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THE EMERGING CONCEPTS OF SOCIAL RIGHTS IN BELARUS, UKRAINE, AND RUSSIA

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I. CONTEXT AND SCOPE

'Charity creates a multitude of sins'

Oscar Wilde 'The Soul of Man Under Socialism', 1891

The very definition of social rights in the post-Soviet context of three transitional countries, Belarus, Russia, and Ukraine, remains elusive. The ethos of the communist state was built around a vulgarized perception of Marxism, which underlined the egalitarian character of citizenship. Social (or rather *socialist*) rights were proudly portrayed as the mainstream of the Soviet constitutionalism, counter-positioned against the "hypocritical individualism" of Western human rights. Therefore, these rights were described explicitly in terms of the legal benefits that were guaranteed by state, including the rights to education, health protection, accommodation, etc.

In strictly heuristic terms, this article aims to explain the contemporary understanding of social rights in the three ex-USSR countries. Social rights are deconstructed as a socio-legal phenomenon bearing an essential legacy from the totalitarian perceptions of law and society in general. This legacy is characteristic of the Soviet state and was

mutated in the first post-Soviet decade to incorporate some of the rhetoric of “Western” human rights.⁴⁷⁷ Considering the lacuna in the English-language bibliography on social law in post-Soviet countries, this work is designed as an introduction to the concept of social law in Belarus, Russia, and Ukraine.

As an important disclaimer, the author does not subscribe to any pan-Slavic ideologies. Belarus, Ukraine, and Russia are independent countries that represent three distinctive national identities with different historical and ethical backgrounds. Belarus and Ukraine were annexed into the Russian empire at the end of the 18th century. Until then, the Belarusian and Ukrainian legal traditions (within such historical entities as the Great Duchy of Lithuania, *Rzecz Pospolita*, and the Austrian Empire) were influenced by the same factors throughout the rest of Europe, with deliberative forms of governance prevailing in opposition to the strongly centralized despotism of Russian tsarism. Until 1939, the western parts of Belarus and Ukraine remained under Polish rule with an alleged influence of the 1921 and 1935 Polish constitutions, suggesting a somewhat different vector for social rights. The cultural ethos of labor relations cannot be attributed exclusively to the Orthodox tradition. Belarus and Ukraine have a significant Roman and Greek Catholic population as well as an influential historical experience of Protestantism and Judaism. Meanwhile the Orthodox and the substantially smaller Muslim traditions (at the regional level) can be viewed as an underlying ethical matrix for labor relations in Russia. In terms of the current political construction, one of the countries is a centralized oligarchy (Russia), another one is an oligarchy with features of a deliberative democracy (Ukraine), and the last is a clearly authoritarian regime (Belarus). Despite these important differences, the development of social rights in these three countries has been influenced by institutional predispositions and juridical mythologies that stemmed from postwar

⁴⁷⁷ For a comprehensive analysis of social rights in the post-communist countries of Central and Eastern Europe, see Wojciech Sadurski, *Rights before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (2008).

Soviet jurisprudence and has been refashioned in a similar manner during the last two decades.

II. SOVIET “HERITAGE”

In Soviet legal dictionaries, the entries on social legislation were akin to the exemplary definition as follows⁴⁷⁸:

[...] in the capitalist countries that is a part of the labor legislation, dealing with certain aspects of the family relations, social insurance and social security, health protection, education, and house-building. In the sphere of labor, social legislation regulates working hours, holidays, wages, trade unions, the right to strike, and collective bargaining. Social law appeared as a result of the intense struggle of the working class for their rights. As for their class-based essence, the progressive norms of social legislation amount to concessions, which the ruling classes are forced to make due to the struggle of labor class for their rights. They make those partial concessions in order to safeguard the dominance of the capital. The concessions serve to create an illusion that a state is interested in the welfare of people. [...] Social rights are actively used by the bourgeois propaganda (especially in the mid 20th century) to spread the ideas of “class cooperation” (like the fiction of a welfare state) [...] Communist and labor parties relentlessly expose this bourgeois and reformist propaganda. They defend workers’ rights and motivate them for an active struggle for their vital interests.⁴⁷⁹

⁴⁷⁸ Considering the significance of this definition for the proper understanding of the post-soviet rhetoric around social rights, I give a full quotation here.

⁴⁷⁹ “Социальное законодательство – в капиталистических странах законодательство о труде, о некоторых сторонах семейных отношений, социальном страховании и социальном обеспечении, здравоохранении, просвещении, жилищном строительстве. В области труда С.з. регулирует

With the rough differentiation of fundamental rights into civil, economic, cultural, and social (stemming from the logic of international covenants), there were no pure economic rights (most importantly, the right to establish and own a business) in the Soviet Union, based on the traditional Western rhetoric. Therefore, social rights were more accentuated because of the omnipresence of the state. The state was supposed to “take care” of the collective freedoms. The perception of social rights in the Soviet doctrine was essentially guided by the transformation of the property relations under the formal presence of the *Rechtsstaat*, mantled into the label of socialist legality (*социалистическая законность*).

This rudimentary thinking is clearly present in early post-communist legal definitions. As an example, one can quote the first post-

продолжительность рабочего времени, отпуска, установление размеров заработной платы, положение профсоюзов, право на забастовку и коллективный договор и др. С.з. появилось в результате упорной борьбы рабочего класса за свои права. По своей классовой сущности прогрессивные нормы С.з. представляют собой уступки, на которые правящие классы вынуждены идти в условиях усиления борьбы трудящихся за свои права. Эти частичные уступки трудящимся делаются, чтобы сохранить главное – господство капитала; для создания у трудящихся иллюзии о заинтересованности государства в поднятии благосостояния всего народа. [...] С.з. активно используется буржуазной пропагандой (особенно это характерно для середины 20 в.) для распространения идей о «классовом сотрудничестве» (теории «народного капитализма», «государства всеобщего благосостояния» и т.п.). [...] Коммунистические и рабочие партии неустанно разоблачают буржуазную и реформистскую пропаганду, отстаивают права трудящихся, ориентируют их на активную борьбу за свои жизненные интересы». Aleksandr Ya. Sukcharyev (ed.), *Юридический энциклопедический словарь* [Legal Encyclopedic Dictionary] (1987), 441-442. Somewhat symbolically A. Sukcharyev was the Last Chief prosecutor of the USSR. See also Igor Ya. Kiselyov, *Современный капитализм и трудовое законодательство* [Contemporary capitalism and labor legislation] (1971).

DISCLAIMER: Hereinafter all the translations from *Belarusian*, *Russian*, and *Ukrainian* are made by the author.

Soviet legal dictionary in the Belarusian language.⁴⁸⁰ It does not contain a definition of social law [as a discipline] and places social rights under the entries of social services (*сацыяльнае забеспячэнне*) and social insurance (*сацыяльнае страхаванне*).⁴⁸¹ The post-*perestroika* period and a radical shift toward the “capitalist economy” required the redefinition of old concepts, including those dealing with social rights. The newest Russian legal dictionaries refer to social rights in a more pragmatic and Westernized way, although still bearing the traces of Soviet terminology. The Big Legal Dictionary⁴⁸², edited in 2002 in Moscow, contains an entry entitled “*social rights of a person*”. It describes social rights as a complex of constitutional rights, safeguarding certain benefits from the state. The catalog of social rights, according to this dictionary, covers the right to social security, the right to education, the right to health and medical assistance, the right to accommodation and special rights for children and disabled persons. The authors of this dictionary still claim that the most adequate constitutional proclamation of these rights is distinctive to the socialist and post-socialist states. It is remarkable that the newest Big Legal Encyclopedic Dictionary, edited in 2007 (also in Moscow) simply copies the above-mentioned definition.⁴⁸³

Following the German model (Article 20 of the *Grundgesetz*), the constitution of Belarus proclaims that the Republic is a social state (Article 1).⁴⁸⁴ The Ukrainian constitution makes a similar proclamation.⁴⁸⁵ The

⁴⁸⁰ S. Kuźmin, *Юрыдычны энцыклапедычны слоўнік* [Legal Encyclopedic Dictionary] (1992).

⁴⁸¹ *Ibid*, 493.

⁴⁸² A. Ya. Sukcharyev (ed.), *Большой юридический словарь* [Big Legal Dictionary] (2002), 579.

⁴⁸³ A.B. Barikhin, *Большой юридический энциклопедический словарь* [Big Legal Encyclopedic Dictionary] (2007), 649.

⁴⁸⁴ Article 1: “The Republic of Belarus is a unitary, democratic, social state based on the rule of law [...]” The original version: “*Рэспубліка Беларусь - унітарная дэмакратычная сацыяльная прававая дзяржава.*” (Belarusian). Compare to the respective German constitutional clause: “*Die Bundesrepublik Deutschland ist ein demokratischer und sozialer Bundesstaat.*”

Russian constitution refers to social rights in Articles 38-41 and 43.⁴⁸⁶ An illustrative example of the catalog of provisions perceived to exist in the realm of social rights may be demonstrated through Ukrainian legislative sources. The constitutional provisions⁴⁸⁷ are supported by the Statutes of Ukraine as follows: “On Pension Security” (1991), “On Status and Social Protection of Victims of the Chernobyl Catastrophe” (1991), “On Status of the Veterans of War, Guarantees of Their Social Protection” (1995), “On The Fundamental Principles of Social Protection of the Veterans of Work and Other Retired Citizens in Ukraine” (1994), “On State Social Aid to Low-Budget Families” (2000), and “On Social Services” (2003) as well as by the Edicts of the President of Ukraine, such as the one “On the

⁴⁸⁵ The preamble to the Ukrainian Constitution states that “The Verkhovna Rada of Ukraine [Parliament – UB], on behalf of the Ukrainian people [...], striving to develop and strengthen a democratic, social, law-based state, [...] adopts this Constitution — the Fundamental Law of Ukraine.” The original version: “*Верховна Рада України від імені Українського народу [...] прагнути розвивати і зміцнювати демократичну, соціально, правову державу, [...] приймєє цю Конституцію — Основний Закон України.*”(Ukrainian). Article 1 proclaims that Ukraine is a sovereign and independent, democratic, social, law-based state.

⁴⁸⁶ The right to free labor (37), protection of mother and child (38), social age protection (39), accommodation (40), health protection and medical assistance (41), healthy environment (42), education (43).

⁴⁸⁷ E.g., a traditional reference to social rights in Article 46:

- Citizens have the right to social protection that includes the right to provision in cases of complete, partial or temporary disability, the loss of the principal wage-earner, unemployment due to circumstances beyond their control and also in old age, and in other cases established by law.
- This right is guaranteed by general mandatory state social insurance on account of the insurance payments of citizens, enterprises, institutions and organisations, and also from budgetary and other sources of social security; by the establishment of a network of state, communal and private institutions to care for persons incapable of work.
- Pensions and other types of social payments and assistance that are the principal sources of subsistence shall ensure a standard of living not lower than the minimum living standard established by law.

Strategy to Fight with Poverty” (2001), the decisions of the Cabinet of Ministers of Ukraine and other acts of legislature. In all three countries, the traditional social rights themes of pensions, wages and unemployment benefits are accompanied by sensitive local matters, like post-Chernobyl compensations and social benefits for a category of veterans.

III. SOCIAL LAW: LOST IN SUBJECT & METHOD

The academic discussion about social rights has been constructed in a somewhat different mode from Anglo-Saxon, Scandinavian or French analogues. The post-Soviet scholarly tradition on social rights chose the German model as its closest counterpart. Therefore, the discussion has been most often blended into attempts to construct a discipline of social law. The label *Sozialrecht* appeared in Germany during the 1970s and has since motivated a strong focus on codification.⁴⁸⁸ Social law in Germany is perceived as essentially beyond pure social legislation and encompasses any legal space with a socio-political purpose, including health insurance, child and youth welfare, social security, protection against unwarranted tenant eviction, unlawful dismissal, and even perpetrator-victim compensation, as well as care, guardianship and curatorship.⁴⁸⁹ The result of this scholarly focus,⁴⁹⁰ informed by the constitutional expression of the welfare state, became distinct in the codification of social law in the *Sozialgesetzbuch* (1976-2005 Social Code, currently comprising twelve volumes). Another important development was shaped by the *Sozialgerichtsgesetz* (Social Courts Act), which created a peculiar system of social courts (*Sozialgerichte*) that are special administrative courts, independent of the administrative authorities. In line with the German model, attempts at codification and relative

⁴⁸⁸ See Michael Stolleis, *Geschichte des Sozialrechts in Deutschland. Ein Grundriß* (2003).

⁴⁸⁹ See Gerhard Igl & Felix Welti, *Sozialrecht Ein Studienbuch* (2007).

⁴⁹⁰ Amongst others, in 1980 a *Max-Planck-Institut für ausländisches und internationales Sozialrecht* was established in Munich, a separate Max Planck Institute for the research in comparative social law. The mainstreaming of the field is also distinct in the nomenclature of legal journals, for instance, *Neue Zeitschrift für Sozialrecht*.

suggestions periodically appear in the political rhetoric in Ukraine and Russia, but no proposals for the respective reform of judicial system have been announced.⁴⁹¹ Another similarity can be traced to the active professionalization of “social work” (i.e. legal representation of minors, care and curatorship, unemployment counseling and support, social benefit counseling and claims) in all three countries during the 1990s.

Consequently, the whole important discussion on the negative-positive legal nature of social rights and their justifiability seems to have been essentially omitted in academic writings. A name-calling phase was substituted in the post-Soviet decades with a meaningless discussion on the “subject and method of social law”, focusing on two main issues. First, the debate was centered on the justifications to distinguish social law from other areas of law. Second, scholars in all three countries attempted to find an adequate niche for social rights in the dichotomy of public and private law. The Russian scholar Filimonova linked social law to four main areas: administrative, financial, labor, and even civil law.⁴⁹² She focused on the interaction between social law and social policy.⁴⁹³ The Ukrainian scholar

⁴⁹¹ Amongst other, see *Проект закону України “Соціальний кодекс України”* [Bill of Ukrainian Act “Social Code of Ukraine”] from 21.09.2004 (renounced in 03.11.2005), Number 6170; see also T.V. Borodina (ed.), *Социальный Кодекс Российской Федерации: Проблемы кодификации законодательства о социальном обеспечении* [Social Code of Russian Federation: Problems in Codification of the Legislation about Social Security] (2004); O.P. Frolov, A.V. Trukhanovich, *Подготовка Социального Кодекса РФ* [Preparation of Social Code of the Russian Federation] [2004] *Kadry Predpriyatiya* 4; J.V. Usachyova, *Кодификация действующего социального законодательства России: приоритетное направление правовой политики* [Codification of the Current Social Legislature of Russia: Priority in the Legal Politics], [2009] *Agrarnoye i zemelnoye pravo* 10, 83-88. Most recently, Obshchestvennaya Palata (Public Chamber of Russian Federation, an oversight committee created in 2005) announced its initiative to draft the Social Code.

⁴⁹² M.F. Filimonova (ed.), *Право социального обеспечения: Учебник* [The Law of Social Protection] (2006).

⁴⁹³ See in particular, D.A. Nikonov, A.V. Stryemoukhov, A.P. Fyedorov, *Социальное право* [Social Law] (2002). Ye. Kozlov, *Социальная политика: Конституционно-правовые проблемы* [Social Policy: Legal Constitutional Problems] (1990), 8.

Petro Rabinovych described social rights as a complex integrated field or super-field (*‘супергалузь’*) that covers four subfields, namely labor, social security, medical and education law.⁴⁹⁴ Similar approaches can be traced in the writings by L.N. Anisimov, M. Y. Fyedorova, D.A. Nikonov, A.V. Stremukhov, A.P. Fyedorov, M.I. Lepikhov. The labeling of their academic pieces often mirrors the Soviet perceptions regarding the emphasis on social protection, re-constructed in a mode similar to the German *Sozialversicherung*.⁴⁹⁵

Therefore, social rights are conceived through the binary lenses of the private-public dichotomy rather than as the second generation of human rights (economic, social and cultural rights). Most importantly, the writings in all three countries echo an obsession of Soviet legal theory with a “method & subject” for a field of law. Deprived of academic liberties and the opportunity to interact with Western legal philosophy in the totalitarian state, Soviet legal theory dedicated voluminous editions to the barely practical question of the disciplinary criteria that demarks each field of law. It is somewhat striking that in the first two decades legal theory did not dare to move any further in any of these countries.

Consequently, Filimonova maintains that social law is a system of legal relations and its respective legal rules, which defines the content and fulfills the social policy, i.e. the regulatory activity of the state and other social entities that perform the role of state agents. This activity is mainly

⁴⁹⁴ P. Rabinovych, O. Pankevych, *Соціальне право: деякі питання загальної теорії* [Social Law: Some Questions of General Theory] [2003] *Pravo Ukraïny* 1. See also N. Bolotina, *Соціальне право України: окремі теоретичні проблеми формування та розвитку* [Social law of Ukraine: Some Theoretical Problems of Formation and Development][2000] *Pravo Ukraïny* 12.

⁴⁹⁵ E.g., M.I. Lyeikhov, *Право и социальная защита населения (социальное право)* [Social Protection of the Population (Social Law) (2000), 7-36. M. Yu. Fyedorova, *Социальная защита населения в Российской Федерации* [Social Protection of the Population in the Russian Federation] (1999), 25-31.

focused on the provision of social services and aims at social development.⁴⁹⁶ Filimonova identifies two main features of social law:

1. The subject of social law is represented by the relations stemming from the fulfilment of social policy, i.e. the activities in the social sphere that are aimed at social development.
2. The subjects of social law are the state and public agents.

Although, the contemporary Russian scholars, like Filimonova, do not fully equate social law and the law of social security, the emphasis on social benefits and state guarantees is still omnipresent. Curiously enough, recently Ukrainian universities have been developing courses on social law under the label *Law of Social Protection of the Population*⁴⁹⁷, while in Saint Petersburg State University a course on *Social Law*⁴⁹⁸ was introduced in the Department of Sociology. The key study areas for these courses have been the issues of social protection, social security, state insurance, social aid, subsidies, social standards, state social guarantees, low-budget families, and pensions.

The Ukrainian scholar, Olena Chomakhashvili maintains that the subject of social law encompasses three components:

1. Protection of working rights, medical services, social services, obligatory social insurance, obligatory state insurance, and pensions.

⁴⁹⁶ “Социальное право – это система правоотношений и соответствующих правовых норм, в рамках которых определяется содержание и реализуется социальная политика, т.е. регулятивная деятельность государства и иных социальных образований, выступающих в качестве публичных агентов, выражающаяся, по преимуществу, в оказании социальных услуг и направленная на социальное развитие.” (Filimonova, *supra* above n 16).

⁴⁹⁷ Право соціального захисту населення [Ukrainian].

⁴⁹⁸ Социальное право [Russian]

2. Social protection of certain groups (e.g., war veterans, disabled persons, women and children, military men, refugees, victims of the Chernobyl catastrophe, etc) that live within the territory of Ukraine and require social protection.
3. Activities of the social protection services.⁴⁹⁹

The Belarusian scholar Postovalova deduces the essence of social law from international legislation (e.g., Conventions of the International Labor Organization) and references German authors.⁵⁰⁰ Among the peculiar ‘methods’ of social law (as a discipline), she distinguishes the methods of social insurance, social protection and social aids. However, the practicality of the post-Soviet scholarly obsession with subject and method remains ultimately unclear.

IV. NON-DISCRIMINATION AND SOCIAL LAW WITH TRACES OF AUTHORITARIANISM

The timid development of non-discrimination law has been perhaps the most contradictory aspect in the background of social law in the three post-Soviet countries. On the one hand, this domain illustrates the modest theoretical level of its respective scholars who are briefly acquainted with the Western writings about non-discrimination law. On the other hand, it is precisely the area in which Soviet rudiments of legal

⁴⁹⁹ Olena Chomakhishvili, “Соціальне право як самостійна галузь права” [Social Law as an Independent Field of Law] [2005] *Jurydychnyj zhurnal* 10. Available at: <http://www.justinian.com.ua/article.php?id=1961> For the Ukrainian academic discussion about human rights and social rights, see also Petro Rabinovych, “Права людини: уніфікація назв та розмаїття змісту (теоретико-методологічні зауваги)” [Human Rights: Unification of Titles and Diversity of Contents (Theoretical and Methodological Observations)] [2001] *JI* 21. Available at: <http://www.ji.lviv.ua/n21texts/rabinovych.htm>

⁵⁰⁰ Т.А. Postovalova, *Право социального обеспечения: общая часть* [The Law of Social Security: General Part] (2005), 60-63.

thinking have been facing with (ultra-conservative) religious propaganda, astonishingly blooming after years of Soviet atheism, and anti-Western rhetoric, actively supported by the [(semi-)authoritarian] state. The idea that equality rights (disability, age, marital status, sexual orientation, social status/condition, receipt of public assistance, nationality, and refuge or migrant status) are the main prerequisite of “social law”⁵⁰¹ does not seem to be strongly emphasized.

As a brief example, I shall quote a passage from a recent Russian textbook on comparative labor law, whose author seriously suggests that “*the legal regulation of the work of women in Russian Federation not only corresponds to the strictest legal standards, but even exceeds the level of the protection of the work of women in many foreign* [from the context of the book, the wording should be understood as attributed to western countries – UB] *countries. Therefore, there are even suspicions that the benefits for women tend to become the anti-benefits, and their excessive protection sets a potential for a peculiar discrimination*”.⁵⁰² Another popular Russian textbook quotes “distinguished scholars” such as a Bolshevik minister Alexandra Kollontaj,⁵⁰³ to justify the authority of gender equality and non-discrimination in labor relations, ignoring or most likely being poorly acquainted with the gender-based deconstruction of law.⁵⁰⁴

The poor academic level is echoed in the adjudication of non-discrimination. In 2008, a Russian regional prosecution department made an illustrative decision on discrimination based on sexual orientation. The activists of a gay organization were trying to commence the prosecution

⁵⁰¹ About the link of social rights to the language of non-discrimination and dignity, see amongst other, Cécile Fabre, *Social Rights in European Constitutions*, in G. De Búrca & B. De Witte, *Social Rights in Europe* (2005), 15-28 at 23-28.

⁵⁰² I. Ya. Kiselyov, *Сравнительное трудовое право* [Comparative Labor Law] (2005), 218-219.

⁵⁰³ A. M. Kollontaj, *Новая мораль и рабочий класс* [New Moral and Working Class] (1919). A.M. Kollontaj, *Труд женщины в эволюции хозяйства* [The Work of Woman in the Evolution of the Economy] (1928).

⁵⁰⁴ M. Lushnikov, A. Lushnikova, *Очерки теории трудового права* [The Essays on Theory of Labor Law] (2006), 439-440.

against the governor of the Tambov region who publically called for the physical annihilation of homosexuals. The refusal of the prosecutor to bring the case before the court under the criminal article of non-discrimination was based on the argument that apparently [...] “the claimants could not prove that they belong to homosexuals and, therefore, that their personal rights were infringed”.⁵⁰⁵

The basic concepts of non-discrimination law, like ‘gender-based discrimination’, ‘positive discrimination’ (affirmative action), and ‘adequate comparator’ have entered into the legal terminology of post-Soviet countries rather recently and do not appear to enjoy a particular popularity, limited primarily to the jargon of human rights activists.

Nonetheless, the fundamentalization of social rights has become evident with the involvement of constitutional courts. In 2007, the Ukrainian Constitutional Court ruled unconstitutional several articles of the 2007 budget of Ukraine, which covered the social guarantees of citizens.⁵⁰⁶ In 2002, the Minister of Labor and Social Policy issued the State Classification of Social Standards and Normative Minimums. Subsequently in 1996, the Cabinet of Ministers of Ukraine attempted to establish the sub-nomenclature of 52 paid services that could be provided at state hospitals. The Constitutional Court held this provision contradictory to the constitutional clause of state-guaranteed medicine.⁵⁰⁷

The Russian case is interesting with regards to the numerous strikes that accompanied the first post-Soviet decade, including the notorious “hunger strikes”. Most of them dealt with the failure of the Russian government to pay salaries and pensions on time. The conflict between the economic rights of the employer and the right to organize a

⁵⁰⁵ *Homophobic Governor of Russian Region Will Not Face Criminal Prosecution* // <http://www.gayrussia.ru/en/homophobia/detail.php?ID=11852>.

Тамбовский губернатор может и дальше «рвать» геев, которые «не являются социальной группой» [The governor of Tambov can further “tear off” gays, who “do not constitute a social group”] // <http://www.gay.ru/news/rainbow/2008/07/28-13526.htm>

⁵⁰⁶ Decision of the Constitutional Court of Ukraine, 2007.

⁵⁰⁷ Decision of the Constitutional Court of Ukraine, 2008.

strike was considered by the Constitutional Court of Russia in 2002. The Court ruled this was contradictory to the constitutional principle pertaining to the freedom of economic activity under the provision of the Federal Act on Trade Unions (1996), which dealt with the dismissal of trade unions organizers by their employers.⁵⁰⁸ As it is often argued, “until now the real independence of many trade unions is a matter of doubt [...] Despite the fact of rather high level of union membership and collective bargaining coverage, the authority of unions is rather low and the majority of collective agreements is just a formal paper; that does not give any substantial rights to the employees in addition to the rights already provided in the labor legislation”.⁵⁰⁹ Ironically, the country that once announced the abolition of class inequality and social protection for everybody can now be compared only to Latin American states in terms of the tremendous differences in wages between the *nouveau riches* and the majority of population, as well as through a looking glass of Moscow and Saint Petersburg *vis-à-vis* the rest of Russia.

In Belarus, the situation is aggravated by particularly serious human rights violations for which the country is often referred to as the “last dictatorship in Europe”.⁵¹⁰ It is the only European state that has not

⁵⁰⁸ Decision of the Constitutionanl Court of Russian Federation, 2002

⁵⁰⁹ Nikita Lyutov, 'Russia', in R. Blanpain & A.M. Świątkowski (eds.), *The Laval & Viking Cases. Freedom of Services and Establishment v. Industrial Conflict in the European Economic Area and Russia* (2009), at 157.

⁵¹⁰ According to the 2008 worldwide annual press index (provided by *Reporters without Borders*), Belarus ranked 154th in the “free speech measurement” with Iceland in first place and Eritrea in last place (173). The situation in Belarus is comparably better only to a few other (mostly declaratively socialist or post-socialist) states such as North Korea (172), Turkmenistan (171), Cuba (169), China (167), and Uzbekistan (162). The president of the country, Aliaksandr Łukašenka initiated several referendums, the last of which has overruled the constitutional restriction for the two-year term limits for the presidency. Thus, Mr. Łukašenka has been in power for 16 years in Belarus, gaining a worldwide notorious reputation for the *coup d'état* in the parliament and constitutional court, alleged falsifications of elections [Organization for Security and Cooperation in Europe (OSCE) observation mission reports], and severe prosecutions of political opposition leaders.

ratified the European Convention on Human Rights and has not appeared before the bodies of the Council of Europe. Belarus has been severely criticized for the violations of non-discrimination standards, including social and labor rights.⁵¹¹ It is often suggested that “while the main labor laws in Belarus, concerning equal treatment appear to comply with its international obligations, in the absence of an independent judiciary and basic civil liberties, law enforcement remains a problem”.⁵¹² As far as the social rights are concerned, the most serious violations deal with the constitutional freedoms of trade unions and the peculiar contract system of employment, introduced in Belarus.

While independent trade unions have been facing severe prosecutions, the state-controlled trade union is infamous for its lip service, disguising the problems of the industrial dialogue in Belarus.⁵¹³ In 2004, the government introduced a peculiar system of “contractualization” (*кантрактуалізацыя*), i.e., the obligatory transfer of workers from open-ended labor contracts to fixed-term contracts with a one-year duration.⁵¹⁴ This transfer makes the employees entirely dependent on the state, whose organs are not obliged any more to justify the non-renewal of the contract, to give advance notification or to provide redundancy payments. In the absence of mechanisms for independent trade unions to participate in the industrial dialogue, “contractualisation” challenges workers with the horns of a dilemma, to either be subordinate to all of the injustices of the Belarusian industrial model (the employer is not obliged to justify the non-

⁵¹¹ For a full account of the labor and social law violations, see Yaraslau Kryvoi, “Discrimination and Security of Employment in a Post-Soviet Context” [1006] 22 *The International Journal of Comparative Labour Law and Industrial Relations* 11, 5-18. The author argues that the Soviet legacy of industrial relations and the legal nihilism of that era have been taken by Belarusian authorities as a model for their policies.

⁵¹² *Ibid.*, 5.

⁵¹³ International Labor Organization (ILO), *Trade Union Rights in Belarus – Report of the ILO Commission of Inquiry*.

⁵¹⁴ Instruction of Council of Ministers of Belarus No. 30/14/102-925, 9 January 2004.

continuation of the one-year contract) or join the caste of the unemployed.⁵¹⁵

V. CONCLUSIONS

*It is striking that a number of [constitutional] pledges – be they state goals or social rights – increase in inverse proportion to the extent that these countries are able and prepared to establish a welfare state [...]*⁵¹⁶

The collapse of the Soviet empire has left the three reemerged independent countries with a similar question of *quo vadis?* The migration of Western constitutional ideas, combined with the traditional emphasis on state-guaranteed social benefits has opened a heated political debate on the redefinition and an adequate protection of social rights. The bitter experience of the transition from socialism to capitalism has certainly aggravated the public discussion. The adoption of neoliberal policies, which included the ongoing privatization of public services fueled the discussion on social justice. Consequently, the emerging doctrines of social law in Belarus, Ukraine, and Russia illustrate a peculiar muddle of Soviet “beneficial” populism, traditional labor rights, regulation of collective bargaining, crescent consciousness of the environmental protection rationale (especially with regard to post-Chernobyl compensations) and, most recently, a somewhat timid and ultimately contradictory development of the non-discrimination law.

⁵¹⁵ For further, see Kryvoi, *supra* note 24 (the author discusses the incompatibility of “contractualization” with the ILO Termination of Employment Convention No. 158, 1982).

⁵¹⁶ Ulrich K. Preuss, “Patterns of Constitutional Evolution and Change in Eastern Europe”, in J.J. Hesse & Johnson, (eds.), *Constitutional Policy and Change in Europe* (1995), 95-126 at 103.

Following a simplistic yet still popular threefold classification of welfare states suggested by the Danish sociologist Gøsta Esping-Andersen,⁵¹⁷ the cases of the three post-Soviet countries should be attributed to attempts of constructing a corporatist-statist (German) model. Despite the political rhetoric of earlier capitalism in the 1990s (fancying the libertarian Anglo-Saxon model) and the popularity of the social democratic (Scandinavian) model in the political populism of the 2000s, the German model with its extensive constitutional proclamation of welfare rights and codification of social legislation seems to be the closest vector to the developments in Ukraine, Russia, and Belarus. Yet, this conclusion may justify itself instead with appeal to a general form and external attributes. In terms of real welfare practices and substance, the post-Soviet social models have more similarities with their Latin American counterparts (especially in Venezuela, Brazil, Bolivia, etc.), where the extensive declaration of social rights is hardly correlative with the real state of welfare. This is not unexpected considering that a vulgarized Marxist idea of redistribution has been pertinent to the majority of leftist regimes. The state-benefit populism in the post-Soviet context should not be confused with the communitarian ethos of the Scandinavian model and its involvement of the state apparatus.⁵¹⁸ While industrialization in Scandinavia coincided with the democratization and the new emphasis on social benefits, in the USSR, industrialization coincided with the appropriation of property (collectivization of agrarian lands) and severe totalitarianism. The communitarian forms of legal protest in the two post-Soviet decades have remained weak, and the involvement of the state has proved to be substantially corrupted. The intersection between undermined equality (i.e., non-discrimination from the viewpoint of the fragile civil society) and social rights as well as weak community mobilization (due to the absence of the democratic experience in

⁵¹⁷ Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (1990).

⁵¹⁸ For an inquiry into Scandinavian model of social rights, see Tor-Inge Harbo, *Social Rights in Scandinavia: Between Politics and Law*, paper presented at the Conference 'Variety of Social Rights in Europe: at the Intersection of Legal Orders', EUI (Florence), June 2009.

thoughtful collective actions against social injustices) have contributed to the failure of the welfare model in these three countries.

Regardless, an important role in the (re-)construction of social rights in these three countries pertains to international legal regimes,⁵¹⁹ including the United Nations Committee on Economic, Social and Cultural Rights, International Labor Organization (ILO), and the Council of Europe. As far as Strasbourg system is concerned, a reservation should be made for Belarus, which was deprived even of observer status in the 1990s and whose authoritarian regime refuses to join the Council of Europe. The judicial activism of the European Court of Human Rights (ECtHR) with regards to housing, health care, security, social care, education, and the right to property should have been (at least, theoretically) incorporated into the constitutional vision of social rights in Ukraine and Russia.⁵²⁰ Similarly, the ILO conventions could set standards in all three countries for the right to strike, freedom from forced labor, social bargaining, and so forth.

Among the recent positive trends in the academic narratives on social rights, there is an increase in the translation of European scholars of EU law and authors' attempts to create textbooks on EU law in local languages. Since these textbooks usually contain the chapter on labour and social law in the EU, a somewhat alternative discourse of social rights has

⁵¹⁹ About the influence of international regimes on social rights, see Julia Iliopoulos-Strangas & Theunis Roux (eds.), *Perspectives nationales et internationales des droits sociaux* (2008).

⁵²⁰ In 2002, a curious decision dealing with Russia came from Strasbourg, where an applicant before the ECtHR complained, *inter alia*, that the amount of the pension combined with other social benefits was insufficient to maintain a proper living standard. The Court held that there was no proof that the amount of her social benefits had caused damage to her physical or mental health comparable to the minimum level of severity within the scope of Article 3 ECHR, which prohibits inhumane and degrading treatment. The applicant received a monthly payment amounting to € 25. The judgement proves that Strasbourg is unwilling to redress the issues of poverty, which is pertinent to the striking differences in the welfare structure between the members of the Council of Europe. There is more than a billion people in the world who have to live for less than \$1 per day. Case *Lariosbina v. Russia*, Application no. 56869/00, admissibility decision 2002.

been inevitably filtering into the academic discussion in Belarus, Ukraine, and Russia. In Ukraine, the studies on social rights have drawn additional inspirations from the declaratory intentions for the country to join the European Union.⁵²¹ Paradoxically, social *acquis* is becoming a serious catalyst for the interest in social rights. The judicial activism of the European Court of Justice (ECJ) might implicitly affect the constitutional vision of the rights to move and reside, health care, social security, education, employment, the scope of citizens' rights, and gender discrimination.⁵²²

Regarding the state-budget sensitivity of social rights, their construction remains essentially programmatic. In the space of political rhetoric, social rights have retained post-Soviet mantras, whose nature could be attributed to the entitlement to a right rather than to a right *per se*. As elsewhere in Europe, social rights are an evolving concept. Nonetheless, several spheres can be regarded as more successful than others. Despite the neoliberal policies of the 1990s (with an appeal to the ethos of the Anglo-Saxon welfare model), education and health services in all three countries remain essentially subsidized. Most Belarusian, Russian, and Ukrainian citizens benefit by receiving those services for free, though often with reservations concerning the quality of those services and the adequacy of the wages for the employees engaged in these spheres. The poor theoretical basis and linguistic poverty of comparative labor and constitutional law (most scholars in the three countries speak only Russian and their national language – Belarusian or Ukrainian – mutually repeating the arguments from the post-Soviet academic space) do not inspire the judicial activism observed, for instance, in case of the South African

⁵²¹ See Oleksandr Serdiuk & Roman Petrov, 'Ukraine: A Constitutional Design Between Façade Democracy and Effective Transformation?', in L. Morlino & W. Sadurski, *Democratizaion and the European Union. Comparing Central and Eastern European Post-Communist Countries* (2010), 170-193.

⁵²² Amongst other see (with a focus on social rights in EU law), Jean-Michel Servais, *Droit social de l'Union Européenne* (2008); Jo Shaw (ed.), *Social Law and Politics in an Evolving European Union* (2000); Uladzislau Belavusau, *The Case of Laval in the Context of the Post-Enlargement EC Law Development* [2008] 9 *German Law Journal* 12, 1279-1308.

Republic of India. Generously proclaimed in national constitutions (contrary to modest proclamations in, for example, their Scandinavian counterparts), social rights are often viewed as merely targets (*lege ferenda*), *droits-créances* and not law as it exists (*lege lata*), *droits-libertés*.⁵²³ The popular *habitus* of the rhetorical practices about social rights illustrates the expectations for welfare dependence.

Despite some positive tendencies, the level of academic discussion is imprisoned between the rudiments of Soviet thinking in terms of the “state beneficial mythology” and the problems of democratic deficiencies, weakness of civil society and communitarian ethos, a peculiar isolationism of comparative labor law *vis-à-vis* foreign doctrines, religious and political populism, corruption, and the lack of the transparent public debate.

⁵²³ For the concept of *droits-créances*, see Laurent Pech, France. Rethinking ‘Droits-Créances’, in M. Langford, *Social Rights Jurisprudence. Emerging Trends in International and Comparative Law* (2008), 267-275.

**THE EMERGING CONCEPTS OF SOCIAL RIGHTS
IN BELARUS, UKRAINE, AND RUSSIA**

ULADZISLAU BELAVUSAU

ABSTRACT

The article examines the contemporary understanding of social rights in three former USSR countries. Social rights are deconstructed as a socio-legal phenomenon bearing an essential legacy from the totalitarian perceptions of law and society in general. This legacy is characteristic of the Soviet state and was mutated in the first post-Soviet decade to incorporate some of the rhetoric of “Western” human rights. Considering the lacuna in the English-language bibliography on social law in post-Soviet countries, this piece is designed as an introduction into the concept of social law in Belarus, Russia, and Ukraine.