continue to offer another dimension to the debate among comparative lawyers generated by the 1917 Russian Revolutions. The Revolution of February 1917 brought an end to the Russian monarchy; the Revolution of October 1917 terminated the rule of the coalition Provisional Government that had supplanted the monarchy. Soviet law claimed, on the basis of ideological axioms, to be unique amongst all existing and precedent legal systems. While most Bolsheviks accepted that “law” was a component of the Soviet public order, whatever its ultimate fate was postulated to be, this claim to uniqueness challenged the classical classifications of legal systems or families of legal systems.

Some considered the Soviet legal system to be merely a species of the European Romano-Germanic civil law system embellished with ideological encrustations.¹ Professor Albert Ehrenzweig (1906—1974) observed that if the Soviet legal system could validly be segregated as unique in the traditional realm of private law, he would be obliged “to abandon the philosophical pattern of two and one-half millennia and the comparative concern of a thousand years”. Whatever innovations may have been wrought in public law, he believed that the “essentially civilian structure” in the law of the family, property, succession, contract, and tort remained unchanged, and he perceived only minor changes in established European patterns of criminal law and procedure.²

Presumably those partial to this perception of Soviet law will have seen nothing novel in the post-Soviet period, merely a discarding of certain Soviet “forms” of no substantive consequence and the preservation of a “legal mentality” formed during the decades of Soviet rule. Those who truly do know Soviet law will have found the 1990s and first two decades of the twenty-first century immensely challenging, for the effort to “democratize” and to “marketize” the Soviet legal legacy has been a formidable task going far beyond the rejection or replacement of “forms” and the importation of “transplants”.

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¹ See F. H. Lawson (1897—1983), cited in the preface to J. N. Hazard, W. E. Butler, and P. B. Maggs, *The Soviet Legal System* (3rd ed., 1977), p. vi.

² See Ehrenzweig’s review of J. N. Hazard (1909—1996), *Communists and Their Law* (1969), in *California Law Review*, LVIII (1970), p. 1007.

Perceptions of uniqueness in the classification of foreign legal systems depend partly upon developments within our own. Those who in the interwar or early post-1945 era attributed significance in analyzing Soviet law to the differences in economic system between East and West found that by the mid-1980s the enlarged State sector and greater commitment to social welfare in Western economies and enhanced decentralization and recourse to economic accountability in socialist economies had reduced a distinction of principle to one of degree.³ The transition instituted in 1986 by M. S. Gorbachev to a socialist market economy in the former Soviet Union both reduced and mutated the elements of distinction all the more. The accession of the Russian Federation to the Council of Europe and the World Trade Organization required yet more changes in order to approximate domestic Russian legislation to the requirements of those entities. The partial disengagement noticeable in 2013 of Russia from European institutions and reorientation towards the Far East and Southeast Asia has not altered significantly the continued pursuit in Russia of further market-oriented law reform.

In the process of comparison much depends on what one considers to be important when asserting or dismissing claims for uniqueness. All modern legal systems experience continuous change of greater or lesser moment, but few claim to be in “transition” from one developmental stage to another or even have an awareness of being at a particular developmental stage. Soviet law, however, was claimed to be in constant transition, moving towards the creation of a socialist and eventually a communist society. Russian law today purports to be in transition while dismantling the legacy of the Soviet era. In this sense Soviet and post-Soviet law have been avowedly “transitional” since February 1917.

The Soviet law codes of the New Economic Policy (NEP) era (1921—1928) were modeled upon those of Germany, France, Switzerland, Austria, and the draft Russian codes under preparation in the twilight years of the Empire. In the NEP years the Soviet authorities pursued mixed economic and legal policies containing capitalist and socialist elements, both implemented in the legislation of those times. The more considered Soviet codifications of the 1960—1970s elevated the claims of uniqueness and novelty to a more profound level. Although certain codification statutes from the Soviet era remain in force, the codes in force in the Russian Federation from the Soviet era eventually were replaced, although in some cases more than two decades were required for this to transpire.

The concept of “families of legal systems” is among the analytical categories extensively used in comparative law to differentiate legal systems, individually and collectively, from one another.⁴ Although this concept matured early in the twentieth century (in the writings of, *inter alia*, John Wigmore),⁵ it achieved popularity from the

³ René David (1906—1991) was amongst those who altered his view with respect to these criteria for classifying legal systems. Compare his *Traité élémentaire de droit civil compare* (1950), p. 224, with his *Major Legal Systems in the World Today* (3d ed., 1985), as translated and revised by J. E. C. Brierley. Russian legal scholars continue to reappraise their own post-Soviet past. Alekseev (1924—2013) was among those who believed that the Soviet legal system qualified as a “totalitarian” legal system, which constituted a distinct family within the world family of legal systems. See S. S. Alekseev, *Теория права* [Theory of Law] (1993).

⁴ See L. A. Luts, “Typologies of Modern Legal Systems of the World”, in W. E. Butler, O. V. Kresin, and Iu. S. Shemshuchenko (eds.), *Foundations of Comparative Law: Methods and Typologies* (2011), pp. 36—52.

⁵ See John Wigmore (1863—1943), *A Panorama of the World's Legal Systems* (1928; rev. ed., 1935); also see W. R. Roalfe, *John Henry Wigmore: Scholar and Reformer* (1977).



mid-twentieth century in the works of the French comparatist, René David (1906—1991). Because “families of legal systems” is an analytical concept, a kaleidoscope through which different facets of legal systems interplay and acquire different hues, a particular individual legal system may belong to two or more families of legal systems simultaneously.

The Russian science of comparative law — still greatly attracted by the concept of “families of legal systems”⁶ — is divided as to whether Russian law (and presumably other CIS legal systems) remains outside the Romano-Germanic legal family. Some comparatists consider this to be so, others do not. Many see Russian law as falling within the category of “transitional” legal systems whose ultimate destination, for comparative law classification purposes, remains as undetermined as it is uncharted.⁷ General western studies of comparative law have not decided what to do with Russia. Zweigert and Kötz deleted their chapter on socialist legal systems from recent editions. Some recognize that Russia and other CIS countries may become “hybrid” legal systems.⁸ Glenn saw “force” as the overriding characteristic of Soviet law and gave but the most cursory attention to Russia at all.⁹

One may ask why jurists in post-Soviet legal systems place such emphasis upon the classification of national legal systems into legal families. The answer lies in their very conception of law as one of the social sciences. One purpose of the scientific method is to isolate, describe, and categorize living and non-living things according to their generic characteristics, determine what is similar and what differs, why, and what follows from such an analysis. Law is deemed to be no exception; as a phenomenon, it should be subject to the same standards of classification as any others. Thus commences the challenge.¹⁰

A number of classifications exist, each of which emphasizes certain features of Russian law, legal history, and legal experience:¹¹

⁶ For recent examples, see V. E. Chirkin, *Основы сравнительного правоведения* [Foundations of Comparative Law] (2014); V. I. Vlasov, G. B. Vlasova, and S. V. Denisenko, *Сравнительное правоведение* [Comparative Law] (2014); M. V. Zakharova, *Сравнительное правоведение* [Comparative Jurisprudence] (Moscow, 2016).

⁷ See the Uzbek jurist, A. Saidov, *Comparative Law*, transl. W. E. Butler (2003); on Russian writings, see Iu. A. Tikhomirov, *Курс сравнительного правоведения* [Course of Comparative Law] (1996); M. N. Marchenko, *Сравнительное правоведение* [Comparative Law] (2d ed.; 2011; reprinted annually between 2013 and 2018); id., *Правовые системы мира* [Legal Systems of the World] (2d ed.; 2008; reprinted 2009 and 2016).

⁸ P. de Cruz, *Comparative Law in a Changing World* (3d ed., 2007), p. 193.

⁹ H. Patrick Glenn (1940—2014), *Legal Traditions of the World* (5th ed., Oxford, 2014), the first edition of 2004 was collectively reviewed in *Journal of Comparative Law*, I (2006), pp. 100—176 (Russia, reviewed by W. E. Butler, pp. 142—146). Russian law students have enjoyed access to several editions of René David since 1967 in the Russian language, as well as to Zweigert and Kötz.

¹⁰ See W. E. Butler, “What Makes Socialist Legal Systems Socialist?”, *Journal of Comparative Law*, XIII (2018), pp. 1—19.

¹¹ The analysis with respect to Belarus and Ukraine would be similar. With respect to Ukraine, see W. E. Butler, “Україна на юридичній карті світу” [Ukraine on the Legal Map of the World], in O. V. Petryshyn (ed.), *Правова доктрина України* [Legal Doctrine of Ukraine] (Kharkiv, 2013), I, pp. 250—263; translated in O. V. Petryshyn (ed.), *Ukrainian Legal Doctrine* (London, 2015), I, pp. 170—190. With respect to Belarus, see A. V. Egorov, *Теоретико-методологические основания сравнительного правоведения* [Theoretical-Methodological Grounds

Russian Legal System as Socialist. Insofar as Soviet law constituted a separate and distinct family of legal systems, Russian law was an integral part of that family during the period from approximately late 1917 or early 1918 until 1991. This view was universally accepted in Soviet legal doctrine. Given that some western comparatists did not regard Soviet law as something distinct from the Romano-Germanic legal family, they would have classified Russia as part of the Romano-Germanic family.

At one time thirteen countries with a total population exceeding two billion persons would have fallen into this family of legal systems; at present, five (or six) countries remain: Vietnam, China, Cuba, Laos, and North Korea, with Ethiopia considered by many to qualify.¹² The collective population of these five States exceeds 1.6 billion persons. The fate of the other eight countries, insofar as the classification of legal systems is concerned, remains controversial. Some have joined or become associated with the European Union. Some fragmented into multi-States, and the Soviet Union itself dissolved into twelve independent States (the three Baltic countries seceded earlier). All have distanced themselves to some extent from the classical “socialist” model of legal system, but to varying extents.

Although comparatists share different views with regard to what the distinguishing indicia of a socialist legal system were/are with respect to Russia, the following would be singled out in the discussion:

(1) private ownership of the means of production leads to the exploitation of man by man and should be replaced by socialist, State, and social forms of ownership, usually achieved by the nationalization of private property and State predominance in the economy;

(2) capitalist anarchy in production and distribution relations is replaced by State economic planning and centralized distribution; five-year and one-year economic plans are issued in the form of a law;

(3) antagonistic class elements are eliminated or isolated through various means of legal discrimination (deprivation of some civil rights, class justice);

(4) the laboring masses comprise the people and those who use hired labor for their personal enrichment do not fall within the concept of the “people”;

(5) class struggle is the driving force of historical change, and class enemies may take the form of exploiters or enemies of the people;

(6) members of the working proletariat are accorded certain advantages in comparison with the peasantry and intelligentsia, at least in principle;

(7) the Communist Party played the role of vanguard in the Soviet State and enjoyed a monopoly of political power;

(8) social (that is, non-State) organizations must be under Party direction; religious organizations may be tolerated, but were not encouraged and experienced various levels of persecution;

of Comparative Jurisprudence] (Vitebsk, 2014); Egorov, Сравнительное правоведение [Comparative Jurisprudence] (Minsk, 2015).

¹² See S. G. Abebe, *The Last Post-Cold War Socialist Federation: Ethnicity, Ideology and Democracy in Ethiopia* (2014), p. 2: Ethiopia is “...fundamentally a socialist federal system based on the Stalinist notion of ‘the right to self-determination of nationalities’ and Marxist-Leninist organizational principles of the state”. Subsequent changes in Ethiopia may constitute a move away from this model.



(9) Marxism-Leninism, sometimes augmented by the writings or doctrines of other local revolutionary leaders, operated as the official State and Party ideology;

(10) drawing upon the experience of the Paris Commune in the early 1870s, the foundation of the Soviet State system is the “soviets”, or councils, which acted as agencies of State power (as distinct from agencies of State administration);

(11) the separation of powers is recognized, but not the principle of checks-and-balances;

(12) the principle of democratic centralism within the State system means that medium-level and local soviets are subordinate to superior soviets, and the principle of dual subordination means that executive committees of soviets are subordinate to their own soviet and to their superior executive committee;

(13) courts at the lowest levels are elected directly by citizens and at the higher levels by the respective soviets. The principle that judges may not be removed is not recognized in socialist legal culture;

(14) the exercise of rights and freedoms is subject to the cause of achieving socialism or communism and to the leading role of the Party;

(15) the distinction between public and private law is not recognized;

(16) unequal forms of ownership, discouragement of personal enrichment, cooperative marketing of goods; civil marriage; duty to rescue socialist property; greater emphasis given to crimes against the State and ideological crimes; discouragement or prohibition of strikes in labor relations; and many others.

Russian Legal System as Totalitarian. In the post-Soviet era some jurists have reclassified the Soviet legal system as a “totalitarian” system which was never truly “socialist” and which, in their view, belongs to a distinct family of legal systems. They would regard Russia as being within the totalitarian family.¹³ This classification has not been widely accepted in comparative law circles because it is, in effect, a classification based principally upon political characterizations of leaders (Stalin, Hitler, Pol Pot, and so on) rather than legal principles and institutions.¹⁴ Some have characterized this as an “ideological” classification. Yet others have collapsed two classifications into one and refer to the “legal system of totalitarian socialism”.¹⁵

¹³ See, for example, Alekseev, note 3 above. Baglai regarded Soviet constitutional law from 25 October 1917 through the late 1980s as “totalitarian constitutional law”. See M. V. Baglai, Конституционное право Российской Федерации [Constitutional Law of the Russian Federation] (13th ed.; 2018), p. 58.

¹⁴ The term originated in the Italian as “totalitario” and first appeared in its English language guise in the translation of Luigi Sturzo (1871—1959), *Italy and Fascismo*, transl. Barbara Barclay Carter (1926). As a political characterization it received considerable purchase in the philosophical analysis by Hannah Arendt (1906—1975), *The Origins of Totalitarianism* (New York, 1951), originally published at London as Arendt, *The Burden of Our Time* (1951). Il’in introduced the term in his work on the essence of legal consciousness when he completed his final emendations to that work ca. 1953. The term did not appear, presumably because it did not exist, in the 1919 proofs of this work. One may reasonably assume that Il’in became aware of the term as part of its cold war currency and, indeed, may have been among the first Russian jurists to include the term in his doctrinal oeuvre. See Iu. T. Lisitsa (ed.), И. А. Ильин. Сочинения в двух томах [I. A. Il’in. Works in Two Volumes] (Moscow, 1993), I, p. 107; Il’in, *On the Essence of Legal Consciousness*, ed. W. E. Butler, P. T. Grier, and V. A. Tomsinov (London, 2014).

¹⁵ See Chirkin, note 6 above, pp. 315—330.

There is a substantial political science literature on the concept of “totalitarianism” and whether this concept was relevant or useful with respect to the former Soviet Union or Hitlerite Germany. A number of western specialists on Soviet law, with support from the Ford Foundation, attempted during the 1980s to identify the distinctive “Stalinist” or “totalitarian” component of Soviet law, without a great deal of success, in both private and public law.¹⁶ The specific legal component(s) in a “totalitarian” State and its legal system could not be satisfactorily isolated and identified. In particular, it has been difficult to identify uniquely totalitarian elements of law and legal systems which cannot be otherwise described (authoritarian, dictatorial, and so on).

Although examples of “totalitarian” legal systems cited in the literature happen to be associated with a particular ideology, the presence or absence of an ideology does not appear to be decisive. The “seeds of totalitarianism” have been traced as far back to China in the years 210 to 258 bc.¹⁷

Russian Legal System as Technocratic. The observation has been and is being made in comparative-law circles that the legal systems of western countries, including Russia, are becoming increasingly “technocratic”. For these purposes “technocracy” means that normative legal acts are being drafted more in the style of “technical documentation” than in the style of “legislation”. The excessive detail means the enactments lose any link with reality, reflecting, as Lafitsky expressed the position, “the illusions of their compilers”.¹⁸ The more they are divorced from reality, the greater the reliance upon sentences and words that are meaningless.

In effect, a technocratic legal system moves away from setting out general principles of law in the texts of legislative acts and indulges in excessive legislative activity, “over-legislates”. Partly this trend results from the absence of a clear doctrine and principle determining the spheres of social life in which it is inappropriate for the State to intervene. Legal theorists devise concepts of the “perfect legal system” to which ideal legislation should correspond, but fail to indicate those domains of human existence which the State in the broadest sense of the word should refrain from regulating. In practice, legislation becomes increasingly fragmentary as it explodes in quantity and more readily reflects the interests of special groups.

The language and terminology of legislation is no longer comprehensible by the average citizen in a technocratic legal system. Judicial practice tends to follow legislative patterns, and as a result in a technocratic legal system the issues confronting the courts move away from the application of legal principles towards the application of technicalities of construction that defy sound reason.

Measured by the standard of “technocracy”, the Romano-Germanic, Common Law, and former socialist legal systems form a single family. One may conjecture about the extent to which elements of technocracy were accelerated by the introduction of national economic planning within the socialist legal tradition and continue to be reflected by the introduction of “administrative reglements” and similar normative legal acts in the post-Soviet legal systems. Technology itself doubtless furthers “technocracy” by reducing the costs of publication and dissemination of the texts of normative legal acts.

Russia is doubtless among the technocratic legal systems of the world.

¹⁶ See D. D. Barry, G. Ginsburgs, and P. B. Maggs, *Soviet Law After Stalin* (1977—79). 3 vols.

¹⁷ See V. I. Lafitsky, *Сравнительное правоведение в образах права* [Comparative Jurisprudence in the Images of Law] (2010—2011), II, p. 394.

¹⁸ *Ibid.*



Russian Legal System as "Formalist". Modern legal systems may be characterized not only by the volume of normative legal acts which they adopt, but by the way in which those acts are interpreted and applied. Comparative lawyers, legal practitioners, and socio-legal specialists have noted the extent to which post-Soviet legal systems have preserved, some would say reinforced, the "extreme formalism" as a characteristic Russian pattern of thinking about what law is and how it should be understood. The origins of this phenomenon have yet to be fully explored. Whether it originated in Soviet legal experience or existed previously and merely found a congenial context in national economic planning remains to be explored, not least in comparative studies of legal systems whose historical experience differs.

The formalist approach is embodied in Article 431 of the Civil Code of the Russian Federation, which instructs courts when interpreting contracts to use "the literal meaning of the words and expressions contained therein" by means, in the event of ambiguity, of comparing the contract provisions with other provisions and the sense of the contract as a whole. Only if that approach fails may the court take into account the purpose of the contract, including preceding negotiations, practices between the parties, customs of business turnover, and subsequent conduct of the parties. This formulation, it should be stressed, is a post-Soviet formulation, but one which departs but little from the earlier Soviet civil codes.¹⁹

The plausibility and efficacy of a Planned Economy from a legal perspective depends upon the rationality of the planning "command system" of normative legal acts implementing the Plan and disciplining the discretion of actors within the system. There can be minimal scope, if any, for human volition, lest the symmetry of Plan relations be disturbed. A literal approach to the interpretation of contracts (and of legislation and treaties) is essential. Whether the "Russian characteristic" was created by the Soviet Planned Economy or originates in earlier Russian experience requires further investigation. Whatever the answer, there is a mental set in the Russian legal system and among Russian professionals that finds reflection in the general population:

The manner in which law is interpreted is formalistic in the extreme; law in practice is expected to be equated with the letter of the law. In other words, the characteristic Russian vision of law does not allow space for interpretations that would give prominence not so much to what the law actually says, as to what its makers intended to bring about, with an appreciation that any given legal principle or stipulation should be adjusted to fit the circumstances. However, in extreme formalism, the legal space of law is restricted to the law as it is written down. It is assumed that if the law is a good law, it must be applicable to any relevant circumstances just as it is written; when the time comes to implement the law there can be no legitimate requirement for flexibility or adjustment. It follows that there is very limited provision for a judge to exercise discretion and adapt the content of the law to specific circumstances of a particular situation, as judges do in many other jurisdictions.²⁰

¹⁹ See W. E. Butler (ed. & transl.), *Civil Code of the Russian Federation* (2010), p. 146. In 2015 Article 431 was amended to provide that if the literal interpretation does not enable the content of the contract to be determined, the "true common will of the parties" is to be taken into account by eliciting all the respective circumstances. See Butler (ed. & transl.), *Civil Code of the Russian Federation* (2016), p. 246. Insofar as this formalism is a "Russian characteristic", it is nonetheless present in all the post-Soviet civil codes, having been carried over from Soviet legal experience.

²⁰ M. Kurkchyan and A. Kubal (eds.), *A Sociology of Justice in Russia* (2018), p. 268. In ca. 1999 a member of the United States Supreme Court and a senior appellate judge were sent to

In the language of socio-legal studies, this would appear to be an example of where the “law in the books” and the “law in action” coincide and the “law in the books” has an overriding impact on law in practice. Although Article 431 of the Civil Code addresses contract interpretation, it has been generally understood to extend to all interpretation, including statutory interpretation, and is an integral element of legal education in all post-Soviet law faculties.

Russian Legal System as Transitional. All modern legal systems experience legal change of greater or lesser moment, but few claim to be in “transition” from one developmental stage to another. Russian legal doctrine during the Soviet era claimed to be constantly in transition towards the creation of a socialist and, ultimately, a communist society. In the post-Soviet period, Russian law purports to be in transition while dismantling the legal norms and legacy of the Soviet era. In this sense, Russian law in the Soviet and post-Soviet periods has been avowedly “transitional” since 1917.

The question within comparative law is: “transition” from what to what, or from where to where? Modern Russia is plainly no longer part of the socialist family of legal systems. Some comparatists believe that Russia already has returned to, or always been a part of, the Romano-Germanic family of legal systems. Although Russia is a member of the Council of Europe and in the process of doing so received elements or standards of European human rights law into the Russian legal system, and likewise has modified its legislation to accommodate membership in the World Trade Organization, that “approximation” or “harmonization” of the legal systems is far from completed.²¹

Russia has never officially declared an intention to become part of the Romano-Germanic family of legal systems in the non-EU sense of the word, and it remains unclear what the threshold criteria would be to qualify for classification in that family. Whatever the criteria may be, it is not simply a matter of “reversing”, or “repealing”, or “substituting” the legal changes from the Soviet era, as some comparatists have suggested.²²

Modern post-Soviet Marxist thought in Russia, however, shares a different understanding of “transition” and believes that the transition underway has a particular destination in view: the reintroduction of capitalism, albeit in a new variant.²³

Russia in order to explain to Russian judges of all the court systems why and how in corporate cases it would be advisable for Russian courts to have regard to the interests of parties (for example, stockholders) who were not before the court but nonetheless might be affected by the outcome of litigation between the parties — an approach that would have required a modification of the principles set down in Article 431 of the Civil Code.

²¹ Both the Council of Europe and the World Trade Organization are international organizations established by treaty and subject to the law of treaties. Within their respective parameters, however, both are developing a body of law applicable to the legal relations that arise under their respective treaties. To the extent that law is formulated, articulated, and enforced by Council of Europe and WTO institutions, it is not inappropriate within the framework of comparative legal analysis to refer to the constituents of those legal rules as members of the Council of Europe or WTO family. Russian jurists and legislators have reacted negatively to decisions of the Council of Europe and of the European Court of Human Rights which, in their view, are contrary to the supremacy of the Russian Constitution and introduced measures to restrict the application of such judicial decisions since 2015.

²² See Glenn, note 9 above.

²³ These views are explored in M. N. Marchenko, Советское и постсоветское государство и право: сравнительно-правовое исследование [Soviet and Post-Soviet State and Law: Comparative-Legal Study] (2018).



Russian Legal System in the Family of Slavonic Law. Russians are among the early Slavic peoples;²⁴ the Slavs of Belarus and Ukraine figure marginally, if at all, in most discussions²⁵ in comparative law circles with respect to the existence of a Slavonic family of legal systems. A “native, pure, and distinctive Slavic legal system” never came to pass, as Wigmore observed, yet he devoted nearly 80 pages of his treatise on the world’s legal systems to those inhabited principally by Slavs.²⁶ The category of “Slavonic law”, as a term, poses some of the same conundrums that “comparative law” does. There is no country called “Slavonia” and therefore no positive law which purports to govern all peoples of Slavonic ethnic affinity or origin.

Instead we are dealing with an ethnos whose rulers formed sundry entities and allegedly gave expression in their positive-law enactments to Slavonic mores, values, traditions, folkways, and the like. Slavonic law, insofar as expressed in norms, is customary law, or is a body of values reflected in particular formulations of positive State legislation in countries where the Slavonic population is predominant, or is a sub-stratum of natural law founded on the religious principles of Christian Orthodoxy. For some comparatists the concept of a family of Slavonic legal systems falls within a larger classification of the “legal community of the Christian tradition of law”, which includes Slavonic, Romano-Germanic, Common Law, Scandinavian, and Latin American legal families. Jurists of this persuasion emphasize the Christian writings that determine the “spiritual heart”, distinctive features, and, ultimately, the fates of the major legal systems of the world. The Christian roots of individual legal enactments are traced.²⁷

Comparative research on Slavonic legal systems originated in the nineteenth century within the Eastern European countries concerned and eventually became known to western European comparatists.²⁸ The pioneer in this field was the Polish legal scholar,

²⁴ S. Plokhy, *The Origins of the Slavic Nations: Premodern Identities in Russia, Ukraine, and Belarus* (2006).

²⁵ A recent major multi-volume treatise on comparative law begins with the “legal systems of Eastern Europe” and, following introductory chapters on the history and subject-matter of comparative law, devotes chapters to the “national legal systems of the Slavonic world”: Russia, Poland, Czech Republic, Bulgaria, and Croatia. Ukraine and Belarus are given no separate treatment. See V. I. Lafitsky (ed.), *Сравнительное правоведение: национальные правовые системы* [Comparative Law: National Legal Systems] (Moscow, 2012), I, pp. 119—527. Of relevance is A. V. Seregin, *Цивилизационный феномен средневекового многообразия форм Славянских государств* [Civilization Phenomenon of the Medieval Diversity of Forms of Slavic States] (Moscow, 2017).

²⁶ J. H. Wigmore, *Panorama of the World’s Legal Systems* (Library ed., 1936), pp. 733—808. Others who singled out “Slavonic law” as a basis for classifying families of legal systems included Adhémar Esmein (1848—1913) and Adolf F. Schnitzer (1889—1989). See A. F. Schnitzer, *Vergleichende Rechtslehre* (2d ed.; 1963).

²⁷ See, for example, R. A. Papian, *Христианские корни современного права* [Christian Roots of Contemporary Law] (2002); Iu. A. Ziubakov, *Христианские основы уголовного кодекса Российской Федерации* [Christian Foundations of the Criminal Code of the Russian Federation] (2007).

²⁸ Among the western comparatists who drew attention to Slavonic law was R. M. Dareste de la Chavanne (1824—1911), who published several articles during the 1880s and collected these in *Études d’histoire de droit* (1889; 2d ed., 1908), later published in Russian as R. Dareste, *Исследования по истории права* [Studies on the History of Law] (reprint ed.; 2012). One

Wacław Aleksander Maciejowski (1793—1883), who published a four-volume history of Slavonic legislation between 1832 and 1835. The purpose of this work was to demonstrate that there existed in Europe, in addition to Roman and German law, legislation distinctive in its foundation and original in its development — Slavonic legislation.²⁹ The immediate German translation of this work made it accessible to an all-European audience.

Within the Russian Empire, Russian and Ukrainian jurists elaborated his approach. Among these was Nikolai Dmitrievich Ivanishev (1811—1874), who argued persuasively that Russian criminal legislation could only be understood against the background of Slavonic legislation generally. A national school of Slavonic law emerged which led to the conviction that medieval Russian law should be studied by means of comparing it with the law of other Slavonic peoples. Mikhail Flegontovich Vladimirkii-Budanov (1838—1916), Fedor Ivanovich Leontovich (1833—1911), Ivan Mikhailovich Sobestianskii (1856—1896), Baltazar Bogišić (1834—1908), Fedor Vasil'evich Taranovskii (1875—1936), and others became active proponents and followers of the proposition that Slavonic law should be studied comparatively and distinguished from other legal traditions.³⁰

In his Ilchester Lectures at Cambridge University in 1900, Fedor Fedorovich Zigel (1845—1921), *professor ordinarius* at Warsaw University, suggested that Slavonic law was the law of an agricultural people and, insofar as the Slavic peoples lived according to their old customs and usages preserved only by tradition, was perhaps nearer to English and American law than to the law of continental Europe. In his view the rules of Slavonic law were more independent of Roman and canon law than in Europe. The Slavs elaborated their legal rules themselves; the undoubted substantial influence of foreign ideas was confined to ideas and did not affect the legal rules themselves.³¹

The fundamental approach developed by Russian, Ukrainian, and other comparatists during the nineteenth century is mostly shared by their modern colleagues who support the idea of a family of Slavonic law and legal systems. They believe that Slavonic law is where “Christian values find their fullest embodiment”.³² The Slavs, they observe, are the

modern comparatist believes that the reception of Byzantine legal forms and norms was facilitated by the fact that “...in Byzantium itself they were drawn up under the influence of a Slavonic element”. V. N. Siniukov, *Российская правовая система: Введение в общую теорию* [Russian Legal System: Introduction to General Theory] (2d ed.; 2010), p. 106.

²⁹ W. A. Maciejowski, *Historia prawodawstw słowiańskich* (Warsaw, 1832—35; 2d ed., Warsaw, 1956—65); a German translation was published at once. See Maciejowski, *Slavische Rechtsgeschichte*, transl. from the Polish by F. J. Buss and M. Navrocki (Stuttgart, 1835—39). 4 vols. For the Russian translation, see Maciejowski, *История славянских законодательств* [History of Slavonic Legislation] (Moscow, 1958), I, p. 3, a version cited but impossible to find.

³⁰ See, generally, M. A. Damirli, “Comparative-Legal Science in Ukraine: Theoretical-Methodological Traditions”, *Journal of Comparative Law*, VIII (2013), pp. 1—44.

³¹ See F. Sigel, *Lectures on Slavonic Law* (London, 1902). On Zigel, see K. P. Krakovskii, “Zigel, Fedor Fedorovich”, in W. E. Butler and V. A. Tomsinov, *Russian Legal Biography* (2007), I, pp. 391—402.

³² Lafitsky, note 17 above, I, p. 200. Also see Mykhailo Iuriiovych Riazanov, *Слов'янське право в правовій спадщині України* [Slavic Law in the Legal Heritage of Ukraine] (Odessa, 2015). But compare D. V. Lukianov, “Religious Legal Systems: Features and Classifications”, in Butler, Kresin, and Shemshuchenko, note 4 above, pp. 304—317. Christian legal systems are classified as “canon law” systems and discussed at length in D. V. Lukianov, *Релігійні правові*



largest and probably the most ancient ethnos in Europe, today comprising about one-third of the inhabitants there. They believe that Slavonic law is developing during recent decades at the greatest rate, increasingly exerting more influence on other Christian legal families.

Specific features of Slavonic law, including, in this view, Russian and Ukrainian law, are identified as: a distinctive relationship among the State, the law, and the citizenry which emphasizes (notwithstanding historical experience to the contrary) the depersonalization of authority, a non-class and non-estate organization of society, and an unusually strong sense of collectiveness and community. Economic development, in this view, has proceeded on the basis of collective forms of economic management expressed in the peasant community, artel, agricultural cooperative, labor democracy, traditions of local self-government, and others. The individual has a special type of social status in which collectivist elements predominate in legal consciousness and a sharp line is not drawn between the individual (and individualism) and the social State.

Russian Legal System in the Romano-Germanic Family. Those comparatists who regard the Russian legal system as an integral part of the Romano-Germanic family of legal systems emphasize the influence of continental European legal traditions, values, and rules upon the development of Russian law, the existence of Russia within continental historical experience and legal development, and the numerous similarities of Russian approaches to law and legal institutions with those of continental Europe.³³ For those comparatists who perceived the “socialist legal tradition” to be a development within the Romano-Germanic legal tradition, *a fortiori* Russia continues to be a part of that tradition. Many modern Russian comparatists describe the Russian legal system as “gravitating” towards the Romano-Germanic family.

While some observe that “the legal system of Russia has no distinctions of principle” when compared with the legal systems of continental Europe, nonetheless the “Russian legal system has still not become fixed in comparison with the leading legal systems of the family of continental law”.³⁴ It is, in other words, a legal system still in transition from its socialist past to its undetermined future.

Russian Legal System as “Mixed” Legal System. There is no such thing as, and perhaps never has been, a “pure” legal system. All legal systems are “mixed” systems; the mere fact that an individual legal system is, for the purposes of classification, thrown together with others suggests an analytical “mixture”, if nothing else. The term “mixed legal system” is used variously in doctrinal writings, sometimes to refer merely to legal systems combining elements of the “civil law” and “common law” traditions; sometimes to refer to a “third family” of legal systems having overlapping civil law and common law elements; sometimes to describe other combinations of legal traditions (religious, tribal, socialist, customary, civil, common, and so on). Although the subject of “mixed” legal systems has generated a substantial literature in recent times, Russia does not

системи в сучасному світі [Religious Legal Systems in the Contemporary World] (Kharkiv, 2015), together with Islamic, Jewish, and Hindu.

³³ But for an analysis of European private law experience that distinguishes between the Eastern and Western European approaches, see E. O. Kharitonov and O. I. Kharitonova, “Classification of European Systems of Private Law”, in Butler, Kresin, and Shemshuchenko, note 4 above, pp. 255—275.

³⁴ See Vlasov, et al., note 6 above, pp. 220, 221.

figure in these writings except for the most passing mention as a “transitional” legal system.³⁵

The history of Russian law gives more than ample evidence of the multiple influences of other legal traditions throughout Russia, but not the classic juxtaposition of “civil law” and “common law” influences. If there is to be any serious trace of “common law” influence in Russia, this is a development of the period since 1991 and the outcome of individual law reform undertakings that deliberately drew upon Anglo-American legal experience or upon “common law” elements of European legal institutions and rules. Under any definition of a “mixed legal system”, Russia would constitute one of the most complex (and interesting) examples.

Implications of classifications. The classification of legal systems can have practical consequences. In international treaties and arbitration clauses one finds references to the “principal legal systems of the world” as a criterion for representation on international judicial tribunals (see Article 9, Statute of the International Court of Justice; Article 2(2), Statute of the International Tribunal for the Law of the Sea; Article 36(8), Rome Statute of the International Criminal Court) or even arbitral tribunals. On the basis of these criteria, should Russia be considered part of the Romano-Germanic legal tradition and compete with other continental European jurisdictions, or even those of Latin America and Japan, for electing individuals to an international court? Or does “principal legal systems” have reference in practice to a combination of geographical representation and status as a great or influential power?

Classifications of legal systems have been used in judicial and arbitral proceedings to influence or determine the outcome of a proceeding. It has been suggested, for example, that an alleged “gap” in Russian law might be filled from another legal system by analogy. If an analogy were drawn, should one look to other post-socialist legal systems, or to Romano-Germanic legal systems, or to “technocratic” legal systems, or to “mixed” legal systems, to the law of the Council of Europe, or others?

Teaching and Research on Russian Law

Russian law was not taught as a distinct subject in European and American law schools prior to 1917, and the same was true of Soviet law throughout the inter-war era.³⁶ The rise of Soviet legal studies as a component of legal education dates from the aftermath

³⁵ See Esin Örüçü, “What is a Mixed Legal System? Exclusion or Expansion?”, in Örüçü (ed.), *Mixed Legal Systems at New Frontiers* (2010), p. 77.

³⁶ Although lectures may have been given on Soviet law in a general course on comparative law; for example, by T. A. Taracouzio (1896—1958) at the Harvard Law School during the mid-1930s. Moreover, both Imperial Russian law and Soviet law were taught by émigré Russian legal scholars in Berlin, Harbin, Paris, Prague, Sofia, and Uppsala within Russian or other law faculties abroad. Imperial Russian law remained in force after 1917 in the Baltic States, eastern Poland, and areas controlled by the Far Eastern Railway in Manchuria until as late as 1939. See, *inter alia*, V. P. Ponomareva, “Legal Space in Harbin: The Russia Abroad”, *Journal of Comparative Law*, VIII (2013), pp. 247—263. Also see G. S. Starodubtsev, *Международно-правовая наука российской эмиграции (1918—1939)* [*International Legal Science of Russian Emigration (1918—1939)*] (2000); W. E. Butler, “Russian International Lawyers in Emigration: The First Generation”, *Journal of the History of International Law*, III (2001), pp. 235—241.



of the Second World War, when the international status of the Soviet Union changed abruptly from that of a medium power to a great power. Mention of Russian law in Anglo-American writings dated from the sixteenth century and serious research on the subject in the nineteenth century, principally in England (Baron Alexander A. Heyking (1860—1930)), France (Ernest Lehr (1835—1919)) and Germany, and developed into Soviet legal studies promptly from 1918. In the interwar era Soviet law was examined principally as the legal system of a large country whose legislation and institutions were part of the corpus of foreign law and, for some, because the Soviet Union claimed to be charting new paths by using law for social change. Those who were supportive of changes occurring in what became the Soviet Union believed the legal reforms contained much of possible interest to like-minded individuals abroad.³⁷ Governments and commercial firms needed to know the rules applicable to transnational transactions. For most language was a formidable barrier, but a small cadre of Russian *émigré* lawyers (including in England: Samuel Dobrin, Boris Elkin, Alexander Halperin, and Marc Wolff; in the United States: George C. Guins, Alexander N. Sack and Timothy A. Taracouzio; in Germany: Alexander N. Makarov; in France: Boris Mirkine-Guetzévich, Baron Boris Nolde, Al...exander Stoyanovitch, Baron Mikhail A. Taube; in Germany and Switzerland: Ivan A. Il'in) kept pre-Soviet Russian legal traditions alive through to the 1950s. The number of Anglo-American law graduates suitably trained to engage in serious comparative study or legal practice was then and remains tiny.

The principal Western research center of consequence was founded as the Institut für Ostrecht in Germany under the direction of Heinrich Freund (1885—1946) at the University of Heidelberg from 1925. The Institute published an excellent journal, *Zeitschrift für Ostrecht*, which during the first decade of its existence included many Soviet jurists among its regular contributors.

Comparative legal studies in general prior to 1939 were dominated by the belief that a principal task of the discipline was to identify and develop general or common principles of law in at least the major extant legal systems. Harmonization and unification were cherished objectives, particularly in the minds of those who sought to reconstruct the world after the devastating carnage of the First World War. To those who regarded the Soviet legal system as a variant of the Romano-Germanic civilian tradition, the Revolutions of 1917 posed no insuperable barriers to unification and harmonization of law. Insofar, however, as Soviet claims to represent a qualitatively new and higher socio-economic, political, and legal order contained substance, the foundation for harmonization and codification even in the most congenial international political climates had narrowed considerably.

Following the Second World War, that narrow base appeared to have vanished as the Cold War unfolded. On one hand, the group of States that were communist regimes in control had enlarged from the Soviet Union, Mongolian People's Republic,³⁸ Chinese Soviet Republic,³⁹ and a brief episode with the Hungarian Soviet Republic to embrace

³⁷ For the undoubted impact of the Soviet legal example on western society, see J. B. Quigley, Jr, *Soviet Legal Innovation and the Law of the Western World* (2007); P. B. Stephan, "The Impact of the Cold War on Soviet and US Law: Reconsidering the Legacy", in T. Borisova and W. B. Simons (eds.), *The Legal Dimension in Cold-War Interactions: Some Notes from the Field* (2012), pp. 149—158; the last reviewed in *Journal of Comparative Law*, VII (2012), pp. 334—341.

³⁸ See W. E. Butler, *The Mongolian Legal System* (1982).

³⁹ W. E. Butler (ed.), *The Legal System of the Chinese Soviet Republic, 1931—34* (1983).

Central and Eastern Europe, China, Vietnam, and Cuba, and arguably even portions of the Third World which had “legal systems of a socialist orientation”.⁴⁰ The ensuing intense political hostility and confrontation, although they had the lamentable result of cutting off meaningful contacts, stimulated area and disciplinary studies of the region. Comparative studies were faced not merely with a different legal model, but one that was being received, transplanted, absorbed, assimilated into countries of widely varying legal cultures, languages, revolutionary experience, values, and traditions.

During the Cold War period, Soviet legal studies in the West were mostly a part of the “know thine enemy” syndrome: to comprehend how he lived, to facilitate means of understanding and communication so as to avoid miscalculation and minimize misperception in a nuclear age, to identify and clarify opposed positions and values. Professor Harold J. Berman (1918—2007) observed in the introduction to his interpretation of Soviet law: “a legal system expresses in a most vivid and real way what a society stands for. It represents both what is preached and what is practiced”.⁴¹ Meaningful harmonization and unification of law on a worldwide scale were inconceivable under these conditions, indeed ideologically rejected by the East, and so too was the prospect of identifying or developing general principles of municipal law common to the principal legal systems of the world.

It was a period in which Soviet legal studies as a field found its own place in the cosmos of comparative law, pointing up the need to study foreign and domestic law in the larger context of the basic philosophical, historical, sociological, economic, and political premises of the existing worldview, first in order to better comprehend them and second, in order better to comprehend our own. Architects of programs in Slavonic and East European studies were quick to appreciate that some knowledge of law and legal institutions would be essential to an understanding of Soviet society and the group of states called “socialist”;⁴² most who specialized in Soviet law maintained close links to Slavonic studies as part of the infrastructure of their area of concentration.

The final four decades of Soviet law under Soviet power were followed by Western students closely and with fascination: first the processes of de-Stalinization; then the rise and decline of structures intended to further a “socialist community law of economic integration”, the postulation and then abandonment of policies aimed at eliminating law in a society building communism, the emergence of a Soviet legal profession able to pursue a long-term role for law in society, the stagnation of the economy and social system and the market-oriented measures designed to rectify the situation, and the ultimate dismantling of Soviet structures (although not necessarily of Soviet law). Access to materials improved beyond imagination, partly due to more democratic attitudes towards disclosure of normative documents, partly to the heavy demand for a knowledge of local law on the part of the foreign legal profession, and partly to the prodigious labors of Western legal specialists in translating Russian texts.⁴³ It continues to be the case that the

⁴⁰ J. N. Hazard, *Communists and Their Law* (1969).

⁴¹ H. J. Berman, *Justice in the U.S.S.R.* (rev. ed., 1963), p. 3.

⁴² The Hayter Report issued during 1968 in the United Kingdom led to Professor George Keeton (1902—1989) at University College London obtaining support for an Established Readership in Soviet Law, later renamed the Readership in Comparative Law.

⁴³ My own contributions in this respect are recorded in W. E. Butler, *International and Comparative Law: A Bibliography with Annotations and Notes of the Published Writings and Reports of William E. Butler* (2d ed., 2015).



Western law student or lawyer has more available to him in English translation concerning the Russian legal system than for any continental European jurisdiction, leaving aside mediocre computer translations.

The demise of the Soviet Union has altered in some measure the reasons commonly given for studying Soviet law, yet an improved knowledge and understanding of Russia remain as important today as was the case earlier with respect to the closed Soviet society. The ideological component of political tension and mistrust between East and West, although largely dissipated, is not entirely absent. Law remains a shared interest and a mechanism for resolving disputes between Russia and other States, and one which the Russian leadership has emphasized much more than its predecessors and the domestic and international levels. Indeed, law has an even larger role to play than in the past. As governments enlarge their domains of cooperation and foreign investors operate routinely within Russia, and Russian investors do so abroad, the need for a thorough command of legal rules and institutions is self-evident.

Although the configuration of Russian law in the larger domain of comparative law has assuredly altered, Russian law continues to offer the same scope of comparative enquiry as other European systems together with fundamentally different and challenging approaches or views for the student's consideration. Russian law is a legal system within a single State and simultaneously within a federated system of "subjects of the Russian Federation", some of which are themselves recognized as sovereign States. Russian law continues to seek its identity within a cluster or family of legal systems. Although Marxism-Leninism has been discredited as an ideology, powerful forces of varying orientations offer substitutes which would differentiate Russia from the West. The transition from a planned economy to a market economy is one which no State has previously undertaken in human history; Russian law is the principal vehicle of this transition. No less absorbing is the transition from a single-Party authoritarianism to multi-party democracy based on a rule-of-law State, political pluralism, separation of powers, and checks and balances.

One may examine the impact of Revolution upon a pre-existing legal and social order in several societies, including the English, American, and French. But Russia offers the more immediate and compelling example in two respects: a Revolution against capitalism, and a second in 1991 against the socialist authoritarianism that followed. The dynamics and effects of both are best viewed through the legal system.

The tensions between revolutionary change and the need for order, stability, and predictability are manifest in the substance of law and law reform, in the nature and role of the legal profession, in the sources of law and schemes for its codification, systematization, and dissemination, and in the functions of State and non-State organizations created to "administer" or reinforce legality. Although Russian law eschews the explicit educational role of law associated with Marxism-Leninism and the concept of "Soviet Man", it continues to be accepted that law does and should influence character and personality formation, and consequently the law-maker needs to consider how legislation will affect social behavior.

In modern times Russian law, just as Soviet law did in the past, sees itself as having more than merely "national" significance, of being more than an oasis to be frequented when seeking to develop a comprehensive theory of law. In its Soviet costume, Russian law was an historical and contemporary model for other legal systems in the socialist and Third worlds; and Soviet and post-Soviet experience of the industrial and post-industrial ages⁴⁴ contains positive and negative lessons instructive for other advanced Western

⁴⁴ J. N. Hazard, *Managing Change in the U.S.S.R.: The Politico-Legal Role of the Soviet Jurist* (1982).

legal systems. In its guise as a transitional legal system during the post-Soviet era, the Russian legal system continues to exert enormous influence by example over the other independent states of the former Soviet Union and to shape the foundations of what may become the “law of the Commonwealth of Independent States” or the law of the Eurasian economic community.⁴⁵

The legal aspects of the transition from a planned to a market economy continue to be of immense practical relevance to Western lawyers and investors throughout the CIS. Concepts of ownership, freedom of contract, intellectual property, State immunity, delict, juridical persons, and the proper distribution of legal regulation among civil, family, land, economic, environmental, and other branches of law are but some examples which contain difficult issues of reconciling the Soviet past with the Russian present and immediate future. In the domain of administrative law one encounters a range of offences and penalties which have no equivalent in Anglo/American law, whereas in the criminal law and procedure the equation of public and individual rights and the system of investigation and adjudication proceed, even in their post-Soviet form and even after substantial discussion with Western colleagues, from premises, considerations, and values quite different from Anglo/American legal systems.

Comparative issues of this magnitude and nature help us to rethink crucial social, economic, cultural, and legal questions which confront our own legal system, the reasons those issues arise, the historical foundations of our law, and the appropriate role(s) for law in society. Russian law, just as other legal systems, including the Soviet legal system, offers a convenient backdrop, an analytical screen, for approaching our own problems with a fresh and perhaps unique perspective.

For the legal practitioner these considerations take on a different dimension. We no longer speak only of commercial transactions with Russia: we speak of investment transactions under which the foreign investor operates within the Russian legal framework and Russian law is the applicable law. Most special Soviet institutions created as part of the State monopoly of foreign trade have been dismantled, but in their place arise modes of operation and thought deeply indebted to the Soviet past. The totality of the Russian legal order, including its immediate past, must be within the range of Western practitioners who offer services in or connected with Russia.

Moreover, the value of Russian legal studies, as in the case of the former Soviet Union, transcends the traditional realm of comparative law. Russian State practice in the form of foreign affairs legislation in the broadest sense contributes to the development or clarification of international law.⁴⁶ Although the ideological elements of hostility are now removed from the equation and Russia is gradually being absorbed into a vast spectrum of international engagements which previously were off limits, there is nonetheless emerging a sense of Russian statehood which will have its own impact upon the codification, reception, and application of international law. The essential components of Russian law will continue to be of fundamental importance to the education of the public international lawyer as part of his understanding of the principal legal systems of the world.⁴⁷

⁴⁵ See Siniukov, note 28 above.

⁴⁶ See Butler, *Russian Foreign Relations and Investment Law* (2006).

⁴⁷ Butler, “Comparative Approaches to International Law”, *Recueil des cours*, CXC (1985), pp. 9—89; Butler, “Comparative International Law”, in W. E. Butler and O. V. Kresin (eds.), *The Interaction of Legal Systems: Post-Soviet Approaches* (2015), pp. 297—314.



It remains to be seen how rapidly the international legal vocabulary of Marxism-Leninism will disappear from the diplomatic lexicon of the Russian Federation, for Russia is officially the “legal continuer” of the former Soviet Union and the international treaties to which it was a party. To the extent that this terminology is indebted to domestic legal institutions, it is likely to survive and affect international negotiations (for example, the foreign investment protection treaties concluded by the former Soviet Union with several Western States fail to take account of the repertoire of terms in the Russian language for various forms of “taking”). And there are nuances in Russian legal terminology which have nothing to do with the Soviet legacy but nonetheless can create awkward moments in international negotiations of a public or private nature.

The Russian international lawyer is himself a product of his municipal system of legal education, be it Soviet or post-Soviet. His concepts of law, the manner and style in which he reasons and expounds his views, his legal consciousness, are deeply indebted to his domestic legal milieu and his legal heritage. Also formed in his municipal legal context is the international lawyer’s perception of what role(s) a lawyer has in giving counsel to his employer or client.

On a larger scale, the implementation of international legal arrangements can depend upon the effectiveness of, or obstacles within, national legal systems. The 1993 Russian Constitution is truly remarkable in its approach to making customary and treaty rules of international law an integral part of the Russian legal system (Article 15[4]). But within Russia this situation is complicated by the federated structure of the Federation. Those who draft international arrangements must have regard not merely to the municipal formalities for approving international agreements but likewise to the municipal legal context in which they will operate. These are but a few of the concerns to which comparative legal studies, including Russian or CIS legal studies, can make an indispensable contribution to improving our understanding of the nature and effectiveness of international law.

Comparative Law in Russia

The study of foreign law dates back to the earliest days of formal legal education in Russia, not least because the early professors were of foreign origin and had little, if any, command of the Russian language. The Byzantine and European origins of Russian legislation were explored by Russian historians of the eighteenth century; Roman law was taught at Moscow University from its founding in 1755 and included in the teaching syllabus at the Russian Academy of Sciences from 1725 (there were only a handful of students, the offspring of foreigners in Russia). A comparison of Russian and Roman law by Aleksei Artem’evich Artemev (c. 1740—1820), based on the lectures of Philip Heinrich Dilthey (1723—1781)⁴⁸ at Moscow University, may have rightful claim to being the first printed Russian work on comparative law.⁴⁹ Russian works on Chinese law

⁴⁸ On Dilthey, see V. A. Tomsinov, “Dilthey, Philip Heinrich”, in W. E. Butler and V. A. Tomsinov (eds.), *Russian Legal Biography* (London, 2007), I, pp. 189—193.

⁴⁹ A. A. Artemev, Краткое начертание римских и российских прав с показанием купно обоим равномерно как и чиноположения оных историй [Brief Outline of Roman and Russian

were undertaken in the form of translations of Chinese legal texts.⁵⁰ Foreign legislation, especially Swedish, was studied and adapted by Peter the Great. Catherine II read Beccaria, Blackstone, and Montesquieu, among others and drew upon them when composing her celebrated *Nakaz* or Russian enactments.

Their works were translated into Russia in furtherance of Catherine's legal reforms. Mikhail Mikhailovich Speranskii (1772—1839) and his associates were well-schooled in French and German law when they prepared their draft codes under Emperor Alexander I and sufficiently attracted by the ideas of Jeremy Bentham (1748—1832) to translate his major work on codification into Russian.⁵¹

A major bibliography of Russian law published in 1891 enumerated more than 200 titles devoted to the "Comparative-Historical Method Applied to the Study of the History of Russian Law".⁵² Amongst the Russian and Ukrainian scholars who pioneered comparative legal studies were Nikolai Mikhailovich Korkunov (1853—1904),⁵³ Vasilii Ivanovich Sergeevich (1832—1910), Kronid Ivanovich Malyshev (1841—1907),⁵⁴ Nikolai Pavlovich Zagoskin (1851—1912), Maksim Maksimovich Kovalevskii (1851—1916), Sir Paul Grigor'evich Vinogradoff (1854—1925), Sergei Andreevich Muromtsev (1850—1910), Gabriel' Feliksovich Shershenevich (1863—1912), and Fedor Vasil'evich Taranovskii (1875—1936). Kovalevskii in particular produced works on the usefulness of the comparative method in studying Russian law.⁵⁵ One comparatist observed that the

Law Showing the Symmetries of Both and the Rituals of Their Histories] (1777), published by Moscow University in an octavo of 200 pages.

⁵⁰ See Aleksei Leontovich Leont'ev (1716—1786), *Китайское уложение* [Chinese Statute] (1779). 2 vols. 1200 ptd.; reviewed in *СПб. Вестник* [St. Petersburg Herald] (September 1779), IV, pp. 202—222. Also see Leont'ev, *Тайцин гурунь в Ухери коли, то есть все законы и установления китайского (а ныне манжурскаго) правительства* [Taitsin Gurun and Ukheri koli, that is, All Laws and Statutes of the Chinese (and now Manchurian) Government] (1781—1783). 3 vols. 1200 ptd. Vol. 1; 600 ptd. Vols. 2—3. Leont'ev was a councilor in the College of Foreign Affairs of the Russian Empire. Harvard and Yale Law School libraries hold both titles.

⁵¹ J. Bentham, *Разсуждение о гражданском и уголовном законоположении: С предварительным изложением начал законоположения и всеобщаго начертания полной Книги законов, и с присовкуплением опыта о влиянии времени и места относительно законов* [Discourse on Civil and Criminal Legal Provisions: With a Preliminary Account of the Principles of Legislation and General Sketch of a Complete Book of Laws, and with the Addition of Experience concerning the Influence of Time and Place Relative to Laws], transl. Mikhail Mikhailov (1805—1811). 3 vols.

⁵² N. P. Zagoskin, *Наука истории русского права* [Science of the History of Russian Law] (1891), pp. 13—34. A number of these individuals are of Ukrainian origin and justly claimed as being among the fathers of Ukrainian legal science and/or comparative legal studies. See M. Damirli, "Comparative Legal Science in Ukraine: A Historical Introduction", *Journal of Comparative Law*, VIII (2013), pp. 1—44.

⁵³ See N. M. Korkunov, *General Theory of Law*, transl. W. G. Hastings (Boston, 1909).

⁵⁴ See V. S. Ivanenko, "Kronid Malyshev and the Renaissance of Private International Law, *Jus Gentium: Journal of International Legal History*, III (2018), pp. 539—551; also see Ivanenko, "The Rising Generation of International Lawyers at St. Petersburg University: Zarembo and Spasovich", in *ibid.*, III (2018), pp. 419—435.

⁵⁵ M. M. Kovalevskii, *Историко-сравнительный метод в юриспруденции и приемы изучения русского права* [Historical-Comparative Method in Jurisprudence and Methods of Studying



comparative method had become so popular, so fashionable, that “at present in Russia there is no textbook on procedure or any branch of law which does not give its due to the spirit of the time; even a manual of practical jurisprudence, making pretensions to comprehensiveness, encumbers the innocent reader with a mass of facts compiled without any conclusion and selected from all foreign legislation possible”.⁵⁶

Sir Paul Vinogradoff, who became the Corpus Professor at Oxford University in 1903 upon resigning his Chair at Moscow University, is regarded as having based virtually all of his works upon the comparative method.⁵⁷

Ideological constraints severely limited comparative legal studies during the Soviet period. Several Soviet jurists produced interesting comparative works during the 1920s, but by the end of the decade comparative legal research was reduced either to ritualistic contrastive self-justification of Soviet law in contradistinction to “bourgeois” law or to purely descriptive, albeit often quite useful, accounts of foreign legal systems.

A more enlightened view emerged in the early 1960s. The comparative method was recognized to be useful in analyzing the Soviet legal system itself, the legislation of the fifteen union republics. Comparison also was essential to investigations of other socialist legal systems, the more so as the Council for Mutual Economic Assistance (Comecon) pursued measures requiring the harmonization or unification of law. The expanding international contacts of the former Soviet Union required a sound knowledge of foreign legal systems, including those of a “socialist orientation”. Although some Soviet legal research institutions had impressive numbers of specialists on individual branches of law in foreign countries, neither the academies of sciences nor the universities formed sectors or chairs expressly devoted to comparative law. Even in the *perestroika* era progress was slow in comparative legal studies, although the term “comparative law” gradually appeared in the designations of certain sectors of research institutes and teaching institutions.

Applied comparative law took on a life of its own in Russia and elsewhere in the CIS with the opening of offices of foreign law firms and, in due course, the opening of law offices abroad by Russian law firms. Many younger Russian lawyers have obtained law degrees from foreign universities, whether in Russia or abroad, and a few western lawyers have qualified for Russian degrees. The impact of these measures is accumulating in the form of published comparative law dissertations, translations of important foreign codes or model legislative acts, collaborative works by Russian and foreign jurists, and translations of leading foreign treatises into Russian or of important Russian works into foreign languages. The Society of Comparative Law, founded in May 2000 at Moscow, has published a yearbook of comparative law at irregular intervals. Russian law students are required to master at least one foreign language as an integral part of their legal studies, and some undertake two. Foreign language materials are expected to be an integral part of the diploma thesis which each law student must produce as a condition of

Russian Law] (1880); also see Kovalevskii, “Сравнительно-историческое правоведение и его отношение к социологии” [Comparative-Historical Jurisprudence and Its Relationship to Sociology], in Iu. S. Gambarov (ed.), Сборник по общественно-юридическим наукам [Collection on Socio-Legal Sciences] (1899). I, p. 9. Legal anthropology in the tradition of these scholars is enjoying a revival in the study of Russian law with special emphasis upon customary law. See A. I. Kovler, Антропология права [Anthropology of Law] (2002).

⁵⁶ A. Bashmakov, in Юридический вестник [Legal Herald], XXII (1882), pp. 551—552.

⁵⁷ On the jurist and a bibliography of his principal works, see “Vinogradoff, Pavel Gavrilovich”, in Butler and Tomsinov, note 31 above, I, pp 368—386.

graduation; individuals writing dissertations are required to publish in foreign legal media as a condition of supplicating for the degree. The phenomenon of globalization and its attendant awareness of the larger legal community are recognized as a driving force in Russian legal education.

Russian law, in the second decade of the third millennium, is beginning to configure its new presence in the community of world legal systems. It remains close, as before, to the continental European legal tradition, but not part of it, still detached, still uncommitted, still indebted to its twentieth-century legal heritage, still in “transition” to a destination undetermined.

Socio-Legal Research in Russia and Comparative Law

Probably everyone outside Russia who works in the field of Russian law, whether a legal scholar and/or legal practitioner, has encountered the question: “Russian (or Soviet) Law? Is there any”? When the question is not facetious, one wonders what the interlocutor has in mind: law [*jus*] or law [*lex*]. If the former, the question is a matter of jurisprudential consequence and a fair, even probing, query. If the latter, the question would betray astonishing unfamiliarity with how a legal system designed to serve a Planned Economy or a society transitioning away from a Planned Economy operates.

An awareness that a distinction should be drawn between “law in the books” and “law in action”, originally an insight of significance, has become a banal truism. In the former Soviet Union, matters were not so simple and continue to be delicate. To empirically demonstrate that the law and legal institutions may not operate in practice as it would appear to read will sometimes be understood as political failure, an explicit or implied criticism of the existing regime. On the other hand, all regimes, however democratic or authoritarian, need feedback on what in the legal system actually seems to work, what does not, and why.

Feedback has no predetermined forms and is subject to the canons of sound research: opinion surveys, informed observations, interviews, questionnaires, sampling, analysis of official and gathering of unofficial statistics, letters to the editors of mass media or specialist publications, appearances on television, video, facebook, twitter, and other sources of information or opinion, recordings or verbatim transcripts of court and arbitral proceedings, access to doctrinal writings and normative legal acts, the publishing practices of State agencies, case reports and other materials of judicial and arbitral practice, among others. The feedback may be mundane or full of insight — much turns upon the analytical qualities of those who assembled the data, the representativeness of the material, and the accuracy of the sample.

That law mattered and matters in Imperial Russia, the Soviet Union, and Post-Soviet Independent States has never been doubted by most western comparative lawyers. Puzzling perhaps is that the question is even asked: Is there (was there) Russian or Soviet law? How many other legal system on the planet, past or present, have routinely confronted that question. For most of its history Rome was hardly a democracy — does one assume there was no Roman Law? The answer may lie in a traditionally Russian sardonic sense of humor and a misperception by foreigners of this quality among Russians.⁵⁸ The “politicization” of the justice system is a concern in Russia, and indeed

⁵⁸ This tendency reaches far back into Russian (Slavic?) legal culture. Hendley noted: “A comparative assessment of the actual data suggests that Russians are no more nihilistic



elsewhere, although western specialists in Soviet law were well aware that even under the scale of terror in the Stalin era for most people, most of the time, most disputes were considered with no or limited outside interest or interference.⁵⁹

Evidence of this on the basis of direct access to the Russian population was another matter; indeed, simply impossible, and efforts by other social scientists to take steps in this direction encountered suspicion and enforcement actions on the part of Soviet authorities. From the 1960s, however, the Soviet authorities, including the Communist Party, became interested in learning about the effectiveness of rules and institutions. To this end, empirical social science research was encouraged to some extent and the results evaluated; some was classified and to this day the outcomes and reactions to the outcomes remain out of public view.

In post-Soviet Russia the equation has changed with respect to the “politicization” of the justice system. There is no longer a single ruling Party, and the “private sector” has assumed a role to such an extent that individuals of wealth, power, and influence in Russia often prefer to have their disputes settled abroad (London being a favorite venue) rather than in Russian courts. One observer has noted:

As a result of the relentless emphasis on high-profile cases in countries like Russia, a backhanded consensus has emerged that politicized justice is a cancer that, once present, will inevitably take over the organism. The belief lends credence to the popular image of Russia as lawless. Further buttressing this image is the sad reality that predicting outside intervention is impossible... Focusing on this view of Russia as lawless fails to capture the full richness of Russians’ experience of law. It leaves no room for the everyday reality... that Russians routinely negotiate resolutions to their problems with others in the shadow of the law or, when informal efforts prove futile, take their problems to the courts and have them resolved in accordance with the law.⁶⁰

It might be argued that at this level of socio-legal verification, the discipline is merely confirming what has been believed about the Soviet and post-Soviet legal system for nearly nine decades, the proverbial “low-hanging fruit” of comparative legal analysis. Evidence of a legal system operating more or less routinely in most cases is news only to those whose ideological proclivities inclined them to suppose the opposite. Once that threshold is crossed, research into the actual operation of legal institutions becomes more detailed and interesting — and possibly sensitive insofar as such research demonstrates maladministration, misconceptualization of the system, inherent institutional shortcomings,

when it comes to law than are others”. See K. Hendley, “Who Are the Legal Nihilists in Russia?”, *Post-Soviet Affairs*, XXVIII (2012), pp. 149—186. But they are more “formalist”, which may contribute to an exaggerated impression of nihilism when formalism breaks down.

⁵⁹ This view was sustained through studies of Soviet case reports, interviews with Russian emigrés, and similar efforts to collect empirical material on the Soviet administration of justice under the most challenging conditions. See, for example, H. J. Berman (ed. & transl.), *Soviet Law in Action: The Recollected Cases of a Soviet Lawyer* (1951); a mimeographed edition, published two years later by Harvard University Press. Another specialist observed: “Then, as now, most cases had little political resonance, and hence, even during the worst of the Stalinist purges, law retained its relevance for mundane cases”. See R. Sharlet, “Stalinism and Soviet Legal Culture”, in R. C. Tucker (ed.), *Stalinism: Essays in Historical Interpretation* (1977), pp. 155—179.

⁶⁰ K. Hendley, *Everyday Law in Russia* (2016), pp. 3—4: “...official interference is very much the exception in ordinary cases” (p. 10).

bureaucratic incompetence, personnel failures, disenchantment with particular legal rules or institutions, and the like.

It remains the reality, moreover, that a considerable portion of socio-legal research is conducted by sociologists who have no knowledge of legislation or of legal practice; what seems, for example, to them to be a clever circumvention of the law may be nothing more than a routine professional response to legislative drafting and client interest. Neither corrupt nor close to the margin of illegality, it may be innovative, imaginative, and responsive to client interests. Similarly, some Russians have become so inured to what one observer called the “negative myth of the rule of law” that they are skeptical when empirical evidence suggests a positive impression of the quality of the justice system.⁶¹

The challenges for socio-legal studies, and their integration with comparative law in Russia and abroad, will intensify as the Russian social system becomes more amenable to this type of legal research.

⁶¹ M. Kurkchian, “The Illegitimacy of Law in Post-Soviet Societies”, in D. Galligan and M. Kurkchian, *Law and Informal Practices: The Post-Communist Experience* (2003), pp. 24—47.