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SOVIET AND POST-SOVIET LAW: FAILED TRANSITION FROM SOCIALIST LEGALITY TO RULE OF LAW

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The question of what is to be considered as legal and antilegal is one of the central questions of legal philosophy. However, its relevance is not restricted to philosophical reasoning only—the dichotomy of legal/antilegal leads to a wide range of discussions in legal science, especially in the field of constitutional law. Political science is involved in these discussions too, since law can be instrumentalized as a means of carrying out political will. The content of this will can be evaluated as to its compliance with certain ethical principles. In this perspective, one can as well examine whether legal norms issued by holders of political power comply with such principles.

Debates about "legal and antilegal" often concern legal validity of normative orders. Norms and other elements of these orders, although formally adopted according to established procedures, can sometimes go astray with ethical standards. If one can evaluate compliance of individual legal norms with ethics, this can also be made with entire normative orders. With this, one can ask whether the regulatory systems of wicked political regimes can be called legal. Can be considered as legal the norms that are issued by such regimes which violate generally accepted ethical standards and these violations are conducted at least in part through regulatory mechanisms of the law.

Historically, there have been two opposing approaches in philosophy of law, along with intermediate versions orientated at reconciling of extremities of these approaches. On the one hand, it is legal positivism. Its position can be illustrated by Hans Kelsen's famous words that positive law can have any content whatsoever. On the other hand, there are natural-law approaches. Their logic can be expressed by Cicero's words that unjust laws do not create law. This discussion is nowadays focused on criteria of correctness of legal regulatory systems. These criteria are partly summed in such standards as *Rechtsstaat* or rule of law. These standards in legal theory are sometimes contrasted with the requirement of strict compliance with the law (the principle of legality).

This discussion has also become the subject matter of this issue. The issue deals with the processes of transformation of political regimes and legal regulation in the post-Soviet space (the former Soviet Union) and especially in the two largest post-Soviet states, Russia, and Ukraine. These and other states studied by the authors (Georgia,

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Armenia, Moldova, etc.) have different political regimes, vectors of geopolitical development and ideological orientations. Nonetheless, legal systems of these states can be described as: "the failed transition from socialist legality to rule of law", which is the title of this entire IPJ issue.

Almost all post-Soviet states issued constitutional acts in which enshrined the rule of law standards. Initially, these standards were accepted in the meaning they have in Western legal discourse. However, three decades after the beginning of Perestroika, it cannot be asserted that rule of law has been implemented in the post-Soviet states.[1] As to certain countries one can even question whether their legal development is still orientated to these standards or whether, on the contrary, this development goes backwards to the conceptual schemes and institutional practices that have been established in the imperial and Soviet history.

In the post-Soviet theory and philosophy of law, the Soviet period is often perceived as a period of lawlessness. In the years of Perestroika, liberation from its legacy was seen as the starting point for reforms. With this, the Soviet legal tradition was a kind of alter ego to be rejected for the sake of rule of law. The reality, however, seems more complicated. It is now clear that the post-Soviet republics have failed to become liberal democracies and implement rule of law standards. Moreover, since the 2000s, many states have questioned this path of development, citing their specific historical path, difficult geopolitical situation, and the general distrust toward Western legal values.

Reception of liberal legal values, doctrines and institutions such as dignity and human rights, constitutional review, judicial independence and recognition of these values as having binding force in the law have yielded unexpected results. In a number of post-Soviet countries, the idea of human dignity was utilized, in its religious-conservative interpretation, for restricting fundamental rights; constitutional control became a tool for rejection of international obligations and decisions of international courts; the ideas of rule of law were instrumentalized by those who want to ignore explicit legal provisions and to protect informal interests of political and economic actors. These problems cannot be explained solely by a negative influence of the Soviet past. Many of them are in one way or another related to the peculiarities of the post-Soviet legal reality itself.

Having rejected socialist legality in favor of rule of law, post-Soviet law has not lost its links with Soviet law. It has not undergone any substantive changes in legal thinking, institutional practices, or legal culture. This post-Soviet law still hangs on the basic principle of Soviet law—the primacy of politics over the law. This principle means that any legal principle, norm, or procedure can be set aside if political expediency requires so.

This situation was critically analyzed by the authors of this issue. They attempted to clarify the ways in which Western legal values (human rights, democracy, rule of law, constitutionalism, etc.) have been adopted in the post-Soviet legal systems. The first section examines the particularities of thinking about law in the Russian Empire and the

[1] For a number of reasons, the Baltic states are not considered here as "post-Soviet states".

Soviet Union. The second section of the issue deals with protection of rights and freedoms, while constitutionalisation of political power was examined by the authors of the third section.

In his article, **Will Pomeranz** examines the implementation of the principles of rule of law in Russian law. The author argues that failure of this implementation is due to the fact that Russian legal culture prioritizes the formal legal means for political action. With this Rechtsstaat and rule of law become law-based state and rule by law. At the same time, the principle of separation of powers and other elements of the Western standards are put on the back burners. Although this principle is formally declared to be among the foundations of constitutional order of all these states. In the opinion of Professor Pomeranz, this development can be explained by the principle of state unity, which is central to the political systems of the region.

Natalia Varlamova also believes that many problems are rooted in the Soviet past. Her view on this development is more optimistic. She admits that the period of socialism in Russia and the countries of Central and Eastern Europe was a dead end in the development of legal theory and practice. But this period was not a futile journey either. In the course of this development, the law was enriched by new social experience and demonstrated its social necessity and sustainability even in those societies where rule of law was never implemented in practice. Professor Varlamova refers to several conceptions of leading Soviet legal theorists to substantiate her thesis. These conceptions have much in common with conceptions of scholars from other parts of the world. In author's opinion, this demonstrates universality and enduring value of the underlying legal concepts, principles, notions, and constructs. They have found their partial implementation also in Soviet law.

The paper of **Elena Timoshina** and **Svetlana Volkova** is devoted to the legacy of Professor Lev S. Yavich. The authors show how this Soviet legal scholar managed to continue some of the theoretical and legal traditions of the school of Leo Petrazycki. Despite the ideological framework, Professor Yavich continued to develop the idea of autonomy in law and to defend the thesis that state is first of all a legal phenomenon. The authors stress that this approach was typical for the school created by Leon Petrazycki. Such a perspective allows to trace certain traditions of the St. Petersburg school of legal philosophy in the works of Professor Yavich. Basing on this perspective, the authors also draw conclusion about continuity of these traditions in the post-Soviet legal research: in theories of a number of the post-Soviet thinkers. These conclusions seem to confirm that one could write and think about rule of law also in Soviet times, although in a camouflaged form, acceptable from the perspective of the dominant ideology. This thinking was also possible in post-Soviet Russia, as attested by the conception of Professor Vladik S. Nersesyants.

The functions of Soviet law and their relationship to the fundamental elements of legal thinking were examined by **Anna Lukina**. She focuses her attention on the educational and disciplinary functions attributed to Soviet law in the system of Soviet ideology. The purpose of these functions was to instrumentalize the law for formation of a new type of personality—a Soviet person. This type of personality had to possess certain

character traits imposed by the law. This use of law was difficult to reconcile with the liberal standards of the Western legal order, where, on the contrary, the law was designed to protect the sphere of individual freedom and self-determination of individuality.

Dmitry Gorin proposes a philosophical overview to show how law, political power and faith are intermingled in the transformation of Russian society. He points out to certain tendencies in Russian culture which favor justification of political power through its sacralization. In Professor Gorin's account, this link between the political and the religious discourses sheds light on the discussions about traditional values. Furthermore, this sacralization of the politics can explain the distain to the key component of the liberal legal order. Human rights and civil freedoms are grown out of the rationalism of the Modernity and are hard to reconcile with religious mysticism. At the same time, the demand for protection of rights and freedoms, control of civil society over the state, transparency and sustainability of legal procedures is widening in the Russian society. In author's opinion, this keeps open a window of opportunities for further socio-political development of Russia.

Mikhail Antonov scrutinizes the development of Soviet and post-Soviet law in the context of the confrontation of positivism and non-positivism. He draws attention to the fact that in authoritarian regimes political actors often seek to control legal system and use its institutions to implement their ideological objectives. In countries where judicial independence is not guaranteed, the principle of legality can help to bridle these aspirations. This principle of legality is easily combined with legal positivism, while non-positivist approaches can encourage decisionism. From this point of view, critique of legal positivism in authoritarian regimes can hide the intention of these political actors to get rid of legal constraints and to control interpretation and enforcement of law by means of ideology.

In his polemical article, **Andrey Polyakov** expresses his partial disagreement with Mikhail Antonov's theses. From the perspective of his communicative theory of law, the author argues that there must be a necessary link between values and ideas. This connection is always present in legal philosophy because law is the mean for realization of values in social and political life. Denial of this self-evident connection, according to Professor Polyakov, indicates at unwillingness to disclose the real value choice hidden behind ideas about law. Positivist methodology is unable, in the author's conviction, to restrain decisionism for a few reasons, which are explored in the article. Professor Polyakov thinks that his communicative theory of law can be helpful to defend the law from political intrusions. This theory assumes that human behavior is rational and is orientated at maximization of one's welfare. Through the lenses of the fundamental principle of mutual recognition, one can arrive at an adequate explanation of human rights and freedoms.

Yuri Permyakov, in his paper, describes how Soviet lawyers in the years of Perestroika got their first experience of working with the Western principles of protection of rights and freedoms, after these were positivized in the constitutional law, and how the lawyers could apply these principles in courts and administrative procedures in these years. Professor Permyakov's personal experience, along with his observation of the

changes taking place at that time in Russian society, leads him to conclude that these principles and the norms based on them had crucial importance for legal development. For the first time in history, it has become possible for the civil society in Russia to defend their legitimate interests through the law. Because of it, the law gained key value for defining identity of the civil society itself. The author interprets this struggle for law as confirming that civil society cannot be defined without reference to basic constitutional principles.

The same problematics, albeit from a slightly different angle, is discussed in the paper of **Sergey Belov**. He analyses the post-Soviet perception of human rights in Russia and concludes that the ideological opposition between liberal democracy and different versions of illiberal democracies is fundamental to this perception. This difference expresses itself through the divergence of discourses on human rights in their relation to state interest. In the post-Soviet public sphere, the perception of human rights follows the Soviet tradition of prioritizing collective rights over the individual ones. This understanding of human rights is reflected in law enforcement practice, including the constitutional justice. This historical continuity in legal thinking leads the domestic courts to findings that sometimes depart from the standard of protection of rights and freedoms in Western law. The difference between legal and political cultures can be revealing for understanding this situation. Such anthropological approach can indicate at ways to reduce mutual misunderstanding and tensions in international relations. Professor Belov calls for a deeper analysis of these differences and for a dialogue of different legal cultures.

Serhii Rabinovych examines the relationship between law and politics in the Ukrainian constitutional justice from the perspective of Pierre Bourdieu's sociological conception. The author suggests that constitutional justice can be seen as a specific legal market functioning in the logic of demand and offer. This logic allows to reproduce constitutional legitimacy of the acts issued by state authorities. In contrast to Western constitutional courts, which generally demonstrate the ability to maintain the position of an independent arbitrator in disputes over the constitutionality, the Ukrainian Constitutional Court often finds itself in the role of hostage in the struggle between the political elites for access and redistribution of economic resources. This leads to politicization of constitutional justice. One can notice results of this process in the motives for certain decisions. These practices negatively affect legitimacy of the Court. According to Professor Rabinovych, it is vital to improve the institutional mechanisms of selection of constitutional judges in order to promote constitutionalism.

The article by **Dmytro Vovk** and **Iuri Barabash** suggests an empirical study of the politicization of constitutional justice and constitutional law of Ukraine. The formal legal analysis and interpretation of the decisions of the Constitutional Court is enriched in the paper with the results of anonymous interviews with six retired judges of the Constitutional Court of Ukraine. The authors show that in cases in which the President of Ukraine is directly or indirectly involved, the Constitutional Court tends to side with the Head of State. The Court applies various interpretative techniques—not only literal interpretation but also broad purposive interpretation based on axiological narratives. In

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revisiting its previous positions in similar cases, the Court does not give reasons when overrules its previous decisions. It seems that the Court even does not consider it necessary to explain its reasons for overruling. This practice is incompatible the rule of law, whilst the Constitutional Court becomes an instrument of political struggle and a vehicle for justification of political decisions. The interviews conducted by the authors show that the political subordination of the court and the politicization of constitutional justice is not always the result of political pressure from the President or other political actors. As one of the interviewees noted, judges have a "political sense" that allows them to understand what kind of decision is expected from them.

Thomas Barrett addresses a similar problem, but in the context of general jurisdiction courts. In his article, he offers a political analysis of the judicial systems in Armenia, Georgia, Moldova, and Ukraine. He is skeptical about the thesis that the judiciary is totally subordinated to the executive in post-Soviet countries. Thomas Barrett shows that in the unconsolidated democracies, the judiciary gains political weight proportionally to weakening of the power vertical and proportionally to deconcentrating of political power. This does not, in the author's view, create an independent judiciary in the Western sense. This perspective, however, explains the role of courts in distribution of political and economic resources. The author contends that the judicial corporation does not seek to enforce the rule of law—its objective is to secure its own survival and protect its corporate interests.

Iya Osvetimskaya explores how the communication between the state and society is organized in Russia. She calls for symmetric communication between the state and society. Nonetheless, the forms of communication between the state and the individual in post-Soviet Russia deviate from this model. These forms are described by the author as one-sided, hierarchical or imitative. For Iya Osvetimskaya, a departure from the Soviet political and legal tradition requires a reinforced legal communication. A prerequisite for this communication must be the recognition of subjectivity of individuals and their groups in their relations with the holders of public power.

This multidimensional analysis allowed the authors of this special issue to cover a range of interrelated issues that are often discussed separately in the political and legal sciences. This interdisciplinary approach was complemented by historical research, which reveals the continuity of legal development. The issue proposes a multi-disciplinary framework that explains the interdependence of law and politics in the post-Soviet space. This perspective reveals how socio-cultural conditions can determine the development of law and politics, and their interaction.