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THE RULE OF LAW: BUT OF WHICH LAW? NATURAL AND POSITIVE LAW IN POST-COMMUNIST TRANSFORMATIONS

IGOR GRAZIN*

INTRODUCTION

In addition to other important global consequences, the collapse of Communism in Europe and the Soviet Union dissolved all principal socio-political institutions in those countries. These institutions included not only state structures, but also the dominant political party, public organizations and laws. Society reverted to its initial stage — all institutions and organizations had to be rebuilt. These countries faced the inevitable, they had to start anew; modest or gradual reforms were not feasible.

The natural law theory which underlies society's initial stage holds a long and outstanding history: from Aristotle to St. Thomas Aquinas, up to "contrat social" of Rousseau, and the natural law of Grotius. Although some very outstanding theorists¹ have made efforts to give natural law a more contemporary empirical meaning, it still largely remains within the province of academic discussions and research. The lack of proper or adequate understanding on the level of common legal knowledge was evidently demonstrated during the confirmation hearings of Justice Clarence Thomas in the United States Senate.

Although the natural law idea has prevailed in developed and advanced democratic countries, the situation in post-communist countries is principally different. In other words, while judges in the United States must adhere to certain professional skills and ethical standards in deciding questions of law, judges in the former communist countries are not bound by these stable ethical standards; nor, for the judges, do these principles even exist. With the collapse of former social organization, all principles that imple-

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EDITOR'S NOTE: Some of the sources cited in this Article are written in Russian. We have taken every effort to translate them correctly. However, because of the variances in interpreting, they may not be direct translations.

1. See LON L. FULLER, *THE PRINCIPLES OF SOCIAL ORDER* (Kenneth I. Winston ed., 1981); JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

mented philosophy and the meaning of law — codes, procedures, numerous governmental decrees, instructions and orders, decisions — have disappeared or at least lost their stability and uncontested technical applicability. As I have said elsewhere, all the principal questions of legal being — what is law and what is the Law, what is its justification and validity, what is justice and who has the right of legal judgment and many other related questions — have once again obtained their initial significance and simplicity. Institutions, organizations and man-made laws are extinct, or have become so unstable that in searching for justification all that is left is God, Man, Nature, and Society whose relationships must be rebuilt.

In spite of journalistic outcries, the collapse of communism did not result in lawless societies. Although the system of man-made positive law was shaken and destroyed, life goes on. The police still prosecute the criminals, who are punished by the judges; contracts are signed and often fulfilled; parliaments and presidents are elected. However, it is not clear which law was correct and applicable in these cases. I believe this situation provides traditional legal positivists — especially the analytical branch — with their most serious theoretical challenge in modern times. Although in many cases it is easy to prove that there were no legal sovereigns² in 1989-91, it is almost impossible to prove that there were no laws. What this means is that the lawyers must find legal sovereignty somewhere, but not in the textbooks. Thus, when we think about law and the new world order, we still have to ask ourselves, "Which law? What order?" and "What is new about them?" Although I do not know the answers to these questions, I will use the dramatic transformations in Eastern Europe and Russia to advocate the concept of natural law.

Although the idea of the supremacy of law in society is fairly complicated, it was considered antisocial and heretic from the Marxist point of view. To quote Nikita Krushchev, "Who's the Boss: we or the law? We are masters over the law, not the law over us . . ." ³ This statement is not an arrogant rhetorical statement of a plain and outspoken Soviet leader. Instead, this is a position resulting from the very core of Marxist theory: the "new type" of statehood corresponding with the socialist society.

By referring to two classical works of Marxism-Leninism,

2. John Austin formulated the basis of analytical positivistic doctrine in the following way: "Every positive law, or every law, simply and strictly so called, is set by a sovereign person or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme." JOHN AUSTIN, LECTURES ON JURISPRUDENCE 87 (Robert Campbell ed., 1875).

3. KONSTANTIN M. SIMIS, USSR: THE CORRUPT SOCIETY 39 (1982).

Marx's *Civil War in France*⁴ and Lenin's *State and Revolution*,⁵ one sees the most crucial deviations from mainstream democratic political thought of the 19th and 20th centuries. In these works, the authors outline their political beliefs based on analysis of the Paris Commune experiences⁶ and the Soviet workers' strike committees.⁷ They emphasize that the new proletarian socialist state has to "overcome" the partiality and class-restrictedness of "bourgeois principle" of separation of powers. They recite that "real democracy" can only be achieved through direct representation of workers in simple monocameral bodies unifying all three principal functions: legislative, executive, and judiciary. According to Lenin, the parliamentarian Soviets "have to work themselves, they have to follow their own laws, to check their implementation in reality and be directly responsible to the voters."⁸ Therefore, this "supreme body" obtains all of the power available in addition to a legalized opportunity to act with discretion and at its own pleasure. Consequently, supreme state power is placed in the legal position of standing above positive laws.

Because of these beliefs, it is natural to consider that the idea of a supreme binding power of law deviated from the orthodox Marxist vision of the proper and just organization of society. Indeed, almost all university textbooks discussing the general theories of the state and law in the former communist countries deal with non-Marxist and "bourgeois" theory by only briefly criticizing the idea of a state governed by law. However, these sources do not support the idea that the communist legal nihilism abolished law completely; instead, they suggest that law continued in the communist states, but functioned only within the scope of less important, routine and non-political cases. On the other hand, when a case involved major social importance, political significance, or parties of certain official political ranking, communist authorities subordinated the rule of law to their discretion and expediency.

The very existence of some law, in its normative sense, has always been theoretically inconvenient for Marxism. Hans Kelsen⁹ demonstrated that all classical authorities in Soviet theory of law interpreted the phenomenon of law in socialist society as something very exceptional, transitional, or temporary. E. B. Pashukanis wrote: "It must . . . be borne in mind that morality, law, and state are forms of bourgeois society. The fact that the proletariat may be

4. KARL MARX, *THE CIVIL WAR IN FRANCE* (1940).

5. VLADIMIR I. LENIN, *STATE AND REVOLUTION* (1943).

6. MARX, *supra* note 4, at 54-82.

7. LENIN, *supra* note 5, at 17-24, 75.

8. 8 LENIN, *POLNOE SOBRANYE SOCHINENII* 48 (1962) (in Russian).

9. HANS KELSEN, *THE COMMUNIST THEORY OF LAW* (1955).

compelled to use them by no means signifies that they can develop further in the direction of being filled with a socialist content."¹⁰ In the works of Stuchka, and even more in those of Pashukanis, economic relationships replaced law. As a direct consequence, economic management was one of the most important functions of the state. The constraints of law did not bind the state, it was merely one means of social regulation. "The state as a meta-legal fact cannot [according to Marxism] be conceived of as subjected to the law and hence not as a legal subject . . ."¹¹ As Hans Kelsen has correctly concluded, in practice, Marxism meant the extreme form of sociological relativism in legal theory combined with political pragmatism of communist ideology.¹²

With this basis of socialist theory in mind, it becomes apparent that this shift was of principle significance when the Nineteenth Conference of the Communist Party of the Soviet Union ("CPSU") reintroduced the notion of a law-governed state.¹³ As Pashukanis correctly warned six decades earlier, the supremacy of law and socialism are incompatible. Although this statement appears correct from a socialist point of view, it is not necessarily so from a formally positivistic point. The paradox here is that the principle of legality itself can be formally eliminated with positive law, as the course of Soviet constitutional development demonstrates. The latest, and last, Soviet constitution¹⁴ introduced a special clause¹⁵ that abolished not only the rest of its text, but the rest of the legislation also. Article 6 provided:

ARTICLE 6. The leading and guiding force of Soviet society and the nucleus of its political system, of all state organisation and public organisations, is the Communist Party of the Soviet Union. The CPSU exists for the people and serves the people.

The Communist Party, armed with Marxism-Leninism, determines the general perspectives of the development of society and the course of the home and foreign policy of the USSR, directs the great constructive work of the Soviet people, and imparts a planned, systematic and theoretically substantiated character to their struggle for the victory of communism.

10. *Id.* at 106 (quoting E.B. Pashukanis).

11. *Id.* at 95.

12. *Id.* at 193. The awesome reality of this doctrine has been brilliantly described in chapters 8, 9, and 10 of Volume I of ALEKSANDR I. SOLZHENITSYN, *THE GULAG ARCHIPELAGO* 1918-56 (Thomas P. Whitney trans., 1917).

13. For more details, refer to Mart Susi, *The Meaning, Genesis and Perspectives of the Concept of Law-Governed State (Pravovoe Gosudarstvo) in Recent Soviet Legal Theory* (1991) (unpublished LL.M. Thesis, University of Wisconsin (Madison)).

14. KONST. USSR (1977).

15. *Id.*, art. 6.

All party organisations shall function within the framework of the Constitution of the USSR.¹⁶

Without further details or specifications, Article 6 placed political and legal discretion above the rule of law. Thus, even the formal "legalization" of the notion of law-governed state subordinated the rule of law to the superiority of the dominant monopolistic party. Although Article 6 was formally valid,¹⁷ the question remained whether other extra-positivistic criteria of validity were met.

I. ADMINISTRATION V. LITIGATION

The term "administrative law" in the continental European legal system in its former socialist part is fairly ambiguous unlike our Anglo-American counterpart. First, administrative law means the law directly applicable to the sphere of administration. It allows administrative and managerial jurisdiction as long as the situation falls within the sphere of state regulation. This includes the relationships between the minister and the head of departments in the governmental ministry, the chief of the fire department and his fire inspector, and the governor and his chief of staff.¹⁸ In this sense, administrative law is a counterpart to constitutional (state) law that deals with the legislative rather than the executive branch of government.

Similarly, administrative law connotes another meaning. This meaning covers administrative power exercised by executive authorities over "outsiders," those who are not routinely part of state administration. It controls contact between private citizens and executive officials. This definition includes the relationships between drivers and traffic patrolman, clients and the state notary, and taxpayers and the revenue collector.

Without further elaborating on the distinctions between the two meanings of "administrative law," one can discern their common feature. In all of these situations, the relations between the two parties are based upon certain legally fixed and regulated *inequalities*. The minister has the right to demand reports from the

16. *Id.* Under such limitless rights, the "framework" loses all structure. We may only guess why the previous Soviet constitutions did not contain such a clause including Stalin's constitution of 1936. Most probably, the openly totalitarian regime did not feel any need to make its actions under such constitutional covers.

17. The Article was passed by the formally valid procedure, namely, through the formally legal and internationally recognized parliament — the Supreme Soviet of USSR.

18. This is not the case when we talk about private corporations because they are not exercising state power. In addition, their internal relations are not regulated by legal administrative means. Nonetheless, another law may be applicable, such as labor legislation.

head of the department and not vice versa. The traffic policeman may penalize the speeding driver, but the driver has no power to check the policeman.¹⁹ Within administrative law, this inequality constitutes the principal foundation of legal regulation.

Unlike administrative law, civil law is diametrically opposite. Regulating primarily the relations of property, ownership, contracts and wills, civil law assumes that the participants are legally equal and that they enter their relationships with sound and free will. Thus, the individuals or entities are responsible for their own acts. If a dispute arises, the complaining party must specifically prove the lack of free will and establish that the assumption of equality is not present. If the complaining party presents such proof, civil law may invalidate the whole transaction.²⁰ This material assumption is reflected procedurally since the plaintiff and defendant in a civil suit are not subordinated to each other, but rather hold the same rights and equal procedural standing.

However, equal standing exists between the parties only under one other condition; the parties must in fact be separate, controlling their own resources, acts, and obligations. Consequently, civil legislation and procedure conflicted with socialist theories from the very beginning. The basic feature of the socialist society in its Soviet or Soviet-influenced version is that "all means of production, all productive organizations, are state owned [or controlled]."²¹ Since "all" here really means "almost all," strictly speaking there are no "civil legal" entities or separate individual owners. Thus, no persons or entities exist upon which to apply civil law and procedure. Pashukanis clearly understood this problem when he restricted civil law to its private versions, those unremarkable, remote provinces of socialist society that were not under direct state regulation.²²

With these distinctions in mind, and from a purely legal point of view, there was something else that replaced civil law when socialism was introduced. When describing the Soviet economy, Sta-

19. However, it does not matter that in other situations, this inequality ceases to exist. The department head may sue the minister if the minister runs into the department head's car because that is a clear case of property damage, *i.e.*, a civil case.

20. The lack of free will and clear understanding invalidated certain legal actions under the Roman law. Justinian's "Institutes" elaborated on this topic specifically when dealing with the validity of wills. JUSTINIAN'S INSTITUTES 69 (Peter Birks and Grant McLeod trans., 1987). The invalidation of contracts due to their inequality was based on proof of mistake, fraud, and duress. PH. J. THOMAS, INTRODUCTION TO ROMAN LAW 83 (1986).

21. Michael Keren, *On the (Im)Possibility of Market Socialism*, in THE ROAD TO CAPITALISM: ECONOMIC TRANSFORMATION IN EASTERN EUROPE AND THE FORMER SOVIET UNION 45 (David Kennett & Marc Liberman eds., 1992) [hereinafter THE ROAD TO CAPITALISM].

22. KELSEN, *supra* note 9, at 93-94.

lin often utilized one metaphor: "Huge single factory." Although the excesses of his totalitarian version vanished after his death, the metaphor remained sound. Indeed, state-appointed managers and state officials operated the state-owned factory. In turn, the state managers were subordinate to governmental ministries and departments. Similarly, the ministries and departments were under orders and directives of the bodies in charge of planning, price setting and distribution.²³ In other words, all these relationships fell within the execution of state powers based on subordination, the sphere of regulation by administrative law. As Guy Sorman puts it, "State enterprise in the socialist world is [not an economic but] an administrative unit subordinated to the logic of administration."²⁴ Therefore, administrative law replaced civil law in the socialist regimes.²⁵

Nonetheless, it does not necessarily follow that lawlessness and voluntaristic discretion prevailed simply because administrative law governed the economy generally and industrial production specifically. Though principally different from the civil law, administrative law is nonetheless law. Likewise, merely because one is administratively subordinated, that does not mean a person lacks rights. Individuals were still protected by other laws, such as labor laws. Thus, if a minister desired to fire an incompetent subordinate, he faced the possible risk of being involved in labor litigation in which he would have to prove and defend his position under labor law. Consequently, even the province of administrative law provided certain *per se* procedural guarantees to the subordinate parties in certain circumstances. For instance, under the former Soviet administrative legal system, the advisory boards of ministries (usually made up of the department heads of the same ministries) had the right, when they disagreed with the minister, to appeal to the next level of government, the Council of Ministers.

Likewise, being subordinated in the administrative hierarchy did not by itself necessarily deprive those individuals of their principal rights. The inequality in these relationships is part of the "rule of the game" known to participants in advance. A person applying

23. See Heinz Kohler, *Soviet Central Planning*, in *THE ROAD TO CAPITALISM*, *supra* note 21, at 5-14; Larissa Popkova-Pijashcheva, *Why is the Plan Incompatible with the Market?*, in *THE ROAD TO CAPITALISM*, *supra* note 21, at 53-58 (discussing mechanics of planning and plan enforcement).

24. GUY SORMAN, *ABANDON SOCIALISM* 176 (1991) (in Russian).

25. There were other replacements as well. By rejecting civil law, one of the most important parts of private law was also automatically rejected. Therefore, property relations, initially the core of private law, fell under the regulatory means of public law. Lenin, himself a lawyer by education, put it very clearly: "We [the communists] do not recognize anything private for us *all* spheres of economy are public-legal and not private ones." LENIN, *supra* note 8, at 44.

for a position in the United States Department of Agriculture knows in advance that he or she must obey certain commands and knows the consequences of failing to do so. However, this was not the case with the Soviet-type administration in the economic sphere. Although theoretically controlled by the state, ruled by its plan-orders, and managed by nominated officials, the economic system failed to operate as designed. Consequently, loopholes endured in the initially designed mechanism. The fault lies in the control system. The plan-orders were designed to control, but they failed to function. In fact, the whole set of control mechanism was unable to function. Therefore, the "rules of the game" were somewhat obscured.

Nonetheless, the economy kept moving, although inefficiently and costly. This was due to those elements of the system which were not governed by the plan and plan fulfillment oriented legislation. Other mechanisms evolved to sustain the economy. For example, managers compensated shortcomings in supplies by strange systems of expeditors as well as semi-legal and illegal transfer of goods and equipment through "quasi" markets. John H. Litwack put it correctly: "[I]t is impossible to be a successful manager in a Soviet-type economy without continually breaking the law."²⁶ A manager could not continue production because he had not received adequate supplies of raw materials through official channels of distribution. Therefore, he asked an individual hired for this purpose to obtain the materials "directly" (not through the chain of state provided suppliers) from their producer, in exchange for some other sort of "favor" (such as a bribe). Consequently, the manager was able to keep the business going. At the same time, the manager's actions fell under the provisions of a criminal code.²⁷

We may put aside for a moment the rationality of this regulation itself. Whatever the legal rule, whether good or bad, it does not matter here. The rule operates through certain mechanisms of automation. As Ronald Dworkin put it, "Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision."²⁸

26. John M. Litwack, *Legality and Market Reform in Soviet-Type Economies*, in *THE ROAD TO CAPITALISM*, *supra* note 21, at 113. See PAUL C. ROBERTS & KAREN LAFOLLETE, *MELTDOWN: INSIDE THE SOVIET ECONOMY* 7-38 (1990) for an excellent description of managerial acrobatics required by the managers in this system.

27. Russian, Art. 153, section 2 of the criminal code. The "commercial mediation" was punished by up to 5 years of imprisonment with the confiscation of personal property.

28. RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 24 (1977).

Therefore, if individuals obey the rules, there will be no negative legal consequences. Conversely, if the rules are violated, ideally sanctions will follow. However, this is not the case in Soviet-type administrations. Because almost all managers violated the law,²⁹ particularly the criminal laws, the state could not punish all of them. If it did, the economy would have halted. Thus, even though almost all managers violated the law, the state punished only some of them. However, the state determined whom to punish not by law, but by *discretion*.³⁰ States utilized a combination of individual circumstances to determine whether a successful manager went to jail or was awarded the title of a Hero of Socialist Labour. Thus, the Soviet managers' "rules of the game" included the risks of administration discretion resulting from the state's departing from the automatic application of the law; much different from the situation facing an applicant to the United States Department of Agriculture.

II. THE SCOPE OF CIVIL LAW: WHAT WAS PRESERVED?

Even though the socialist regime was based on principles inconsistent with civil law, civil law and litigation existed in socialist societies. Not only did a civil code exist based on European and ancient Roman traditions, but civil law was taught in law schools. In addition, courts applied civil law to a wide range of cases.

First, courts applied civil law in cases involving private citizens or cooperative organizations whose property was officially separate from the state's. Second, courts applied civil law to cases arising between state-owned economic entities which were politically, macro-economically or otherwise neutral from the interests of the socialist state. Courts heard these disputes even though the state

29. This inevitability of violations is a crucial point. Mancur Olson makes an ingenious observation: "Though economists have a relatively well developed theory of why markets work, neither they nor specialists in any other discipline have any satisfactory explanation of why Soviet-type economies worked at all." Mancur Olson, *The Hidden Path to a Successful Economy, in THE EMERGENCE OF MARKET ECONOMIES IN EASTERN EUROPE* 56 (Christopher Clague & Gordon C. Rausser eds., 1992). One of the elements of explanation provides as follows:

Paradoxically, they performed as well as and survived as long as they did in part because of the many markets, legal and illegal, explicit and implicit, that they contained Though not all of the implicit and illicit transactions were socially desirable, many of them were indispensable for correcting the shortcomings in the state plans and for maintaining production in state enterprises.

Id. at 63.

30. Let us use a more familiar analogy to clarify this point. On the toll road with a speed limitation of 55 miles per hour, the traffic might move at a speed of 60-65 miles per hour (not such a rare case, is it?). This is not a rule-based decision, but the discretion of a traffic policeman whom to stop and fine and whom to let go.

was the sole owner of all significant means of production because it was physically impossible for the state to administer all this property on a daily basis. Therefore, some type of mechanism of dispute settlement was needed to handle the routine cases without direct interference from the top units of governmental administration. Thus, courts stepped in and handled these matters.

Although civil law provided the formula for this court mechanism, the court did not have the final say in dispute settlement. In cases of significant importance, or if an official felt the need to exercise his discretion, administrative means were used to overturn the legal solution. In fact, administrative means often overruled civil decisions. They included such things as ministerial orders not to sue contractors for their violations and the compensation of plaintiffs from the ministerial "reserve funds," changes in the range of "operative managerial" rights of a given enterprise or its charter, and the procedures of state arbitration (actually administrative arbitration).³¹

One of the living classics of Soviet civil law³² provides the analysis of the civil legal status of a socialist enterprise. Being an "operative administrator" of state property, the socialist enterprise possessed seemingly all the title of an owner to possess, use, and dispose of, but only within the "limits established by law."³³ Besides that, the titleholder functioned in accordance with (a) the purpose of its activity (fixed in the charter granted by the state), (b) planned tasks, and (c) the purpose of the property.³⁴ Because all these conditions were put forward in an administrative way, mainly through governmental decree (with the exception of the most general so called five year plan), administrative superiors also determined whether these conditions were met in any particular case and whether to interfere in the economic activities of an enterprise.

Despite the existence of civil law, society's success or survival depended on something else, a non-positive law. This was due to the flexibility of the legal regime. Positive law existed, but it was not posited. In other words, it was not enforced, or even enforceable. Thus, the non-positive law was the something that made rational behavior and predictions possible.³⁵

31. The system of state arbitration was "developed in part to resolve property rights disputes between state enterprises, but its scope was limited and its functions confused since it made rules, interpreted them, and enforced them." David Kennett, *The Role of Law in a Market Economy*, in *THE ROAD TO CAPITALISM*, *supra* note 21, at 104.

32. OLIMPIAD S. IOFFE & PETER B. MAGGS, *THE SOVIET ECONOMIC SYSTEM: A LEGAL ANALYSIS* (1987).

33. *Id.* at 70-71.

34. *Id.*

35. Ludwig von Mises described the economic aspect of this (un)predictability as follows: "Since under socialism economic calculation is

This is the point where natural law normally fits in. However, in socialist reality this was not so. In socialism, classical natural law was replaced by a special sort of political ideology that started to function like natural law. It may sound paradoxical, but the socialist denial and rejection of natural law was also a natural-legalistic position which resulted not in the exclusion of natural law, but instead, in a shift from good natural law to bad natural law.

III. IS IT GOOD TO IMPLEMENT BAD LAW?

Natural law, as opposed to man-made positive law, is often considered to be something fairly abstract, vague, and unwritten. Even if reduced to writing, natural law appears in forms which are not considered legal; for example, holy scriptures, scholarly treatises, and political declarations. However, although rarely, some elements of natural law may still be found in positive law texts: constitutions, preambles, introductory articles, or statutes.³⁶ However, in these documents, the rules of natural law need to be further specified and detailed before they can be applied to specific situations. In detailing natural laws, definers are faced with two options: (1) transform natural law clauses into more specific rules of positive law, or (2) directly apply the natural laws in practice without the application of the positive rules of law. Socialist legality adopted the latter option.

As previously stated, socialist states replaced natural law with communist ideology. Indeed, Lenin did not deny the role of morality. Instead, he replaced natural, normal, divine and human morality with an artificial, manmade, anti-natural pragmatism that *looked* like morality. At the Third Congress of Communist Youth Organization, Lenin declared that there is only one criterion of real morality: faithfulness to the ideas of communism and to the cause of the Communist Party. Therefore, from a legal point of view, because the "Lenin morality" was a substitute for the real roots of natural law, this quasi-morality and quasi-natural law inevitably and logically entered the positive legal texts just as natural law would have.

impossible, under socialism there can be no economic activity in our sense of the word. In small and insignificant things rational action might still persist. But, for the most part, it would no longer be possible to speak of rational production." Ludwig von Mises, *Economic Calculations in Socialism*, in *ROAD TO CAPITALISM*, *supra* note 21, at 37. In other words, rationality may exist, but it is not an economic rationality. In Mises's words, "the wheels . . . go round, but to no effect." *Id.*

36. The famous words, "[w]e hold these truths to be self-evident . . ." stood in a political declaration as well as in the document of international and constitutional legal nature also. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

We have seen an example of such a quasi-natural legal cause before, in Article 6 of the last Soviet Constitution: "Article 6. The leading and guiding force of Soviet society and the nucleus of its political system, of all state organizations and public organizations is the Communist Party of the Soviet Union." Thus, the Soviet Constitution afforded even traditional human and political rights only conditionally, if and only if individuals exercised their rights "in accordance with the aims of building communism"³⁷ and "in accordance with the interests of the people and in order to strengthen and develop the socialist system."³⁸

Therefore, to some extent, the existence and dominance of communist ideology diminished the unpredictability of administrative discretion. Soviet leaders tended to pardon violations of positive law if the offender promoted communism. For example, violations would be overlooked if the manager succeeded in fulfilling plan orders; if the law was violated by a high ranking party official (here the assumption was that although he violated the law, he was a good communist and that was much more important); or if the violation happened in the course of actions that were in general accordance with the latest propaganda campaign.

In essence, the state-controlled economy actually worked for two reasons. It worked because the state failed to control the economy completely and because the state failed to enforce the rules seriously. However, in the Summer of 1988, the situation in the Soviet Union radically changed. When promoters advanced the idea of creating a state based on positive law and its supremacy, they upset the above established balance. Although not immediately, but inevitably, the problem had to arise: What will happen if the immoral, unworkable, destructive laws in force under the communist regime are really enforced?

However, an ideological loophole initially remained. At the Nineteenth Conference of CPSU, Gorbachev did not speak about a law-governed state *per se*, but only about a *socialist* one. According to Marxist-Leninist traditions, this could mean that society would give positive law its supremacy only conditionally, if and only if, it favored the socialist state, which means in reality, favoring the communist rulers. Nonetheless, it became fairly clear that this ideological loophole would not remain for long. The anti-legalistic character of the socialist state, based on discretionary social engineering, is incompatible with the principle of legality. The co-existence of legality and the socialist state could only be a temporary, transitional one. Once Soviet society took the position to stand on

37. KONST. USSR, arts. 47, 51.

38. *Id.* art. 50.

the foundation of law, it pronounced the death sentence for socialism.

The question of what to do with incompatible Soviet law arose for clarification during the III Congress of People's Deputies in March 1990. Without going deeply into the political realities of that period and the resulting Soviet developments, two issues of legal and constitutional significance that revealed opposition to a law-governed state may be explored.

First, Soviet democrats wanted to eliminate Article 6 from the Soviet Constitution. Two years had passed since proponents proclaimed the doctrine of a socialist law-governed state. However, nothing serious had occurred with one exception. On March 26, 1989, through a relatively democratic procedure, the Congress of Peoples' Deputies was elected. After the election, the Congress and its permanent body, the Supreme Soviet, began for the first time to do what they were supposed to do—legislate. However, Article 6 on the supremacy and meta-legal position of the Communist Party held this legislative process and future implementation hostage.

When the question of establishing a mechanism for supervising the Constitution arose for the first time in Soviet history, the danger of legally implementing Article 6 and legalizing the supremacy of the CPSU became apparent. If a judiciary, established through a democratic procedure by the body who has the authority to change the constitution, existed to implement the Constitution, the Communist power would become legal through its *ex post facto* approval by the Congress of Peoples' Deputies. Second, conservative and moderately conservative communist forces wanted to change one of the traditional elements of the Soviet power structure by establishing a Soviet presidency.

These two issues³⁹ imposed some form of compromise upon the parliamentary parties involved. Democrats wanted Article 6⁴⁰ eliminated from the constitution, but opposed the institution of a presidency evidently to be held initially by Gorbachev and, later, by possibly more conservative communist politicians. Gorbachev wanted to become the president, but was opposed to the idea of constitutional acceptance of the already existing, actually multi-party

39. For a discussion of the related issue of the special political position of the Baltic States see Herbert Hausmaninger, *The Committee of Constitutional Supervision of the USSR*, 23 CORNELL INT'L L.J. 287, 312-13 (1990).

40. Although discussed in the Soviet parliament from its first session (May 1989), the first official voting on this question was carried out only in the Second Congress of People's Deputies, December 12, 1989. The inquiry was put very modestly: Whether to include the question concerning Article 6 in the agenda of the session or not. The results were 839 yeas, 1138 nays, 56 abstentions. Among the "nays" was the vote of Gorbachev. *Bulletin of the Second Congress of Peoples' Deputies* (in Russian) v. 1, Moscow, The Supreme Soviet, at 52-73.

system. Finally, a political deal was made between reformist, communists and democrats: the presidency for Article 6. To become president, Gorbachev had to give away the clause granting monopolistic power to the CPSU.

At the same time, both of these opposing parties were united by a common interest. Each wanted to create a mechanism to implement constitutional law. This interest served as the basis for political compromise in spite of the different results sought by the parties. Reformist Communists wanted to achieve the positive legalization and implementation of the communist system. Democrats wanted to use and implement the clauses of the Soviet Constitution that could lead (and actually led) to a civil society. Consequently, the apparent compromise and unity that existed on the level of positive law could not be achieved in reality because of the differences on a natural legal level.⁴¹

IV. CASES OF AMBIGUITY—NATURAL LAW

Without dealing here with what constitutes modern natural law, it can still be stated that from the formal-logical point of view and regardless of its content, the positive natural law is a hierarchical structure. In general terms, the works by John Rawls⁴² and Robert Nozick⁴³ have exhibited that iusnaturalistic premises may be developed to varying deviations from the initial starting point. The academic and political discussions provide evidence that the further natural law's content is explored, the more problematic its statements become. For example, almost everybody agrees with the idea that all men are equal, however, only a few are ready to accept that all men have the right to the same salary. Therefore, the legal processes of democratic forces in Russia and Eastern Europe, though justified by natural legal premises, need not be in compliance with natural-legalistic ideas on the more concrete level. Furthermore, laws introduced by authority established in accordance with natural law do not automatically become iusnaturally valid law. It means that positivistically uncritical acceptance of the law based on authority does not work.

For example, in the August 31, 1992, issue of "Newsweek," Russia's Prosecutor General published his account of plotters of the So-

41. Although the Third Congress of Peoples' Deputies of the USSR actually modified Article 6 and established the system of constitutional supervision, the controversy behind these steps remained sound. The excellent analysis by Herbert Hausmaninger demonstrates that the committee remained a political rather than a legal body, at least until the actual power structure of Communist Party of the Soviet Union ("CPSU") and of its leader, Gorbachev, had been broken or counter-balanced. See Hausmaninger, *supra* note 39.

42. See RAWLS, *supra* note 1.

43. See ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1977).

viet communist coup of 1991.⁴⁴ The Prosecutor General made the publication available before the plotters' trial commenced. Although Mr. Valentin Stepankov presumably represented democratic forces and leadership in Russia, disclosure of this type of material, obtained in the course of preliminary investigation, constituted the most serious breach not only of professional ethics but of the generally accepted rules of criminal procedure. Newsweek's comment here is absolutely correct: "Such disclosures in a U.S. court case could be grounds for dismissal of the charges."⁴⁵ In addition, this is very close to a violation of the laws of Russia as well. Moreover, there is another aspect of legality to this case. Although it may sound surprising, the August coup of 1991, which initially seemed to be an act of criminal behavior, did not amount to a real violation of the Soviet criminal law.⁴⁶ Thus, the plotters could easily be condemned politically but not criminally. Further, it is doubtful, although the Prosecutor General's actions were politically blameworthy, whether such actions were prohibited in these times and could be prosecuted at all. At the least, those actions could not be prosecuted without evident violations of natural legal principles of criminal procedure and legal ethics.⁴⁷

The Tax Agency of Russia provides a similar example, but hinging on a less significant violation involving the principle of non-retroactivity. In August 1992, the Agency retroactively imposed tax on income (at the rate of 32%) earned by stock exchanges on the

44. Valentin Stepankov & Yevgeny Lisov, *The Kremlin Plot*, NEWSWEEK, Aug. 31, 1992, at 38.

45. *Id.*

46. The qualification closest to the case may be found in Article 64 (a) of the Criminal Code of Russia. UK RSFSR art. 64(a) (1992). Here, it was stated that high treason may be committed in the form of "plotting aimed at seizure of power." *Id.* But it has to be kept in mind that the plotters were individuals who did not need to seize the power, because they already had it. Among them were the vice-president of the USSR, the chief of the KGB, the prime minister, and the minister of defense. Some other articles may also be taken into consideration from Chapter XII. For example, Art. 238 pertains to Military Crimes. UK RSFSR art. 238 (1992). A charge of disobedience to the commander may have been brought, keeping in mind that Gorbachev at that time was the Commander-in-Chief of the Soviet armed forces. However, this article is only applicable to the Minister of Defense who had military rank and position. Article 237 states that the articles of Chapter XII are applicable only to the individuals in a military service that excludes their application for other members of junta, the civilians. UK RSFSR art. 237 (1992). Similarly, the law could not be changed to cover the "junta's case" because of the principle *nulla poena nullum crimen sine lege*, according to which criminal legislation cannot be applied retroactively.

47. The Criminal Code of Russia in Article 184 criminalizes "[t]he disclosure of information of preliminary investigation." UK RSFSR art. 184 (1992). However, this article is not technically applicable to Mr. Stepankov's actions because the crime described involves disclosure by a person without the preliminary authorization from the prosecutor or investigator. In this case, the disclosure was made by the prosecutor himself.

sales of their permanent seats in 1991 without any adequate explanation or economic justification. Years earlier, the Ministry of Finances declared this income tax exempt if the exchanges used the money to develop the infrastructure of the exchanges themselves. As a result, those exchanges which undertook long term projects and had not spent the earnings immediately, lost about one-third of their accumulated earnings. This in turn, put them on the verge of bankruptcy.⁴⁸ This action, by positive authorities, is an illegal act from the natural legal point of view only if we accept the following premise: Legal actions do not have retroactive force when they worsen (*i.e.*, restrict, penalize, or increase damages) the position of persons subjected to them. Different than the Prosecutor General's action, from the principles of criminal law, the Tax Agency's action is more disputable. Furthermore, the actions, whether viewed as a violation of natural law through a positive law or simply an unwise administrative decision, undermined the trust that the business community had invested in the new Russian government.

Whereas these examples constitute a mixture of the different influences attributable to natural and positive law, there is one case where the natural law has almost obtained independent standing and direct application in the post-communist legal order. This is the Communist Party's case in the Constitutional Court of Russia.⁴⁹ The legal-political complications of the case itself, and the novelty of the court's own position, required the court to hear the case and to create a procedure for its own actions. One of many dramatic episodes occurred in October 1992, when the court banned the former General Secretary of the Communist party, Gorbachev, from traveling abroad because he refused to testify. This was the court's only available legal option to coerce the insulting witness because the court lacked any direct power to enforce its own decisions. Only the natural legal principle, that the court has to be respected, could justify this ban.

What came as a surprise in this case were the appeals from several Western leaders to lift the travel ban imposed upon Gorbachev. These appeals not only violated the commonly accepted norms of national and international law, but also exemplified the double standards and ethical relativism inherent in the practice of positivistic thinking. The German appeal was even more amazing because Germany had earlier demanded that Russia extradite the former DDR's Communist leader, Erich Honecker. The message was clear: Yes, *our* courts—French and German—have to be respected, but

48. Yuri Khnyckin, *Shock in the Stock Exchanges: Someone Was Caught, All Were Imposed*, COMMERSANT 1 (1992) (in Russian).

49. See Carla Thorson, *The Fate of the Communist Party in Russia*, RFE/RL Research Report, No. 37, Sept. 18, 1992, at 1.

yours—Russia—do not. To put it into perspective, imagine the public outcry that might follow if the Russian president suggested that the United States Supreme Court overrule *Roe v. Wade*! Evidently, the politicians' appeals revolved around a more significant goal—that of setting a precedent. In 1992, Gorbachev faced the possibility of participating in two more trials.⁵⁰ In the long run, such positivistic appeals served the purposes of mistrial and injustice.

As Carla Thorson noted: The Russian Constitutional Court's authority in this case rested only "on its ability to enforce its rulings and on popular perceptions of whether these rulings are just."⁵¹ This was the case for the whole philosophical-legal content of the case itself. Yeltsin's suspension and the ban on the CPSU's activities was not "based on strictly legal or constitutional procedures."⁵² At the same time, because the court did not reject or immediately enforce the claims of the parties on the basis of positive law, other considerations, including those of natural legal character, were given their power under the circumstances of the collapse of the old positive regime.

Unfortunately, some months later, in December 1992, and March 1993, the same Constitutional Court of Russia that had attempted to follow the basic natural-legal principles of due and fair procedure with regards to the Communist Party, lost its judicial authority as an institution for creating and implementing the new democratic legal order. By actively participating in the low-level daily policy making⁵³ and severely violating the procedural rules established by itself earlier,⁵⁴ the court reduced itself to an ordinary political party. Thus, as stated earlier, natural law by itself may be a guideline for democratic transformations, but without positive law support, natural law may be misused and misinterpreted under the pressures and temptations of daily political routines. Therefore, replacing totalitarian positive law with principles of natural and democratic law is only the first steep required to positivize the principles of natural law.

50. Gorbachev could be asked to testify as a witness in the trial of the military junta and face questioning as to criminal negligence. In addition, Gorbachev could face questioning regarding the illegal exportation of the Communist Party's assets.

51. Thorson, *supra* note 49, at 2.

52. *Id.*

53. As one judge in this country said, referring to the numerous interviews and speeches of the Chief Justice of the Constitutional Court of Russia, "[t]oo much publicity for a judge, you know."

54. In March, 1993, the Chief Justice of the Constitutional Court declared Yeltsin's presidential decree unconstitutional. The Judge did this before conducting any court hearings and moreover, even before he read it. See George J. Church, *Yeltsin's Big Gamble*, TIME, Mar. 29, 1993, at 20, 23; Serge Schmemmann, *Speaker in Russia Now Voicing Doubt About Yeltsin Ouster*, N.Y. TIMES, Mar. 26, 1993, at A1.

CONCLUSION

In conclusion, between the general principles of natural law and technical regulations of those relations that need authoritative guidance, or are of importance to the state, the former lose their direct significance and would lead to different legal solutions.

In the words of William Blackstone:

Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these. There are, it is true a great number of indifferent points, in which both the divine law and the natural leave a man at his own liberty; but which are found necessary for the benefit of society to be restrained within certain limits. And herein it is that human laws have their greatest force and efficacy⁵⁵

Through the technical regulations, even some parts of former "socialist"⁵⁶ legislation, those that were actually preserved and developed by the lawyers under the socialist regime, may theoretically be kept intact or, for the sake of legal stability, only slightly modified in the course of the re-establishment of a new social order based on the supremacy of law.

It has been stated repeatedly that the crucial element of the new world order (or the order in the world) is its being based on the principle of legality, on the supremacy of law. There is no reason to doubt the validity of such a statement. However, it prevails only under one condition: if, and only if, this positive legality and legislation itself is derived from some legality of a higher order. Yeltsin's decree banning the Communist Party of the Soviet Union, and taking over the highest military command might, though not necessarily, violate certain elements of the positive Soviet constitution. Nonetheless, these actions were in perfect accord with the very idea of constitutionalism. Although put in writing in an official legal document (positive law) under the higher standards of legality, the ban did not violate the principles of democratic constitutionalism. Positive law does not become valid law merely because it is

55. 1 WILLIAM BLACKSTONE, COMMENTARIES 42.

56. Strictly speaking, the rules of positive law under discussion are neither socialist nor capitalist and therefore they might not only survive but even be of some value. The right to file a civil action expires six months after the event giving rise to the cause of action occurred. This term is politically neutral and at the same time, something quite customary to a Russian lawyer. Moreover, in the "Communist Party's case," Moscow democrats referred to the Stalin signed Soviet decree of 1932 (on public associations) that permitted the "liquidation" of political parties (if they were "purposely directed toward the violent overthrow of, or change in, the constitutional order") by executive order. They argued that this Decree was formally valid when Yeltsin banned the CPSU. Thorson, *supra* note 49, at 3. Although the political circumstances had turned 180 degrees, the law issued by Stalin to prosecute his opponents evidently included a more general iusnaturalistic constitutional principle able to survive under new circumstances and to serve different purposes.

considered official, especially if what is posited officially is political discretion (like Article 6 of the former Soviet constitution) or the replacement of rules by limitless *ad hoc* administration. These examples demonstrate that superiority, in socialist societies, was placed in the hands of an uncontrolled and unbalanced authority and though done in the form of legislative act, the acts themselves failed the test of legality.

Before a country implements the rule of law, there simply must be a rule of law, not only formally, but in substance also. This simple truth is once again demonstrated by the struggle of democracy-minded lawyers in Russia and Eastern Europe.

