1 General Introduction – Intellectual Property in Central and Eastern Europe: A New Era of Post-Socialist Transition

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In the law, as in other domains, the predominance of English is both a gift and a curse. Ours is an age of global *rapprochement*, at least in the literal sense, brought about by technology. As national borders become increasingly porous, the possibility of conversations across legal cultures has never been more interesting or relevant. In no area of the law could this be more apparent than in relation to intellectual property, which is intimately connected with technological developments. English, as a shared language, makes these conversations possible – however halting or incomplete they might be – promising to enrich the understanding of law on all sides.

Yet English as a medium for the exchange of legal ideas is deeply flawed. Law depends on language like virtually no other domain – though poets may sympathize! – and meaningful legal expression demands precision and clarity. The status of great jurists, like the peerless Lord Denning, often reflects linguistic elegance and skill in the art of storytelling, as much as legal incisiveness *per se*.[1] Accordingly, a legal expert who approaches his or her work in a new language is almost certain to be at an instant disadvantage. And, even if the mastery of English is to be had, the issue of communicating across cultures remains – through the haze of unspoken nuance, acquired understanding, and shared beliefs that permeate the legal culture of a country and give it its character. This magic of context colors the law in every way. It can utterly transform our understanding of any given legal principle, and of the language that gives it form.

Then there is the particular prestige of the common law. Law occupies a special place of pride in Great Britain, and the same may be said of the United States. In both cases, as in other countries of common-law heritage, the unique methodology of the common law, with its emphasis on the elucidation of legal principles through case law, is revered. In each jurisdiction, the cumulative body of case interpretation is considered a special and unique aspect of the legal heritage. It is an element that is generally said to differentiate these legal systems from other legal systems of the world, including, most obviously, the civil law systems of Continental Europe. It is worth noting that this distinction is even more starkly apparent in relation to the socialist legal systems that arose historically in Central and Eastern Europe, which developed an extreme focus on legislative instruments.[2]

[1] See the beautiful obituary of Lord Denning written by Edmund Heward for *The Independent*, March 6, 1999, available at www.independent.co.uk/arts-entertainment/obituaries-lord-denning-1078629.html (accessed March 14, 2019).

[2] See e.g. Ugo Mattei, "Three Patterns of Law: Taxonomy and Change in the World's Legal Systems" (1997) 45 *American Journal of Comparative Law* 5, 7.

What do these traditions, beliefs, and value systems imply for legal dialogue? What we may term "legal exchange," in contrast to what was previously known as legal imperialism,[3] implies a dialogue of relative equals. Comparative law scholar Ugo Mattei has aptly described legal imperialism as "a one-sided exportation of legal rules and concepts that usually end up being rejected, or creating intellectual dependency."[4] More recently, he has discussed this issue specifically in terms of a post-socialist aftermath:

> Comparative lawyers have been completely naive about the impact of the Cold War on their own discipline both as it reached maturity in the 1950s and as it developed after the fall of the Berlin Wall until now. This consequence of the professional depoliticization of comparative law is especially troublesome, since the Cold War has accompanied in its entirety the historical moment in which the common law tradition, especially in its U.S. epiphany, has been able to conquer global legal hegemony. Thus, the current disciplinary knowledge of comparative law, the very toolkit of our methodology, has developed in the context of the Cold War confrontation and has reached full global dominance in its aftermath. It is worth thinking about possible implications of this context for the professional project of legal comparativism if we wish to maintain an acceptable level of critical self-understanding.[5]

If not equality, then, at the very least, openness and respect are necessary preconditions for true legal exchange in the sense of a mutually constructive dialogue. Only on these terms, as Mattei suggests, can it become possible to *see* clearly – to be able to grasp legal concepts in more objective terms, and to evaluate their practical consequences with greater realism. At some level, the legal and intellectual capacity of the newcomer must be accepted as "equal" to that of the established legal culture, though undoubtedly different from it.

Comparative legal scholarship continues to reflect its origins in the historical currents of the twentieth century: the struggles of decolonization, and post-War and post-socialist reconstruction. Notwithstanding the progress of history since then, the principle of legal "exchange" remains a difficult notion. Can the experience of Asian traditions, African cultures, or indigenous peoples be said to be relevant to that of modern Western democracies? Do we really have something to learn from people in these contexts *about law*?

And yet, what is the alternative – "exporting" English or American legal values to the rest of the world? This experiment was attempted in the context of the larger imperial forays of the past,[6] as well as largely defining the period of post-socialist law reform in Central and Eastern Europe, based on the "manifest superiority of the Western models

[3] ibid.

[4] ibid., 5. In subsequent work, Mattei goes further, noting that, "In the United States, the dominant legal culture from the early twentieth century has reduced legal cosmopolitanism into the Wilsonian missionary spirit of teaching others the right way of doing things rather than engaging with unbiased understanding of legal 'otherness.'" See Ugo Mattei, "The Cold War and Comparative Law: A Reflection on the Politics of Intellectual Discipline" (2017) 65 (3) *American Journal of Comparative Law* 1 at 3.

[5] ibid., 2.

[6] See e.g. Upendra Baxi, "Review of Selected Writings by Otto Kahn Freund (Stevens & Sons 1978)" (1983) 25 (4) *Journal of the Indian Law Institute* 563, 564, who notes that a consequence of imperialism, in the legal sphere, is "juristic *dependencia*" in the postcolonial era. He argues, in full: "While some of us cannot altogether ignore the Eurocentric heritage of the past and the present borrowings mostly perpetuated by juristic *dependencia* our comparative jurisprudence has to be oriented toward an understanding of the legal evolution in the Third World societies [footnote omitted]."

which reformers hope to emulate."[7] Of course, this statement could apply more broadly beyond law, at least in the immediate post-Communist aftermath, to society as a whole. Formerly colonized countries have held on to the trappings of Western law for various reasons: their practical need to assimilate into the international system, often a heatedly controversial project in its own right, as well as the more idealistic desire to preserve and foster the best traditions of the modern rule of law in their own countries. Indian law is a good example of the latter approach.[8] But indigenous societies and former colonies have also faced desperate and unique situations, often as a result of the extreme cruelty of colonial domination. Accordingly, they have sometimes embraced completely new approaches to the law, in the broadest sense of the term – although, ironically, that novelty might actually be derived from their own, deepest traditions. Canada's indigenous healing circles[9] and South Africa's Truth and Reconciliation Commission[10] are examples of the search for such "new" solutions to extraordinarily complex social and legal problems. It is telling that these new approaches are often adopted as a response to the catastrophic failure of modern regulation.

Western law is part of a larger package, or system – that of Western culture as a whole. In this regard, it is wise to remember the words of Otto Kahn-Freund, one of the greatest comparative lawyers of the last century:

> [A]ny attempt to use a pattern of law outside the environment of its origin continues to entail the risk of rejection. The consciousness of this risk will not, I hope, deter legislators in this or any other country from using the comparative method. All I have wanted to suggest is that *its use requires a knowledge not only of the foreign law, but also of its social, and above all its political, context. The use of comparative law for practical purposes becomes an abuse only if it is informed by a legalistic spirit which ignores this context of the law.* [italics mine][11]

Given the current state of the world, it seems only to be stating the obvious to point out that Western domination presents its share of problems. Indeed, as should once again be obvious – despite any nostalgic tendencies to idealize the past or indigenous cultures – no single culture known to humanity has ever offered a perfect society. Each tradition has had its glories and its nadirs. Different societies have promoted important values, such as artistic greatness, intellectual prowess, spiritual exploration, environmentalism, and the

[7] Mira T. Sundara Rajan, *Copyright & Creative Freedom* (Routledge 2006) 54; the issue is discussed more broadly at 47–59.

[8] See e.g. the discussion of approaches to law reform in India by Baxi (n 5), 564.

[9] See e.g. Toby S. Goldbach, "Instrumentalizing the Expressive: Transplanting Sentencing Circles into the Canadian Criminal Trial" 25 *Transnational Law & Contemporary Problems* (2015), available at Scholarship@Cornell Law: A Digital Repository, https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?referer=https://www.google.be/&httpsredir=1&article=2606&context=facpub (accessed March 14, 2019); and a doctoral thesis on these and related practices by (Gus) Louis Paul Hill, *Understanding Indigenous Canadian Traditional Health and Healing*, Submitted to the Faculty of Social Work at Wilfred Laurier University in 2008, available at http://scholars.wlu.ca/cgi/viewcontent.cgi?article=2049&context=etd (accessed March 14, 2019).

[10] Harvard's Law Library characterizes the Truth & Reconciliation Commission as a form of alternative dispute resolution (ADR): see https://guides.library.harvard.edu/c.php?g=310591&p=2078513 (accessed March 14, 2019). The Commission's website is available at www.justice.gov.za/trc/index.html (accessed March 14, 2019).

[11] Otto Kahn Freund, "On Uses and Misuses of Comparative Law" (1974) 37 (1) *Modern Law Review* 1, Stable URL: www.jstor.org/stable/1094713 (accessed March 14, 2019).

scientific method, all of which have supported human development, while simultaneously contributing to various evils, including gender oppression, racial and caste inequality, the failure to recognize individual rights, slavery, and every other form of inhumanity that exists.

Within the legal sphere, it is worth returning to the example of India. A country with a unique and ancient tradition of legal scholarship and jurisprudence, classical India has produced at least one of the most famous legal texts in history: the roughly two thousand-year-old "code," as it has widely come to be known, of Manu, the *Manu Smriti*.[12] However, as Werner F. Menski convincingly demonstrates, the ancient tradition of Indian law relied heavily on custom and practice, as exemplified by the concept of *dharma*.[13] It is therefore inaccurate to refer to the *Manu Smriti* as a law "code" in the modern, European or North American, sense of that term – as a precise and enforceable statement of rules.[14] Instead, it is a complex amalgam of tradition and counsel. Its content makes it a work to be criticized: while expressing some principles that modern humanity would admire, such as nonviolence and compassion, it simultaneously endorses, at least in some measure, the ultimate "crime" of the caste system.[15] Must the principles in this and other texts be accepted or rejected wholesale? Instead, can a re-evaluation and reimagining of tradition be an acceptable and successful course for social reform? Some of the most brilliant Indian reformers, notably of the nationalist period, supported the latter approach, arguing in favor of searching within their own culture and history for the values that they wished to uphold in a modern India.[16]

Indeed, the inevitable goal of history – of humanity – is to promote the growth of what is valuable. This is arguably the very essence and meaning of culture: the preservation and development, in the broadest sense, of what matters at the grand level of human evolution as a whole. Humanity, itself, must be considered as the complex organism that it is: no mere physical entity, but an idealistic one, too, with intellectual traditions and human values taking their place alongside material constructions and achievements. The story of humanity is simultaneously drawn from the life of the species, of cultures, and, of course, of individuals. Since history is necessarily understood in terms of long-term trends, it can never be properly evaluated by considerations of short-term gain.

In the process of historical development, though, much debris also accumulates. In the present day, humanity has effectively become aware of itself as a global entity, and one facing global catastrophe. There can be no doubt that global solutions to the conflicts and failures of humanity are needed. This amounts to a powerful impetus to

[12] Patrick Olivelle, *The Law Code of Manu* (Oxford University Press 2009); the seminal translation into English was offered by George Bühler, *The Laws of Manu* (Oxford University Press 1886), available at https://archive.org/details/lawsofmanu00bh (accessed March 14, 2019).

[13] See the comments by Werner F. Menski, *Hindu Law* (Oxford University Press 2003) 24–26.

[14] This theme and the "[u]nduly formalistic focus on the *Manusmṛti*" pervade Menski's convincing work on Hindu Law: see ibid., 26 n. 50, e.g. 128–29, 135–36, 146.

[15] See e.g. C. Subramania Bharati, writing in 1916: C. Subramania Bharati, "The Crime of Caste," in *Agni and Other Poems and Translations & Essays and Other Prose Fragments* (A.C. Natarajan 1980) 76; the essay was originally published in the magazine, *Commonweal*, October 6, 1916. In view of the unavailability of the book, a copy of the text can be obtained from the author.

[16] For example, C. Subramania Bharati's attitude toward reform could be summarized in his granddaughter's words: "A precious jewel shines better after the removal of the impurities encrusting it. Likewise, the future India, as a purified and enlightened jewel, shines more than ever before." S. Vijaya Bharati, *Subramania Bharati: Personality and Poetry* (Munshiram Manoharlal 1975) 35.

seek solutions in the best of human traditions – to look *everywhere* for the solutions that are needed. From a legal point of view, some of these solutions, including novel perspectives that can point the way towards new conceptual approaches to the law, are likely to be found in those parts of the world that are not considered leaders in the modern realm of law.

This brings us to Central and Eastern Europe, the region that is the focus of this book.

In purely geographical terms, the Central and Eastern European region stretches from Germany in the west to Russia in the east.[17] The vastness of Russia makes the geographical classification infinitely more complex: at what point does Europe yield to Asia, and how should the transitional countries, across whose lands this transformation occurs, be classified?

After the end of World War II – circa 1950 – this complex question acquired a clear political answer, with the extension of Russia's sphere of influence into both Eastern and Central Europe, on the one hand, and Western and Central Asia, on the other. Moreover, an older tradition of Russian imperialism had long linked areas such as what is now the Republic of Georgia to Russian governance.[18] Finally, geographic proximity, and post-War power-brokering among the Great Powers, allowed the imposition of Russian dominance on the small but culturally distinct Baltic countries of Latvia, Lithuania, and Estonia.[19]

From a legal point of view, the extension of the Soviet sphere of influence was highly significant. The countries of Central and Eastern Europe, in the geographical sense of this term, had previously been part of the broader tradition of European civil law. The articles in this book dealing with the history of intellectual property rights in countries such as the Czech Republic and Hungary show that they closely resembled their counterparts in France and Germany. The concept of intellectual property was developing rapidly in these countries just as the international community was experiencing a dramatic evolution in its understanding of intellectual property rights – particularly in the late nineteenth and early twentieth centuries. During that period, many of the countries of Central and Eastern Europe joined international intellectual property agreements, including the Berne Convention for the Protection of Literary and Artistic Works, the primary instrument of international copyright law concluded in 1886.[20] Membership in

[17] As Rudolf Leška points out, "historically and geographically, Central Europe consists of (from west to east) Switzerland, Germany, Austria, Czechia, Poland, Slovakia and Hungary." A brief consideration of this list helps to illustrate the artificiality of the Iron Curtain: A geographically linked region therefore encompassed both Western democratic states and Communist countries during the Soviet period. See Rudolf Leška, "Performers' Rights – A Central European Export," n 3 and accompanying text in this collection.

[18] See Geoffrey Hosking, *Russia: People and Empire 1552–1917* (Harvard University Press 1997) 20. Hosking offers a detailed analysis of the progress of the Russian Empire into both Europe and Asia, with the perceived strategic advantage, or necessity, associated with each phase of imperial expansion: see ibid., c. 1 (3–31), especially 15–23, 38–39.

[19] For a discussion of the controversy surrounding the pact even today, see David Wedgwood Benn, "Review Article: Russian Historians Defend the Molotov-Ribbentrop Pact" (2011) 87 (3) *International Affairs* 709 at 709–10. As Wedgwood Benn notes, the Molotov-Ribbentrop Pact, an agreement between Stalin and Hitler, contained "a secret protocol providing for German and Soviet spheres of influence in Poland and the Baltic states in the event of war." This agreement later helped to support the cause of independence movements in the Baltic states, "who maintained that they had never become legally part of the USSR."

[20] See Silke Von Lewinski, "Copyright in Central and Eastern Europe: An Intellectual Property Metamorphosis" (1997) 8 (1) *Fordham Intellectual Property, Media and Entertainment Law Journal* 39 at 41; see also György Boytha, "The Berne Convention and the Socialist Countries with Particular Reference to Hungary" (1986–87) 11 *Colum.-VLA J.L. & Arts* 57.

these international agreements signified the understanding and preparedness of these countries to embrace, and keep pace with, the development of the international intellectual property system at a time when, for example, the book trade had become an important form of European and international commerce.[21]

When Russian influence penetrated this region, intellectual property rights were profoundly implicated in the overall ideological and economic shift towards Communism. The perception of a fundamental incompatibility between socialist ideology and private property ownership ultimately extended to intellectual property rights – a system that was viewed with increasing unease due to the grant of exclusive rights to individuals in their roles as creators and right owners.[22] This cultural shift meant that the Russian state had to develop a new form of regulation to deal with authorship. But early socialist approaches to intellectual property were also driven by appropriately novel motivations. According to Soviet theory, the "capitalist" relationship between author and publisher was inherently exploitative – a view that is arguably of interest in modern copyright practice, too, though the rubric of socialism has made it a taboo subject. Curiously, the proprietary quality of copyright still continued to be recognized for some time after the Revolution: property *per se* could apparently be tolerated, as long as it was in the hands of true "workers" rather than "big capitalist[s]." As stated by a 1938 commentary on Russian copyright law:

> In bourgeois society, the author's right is a monopoly, establishing the exclusive right to distribute the products of science, literature and art . . .
>
> [It] is characteristic that, except for a small group of bourgeois authors, the author's right is the property, in bourgeois society, not of the author, but of the publisher, of a big capitalist, an industrialist . . . [T]he author's right in capitalist countries is made into a tool of the interests of the monopolist-publisher, a means of exploiting the author and retarding the cultural growth of the masses of the people . . .
>
> The basic principles of the Soviet author's right are completely different . . . [It] has the objective of protecting to the maximum the personal *and property* interests of the author, coupled with the assurance of the widest distribution of the product of literature, science and the arts among the broad masses of the toilers [italics mine].[23]

But, as in other areas of life, the appealing idealism of this approach was gradually made manifest in a curious practical system: in the Soviet Union, the activity of publication was entirely taken over by the state and its organs. Accordingly, no author could publish a work unless it was, at some level, acceptable to the apparatus of the state. Revisions to the copyright system ultimately led to the removal, under Soviet law, of the principle of exclusivity: as of 1961, authors' rights were no longer considered exclusive rights.[24] By this change, the legislator had eviscerated the concept of copyright, essentially replacing the notion of individual authorship, on which all modern copyright regulation rests, with

[21] For a detailed study of this period, see Catherine Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century*, *Cambridge Studies in Intellectual Property* (Cambridge University Press 2006).

[22] See e.g. Sundara Rajan, *Copyright & Creative Freedom* (n 4) 97–100.

[23] Quoted in ibid., 96. The original text appears in, "A Text Writer's Opinion," *Grazhdanskoe Pravo* (Civil Law), Part I, Moscow 1938, 254–55, translated by J. N. Hazard, *Materials on Soviet Law* (Columbia University 1947); *Copyright Act*, USSR Laws 1928, No 246 (16 May 1928) 35–37. The quoted commentary can be found at 35.

[24] ibid., 98.

a form of (if it may be called such) collectivized ownership. Yet the system fell short of a truly *sui generis* system of socialist copyright, and it also shied away from an open assertion of its affinity for censorship: it still allowed authors to claim rights in their work, and exercise them, within the broader framework of Soviet publishing.[25]

Socialist theory led to what now seems a curious tension, from the point of view of Western copyright law, between limiting property rights and simultaneously recognizing individual rights of creation. The author was, in effect, a cultural "worker." As a result, under socialist law, authors retained the *personal*, *moral* rights to be attributed as the authors of their own work, and to have the integrity of their work preserved once it had been accepted into the state publishing apparatus. However, in relation to works that were considered unacceptable by the Soviet publishing system, for whatever reason, authors found themselves practically unable to enjoy the benefit of the moral rights provisions.[26]

Ultimately, this extensive and well-realized system of authors' rights, particularly their moral rights, became part of a broader political system that ruthlessly undermined dissent. Since creativity and the possibility of dissent go hand-in-hand, no author could truly be safe. The experience of Shostakovich, the composer, provides an apt illustration of the dangers: although his work was at first beloved of Stalin, the day came when his musical innovations stirred the ire of the Soviet leader, and he instantly became a political and cultural outcast.[27] Yet, as the wheel of Stalin's political caprice turned, he was later restored to favor. Sheila Fitzpatrick describes the vicissitudes that Shostakovich experienced, noting that "his disgrace on each occasion proved temporary and his status as an acknowledged 'great Soviet composer' survived these debacles."[28]

The ambivalent treatment of authors and artists under Communist rule ultimately culminated in a brief "Thaw," following Stalin's death, succeeded by a brutal and sustained period of repression. Among other landmarks of indignity, this period saw the first trial of writers for the content of *imaginative* literature: the notorious show trial of writers Andrei Siniavsky and Yuli Daniel in 1966.[29]

[25] See e.g. ibid., 99.

[26] This problem is discussed in detail in ibid., 120–22; a general overview of the situation may also be found in Mira T. Sundara Rajan, "Copyright and Free Speech in Transition," in Jonathan Griffiths and Uma Suthersanen, eds., *Copyright and Free Speech: Comparative and International Analyses* (Oxford University Press 2005) paras 13.39–13.47, 13.49.

[27] The situation is summarized in ibid., 289, endnote 89. For the reader's convenience, the note is quoted here: "Shostakovich was the first composer trained in the Soviet system who came to international prominence. At first, his success was embraced by the Soviet state, which held him up as an example of the creative potential of the new society. Shostakovich's opera, 'Lady Macbeth of the Mtsensk District,' was widely performed in the Soviet Union by the leading opera companies of Leningrad and Moscow. However, after a Moscow performance in 1936 attended by Stalin, a devastating editorial was published in *Pravda*. Not only did the review 'attack [... the] opera root and branch,' in Sheila Fitzpatrick's words, but it also made use of the occasion for a wide-ranging attack on cultural innovation in the Soviet Union. Interestingly, the author of the unsigned editorial was believed to be Andrei Zhdanov, a member of the Politburo and close associate of Stalin's ... " See Sheila Fitzpatrick, *The Cultural Front: Power and Culture in Revolutionary Russia* (Cornell University Press 1992) 187; she discusses the incident in detail at 183–215.

[28] ibid., 213.

[29] The trial, which took place in 1966, received detailed contemporary coverage in M. Hayward, *On Trial: The Soviet State versus "Abram Tertz" and "Nikolai Arzhak"* (Harper & Row 1967) (using the pseudonyms of the two writers). It is analyzed from an authors' rights perspective in Sundara Rajan, *Copyright &*

This, then, was the system of intellectual property law that was exported to the countries of Soviet influence and occupation in Central and Eastern Europe: a comprehensive framework for the protection of nonexclusive rights of authorship, to be exploited within the context of a highly regulated state publishing apparatus, accompanied by the curious anachronism, to the extent that it can be called such, of a comprehensive set of provisions recognizing authors' *moral* rights. In Central and Eastern Europe, this framework was superimposed on an existing system of intellectual property protection in the European civil law tradition, which, as noted previously, recognized authors' exclusive economic and moral rights in their work, while also keeping pace with international developments through membership in key international intellectual property agreements, such as the Berne Convention.

But, as previously noted, Soviet territorial influences extended even further than Central and Eastern Europe, encompassing regions that had been subsumed within the earlier Russian Empire, such as Georgia and Armenia, as well as Central Asian regimes, such as those of Kazakhstan, Kyrgyzstan, and others. The legal systems of these countries, like those of the Central and Eastern European states, became vehicles for socialist law, though the cultural and social context here was so evidently different.

During the mid- to late 1980s, under the gradually liberalizing leadership of Mikhail Gorbachev, the Soviet Union loosened its grip on regional influence, leading, with seeming inevitability, to one of the true formative moments of modern history: on November 9, 1989, the Berlin Wall, which had fatefully separated West and East, democracy from Communist rule, on German soil, for nearly three decades, was breached. Barely two years later, in 1991, the Soviet Union itself dissolved.[30]

These events immediately gave rise to a new historical phenomenon: post-socialism.

The term was a highly significant one. It suggested the continuation of a shared reality on the part of countries that had once been subsumed within the sphere of Soviet influence. Just as these countries had developed certain common features because of the framework of Soviet rule, with shared legal, economic, political, and cultural dimensions, they were likely to face similar challenges in its aftermath. But the term also helped to perpetuate the image of Central and Eastern European countries as a monolithic, homogeneous, and socially underdeveloped group – defined by the legacy of socialism just as, in the previous period, they had been characterized by their participation in the Soviet bloc. In a sense, therefore, it could be said that the rubric of post-socialism impeded the recognition of European diversity, though it did so with a view to recognizing the unique difficulties faced by these countries in the immediate aftermath of socialism.

From the perspective of intellectual property law, post-socialism signified a specific heritage of Soviet law, acquired during the socialist period, and affecting the

Creative Freedom (n 4), c. 6, "Creative Freedom on Trial," 123–49. See also Joseph Frank, "The Triumph of Abram Tertz," June 27, 1991, *The New York Review of Books*; the events of the trial continue to be discussed, with another article in the January 2010 *New York Review of Books* that subsequently received clarification in a letter from Stuart H. Loory, the Moscow Correspondent for the New York Herald Tribune in 1965 and 1966, who reported on the Trial. See Stuart H. Loory, "Opening the Closed Trial," in response to "Writers in a Cage," from the January 14, 2010 issue; April 8, 2010, *The New York Review of Books*.

[30] These events are chronicled by Geoffrey Hosking, *A History of the Soviet Union 1917–1991: Final Edition* (Fontana Press 1992) c. 15, 446–501.

understanding of intellectual property, in both conceptual and practical terms, in these countries. But, in subsequent decades, successive waves of law reform have washed over the underlying structures of socialist legislation.[31] Like ocean tides repeatedly washing over a beach and gradually obliterating footprints, new laws may eventually supplant the old ones so thoroughly that these historical traces become practically invisible.[32] Has law reform thereby eliminated the legacy of post-socialist law?

In answer to this question, it is worth remembering that no complete understanding of the law can be gained from legislation alone. Rather, legislation operates within a broader context – that of interpretation, which, in its turn, depends on the wider social context that gives the law its practical significance. In the case of Soviet copyright law, for example, the peculiar environment for publishing imbued the law with meaning, offering a unique and unprecedented context for interpretation, without which any understanding of the law would have been meaningless.

In this sense, replacing socialist legislation with modern texts, though an essential part of modernization, is necessarily insufficient to accomplish any true "transition" from a socialist legal system to a "modern" one. The broader concept of "transition" is discussed in greater depth later in the chapter; for the moment, it is sufficient to note that legal transition, in this particular sense, may not be achievable – and, indeed, that it may not be desirable. For, a transition to a modern legal system that attempted to erase the socialist past would also erase the lessons that could have been learned from that history. Only if the past had *no value*, and if history *per se* had *nothing to teach*, would such a goal be desirable. Yet there are always lessons to be learned from the past, and this is perhaps all the more evident in the case of difficult past experiences like those under socialism. To say the least, these were hard-won lessons. George Santayana's well-known words are no less true because they have become ubiquitous – "Those who cannot remember the past are condemned to repeat it," he wrote.[33]

The history of Central and Eastern European countries is replete with the examples of authors and artists who believed in the redemptive power of suffering, and, in particular, of dissidents who were willing to sacrifice themselves in order to uphold what they believed to be the "truth." In one of his letters, Boris Pasternak, the Russian writer and poet, wrote:

> Morally discriminating people are never satisfied with themselves; they regret much, repent much. The only basis upon which I have nothing to repent of in my life is the novel [*Dr. Zhivago*, the publication of which led to the award of the Nobel prize in 1958]. I wrote what I think, and to this very day I stand by those thoughts. It may have

[31] For a discussion of the ubiquity of law reform in the post-socialist period, particularly in the area of intellectual property rights, see Sundara Rajan, *Copyright & Creative Freedom* (n 4) 47–71.

[32] In this regard, the fate of the Berlin Wall itself presents a fascinating problem: see Christoph Gunkel, "History Comes Full Circle: Berlin Before and After the Wall," February 5, 2018 (the day when the Wall had been gone longer than it had been standing), available at www.spiegel.de/international/germany/history-comes-full-circle-before-and-after-photos-of-the-berlin-wall-a-1191495.html (accessed March 14, 2019); and Catherine Schaer, "Berlin's Invisible Wall: Littlest Left Today of the Cold War's Most Famous Monument," July 16, 2009, available at www.spiegel.de/international/germany/berlin-s-invisible-wall-little-is-left-today-of-the-cold-war-s-most-famous-monument-a-636586.html (accessed March 14, 2019).

[33] See George Santayana, *The Life of Reason: Reason in Common Sense* (Scribner's 1905) 284. The citation is offered at the Internet Encyclopedia of Philosophy (IEP), A Peer-Reviewed Academic Resource, www.iep.utm.edu/santayan/ (accessed March 14, 2019). These words have practically become a motto, for example, for educators seeking to inform present and future generations about the horrors of the Holocaust: see http://auschwitz.org/en/museum/news/words-in-the-service-of-hatred,1022.html (accessed March 14, 2019).

> been a mistake that I didn't hide it from others. I assure you that I would have concealed it if it were more poorly written. But it turned out to be stronger than in my fondest dreams. The strength comes from above, and thus its further fate is not within my control. I will not interfere with it. If the truth I know must be paid for by suffering, that is nothing new, and I am ready to take whatever comes.[34]

In this vein, it is important to recognize that intellectual property law in socialist countries functioned against a broader background where the rule of law was poorly observed. Individual citizens, rather than operating on the assurance of protection by the law, came to see it, instead, as a tool of power, to be wielded by the state against them.[35] It is part of the "terrible beauty"[36] of the Soviet period that intellectuals and artists continued to believe in the law as a means to a better life. Russian dissidents, for example, demanded that the letter of the Stalinist Constitution be upheld, and placed their very modern demand for constitutional rights at the heart of their attempts at resistance. Alexandra Sviridova identifies Alexander Esenin-Volpin, a Russian scientist and artist, as a leading figure in this movement:

> . . . [P]oet, mathematician, and dissident Alexander Esenin-Volpin . . . drove the ruling order crazy simply by appealing to the law. Esenin had taken the trouble to read and study the Stalinist constitution, which he declared beautiful. The problem was that no-one used it – neither Stalin nor the people. Esenin decided to give it a try.[37]

Nevertheless, the law has proven to be a fragile organism. Central and Eastern European countries in the post-socialist period have evolved in an atmosphere of relentless suspicion towards the rule of law, itself, which has clear origins in the Soviet period.[38] In terms

[34] Translated by Elliott Mossman; see *The Unpublished Letters of Boris Pasternak*, Special to the *New York Times*, January 1, 1978; available at www.nytimes.com/1978/01/01/archives/the-unpublished-letters-of-boris-pasternak-introduction-history.html and https://nyti.ms/1kMl0Jr (accessed March 14, 2019).

[35] See Sundara Rajan, *Copyright & Creative Freedom* (n 4) 221.

[36] Yeats used these words to describe the Irish uprising against the English occupation in Easter 1916: see e.g. Kim Bielenberg, "W.B. Yeats: A Terrible Beauty is Born," June 28, 2018, available at www.independent.ie/entertainment/books/wb-150/wb-yeats-a-terrible-beauty-is-born-31188425.html. The poem is widely available online: see e.g. www.poetryfoundation.org/poems/43289/easter-1916 (accessed March 14, 2019).

[37] Alexandra Sviridova, "Living in Lawlessness" (1998) 7 *E. Eur. Const. Rev.* 71 at 71. See also Sundara Rajan, *Copyright & Creative Freedom* (n 4) 221; Esenin-Volpin's approach and activism are described in detail by Hosking (n 30) 416–18.

[38] For a fascinating discussion of the changing significance of the rule of law in a transitional environment, see Ruti Teitel, *Transitional Justice* (Oxford University Press 2000) Introduction, especially 4–6, and c. 1, 11–26; see also Sundara Rajan, *Copyright & Creative Freedom* (n 4) 65–66. In her book, Teitel observes that, "the law's role in periods of political change is complex" (6), pointing out that, "transitional law is both settled and unsettled; it is both backward and forward-looking, as it disclaims past illiberal values and reclaims liberal norms" (7). But Teitel's preoccupation is the *nature* of law in historical transitions – the problem of whether, how, and to what extent newly liberalizing regimes should recognize, uphold, reform, or dismiss existing laws. This is a foundational problem of legal theory in the post-War era, but the problem of law and lawlessness in post-socialist countries has another dimension: the disrepute arguably brought to the very concept of law itself, due to its contextualized operation, as in the circumstances of copyright law, within repressive government and social structures. From Sviridova's comments, Esenin-Volpin appears to have argued that the law *as it was written* was not respected by the authorities; but others might argue, more cynically, and with longer historical hindsight, that elites write the laws, and that the law is, therefore, perennially vulnerable as a tool of exploitation to be wielded by the strong against the weak. Liberal democracies rely on the checks and balances of democratic infrastructure – elections and an independent judiciary – to protect their citizens from the eventuality of an essentially "lawless" society, but historical events threaten to erode confidence in those institutions. See e.g. Leah Litman, "How Trump Corrupts the