3

The Historical Roots of Socialist Law

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3.1 Introduction

This Chapter will explore the importance of history to socialist law. It will describe how the ultimately triumphant Leninist version of socialism valuing state centralisation drew heavily on a historically rooted imperial Russian practice of 'supervisory legality' that competed with and undermined binding judicial control of legality. This supervisory tradition – justified as a way of ensuring a centralised vertical of power for Party policy, as well as a method for efficiently entertaining and monitoring complaints from individual petitioners – enforced legality through a bureaucratic process of checking and rechecking administrative and judicial decision-making. This supervisory practice was transplanted to other socialist countries and remains influential to this day because of a continued value for centralised state power in the countries of the former socialist bloc. Current efforts at understanding legal systems and judicial reform in these countries requires understanding both the practices and institutions of this tradition of supervisory legality, as well as its internal justifications.

> The Russian czars did a great deal that was bad. They robbed and enslaved the people. But they did one thing that was good. They amassed an enormous state, all the way to Kamchatka ... We have united the state in such a way that if any part were isolated from the common socialist state, it would not only inflict harm on the latter but would be unable to exist independently and would inevitably fall under foreign subjugation.
>
> Joseph Stalin[1]

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[1] Joseph Stalin, 1937. Quoted from Ivo Banac (ed.), *The Diary of Georgi Dimitrov 1933–1949* (New Haven, CT: Yale University Press, 2003), p. 65.

In 1936, the Soviet Union adopted a constitution that would define the socialist legal model.[2] The key legal institutions mirrored those of Western European civil law systems: the Constitution described a Public Prosecutor's Office (hereafter, procuracy) alongside a Supreme Court. However, the Constitution also afforded both of these institutions broad powers of 'supervision' (*nadzor*). As this model spread to other newly socialist countries, scholars in the socialist bloc described these 'supervisory' powers over administrative and judicial decision-making as a socialist improvement on 'bourgeois' separation of powers principles.[3] Western scholars followed suit, tying supervision to socialist political and economic ideology.[4] Despite the end of the Cold War and the rise of capitalism, however, 'supervision' still remains important in constitutional text and practice across many of the former socialist bloc countries.[5]

[2] John Hazard, 'Soviet Model for Marxian Socialist Constitutions' (1975) 60 *Cornell Law Review* 985–1004 (discussing whether the 1936 Constitution has become a 'model to which Marxist-oriented statesmen must adhere on pain of loss of membership in the socialist commonwealth'.).

[3] George Ginsburgs, 'The Soviet Procuracy and Forty Years of Socialist Legality' (1959) 18 *American Slavic and East European Review* 34, 34 (describing the how Soviet jurists saw supervision 'as a vast improvement over Western practice'.). More recent scholars still assume that these types of legal powers were socialist in nature. Rafal Manko, 'Is the Socialist Legal Tradition "Dead and Buried"? The Continuity of Certain Elements of Socialist Legal Culture in Polish Civil Procedure', in Thomas Wilhelmsson, Elina Paunio, Annika Pohjolainen and Helsingin Yliopisto (eds.), in *Private Law and the Many Cultures of Europe* (Alphen aan den Rijn: Kluwer Law International, 2007), pp. 94–98 (discussing legacies of supervisory powers in Polish civil procedure as socialist in nature).

[4] Leon Boim, 'Party-State Control in the Soviet Union', in Leon Boim, Glenn Morgan and Aleksander Rudzinski (eds.), *Legal Controls in the Soviet Union* (Leyden: A. W. Sijthoff, 1966), p. 11 (explaining this form of supervisory control as necessary given 'the nationalisation of the means of production and the planned economy of the communist state'.). Others saw supervision as a feature of an 'absolutist' government which does not 'utilise the constitutional machinery of the West for challenging the legality of administrative enactments'. Glenn Morgan, 'The "Protest" of the Soviet Procuracy – A Means of Challenging Subordinate Legislation' (1960) 9 *American Journal of Comparative Law* 499, 507. Hiroshi Oda, 'The Procuracy and the Regular Courts as Enforcers of the Constitutional Rule of Law: The Experience of East Asian States' (1986–1987) 61 *Tulane Law Review* 1339–1363.

[5] William Partlett and Eric C. Ip, 'Is Socialist Law Really Dead?' (2016) 48 *New York University Journal of International Law and Politics* 463 (describing how key institutions from the Russian tradition continue to shape institutional discourse in China). Russia's post-communist constitution from 1993 placed the Procuracy and the Courts in a chapter entitled 'Judicial Power'. See also the European Court of Human Rights' criticism of supervision in the Russian court system.

A historical perspective helps us better understand the persistence of this critical aspect of socialist law.[6] History demonstrates that supervision in the 1936 Soviet Constitution was not an innovation tied to socialist ideology. Instead, supervision was a socialist rebranding of a deep-rooted imperial Russian practice for the political review of the legality of administrative and judicial decision-making.[7] During the imperial Russian period, this practice had been justified on two grounds. First, and most importantly, supervision was seen as an effective method for modernising the Russian Empire, by centralising and unifying legal decisions. Second, it was justified as a statist tool for entertaining (and monitoring) the large number of informal petitions and complaints from individuals.[8] Stalin's statist version of socialism drew heavily on these justifications and supervisory practices. And these justifications remain present in the state capitalist systems today in many former socialist bloc countries.

This story of continuity begins with the 1917 Russian revolution. In the years after the Russian Revolution, one of the most pressing challenges for the builders of socialist law was the form of the socialist legal system.[9] A critical question emerged: What role would the state and imperial-era legal concepts and institutions (such as supervision) play in socialist law? Would these concepts continue or disappear?

The 'utopians', drawing on an experimental and decentralised conception of socialism (closer to socialism's Western European roots), argued that socialist ideology should lead to a complete abandonment of imperial Russian approaches to law in favour of a less formal and more decentralised form of technical-administrative rules.[10] Perhaps the clearest example of this school of thought was Evgeny Pashukanis, who

[6] Martin Krygier, 'Law as Tradition' (1986) 5 *Law and Philosophy* 237, 244.

[7] David Christian, 'The Supervisory Function in Russian and Soviet History' (1982) 41 *Slavic Review* 73. In fact, the Soviet conception of supervision drew in part on a tradition of supervision that pre-dated the 1864 reforms.

[8] Elise Wirtschafter, 'Legal Identity and the Possession of Serfs in Imperial Russia' (1998) 70(3) *Journal of Modern History* 561–587 (discussing the role of the Senate and the procuracy in responding to petitions from individual serfs in eighteenth and nineteenth century imperial Russia).

[9] Zigurds Zile, *Ideas and Forces in Soviet Legal Theory: Statutes, Decisions and Other Materials on the Development and Processes of Soviet Law* (Madison, WI: College Printing & Publishing Inc, 1970), p. 50. ('Prior to the revolution, no one had thought of drawing up (whether in detail or in a general form) the legal relations to be established and adjusted during the transition from the proletarian revolution to the consolidation of socialism and communism . . . At present, therefore, research in this area is like plowing virgin soil.').

[10] See, e.g., Csaba Toth, 'Most Wild and Visionary': Social Change and the Legacy of Robert Owen' (1996) 7(1) *Utopian Studies* 108–112.

argued that a socialist legal system would look very different from imperial Russian law because the legal 'form' of the bourgeois state was linked to commodity exchange.[11]

The 'statists', by contrast, interpreted socialism through the imperial Russian tradition, and argued that socialist ideology required a centralised state that could ensure Russia's 'transition' from capitalism to communism. One of the critical aspects of this statist program was the continuance of imperial-era practices of supervision.[12] This form of supervisory legality – now labelled as socialist – would have the same effect as its imperial Russian predecessor: centralise the state by ensuring 'that local organs of authority decide such matters in conformity with law'.[13] This position was best represented in the writing of Andrei Vyshinsky, himself the head of a key supervisory institution – the procuracy.

The statists were ultimately successful. Their success was constitutionalised in the 1936 Soviet Constitution.[14] This constitutional order featured a vertically controlled procuracy that combined the power to initiate and supervise criminal prosecutions with vast powers of 'general supervision' over administrative law (*vyschii nadzor*).[15] It also included a supreme court that had wide powers to 'supervise the judicial activities of lower courts' and develop the law that went well beyond the appellate powers of Western supreme courts.[16] The statist supervision in the 1936 Soviet Constitution was then exported to newly socialist East Asia in the post–World War II period. In this process of transplantation, the formal supervisory institutions themselves were superimposed on East Asian traditions of political review of legality.[17]

[11] Evgeny Pashukanis, 'The General Theory of Law and Marxism', in *Russian Legal Theory* (New York, NY: New York University Press, 1996)

[12] Christian, 'The Supervisory Function in Russian and Soviet History', 73.

[13] Andrey Y. Vyshinsky, *The Law of the Soviet State* (New York, NY: Macmillan, 1948), p. 526.

[14] Glenn Morgan, *Soviet Administrative Legality: The Role of the Attorney General's Office* (Stanford, CA: Stanford University Press, 1962), p. 21 ('reached back into the past and revived the supervisory functions of the Procuracy in an effort to promote observance of legality in its sprawling bureaucracy and to ensure the conformity of local enactments with central decrees.').

[15] Article 113, Constitution of the Soviet Union 1936, available (in Russian) at www.hist.msu.ru/ER/Etext/cnst1936.htm#9.

[16] Article 104, Constitution of the Soviet Union 1936.

[17] Though one differing in important ways from that of the Russian. Charles O. Hucker, 'The Traditional Chinese Censorate and the New Peking Regime' (1951) 45 *American*

Today, supervision remains a powerful practice across the former socialist bloc, despite the collapse of the Soviet Union and the rise of capitalism in East Asia. Underpinning this persistence is a continued desire for centralisation and state coordination – now in the context of state capitalism. In fact, these practices are now justified as mechanisms for overcoming problems of state weakness and coping with the challenges of transitioning to a 'socialist market economy'.[18] They have also been justified as a less formalistic way for the people to petition for remedies to violations of their rights. These normative justifications complicate attempts to move towards the judicial control of legality and, in turn, rule of law.[19]

This Chapter will develop this argument in seven sections. Section 3.2 will explore why scholars of socialist law have ignored history and what insights history can bring to our understanding of this legal system. Section 3.3 will describe one of the key foundations of socialist law: the imperial Russian tradition of supervision. Section 3.4 will describe the two competing approaches to socialist law in 1920s and 1930s Soviet Russia. Section 3.5 will describe how these different approaches competed for dominance in the first two decades of the Soviet period. Section 3.6 will explain how the 1936 Soviet Constitution represented the final triumph of the statist approach to socialist law. Section 3.7 will describe how this statist approach remains influential in the former Soviet republics. Section 3.8 will turn to its adaptation and continuing influence in socialist East Asia.

3.2 Socialist Law and History

During the Cold War, legal scholars understood 'socialist law' to be one of the major legal families alongside the common law and civil law

Political Science Review 1041, 1041 ('the Censorate provided a service in Chinese government that has no institutionalised counterpart in any modern western nation.')

[18] Partlett and Ip, 'Is Socialist Law Really Dead?', 463, 485.

[19] Independent and binding judicial review of legality is at the core of all definitions of rule of law. Lord Bingham, for instance, explains that the 'core' of the principle of rule of law is that all persons and authorities shall be bound by 'laws that are publicly and prospectively promulgated and publicly administered in the courts'. Lord Bingham, 'The Rule of Law' (2007) 66(1) *Cambridge Law Journal* 67, 69. Joseph Raz also includes in his thinner version of rule of law the importance of guaranteeing the 'independence of the judiciary'. Joseph Raz, *The Authority of Law: Essay on Law and Morality*, (Oxford: Oxford University Press, 2009), p. 216.

systems. In comparison with common law and socialist law, however, socialist law was viewed as a 'young' legal tradition with very little basis in Russian history.[20] Rene David, for instance, commented on the 'weakness of the legal tradition and the idea of law in Russia'.[21] Stripped of any national roots, the history of socialist law was assumed to be the Western European civil law tradition.[22] This perception has weakened our understanding of the unique debates and approaches to law in countries that were or still identify as socialist, and the role of ideology in shaping these distinctive approaches to law.

3.2.1 An Ahistorical Approach to Socialist Law

This ahistorical approach to socialist law in the West was driven by two main motivations. First, during the Cold War, many scholars were driven by a 'know-thy-enemy' motivation to understand the legal systems in the socialist bloc.[23] Underpinned by government funding, this justification became particularly strong during the détente years in the 1970s.[24] Ironically, this approach drew in part on the work of socialist legal scholars based in the Soviet Union. These scholars – constrained by ideology – argued that socialist law had no historical roots in imperial Russia and was instead a simple product of political ideology, and therefore 'administered in the interest of the defense and education of the proletariat as the only class which can give the Union, and the world, a classless society'.[25] To accord with the dominant ideology of the time, socialist law was portrayed as a new legal system that completely broke with the Tsarist past.

[20] John Merryman and David S. Clark, *Comparative Law: Western European and Latin American Legal Systems: Cases and Materials* (Charlottesville, VA: The Michie Company, 1978), p. 4.

[21] Rene David and John C. Brierley, *Major Legal Systems in the World: An Introduction to the Comparative Study of Law* (London: Stevens and Sons, 1968), p. 11.

[22] John Quigley, 'Socialist Law and the Civil Law Tradition' (1989) 37 *American Journal of Comparative Law* 781–783.

[23] Leonard Shapiro, 'The Importance of Law in the Study of Politics and History', in Leonard Shapiro, Ellen Dahrendorf and Harry Willetts (eds.), *Russian Studies* (New York: Penguin Books, 1988) (discussing law as simply a mechanism of repression).

[24] William Partlett, 'Reclassifying Russian Law: Mechanisms, Outcomes and Solutions for an Overly Politicised Field' (2008) 2 *Columbia Journal of East European Law* 1, 37–42.

[25] John Hazard, 'Soviet Law: An Introduction' (1936) 36 *Columbia Law Review* 1236, 1249.

Much of the English-language research drew on this approach, focusing on the role of ideology in the construction of socialist law.[26] John Hazard – who trained under these socialist theorists in the early 1930s, while on exchange in Soviet Russia – expressed an ideological understanding of the socialist legal system when he commented that the 'first mark of distinction' of the socialist legal system was 'an economic factor … evidenced by the degree of involvement of all elements of society and of its institutions in the operation of a fully state-owned and planned economy'.[27] If scholars saw a historical basis for Russian law, they pointed to its basis in the Western European civil law tradition. John Merryman thus commented that socialist law imposed 'certain principles of socialist ideology on existing civil law systems and on the civil law tradition'.[28]

In the late 1980s, scholars began to argue that socialist ideology had done little to distinguish the socialist legal systems from these Western European, civil law roots. For instance, John Quigley argued that socialist legal systems were firmly part of the civil law tradition.[29] As the distinctiveness of socialist law was criticised, the study of socialist law ended with the collapse of the Soviet Union. Funding and research on the law in many post-socialist countries began to disappear. Socialist law was thought to have disappeared from comparative law casebooks and was declared 'dead and buried'.[30] Freed of Marxist ideology, researchers now argued that these socialist law countries were transitioning back to their historical roots in Western European civil law systems.[31] For instance, a recent book on the Russian legal system states that 'Russian law is gradually returning to the civil law family from which it came'.[32]

[26] Marxist theory held that the means of production (what theorists know as 'the base') ultimately determined the nature of the law and legal institutions (known as 'the superstructure'). Thus, to build communism required creating an economic system with public ownership over the means of production.

[27] John Hazard, *Communists and Their Law: A Search for the Common Core of the Legal Systems of the Marxian Socialist States* (Chicago, IL: University of Chicago Press, 1969), p. 523.

[28] Merryman, *Comparative Law*, p. 4.

[29] Quigley, 'Socialist Law and the Civil Law Tradition', 781.

[30] Hein Kötz, 'Preface to the Third Edition', in Konrad Zweigert and Hein Kötz (eds.), *Introduction to Comparative Law* (Oxford: Clarendon Press, 1998).

[31] Ugo Mattei, 'Codifying Property Law in the Process of Transition: Some Suggestions from Comparative Law and Economics' (1995) 19 *Hastings International and Comparative Law Quarterly* 117, 122.

[32] Peter Maggs, Olga Schwartz and William Burnham (eds.), *Law and Legal System of the Russian Federation* (New York, NY: Juris Publishing, 2015), p. 7.

Second, socialist law has been of interest to Western legal theorists seeking to explore socialist alternatives to present-day legal approaches.[33] These researchers saw opportunities to 'learn-from-thy-enemy'.[34] Although diminished today, scholars have continued to explore the possibilities and dimensions of socialist law as part of critical projects.[35] If these scholars take any interest in history at all, it is simply to suggest how the Soviet Union ultimately abandoned the correct socialist approach to law.[36] Thus, most of the work focuses heavily on thinkers like Evgeny Pashukanis, who were closer to Western concepts of socialism, but (as we will see) ultimately had very little influence on the historical *practices* of socialist law.

3.2.2 Historicising Socialist Law

There were a few exceptions to this ahistorical approach to socialist law. Writing in 1950, Harold Berman identified the deeper historical roots of the socialist legal system in the USSR.[37] Describing how law is 'built up slowly over centuries' and is therefore 'impervious to social upheavals',[38] Berman explained that 'the Soviets again and again were forced to yield to history'.[39] In particular, Berman pointed to the persistence of critical Russian institutions in the socialist legal system, including the procuracy. Other scholars made similar claims. For instance, Gordon Smith's work has also traced the continuities between socialist law and the Russian legal tradition.[40]

This Chapter will expand on this work by exploring the interaction between socialist ideology and historically rooted forms of law. Underpinning this approach is the idea that law is more than just a product of

[33] See, e.g., Michael Head, *Evgeny Pashukanis: A Critical Reappraisal* (Abingdon: Routledge-Cavendish, 2007).

[34] See, e.g., Michael Mandel, 'Marxism and the Rule of Law' (1986) 35 *UNB Law Journal* 7–34. Alice Erh-Soon Tay and Eugene Kamenka, 'Marxism, Socialism and the Theory of Law' (1985) 23 *Columbia Journal of Transnational Law* 217–249; John Quigley, *Soviet Legal Innovation and the Law of the Western World* (Cambridge: Cambridge University Press, 2007).

[35] See, e.g., China Mieville, *Between Equal Rights: A Marxist Approach to International Law* (Leiden: Brill, 2004).

[36] See, e.g., Head, *Evgeny Pashukanis*, n. 34.

[37] Harold Berman, *Justice in the USSR: An Interpretation of Soviet Law* (Cambridge, MA: Harvard University Press, 1978, 5th edn.), 5–7.

[38] Ibid., 5.

[39] Ibid., 269.

[40] Gordon Smith, 'The Impact of Socialism on Soviet Legal Institutions and Procedures' (1984–1985) 23 *Columbia Journal of Transnational Law* 315, 324 ('Soviet legal institutions bear a marked resemblance to those of the tsarist regime they replaced.').

shifting ideological commitments.[41] Law necessarily contains a set of historically rooted normative debates and practices.[42] These historically rooted practices are not static or, therefore, ultimately self-replicating; on the contrary, historical practices of law are inconsistent, dynamic and 'speak[] with many voices'.[43] The history of law matters because it presents the individuals within a tradition the 'substance, models, exemplars and a language in which to speak within and about law'.[44] These practices and models are in turn only relevant to present law when they present 'solutions to present problems'.[45] Ideology then helps to explain what aspects of the tradition are emphasised. In this case, the founders of the socialist legal system operated within the imperial Russian legal tradition. The ultimately triumphant statist interpretation of socialism led them to revive a weakening, but still existing, tradition of supervision.

3.3 Supervision in Imperial Russia

Supervision has been at the centre of the imperial Russian legal system since the early eighteenth century. In general, this tradition involved a set of non-judicial and centrally coordinated practices and institutions that checked and rechecked both administrative and judicial decisions for 'conformity to the law and the commands of their superiors'.[46] This approach rejected Western normative arguments about the necessity of independent judicial supervision over the execution of the law,[47] and instead represented the top-down political control of legality.[48] In the late

[41] Eugene Huskey, 'A Framework for the Analysis of Soviet Law' (1991) 50(1) *Russian Review* 53, 54.

[42] H. Patrick Glenn, *Legal Traditions of the World* (Oxford: Oxford University Press, 2014) (discussing the importance of the concept of traditions in understanding legal development).

[43] Krygier, 'Law as Tradition', 242.

[44] Ibid., 244.

[45] Ibid., 248.

[46] Christian, 'The Supervisory Function in Russian and Soviet History', 73.

[47] Jack Rakove, 'The Original Justifications for Judicial Independence' (2006) 95 *Georgetown Law Journal* 1061 (tracing the idea of control over legality to an independent judicial branch to Montesquieu); Henry Monaghan, '"Marbury" and the Administrative State' (1983) 83 *Columbia Law Review* 1 (discussing the roots of judicial review of administrative action in the United States); Felix Frankfurter, 'Task of Administrative Law' (1927) 75 *University of Pennsylvania Law Review* 613, 615 (describing the task of administrative law to be one studying 'the field of control exercised by courts over such agencies'.).

[48] Christian, 'The Supervisory Function in Russian and Soviet History', 81 (describing how a 'division of powers never made sense' in Imperial Russia). Charles O. Hucker, 'Governmental Organisation of the Ming Dynasty' (1958) 21 *Harvard Journal of Asiatic Studies* 1, 55 (no 'special autonomous status to the judiciary' in the Chinese system).

Tsarist period, this tradition was weakening as imperial Russia moved towards the Western European civil law approach of independent, judicial determinations of legality.

The normative basis for the supervisory tradition has largely eluded characterisation because of its rejection of 'European political theory'[49] such as the separation of powers. Supervisory legality, however, did have deep roots of justification. First, it was seen as a way of responding to the ineffectiveness and weakness of the Russian state. After travelling through Europe, Peter the Great proclaimed the need for a centralised bureaucratic apparatus to ensure the 'co-ordination, unity and supervision of the subordinate organs' to compete with Europe.[50] Supervision – with its ability to relay political orders from the centre – was viewed as a way to ensure that the state could collect taxes and raise a military.[51] Furthermore, as the bureaucracy grew in size, supervision emerged as a way of coping with the growing amount of contradictory and self-interested administrative and sub-legal acts that were issued with little reference to law.[52] Second, it was seen as a method for allowing citizens a less onerous and procedural method for challenging illegal decisions, and a way for the state to monitor these complaints.[53] Petitioning had a long history in Russian imperial governance that predated Petrine Russia.[54] As time went on, this tradition provided individual petitioners with the ability to challenge the growing number of contradictory sub-legal normative acts in imperial Russia.[55] These two justifications have remained at the centre of justifications of supervisory legality to this day.[56]

[49] Christian, 'The Supervisory Function in Russian and Soviet History', 73.

[50] Dominic Lieven (ed.), *The Cambridge History of Russia*, Volume 2: Imperial Russia, 1689–1917 (Cambridge: Cambridge University Press, 2006), p. 435.

[51] Zhand Shakibi, 'Central Government', in D. Lieven (ed.), *The Cambridge History of Russia*, Volume 2: Imperial Russia, 1689–1917 (Cambridge: Cambridge University Press, 2006), p. 430.

[52] Karl V. Ryavec, *Russian Bureaucracy: Power and Pathology* (Lanham: Rowman & Littlefield, 2005), pp. 64–65 (discussion of the 'essentially unfettered' local administrative agencies).

[53] Wirtschafter, 'Legal Identity and the Possession of Serfs in Imperial Russia', 561 (discussing the role of the Senate and the procuracy in responding to petitions from individual serfs in eighteenth and nineteenth century imperial Russia).

[54] Valery Kivelson, *Autocracy in the Provinces: The Muscovite Gentry and the Political Culture in the Seventeeth Century* (Stanford, CA: Stanford University Press, 1996).

[55] Ryavec, *Russian Bureaucracy*, 95 (estimating that in the late Soviet period there were ten thousand sublegal acts in force).

[56] Sergei Kazantsev, 'The Judicial Reform of 1864 and the Procuracy', in Peter H. Solomon (ed.), *Reforming Justice in Russia, 1864–1996: Power, Culture, and the Limits of Legal Order* (Armonk, NY: M.E. Sharpe, 1997), p. 47 (describing how the procuracy began to develop a number of administrative and quasi-ministerial functions which ultimately

Peter the Great placed two institutions at the centre of this tradition of supervisory legality.[57] The first institution in this supervisory tradition was the Senate. Created in 1711, this institution was charged with 'administering the empire', and rapidly developed into a body that formulated law and exercised 'coordination and supervision' over the implementation the empire's laws.[58] It therefore helped to pass laws while overseeing a vast array of undermanned and poorly staffed courts.[59] The second key institution was the procuracy.[60] This centrally accountable institution developed into a hierarchical organisation at the centre of the imperial legal system.[61] It exercised wide power, not only to initiate criminal prosecutions but also to carry out 'general supervision' over judicial and administrative decision-making.[62] These powers of 'general supervision' included quasi-ministerial and adjudicatory functions.[63] Two are most important. First, the procuracy could demand a formal review of acts or decisions by an agency or a court through a 'protest', a document containing a detailed legal analysis that looked very similar to the reasoning in a court opinion.[64] Second, the procurator could provide a 'proposal' (*predstavlenie*), which contained more positive demands about 'what must be done'.[65] Although these actions were not technically binding, they were almost always complied with because of the centralised bureaucratic power exerted by the procuracy.[66]

Alexander II's great reforms of 1864 weakened this supervisory system in order to strengthen judicial control over legality.[67] These reforms stripped the procuracy of its powers of general supervision over

meant that the procuracy represented 'such a mosaic of borrowings as to produce an original Russian picture'.).

[57] Shakibi, 'Central Government', p. 435.

[58] Ibid.

[59] Natasha Assa, 'How Arbitrary Was Tsarist Administrative Justice? The Case of the Zemstvos Petitions to the Imperial Ruling Senate, 1866–1916' (2003) 24 *Law and History Review* 1, 40.

[60] Gordon Smith, *The Soviet Procuracy and the Supervision of Administration* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1978), p. 4.

[61] Ibid., p. 14.

[62] Christian, 'The Supervisory Function in Russian and Soviet History', 76.

[63] Kazantsev, 'The Judicial Reform of 1864 and the Procuracy', 47.

[64] Morgan, *Soviet Administrative Legality,* p. 13.

[65] Ibid.

[66] Gordon Smith, *Reforming the Russian Legal System* (Cambridge: Cambridge University Press, 1996), p. 107 (describing how over 95 per cent of procuratorial protests were complied with).

[67] Berman, *Justice in the USSR*, p. 241.

administrative acts.[68] In the final decades of imperial Russia, the Senate grew in power as the upper house of the legislature, as well as a body for reviewing individual cases and issuing guiding explanations on broad points of law (after abstract study of court practice) that could ensure central control over the development of law.[69] This was not a complete reform, however; the procuracy retained its powers to supervise and protest judicial decisions.[70]

3.4 Socialist Law and the Transition to Communism

This tradition of supervision – and its roots in a normative desire to overcome state weakness – would play a critical role in the formulation of a socialist legal system in the early Soviet Union. Soviet reformers broadly agreed that a transitional period was needed to achieve communism. Two competing visions for law emerged during this transitional period. One school of thought – which I call the utopians – saw this transition happening without many of the pre-existing forms of law from the imperial period. Unleashed by the sense of possibility in the wake of the collapse of the Tsarist state, this approach envisioned this transitional period as beginning a move towards an entirely new approach to law.

The other school of thought – which I call the statists – saw the need for a strong state in the 'transition' from capitalism to socialism. They therefore vigorously argued for a return to a strongly supervisory approach to legality. I do not want to overstate the nature of this split – throughout the early Soviet period, many individuals found themselves making statements that drew on ideas from both sides. Despite these shortcomings, however, this dichotomy is a useful way of understanding a critical early debate about the nature of 'socialist law'.

3.4.1 Utopianism and Anti-Formalism

The utopians grounded their approach to socialist law on the view that imperial Russian legal practices and institutions should play little role in the transition to communism. In this way, the utopians drew on a

[68] Jorg Baberowsky, 'Law, the Judicial System and the Legal Profession', in D. Lieven (ed.), *The Cambridge History of Russia*, Volume 2: Imperial Russia, 1689–1917 (Cambridge: Cambridge University Press, 2006), p. 346.

[69] Alexander Vereshchagin, *Judicial Law-Making in Post-Soviet Russia* (Abingdon: Routledge-Cavendish, 2007), p. 97.

[70] Morgan, *Soviet Administrative Legality*, p. 17.

decentralised and more experimental conception of socialism that was closer to Western socialism. This fact is at least partly reflected in the greater Western interest in the work of Russian legal thinkers such as Evgeny Pashukanis.

In his seminal book, *The General Theory of Law and Marxism*, Evgeny Pashukanis explained that law was ultimately grounded in capitalist commodity exchange.[71] In his conception, law ultimately draws on the market bond between individual enterprises (either capitalist or petty commodity production) and groups of enterprises (either capitalist or socialist). In so doing, law becomes a tool of class dominance. Pashukanis therefore criticised conceptions such as the rule of law as a 'mask' that obscures the repressive aspects of bourgeois law.[72] As soon as the bourgeoisie is threatened as a class, this mask slips and it reveals the 'essence' of the law as the 'organised force of one class against another'.[73]

Pashukanis then described how socialist economic relations would spawn a fundamentally new approach to law, in which key legal concepts like crime and punishment would wither away.[74] This approach towards law was underpinned by the idea that a new system of regulation would emerge spontaneously in the Soviet Union, in response to the replacement of market relations by a socialised economy.[75] The 'narrow horizons' of Tsarist legal forms were a conceptual, and therefore a practical, absurdity in this kind of socialist economic system.[76] Pashukanis argued that, in the place of bourgeois forms will rise 'a technical-expediency relationship with one another', which will destroy any bourgeois conception of 'legal personality'.[77] In particular, this would include regulation through the administrative-technical rules of the plan.[78] This type of regulation would cease to look like law; instead, administrative-technical modes of governance would emerge in its place.[79]

[71] Head, *Evgeny Pashukanis*, p. 191.
[72] Evgeny B. Pashukanis, 'The General Theory of Law and Marxism' in William Butler (ed.), *Russian Legal Theory* (New York, NY: New York University Press, 1996), p. 290.
[73] Ibid.
[74] Ibid., p. 277.
[75] Ibid., pp. 277–278.
[76] Quoted from Berman, *Justice in the USSR*, p. 314.
[77] Pashukanis, 'The General Theory of Law and Marxism', p. 279.
[78] Piers Beirne and Robert Sharlet, 'Toward a General Theory of Law and Marxism: E. B. Pashukanis', in Piers Beirne (ed.), *Revolution in Law: Contributions to the Development of Soviet Legal Theory, 1917–1938* (Armonk, NY: M.E. Sharpe, 1990), p. 25.
[79] Pashukanis wrote that '[t]he withering away of certain categories of bourgeois law in no way implies their replacement by new categories of proletarian law.' Rett R. Ludwikowski,

3.4.1.1 Anti-Formalism

In part because it constituted a rejection of the imperial Russian legal tradition, the precise form of this regulatory form of law was never fully developed in practice. Suggesting that even the utopians could not be completely free of the grip of past Tsarist practices and approaches, the most concrete example that existed of this new form of law could be found in the proposals for a new criminal code. Underlying these proposals was a strong belief that criminal law should adopt flexible, anti-formalist approaches that would allow 'a politically inspired judiciary the tools to control and, when necessary, reverse the formality of the statute'.[80]

This anti-formalist approach emerged clearly in drafts of a new criminal code. As committed Marxists, the utopians understood crime to be something that was ultimately conditioned by the environment. More flexibility would allow judges to take environmental factors into account. For instance, Pashukanis had argued that a socialist approach to criminal law should not involve a judge in determining guilt or innocence, but instead in considering 'how to change the conditions of life of a given person – in order to influence him in the sense of correction'.[81]

Those views were part of the work by Nikolai Krylenko on a new criminal code. Krylenko was in many ways a classic utopian – he had no legal training at all; after studying for a history and philology degree, he had spent most of his life as a professional revolutionary and then a political operative.[82] In the new criminal code, Krylenko proposed to completely eliminate the 'specific' part of the prior criminal code that catalogued crimes, and instead include the 'general' part. This would leave the general part of the criminal code as the main section, and would allow judges considerable flexibility to apply the 'penalty' deemed necessary to deter future violence and therefore assure the protection of

'Socialist Legal Theory in the Post-Pashukanis Era' (1987) 10 *Boston College International and Comparative Law Review* 323, 326.

[80] Gianmaria Ajani, 'Formalism and Anti-Formalism Under Socialist Law: The Case of General Clauses within the Codification of Civil Law' (2002) 2(2) *Global Jurist Advances*.

[81] Quoted from Head, *Evgeny Pashukanis*, p. 185.

[82] Donald Barry, 'Nikolai Vasil'evich Krylenko: A Reevaluation', in Piers Beirne (ed.), *Revolution in Law: Contributions to the Development of Soviet Legal Theory, 1917–1938* (Armonk, NY: M.E. Sharpe, 1990), p. 157. His undergraduate degree was in philology, p. 159.

society.[83] Underlying this idea was the deeper conception that crime was often a product of individual circumstances, and that fixed penalties for certain crimes were inherently unfair.[84]

3.4.2 *Statism and Centralised Supervision*

In contrast to the anti-formalism of the utopians, statists grounded their view of the socialist legal system on the needs of centralising the Soviet state.[85] This viewpoint was grounded on a statist interpretation of socialist ideology in Lenin's *The State and Revolution*, which argued that a centralised version of the bourgeois imperial Russian state was an important tool for the proletariat in vanquishing the 'capitalists' in the transitional period of socialism.[86] In particular, Lenin argued that the transitional period to communism requires 'not only bourgeois law, but even the bourgeois state, without the bourgeoisie!'[87] Stalin also drew on this statist conception of socialism in later proclaiming the 'Marxist formula' to be the 'highest possible development of the power of the state'.[88] This justification reflected a much broader – and Petrine – normative justification for law: a need for a strong state to compete with Europe.

The leading figure in this statist approach was Andrei Vyshinsky. As head of the procuracy himself, he criticised the utopians' anti-formalist approach to law. Vyshinsky explained that legal discipline was necessary to allow the state to play a role in strengthening the state for the top-down Party construction of socialism.[89] This approach, he argued, rejected bourgeois conceptions of judicial independence. Instead, a dictatorship of the proletariat was the only way to truly guarantee 'civil rights' to the proletariat.[90]

[83] Hazard, Reforming Soviet Criminal Law (1939) 29 *American Institute of Criminal Law and Criminology* 157, 164–165.
[84] Eugene Huskey, 'Vyshinsky, Krylenko, and Soviet Penal Politics in the 1930s', in Piers Beirne (ed.), *Revolution in Law: Contributions to the Development of Soviet Legal Theory, 1917–1938* (Armonk, NY: M.E. Sharpe, 1990), p. 181.
[85] For a comprehensive critique of the statist approach to law, see Ludwikowski, 'Socialist Legal Theory in the Post-Pashukanis Era', p. 323.
[86] Vladimir I. Lenin, *The State and Revolution*, (trans. Robert Service), (London: Penguin Books Limited, 1992), p. 87.
[87] Ibid., p. 89.
[88] Quoted from Hazard, 'Soviet Law', 1266.
[89] *Socialist Legality*, 1934, at http://istmat.info/files/uploads/26308/no_1.pdf.
[90] Vyshinsky, *Law and the Soviet State*, p. 538.

3.4.2.1 Supervision

In order to craft the state into a powerful tool of socialist 'transition', the statists drew on pre-1864 aspects of the imperial Russian tradition of supervision.[91] These long moribund, but highly centralising, elements were seen as carrying out the 'socialist' need for intensified state unity, coordination and centralisation. This unified and powerful state, they argued, would in turn achieve a key requirement of socialist ideology: to carry out the central directives of the Party and ensure the transition to communism. Supervisory institutions therefore once again found themselves at the centre of a new push for state modernisation – but this time in the language of socialism, rather than imperial advancement.

To achieve this goal, the statists drew on the same two key institutions that Peter the Great had established in the eighteenth century to build the Russian state. The statists first repackaged the procuracy in the language of socialism, describing it as the critical institution in ensuring 'socialist legality'.[92] In 1934, under the tutelage of the Procuracy, the statists started a monthly journal called 'Socialist Legality', which would serve as a key platform for justifying the procuracy.[93] In this journal and elsewhere, they argued that the procuracy should be given the powers of 'general supervision' that it had lost during the reforms of 1864. Furthermore, the statists argued that a powerful supreme court should also be placed at the top of the Soviet Union's system of courts. They argued that the broad powers of legal supervision and control lodged in the Tsarist Senate should instead be placed in the Soviet Supreme Court.

3.5 Historical Development: 1917–1936

These competing approaches to socialist legal construction waxed and waned in the first two decades of Soviet power. Both sides sought to justify their approaches in both the needs of the day, as well as the language of Marxism–Leninism. In the end, the statist approach triumphed, as it was ultimately better suited to the practical needs of the Soviet state to strengthen top-down legality. As a result, the key supervisory institutions

[91] Ekaterina Trendafilova-Batcharova, 'The New Legal Status of the Bulgarian Prosecutor's Office' (1997) 4(1) *Annual Survey of International and Comparative Law* 132, 139–142.

[92] Eugene Huskey, 'Vyshinskii, Krylenko, and the Shaping of the Soviet Legal Order' (1987) 46 *Slavic Review* 414.

[93] Ibid., 418. (The journal was originally named 'For Socialist Legality' (Za Sotsialistiches-kuiu Zakonnost') and renamed 'Socialist Legality' (Sotsialisticheskaya Zakonnost').

of the Tsarist period – the procuracy and a highly centralised court system – became key institutions in the socialist legal model.

3.5.1 *Early Period: War Communism and the Civil War (1917–1921)*

The early Bolshevik approach to law was highly anti-formalist and utopian.[94] Captured by the possibility of revolution, many Bolshevik leaders openly discussed ways of completely refashioning the entire legal system by 'smash[ing] the old bureaucratic apparatus', and, therefore, the Tsarist legal system.[95] For instance, Anatolii Lunacharsky, the Commissar of Education, described how the revolution would create a new form of law involving a 'popular mass trial over the hated system of privilege'.[96] Lunacharsky went on to describe how, in a socialist legal system, law would be based on what he termed 'intuitive law', which would be grounded on 'direct, revolutionary legal creativity'.[97]

These utopian visions of socialism were paired with key practical challenges of eliminating the Tsarist legal elite. The first piece of legislation pushed through by the Bolsheviks abolished the centralised hierarchy of tsarist courts under the Senate and replaced them with a far more decentralised system of local people's courts and revolutionary tribunals.[98] New judges, who often had no legal training, were encouraged to proceed by their 'revolutionary consciousness' in applying the law.[99] Next, in 1918, another key law abolished the procuracy.[100]

Both pragmatism and principle lay behind these legislative moves. First, these moves reflected the experimentalism and anti-formalism unleashed by the revolution. Many justified the flexibility of the more decentralised and organic approaches as allowing people to resolve disputes without the 'elaborately organised tribunals' and 'a labyrinth of rules of procedure and evidence' that existed in bourgeois legal systems.[101] For instance, in criminal law, judges could now take into

[94] Beirne and Sharlet, 'Toward a General Theory of Law and Marxism', p. 24.
[95] Quoted from Ginsburgs, 'The Soviet Procuracy and Forty Years of Socialist Legality', 35.
[96] Quoted from Head, *Evgeny Pashukanis*, at p. 115.
[97] Ibid., p. 117.
[98] Ibid., p. 97.
[99] Ibid., p. 93.
[100] Pamela A. Jordan, *Defending Rights in Russia: Lawyers, the State, and Legal Reform in the Post-Soviet Era* (Vancouver: University of British Columbia Press, 2006), p. 33.
[101] John Hazard, *Settling Disputes in Soviet Society: The Formative Years of Legal Institutions* (New York, NY: Columbia University Press, 1960), p. vi.

consideration the circumstances of the crime, as well as the personal insecurity and class antagonisms of capitalism in determining a penalty. Second, there was a more pragmatic need to eliminate the old Tsarist elite that existed within many of these institutions. As Lenin said:

> Comrade workers! Remember that you yourselves now administer the state. No one will help you if you yourselves do not unite and fail to take all the affairs of the state into your own hands. Your soviets are henceforth the organs of state power, plenipotentiary organs of decision-making.[102]

3.5.2 *New Economic Policy Period (1921–1928)*

With the end of the civil war, the leaders of the Soviet state realised the need to re-establish stability and order. World War I and the Civil War had immense economic, social and human costs. Amidst the chaos of war-torn Soviet Union, contradictory laws and administrative orders had proliferated. In order to rebuild the state, the Bolsheviks now turned to Tsarist-era legal institutions and concepts to create the New Economic Policy (NEP) period. Although justified in the language of Marxism, these institutions had key practical goals.

The Bolsheviks first moved to re-establish the procuracy after its short period of dissolution. Lenin himself intervened decisively in this debate. In a now famous letter, he criticised the anti-formalist, utopian approach as 'pandering to the ancient Russian view and semi-savage habit of mind, which wishes to preserve Kaluga law as distinct from Kazan law'.[103] The procuracy, he argued, was critical in overcoming the 'ocean of illegality and local influence' in the Soviet Union and securing state unity and coordination.[104] This supervisory institution – organised in a system of vertical accountability – could solve these problems and ensure compliance with law.[105]

Second, a clear judicial hierarchy was reintroduced during the NEP period in the 1922 Judiciary Act.[106] This 'uniform' organisation of judicial power was justified on similar grounds as necessary for 'safeguarding the state' and 'the rights of toilers'.[107] This law gave the provincial court

[102] Zile, *Ideas and Forces in Soviet Legal Theory*, p. 12.
[103] Vladimir I. Lenin, *Dual Subordination and Legality*, at www.marxists.org/archive/lenin/works/1920/may/20.htm.
[104] Ibid.
[105] Ibid.
[106] W. J. Wagner, 'The Russian Judiciary Act of 1922 and Some Comments on the Administration of Justice in the Soviet Union' (1966) 41 *Indiana Law Journal* 420–453.
[107] Ibid., 442.

supervisory power over 'all courts in the territory of the province or oblast'.[108] Another 1922 statute on the procuracy returned powers of 'general supervision' to the newly reinstituted Procuracy.[109]

Despite the return of these statist institutions, NEP also witnessed utopian thinking. In fact, the NEP period saw the publication of a key book of the utopian movement. In 1924, Evgeny Pashukanis produced his famous treatise *The General Theory of Law and Marxism*. This book argued that law was a 'bourgeois category' that regulated relationships between isolated individuals.[110] Bourgeois law would not be replaced by 'new categories of proletarian law'.[111] Instead, bourgeois conceptions of law would fade away as economic concepts of value and capital disappeared.

3.5.3 *The Great Break (1929–1932)*

In 1928, a more revolutionary and anti-formalist conception of socialism arose once more. Key elements of the utopian approach again became highly influential. Consequently, decentralised and discretionary forms of administration were considered as replacements for formal law and the restored Tsarist institutions of the late Tsarist period.[112] The legal codes restored in the 1920s were attacked and some called for 'the thicket of bourgeois laws [to] be cleared out'.[113]

Pashukanis grew in influence, arguing that criminal law was a product of commodity exchange. Under this theory, as commodity exchange disappeared so should criminal law. In 1930, he worked to introduce the changes that would bring the 'decay' of criminal law as the natural progression of a society that was achieving socialism.[114] During this time, Pashukanis' influence was very high. John Hazard – who studied under Pashukanis at the time – described his influence as 'so marked' that 'the course in civil law in the law school [was] abolished, and to replace them (sic) there appeared a course called economic-administrative law,

[108] Ibid.
[109] Ibid., 432.
[110] Quoted from Ludwikowski, 'Socialist Legal Theory in the Post-Pashukanis Era', 327.
[111] Ibid., 326.
[112] Huskey, 'Vyshinskii, Krylenko, and the Shaping of the Soviet Legal Order', 174.
[113] Beirne and Sharlet, 'Toward a General Theory of Law and Marxism', 33.
[114] John Hazard, 'Reforming Soviet Criminal Law' (1938) 29 *Journal of Criminal Law and Criminology* 157, 160.

concerning itself with regulation of the relations between state enterprises'.[115]

Furthermore, adversarial elements in criminal law largely disappeared during this period. Defence attorneys appeared in only a small minority of trials, and even then judges had the right to dispense with 'debate between the sides'.[116] Work begun on a new criminal code under the tutelage of Krylenko.

3.5.4 *High Stalinism (1933–1940)*

With the end of the collectivisation drive and the introduction of Stalin's concept of 'Socialism in One Country', these utopian elements receded. As before, statists argued that the anti-formalist and decentralising aspects of the utopian approach were poorly suited to contemporary needs. In particular, these approaches threatened to undermine the ability of the state to function as a centralised tool for socialist transition. Supporters of 'socialism in one country' wanted the Soviet Union to catch up with the West. This rapid development required an efficient system of legal supervision over compliance with central Party policy.

In a presentation at the Communist Academy, Vyshinsky viewed increased formalisation as critical to solving these problems. He declared that 'the Party now demands of us the strengthening of the legal form, the court and the procedural norm'.[117] Vyshinsky argued that '[h]istory demonstrates that under socialism . . . law is raised to the highest level of development'.[118] Others criticised the utopian Krylenko for attempting to 'undermine' the authority of Soviet law and courts that are necessary in strengthening socialist legality.[119] Statists pointed to the poor education level of many members of the legal community. For instance, in 1935, 85 per cent of people's court judges had no more than a primary school education.[120]

[115] Quoted from Bill Bowring, *Law, Rights and Ideology in Russia: Landmarks in the Destiny of a Great Power* (Abingdon: Routledge, 2013), p. 54.
[116] Huskey, 'Vyshinsky, Krylenko, and Soviet Penal Politics in the 1930s', 180.
[117] Quoted from Robert Sharlet and Piers Beirne, 'In Search of Vyshinsky: The Paradox of Law and Terror', in Piers Beirne (ed.), *Revolution in Law*, p. 151.
[118] Quoted from Head, *Evgeny Pashukanis*, p. 108.
[119] Hazard, 'Reforming Soviet Criminal Law', 157.
[120] Huskey, 'Vyshinsky, Krylenko, and Soviet Penal Politics in the 1930s', 184.

Vyshinsky therefore emphasised the importance of strengthening the Tsarist-era institutions that had been restored during the NEP period.[121] In particular, Vyshinsky saw Tsarist-era supervision as a powerful way of ensuring the more rigid adherence of administrative acts to socialist legality.[122] Drawing on the arguments advanced by Lenin when he reintroduced the procuracy in 1922, he argued that an increased role for the procuracy in general supervision would help in the fight against localism and protect socialist property.[123] A 1933 law on the 'position' of the procuracy described its non-prosecutorial roles as those of general supervision over administrative acts and judicial practice, as well as safeguarding socialist property.[124] A 1934 Handbook tasked the local procurator with 'struggl[ing] against all defects and distortions in the policy adopted toward criminal justice adopted by the people's courts'.[125] Furthermore, the Supreme Court recognised in a resolution that its work should be directed towards fulfilling 'the directive institutions of the party and the government in the province of revolutionary legality'.[126]

Vyshinsky's vision soon became the official line as Stalin criticised the 'leftist prattle' of those advocating a less formalist approach to legality.[127] Stalin described how, during a period of capitalist encirclement, 'the land of the victorious revolution should not weaken, but in every way strengthen its state'.[128] In this situation, Stalin argued, 'we need stability of laws now more than ever'.[129] The idea of 'socialist legality' enforced clearly by supervisory institutions like the procuracy and the Supreme Court would better allow the state to serve its role – in the words of Stalin – as the 'transmission belt' for the decisions of the Party (the 'motor').[130]

[121] Ibid., p. 175.
[122] Quoted from Morgan, *Soviet Administrative Legality*, p. 29.
[123] Huskey, 'Vyshinsky, Krylenko, and Soviet Penal Politics in the 1930s', p. 186.
[124] Polozhenie o prokurature Soyuza SSR, Zakon, www.law.vl.ru/history/showhist.php?his_range=0&his_id=13.
[125] Eugene Huskey, *Executive Power and Soviet Politics: The Rise and Decline of the Soviet State* (Armonk, NY: M.E. Sharpe, 1992), note 5, p. 239.
[126] Vladimir Gsovski, *The Soviet Concept of Law and State* (Georgetown: Georgetown University, 1935), note 66, p. 18.
[127] Sharlet and Beirne, 'In Search of Vyshinsky', in Piers Beirne (ed.), *Revolution in Law*, p. 151.
[128] Quoted from Christine Sypnowich, *The Concept of Socialist Law*, (Oxford: Clarendon Press, 1990), p. 20.
[129] Quoted from Head, *Evgeny Pashukanis*, p. 108.
[130] Boim, 'Party-State Control in the Soviet Union', p. 14.

3.6 A Socialist Version of Supervision?

The success of the statists under Vyshinsky led to the insertion of close prototypes of the Petrine supervisory institutions in Chapter IX of the 1936 Constitution.[131] This placement itself carried significant symbolic power. The 1936 Constitution proclaimed the end of a period of experimentation with different approaches to socialism. Stalin described this Constitution as representing the attainment of socialism through the 'struggles' of the working people and a blueprint for a transitional state that would then attain 'a higher phase of communism'.[132]

Supervision was justified in two official ways. First, it was described as an effective way for the Party to ensure a unified state apparatus, which could then enable the 'transition' from capitalism to socialism.[133] Second, it was described as an efficient method for the state to solve problems raised by citizens in petitions against the actions and regulations of local officials. For instance, many Soviet scholars justified the procuracy's broad powers of supervision as an improvement on the 'weak position' of the ombudsmen in Western legal systems.[134] A key monthly journal called *Socialist Legality* began publication in 1934 and stressed the importance of supervision to ensuring socialist legality.[135]

3.6.1 The Procuracy

The procuracy occupied a prominent role in the 1936 Constitution. Article 113 entrenched 'supreme supervisory power' over the execution of laws in this institution. This provision signalled a formal return to the pre-1864 powers of the procuracy. Reflecting Lenin's arguments about the need for overcoming local control, the procuracy exercised this power as part of a strict vertical of power, with all appointments coming from the Procurator of the USSR.[136] This strict hierarchy was guaranteed by a

[131] 1936 Constitution of the USSR, at www.departments.bucknell.edu/russian/const/36cons03.html#chap09.

[132] Joseph V. Stalin, On the Draft Constitution of the U.S.S.R: Report Delivered at the Extraordinary Eighth Congress of Soviets of the USSR, 25 November 1936, at www.marxists.org/reference/archive/stalin/works/1936/11/25.htm.

[133] Vyshinsky, *Law and the Soviet State*, p. 40.

[134] Leon Boim, '"Ombudsmanship" in the Soviet Union' (1974) 22 *American Journal of Comparative Law* 509, 513.

[135] Huskey, 'Vyshinskii, Krylenko, and the Shaping of the Soviet Legal Order', 414.

[136] Article 113, 1836 Constitution of the Soviet Union.

provision stating that the organs of the procurator 'function independently of any local organs whatsoever'.[137]

The Soviet Procuracy developed into a legal institution that existed at the centre of the legal system. In the criminal law process, for instance, the procuracy had broad powers, not to just prosecute crimes but to oversee and control criminal investigation.[138] It also exercised wide powers to supervise courts, having the authority, for instance, to reopen final cases (through a protest). Finally, and perhaps most importantly, it also possessed wide power to supervise the 'compliance' of administrative law with higher law through the issuance of a 'protest' against a specific administrative law (general supervision) or a proposal.[139] The procuracy also had wide powers to issue 'proposals' (*predstavleniia*) that allowed it be involved in the positive drafting of administrative acts. This practice meant that courts played only a minor role in the consideration of the legality of administrative decrees.[140]

Finally, as designed, the procuracy developed into an institution that carried out the political commands of the central Party apparatus. Soviet Procurators were ranked hierarchically into eleven, military-type classifications.[141] Each was accountable to the procurator at the next highest level.[142] Its effectiveness relied on hierarchy – its non-binding protests and proposals gained compliance because of the ever-present threat of sending a supervisory request to a superior. As a result, although procuratorial protests were not binding, they almost always were accepted by the issuing agency or court.[143] Thus, this supervisory power has largely been seen as a 'watchdog' for the central authorities, and not one that oversees the central authorities themselves.[144] The 1955 law on the

[137] Article 117, 1936 Soviet Constitution.

[138] Harold Berman, *Soviet Criminal Law and Procedure: The RSFSR Codes* (Cambridge, MA: Harvard University Press, 1966), pp. 104–105.

[139] There was some debate over where this protest should be made. Some laws suggested it should be protested in a higher agency. Practice, however, suggested that protests were lodged in the agency or department issuing the decree. Morgan, 'The "Protest" of the Soviet Procuracy', 505.

[140] Morgan, 'The "Protest" of the Soviet Procuracy, 500.

[141] Gordon Smith, The Soviet Procuracy and the Supervision of Administration (1978), 14.

[142] Ibid., 15.

[143] Leon Boim and Glenn Morgan, *The Soviet Procuracy Protests: 1937–1973: A Collection of Translations*, Law in Eastern Europe Series, No. 21, (Alphen aan den Rijn: Sijthoff & Noordhoff, 1978).

[144] Quoted from Berman, *Soviet Criminal Law and Procedure*, p. 100.

procuracy suggested precisely this, specifically directing the General Procuror to guard against any 'local differences' or 'influences'.[145]

3.6.2 *The Court System*

A powerful supreme court was also a critical aspect of the 1936 Soviet socialist legal model. The Constitution granted the Supreme Court power over 'the supervision of the judicial activities of all the judicial organs of the USSR and of the Union Republics'.[146] This system therefore entrenched the highly centralised and bureaucratic nature of the courts. All lower courts were institutionally subordinated to a powerful supreme court with vast power to control the work of lower courts and 'articulate judicial policy'.[147]

The Supreme Court itself possessed a number of 'supervisory' powers that went far beyond the appellate supervisory jurisdiction of high courts in the West. These powers were drawn in part from the practices of supervision over law developed by the imperial Russian Senate. First, when the entire Supreme Court sat together – in what was called a Plenum – it exercised a number of broad supervisory powers over lower courts. This practice included the issuing of 'guiding explanations' for lower courts grounded in an abstract analysis of judicial practice.[148] These directives were obligatory for lower court judges and reflected the Senate's prior role of clarifying the vast array of conflicting Soviet laws and directives and ensuring centralisation. Second, the Supreme Court also retained power to reopen cases that had become final. Individuals could protest a final decision and have it reconsidered by a small panel of Supreme Court judges, called a 'presidium'.[149] The presidium had the power to reopen cases 'that have entered into force' in order to safeguard 'the unity of judicial practice or legality'.[150] Finally, the Chairman of the Supreme Court also possessed wide power over the judges in

[145] Ibid., pp. 100–101.
[146] Article 104, 1936 Soviet Constitution.
[147] Peter Solomon, 'The U.S.S.R. Supreme Court: History, Role, and Future Prospects' (1990) 38 *American Journal of Comparative Law* 127.
[148] Ibid., 131. This Senate developed the power to issue instructions to guide court practice. Vereshchagin, *Judicial Law-Making in Post-Soviet*, p. 97.
[149] Kirill Koroteev and Sergei Golubok, 'Judgment of the Russian Constitutional Court on Supervisory Review in Civil Proceedings: Denial of Justice, Denial of Europe' (2007) 7 *Human Rights Law Review* 619–620.
[150] Article 7, Section 1, Law on The Supreme Court. Also Article 391.1, Russian Code of Civil Procedure.

his or her court, ultimately controlling important benefits like salaries and housing.

3.7 The Legacy of Supervision in the Former Soviet Union

With the collapse of communism in Eastern Europe and the former Soviet republics, comparative law scholars described the socialist legal system as 'dead and buried'.[151] Comparative law casebooks simply omitted the category altogether, leaving what one scholar has described as a 'black hole'.[152] Underlying this 'death' was the logic that when market-based capitalism replaced state-centred Marxist economics, the legal systems in the former Soviet Union would automatically begin 'transitioning' back towards the capitalist civil law system. In one of the major casebooks, John Merryman argued that 'socialist law was little more than a superstructure of socialist concepts imposed on a civil law foundation' and 'with the end of the Soviet empire the superstructure is being rapidly dismantled, and nations once considered "lost" to the Western European civil law are returning to it'.[153]

Many reformers shared these aspirations. They hoped to end supervisory legality and replace it with judicial control over legality. In Estonia, Latvia and Lithuania, reformers successfully ended the practice of supervision. This success was itself a product of history – these Baltic countries always saw their inclusion in the Soviet Union as illegitimate, so their post-Soviet reforms reflected a strong desire to move away from Russian and Soviet legacy and to return to their Western European roots.[154] Furthermore, even when these countries were part of the Russian empire, they occupied an autonomous status, and viewed themselves as apart from Russian imperial development and its normative debates.[155]

In the other Soviet republics, however, supervision has continued to exert a powerful influence alongside judicial control of legality in most of the former Soviet republics. Legal actors and politicians have continued

[151] Zweigert and Kötz, *Introduction to Comparative Law*.

[152] Zdeněk Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* (Leiden: Martinus Nijhoff Publishers, 2011), p. 293.

[153] John Merryman, David S. Clark and John O. Haley, *The Civil Law Tradition: Europe, Latin America, and East Asia* (Charlottesville, VA: The Michie Company, 1994).

[154] William Partlett, 'Restoration Constitution-Making' (2015) 9(4) *ICL Journal: Vienna Journal on International Constitutional Law* 514, 516–518.

[155] Thomas Lane, Artis Pabriks, Aldis Purs and David J. Smith, *The Baltic States: Estonia, Latvia and Lithuania* (London: Routledge, 2002), pp. 1–32.

to argue for its importance in solving problems.[156] First, they have argued that supervision is necessary to ensure state unity amidst the centrifugal forces unleashed by a transition to capitalism.[157] Second, supervision is justified as an important method for protecting individuals from bureaucratic lawlessness.[158] Underlying both of these justifications is a belief that supervision is needed to respond to the unique challenges of post-Soviet governance.

3.7.1 *Prosecutorial Supervision*

In the 1990s, reformers attempted to weaken the procuracy in order to reassert the power of the courts over the control of legality.[159] Yet, despite the reforms, the vast powers of the procuracy have proved remarkably persistent outside of the Baltic countries. At the formal level, constitutional text in many post-Soviet republics remains largely unchanged. For instance, many post-Soviet constitutions continue to place the procuracy in a section entitled 'Judicial Power'. Furthermore, many still explicitly afford the procurator powers of general supervision. Article 125 of the Belarus Constitution, for example, states that the procurator 'shall be entrusted to supervise the strict and unified implementation of the laws'. Furthermore, all five of the Central Asian republics have also preserved the tradition of supervision.

Even countries that did not grant general supervision to the procuracy in the constitution have afforded these powers through legislation.[160] In Russia, for instance, reformers successfully blocked the constitutionalisation of supervisory power in the procuracy. However, Russian legislation affords the procuracy powers of general supervision through legislation.

[156] The monthly journal *Legality* (*Zakonnost'*) – which changed its name from *Socialist Legality* (*Sotsialisticheskaya Zakonnost'*) – has emerged as one of the key publications for these justifications.

[157] See, e.g., A. Alexseev, 'General Supervision: Problems and Perspectives' (1998) 2 *Zakonnost* 8. Iu. Paraskun, 'Net Demokratii bez zakonnosti' ['There is no democracy without legality'] (1993) *Zakonnost,* M. Shalumov, *Prokuratura v pravavoi sisteme gosudarstva* [*The Procuracy in a Law-Based State*] (Moscow, 1993).

[158] Ibid.

[159] Brian Taylor, 'From Police State to Police State? Legacies and Law Enforcement in Russia', in Mark Beissinger and Stephen Kotkin (eds.), *Historical Legacies of Communism in Russia and Eastern Europe* (New York, NY: Cambridge University Press, 2014), p. 136.

[160] William Partlett, 'Post-Soviet Constitution-Making', in David Landau and Hanna Lerner (eds.), *Handbook on Comparative Constitution-Making* (Cheltenham: Elgar, 2017).

In fact, Russian procurators continue to have the power to issue protests and proposals, and are statutorily required to consider and formally respond to requests from citizens.[161] These protests have a similar format and reasoning to judicial decisions.

The justifications for these continuing supervisory powers have shifted from enforcing socialist legality to protecting the interests of the state in fighting terrorism, ensuring territorial integrity and combatting legal nihilism (particularly in administrative regulations).[162] Russia is again illustrative. In the mid 1990s, the procuracy successfully argued that its powers of supervision were critical to managing the 'upheavals' in the country, such as 'skyrocketing crime'.[163] In the early years of President Vladimir Putin's presidency, the procuracy used its supervisory powers to 'scrutinise the legality' of acts of regional and local authorities.[164] The procuracy ended up playing a critical role in that process, issuing thousands of protests against regional laws that brought laws in line with federal legislation.[165]

Despite claims of convergence, supervision remains a point of difference with Western European civil law systems. For instance, the Venice Commission has said that the procuracy 'exercises too many functions which actually and potentially cuts across the sphere of other State institutions' and 'raises serious concerns of compatibility with

[161] See in general the law on the procuracy: Articles 23 and 24, Law on the Procuracy, at www.consultant.ru/document/cons_doc_LAW_262/. S. Bratanovskii and A. Uryvaev, *Prokuratura Rossisskoi Federatsii v mekhanisme zashchity konstitutsionnykh prav i svobod cheloveka I grazhdanina* [*The Procuracy of the Russian Federation in a Mechanism of Protection of Constitutional Rights and Freedoms of the Individual and Citizen*] (Moscow, 2012), pp. 99–100.

[162] Article 4, Section 1, Belarus Law on the Procuracy: states the 'goals' of the procuracy are to protect the 'verticality of law, legality, and legal order, as well as the interests of people, organisations, and the state'.) Article 1(2), Law on the Procuracy of the Russian Federation: similarly states the procuracy's purpose is to protect the 'verticality of law, unity, and strengthening of legality' as well as the interests of both citizens and the state. See also Stephen Thaman, 'Reform of the Procuracy and Bar in Russia' (1996) 3(1) *Parker School Journal of East European Law* 1, 15.

[163] Taylor, 'From Police State to Police State? Legacies and Law Enforcement in Russia', 136.

[164] Gordon B. Smith, 'The Procuracy, Putin, and the Rule of Law in Russia', in Ferdinand J. M. Feldbrugge (ed.), *Russia, Europe and the Rule of Law* (Leiden: Martinus Nijhoff, 2007), pp. 9, 11.

[165] Gordon Smith, 'The Procuracy: Constitutional Questions Deferred', in Gordon Smith and Robert Sharlet (eds.), *Russia and Its Constitution: Promise and Political Reality* (Leiden: Martinus Nijhoff Publishers, 2008), p. 113.

democratic principles and the rule of law'.[166] But these powers have proven resilient. In fact, legal actors have justified supervision as important to solving legal problems unique to the region. These justifications are frequently found in the monthly legal publication *Zakonnost'*, which explores different ways in which supervision can be used.[167]

These practices have proven highly resilient in countries seeking to break with the Russian tradition. In Ukraine, for instance, legal reforms have failed to alter key aspects of supervisory power.[168] The procuracy has the power to interpret customary international law and is present during the formulation of guiding explanations of the law by the Plenum of the Supreme Court.[169] The law also affords the procurator the power to issue decrees requiring administrative agencies to alter their activities, procedures or substantive rules and powers of review over legislative acts.[170]

3.7.2 *Judicial Supervision*

With the fall of communism, a great deal of judicial reform was also carried out in the former Soviet world. For instance, reformers introduced jury trials and adversarial procedure. The supervisory powers lodged in the supreme courts, however, have persisted. Supreme courts across the region exercise broad pseudo-legislative and administrative powers when sitting in a plenary session. These sessions – which include participation and submissions by non-judicial officials, including the general procurator and the minister of justice – carry out a number of duties for overseeing the administration of court practice.[171] Most notably, they provide 'judicial supervision' and 'provide instructions (*raziasnenie*) on the issues of court proceedings',[172] based on the general study of a number of cases and these instructions are binding on all lower

[166] European Commission for Democracy Through Law, Opinion on the Federal Law on the Prokuratura (Prosecutor's Office) of the Russian Federation, Opinion No. 340–2005, CDL-AD(2005)014, at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)014-e

[167] Zakonnost [Legality] is available online (in Russian) at http://pressa-lex.ru/.

[168] William Partlett, Agendas of Constitutional Decentralisation in Ukraine, ConstitutionNet, 23 July 2015, at http://www.constitutionnet.org/news/agendas-constitutional-decentralization-ukraine.

[169] 'Recent Developments' (1993) 34 *Harvard International Law Journal* 563, 616.

[170] Ibid., 618.

[171] Article 5, The Law on the Supreme Court.

[172] Article 126, 1993 Russian Constitution.

courts. Finally, a smaller body of the Supreme Court – the presidium – retains broad power to reopen cases.

The persistence of judicial supervision has also caused significant friction with the European Court of Human Rights (ECHR).[173] This court has held that judicial supervision violates the principle of legal certainty in article 6 of the European Convention for the Protection of Human Rights.[174] After finding the power problematic for Ukraine and Romania, the ECHR turned to Russia.[175] In a 2003 case, the Court stated that 'no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case'. The Court went on to argue that the rights of a litigant would be 'illusory' if a final and binding decision could be 'quashed by a higher court on an application made by a state official'.[176]

Laws describing these powers of judicial supervision point to the need for supervision in order to ensure 'legality' and the 'unity of the legal system'.[177] Furthermore, the Russian Constitutional Court has argued that judicial supervision is a critical part of the Russian constitutional system. In a 5 February 2007 judgment, the constitutional court held that supervision was based on the 'objective realities' of Russia.[178] Later, in a public statement, the Chairman of the Constitutional Court explained that the ECHR did not understand the importance of this kind of supervision to the Russian legal system. Judicial supervision, he argued, must remain a critical aspect of the Russian legal system in order to correct 'judicial mistakes'. He cautioned that 'numerous problems' had

[173] Koroteev and Golubok, 'Judgment of the Russian Constitutional Court on Supervisory Review in Civil Proceedings', 620–622.

[174] Case 48553/99, *Sovtransavto Holding v. Ukraine*, [2002] ECHR 621; [25 July 2002].

> judicial systems characterised by the objection (protest) procedure and, therefore, by the risk of final judgments being set aside repeatedly, as occurred in the instant case, are, as such, incompatible with the principle of legal certainty that is one of the fundamental aspects of the rule of law for the purposes of Article 6(1) of the Convention.

[175] William Pomeranz, 'Supervisory Review and the Finality of Judgments under Russian Law' (2009) 34(1) *Review of Central and East European Law* 15, 19.

[176] Application No. 5284/99, *Ryabykh v. Russia*, [2003] ECHR 396; [24 July 2003].

[177] Article 7, Law on the Supreme Court.

[178] Koroteev and Golubok, 'Judgment of the Russian Constitutional Court on Supervisory Review in Civil Proceedings', 619, 626. This has a parallel in the way that the court relied on the 'developing socio-historical context'.

arisen in other countries that had abandoned judicial supervision as a practice.[179]

3.8 Supervision in East Asia

The supervisory legality embedded in Chapter IX of the 1936 Soviet Constitution has exerted significant influence on formal constitutional design in socialist East Asia. At a textual level, all constitutions afford powers of supervision. The extent of this supervisory power and its manifestations, however, has developed in a very different way. Much of this will be described in the following Chapters in this book. This final part will therefore only sketch the bare outlines of an East Asian socialist supervision system that is grounded on local history and developing interpretations of socialist history.

3.8.1 Textual Similarities

The process of constitutional transplantation from Soviet Union to socialist Asia was not consistent over time. In the People's Republic of China (PRC), for instance, the 1954 Constitution adopted a version of supervisory legality but then abandoned it after the Cultural Revolution. The PRC then reintroduced supervisory legality – in much the same form – in the 1982 Constitution.[180] Vietnam, by contrast, instituted this model in 1959, and has retained it to varying degrees throughout the rest of the socialist period.[181]

Today, most of the major socialist constitutions in socialist East Asia formally follow the 1936 Soviet constitutional model. First, they place the courts and the procuracy in the same section of the constitution, and afford these institutions supervisory power. They also place supervision at the centre of their constitutional orders. In China, for instance, article 129 states that the procuracy is a 'State organ[] for legal supervision'.[182] It describes how the Supreme People's Court 'supervises the administration of justice by the people's courts at various local levels and by the special

[179] Ekaterina Butorina, Vremiya Novostei, Viperson, at http://viperson.ru/articles/valeriy-zorkin-v-nashey-strane-nadzor-neobhodim-ks-zaschitil-rossiyskoe-sudoproisvodstvo-ot-evropeyskoy-kritiki

[180] Partlett and Ip, 'Is Socialist Law Really Dead?', 485.

[181] George Ginsburgs, 'The Genesis of the People's Procuracy in the Democratic Republic of Vietnam' (1979) 5 *Review of Socialist Law* 179.

[182] Article 130.

people's courts'.[183] In Vietnam, the Constitution gives the procuracy the power to 'supervise judicial activities'. The Constitution also describes how the Court 'supervises and directs the judicial work of other courts', as well as ensuring 'the uniform application of law in trials'.[184] Thus, these supreme courts remain powerful bodies that exert significant power over lower courts through a number of different mechanisms.

3.8.2 *Selective Adaptation*

This formal reception has led to some key similarities. Most notably, many courts in socialist East Asia exercise similar powers of supervision to those found in the former Soviet Union. For instance, the Chinese Law on Courts grants the Supreme People's Court the power to promulgate 'explanations on questions concerning specific applications of laws and decrees in judicial procedure'.[185] These judicial explanations are legally binding rulings, which are not case judgments but are instead abstract decrees and replies.[186] With regard to the procuracy, practice varies. In China, for instance, the procuracy serves a similar statist goal, taking cases involving 'acts to dismember the state', or other cases 'impeding the unified enforcement of State policies, laws, decrees and administrative orders'. Second, much like its Soviet counterpart, it exercises wide powers to oversee judicial practice (article 5(4)) and protest individual cases (article 18). For instance, procurators have the power to protest against a legally effective judgment, even if it involves a 'mediation agreement harmful to state interests or social public interests'.[187] Finally, the procuracy also plays an important role in the long tradition of citizen petitions (*xinfang*).[188] The Chinese central government has recently encouraged this practice, issuing regulations to formalise this process. The stated goal of these regulations is to 'maintain[] connections between

[183] Article 127.
[184] Article 104, Section 2.
[185] Shao-Chuan Leng and Hungdah Chiu, *Criminal Justice in Post-Mao China: Analysis and Documents* (Albany, NY: State University of New York Press, 1985), p. 63.
[186] Supreme People's Court of the People's Republic of China [Sup. People's Ct.] June 6, 1997, Several Regulations for Judicial Interpretation, Judicial Distribution [1997] No. 15 (repealed); Supreme People's Court, March 9, 2007, Regulations on the Work of Judicial Interpretations, Judicial Distribution [2007] No. 12.
[187] Yuwen Li, *The Judicial System and Reform in Post-Mao China: Stumbling towards Justice* (London: Routledge, 2017).
[188] Carl Minzner, 'Xinfang: An Alternative to Formal Legal Chinese Institutions' (2006) 42(1) *Stanford Journal of International Law* 103–179.

the government and the masses'.[189] The procuracy has also played an important role in this continuing tradition. In a four-year period, Guandong procuracy received 13,444 petitions for protest and filed official protests in about 5 per cent of these cases.[190]

These formal similarities, however, mask critical differences in operation. Again, historical context helps to ensure how these formal transplants are selectively adapted to each country.[191] A particularly difficult institution to transplant was the procuracy and its vast powers of general supervision over administrative law making. For instance, in China, in the early days of the procuracy, there was confusion about how general supervision should operate.[192] The Procurator General is reported to have said, 'What to do and how to do it?'[193] Other countries without similar traditions of procuratorial control also had trouble in implementing this institution. For instance, in Poland, the procuracy – used to focusing on criminal prosecutions – lacked the resources and trained staff to successfully carry out general supervision.[194] In 1956, Polish lawmakers introduced changes to a comprehensive code of administrative procedure that increased the legal powers of courts in administrative law.[195]

Despite the failure to fully implement the supervisory powers of the procuracy, the supervisory tradition of the political review of legality remains important in China today. General supervision in the PRC is exercised by other institutions – for example, the standing committees of the National People's Congress, at different levels themselves, possess wide-ranging powers of supervision.[196]

[189] Cited from ibid., 120.
[190] Randall Peerenboom, 'The Dynamics and Politics of Legal Reform in China', in Tim Lindsey, *Law Reform in Developing and Transitional States* (London: Routledge, 2012), p. 222.
[191] Alan Watson, 'Aspects of the Reception of Law' (1996) 44 *American Journal of Comparative Law* 335–351 (discussing how the 'reception' of law is one of the most important sources of legal change).
[192] Oda, 'The Procuracy and the Regular Courts as Enforcers of the Constitutional Rule of Law', 1342.
[193] Ibid., 1343.
[194] Klaus-Jurgen Kuss, 'Judicial Review of Administrative Acts in East European Countries', in George Ginsburgs, Gianmaria Ajani, Gerard Pieter van der Berg and William B. Simons (eds.), *Soviet Administrative Law: Theory and Policy*, Law in Eastern Europe Series, No. 40 (Dordrecht: M. Nijhoff Publishers, 1989), p. 474.
[195] Ibid., p. 475.
[196] Chapter IV, Law of the People's Republic of China on Supervision by the Standing Committees of the People's Congresses at All Levels, at www.npc.gov.cn/englishnpc/

Furthermore, the Ministry of Supervision (MOS), as well as the Central Discipline Inspection Commission (CDIC) and their subordinate bodies also have supervisory power.[197] These bodies also rely on the frequent practice of petitioning. For instance, during one period, petitions were responsible for the disciplining of about 80 per cent of cadres for illicit conduct.[198]

Other Chapters in this volume describe the adaptation of supervision in socialist East Asia. For instance, Chapter 9 describes the operation of the procuracy and its relevance to Vietnam's legal system. They describe how Ho Chi Minh established the procuracy 'to ensure that the law was observed strictly and uniformly, and people's democratic legality was maintained'.[199] Since the 2001 reforms, the procuracy has shifted its rationale closer to that of the post-Soviet countries, supervising court practice and compliance with human rights. This change was introduced in part to ensure better control over legality during large-scale market reforms.[200] Despite this difference, however, a key similarity emerges in socialist East Asia: despite judicial reform, socialist law continues to employ the top-down political control of legality. This centralised supervision is in turn a critical tool in East Asian consolidation of state capitalism.

3.9 Conclusion

This Chapter demonstrates the importance of history in understanding how legal systems respond to political ideologies like socialism. In

Law/2008-01/02/content_1388018.htm. (Key provisions demonstrate that standing committees are charged with ensuring that key laws are enforced correctly.). China has also introduced supervisory legality into its governance of Hong Kong. The key institution of supervision over the interpretation of the Hong Kong Basic Law is the National People's Council Standing Committee (NPCSC). Furthermore, Beijing has also established a Basic Law Committee that would assist the NPCSC in its interpretation of the Basic Law. Eric Ip, 'Prototype Constitutional Supervision in China: The Lessons of the Hong Kong Basic Law Committee' (2015) 10(2) *Asian Journal of Comparative Law* 323–342.

197 Yasheng Huang, 'Administrative Monitoring in China' (1995) 143 *The China Quarterly* 828.

198 Ibid., 835.

199 Article 2, Law on the Organisation of the People's Procuracy (LOOPP), 1960.

200 Brian Quinn, 'Vietnam's Continuing Legal Reform: Gaining Control Over the Courts' (2003) 4 *Asian-Pacific Law & Policy Journal* 431.

particular, it reminds us that to understand a legal system requires more than just understanding how those within a new dominant political ideology describe their system. Instead, it requires understanding how this political ideology interacts with a historically situated set of often contradictory practices and concepts in the pre-existing legal system.[201] This suggests that no matter how revolutionary the language of political change, the practice of legal systems changes much more slowly and involves far more continuity.

Understanding socialist law in this way yields three important conclusions. First, it demonstrates how the Leninist, statist version of socialist supervision reinvigorated supervisory practices that ultimately frustrated the judicial monopoly over the review of legality and challenged Western conceptions of judicial power. For instance, supervision invested the review of administrative legality in procuracies or other non-judicial bodies. It also gave a small group of court leadership (in the presidium) the authority to reopen final Supreme Court judgments. In this way, socialist law helped to re-energise politicised methods of ensuring legality.

Second, this historical perspective helps deepen our understanding of the internal debates and practices of supervision. Seen this way, supervision is best understood as the bureaucratised and political control of legality that exists alongside, and in some tension with, independent and binding judicial enforcement of legality. Evolving out of needs to discipline the vast bureaucratic apparatus of the imperial state and respond to a tradition of individual petitions, supervision was justified as a more flexible and effective approach to legality in comparison with judicial proceedings. Although it has varying institutional manifestations, supervision remains an important lever for ensuring state control over the potentially centrifugal forces of capitalism and persistent administrative illegality in the former Soviet bloc.

Finally, these justifications allow us to better understand the persistence of non-judicial supervision across the former socialist bloc countries today. These statist justifications and practices remain persuasive in many parts of the former socialist world, and therefore represent a

[201] For a reflection of this approach to understanding law, see Patrick S. Atiyah and Robert S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Oxford: Clarendon Press, 1987).

significant divergence from the trend towards judicial resolution of legal disputes in the rest of the civil law world. The persuasive power of these justifications is not inevitable; in fact, there have been moves in some former socialist bloc countries to strengthen judicial power.[202] But, as long as a normative value for strengthening centralised state power remains robust, supervisory legality is likely to continue.

[202] William Partlett, 'The Elite Threat to Constitutional Transitions' (2016) 56(2) *Virginia Journal of International Law* 407–457.