

A BRIEF EXAMINATION OF FUNDAMENTAL SOVIET LEGAL PRINCIPLES

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"For Soviet law not only provides an invaluable index to what is happening inside Russia but also challenges us to rediscover the basic categories of our legal system. Our ignorance is therefore doubly tragic."—HAROLD BERMAN.

MARXIST REVOLUTIONARY THEORY

Marxist evolutionary theory provides the philosophical foundation and faith of Communism.¹ Karl Marx, the prophet of Communism, and his collaborator, Engels, lifted many of their theories from Hegel's, although Marx never admitted this but instead made it appear that it was Hegel who was indebted to him. Marx dismissed Hegelian influence on Marxism with the ridicule that he found Hegel standing on his head and put him on his feet.

Hegelian dialectic is both a process of reasoning and a process of historical development. The reasoning process is a resolution of the dramatic conflict of ideas. The first step of this process is the definition of a thesis; the next is the realization of its contradictory—its antithesis; the last is the reconciliation of the thesis and the antithesis in the synthesis.² The process of historical development or evolution is closely connected with the process of dialectical reasoning. Historical development was pictured as the outcome of opposing forces inherent in nature. Each historical tendency generates in the course of its development a contrary force which in the fullness of time proceeds to overcome the former. A struggle between the two evolves into a new tendency, a higher equilibrium than the two previous tendencies.³ This concept developed from the Greek view that life's progress is the upshot of a continuous battle of opposing contrasts.⁴

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¹ PATTERSON, E. W., HISTORICAL AND EVOLUTIONARY THEORIES OF LAW, 51 Col. L. Rev. 707 (1951).

² *Ibid.*, 706.

³ WASSERMAN, L., MODERN POLITICAL PHILOSOPHY, 69-70 (1951); Lenin's conception of dialectic as written in his notebook is:

"Dialectic is the study of how there can be and are (how there can become) identical opposites—under what circumstances they are identical converting themselves one into the other—why the mind of man ought not to take these opposites for dead, stagnant, but for living conditional moving things converting themselves one into another.

"Doubleness of the single and the understanding of its contradictory parts—is the essence—of the dialectic.

"In mathematics:	differential and integral
"In mechanics:	action and reaction
"In physics:	positive and negative electricity
"In chemistry:	the combining and dissociation of atoms
"In social science:	the class struggle."

⁴ EBON, M., WORLD COMMUNISM TODAY, 8 (1948).

Like Hegel, Marx thinks that the world develops according to the dialectical formula. History passes from one stage into another in an inexorable process in such a way that the attainment of the Marxist dream of classless society is but inevitable.⁵ Marx parts company with Hegel when it comes to the motive force of this development. While Hegel talks of an obscure "spirit" as the motive force, Marx relies exclusively on "matter." More specifically what he meant by "matter" was man's relation to matter, the most important part of which is the mode of production.⁶

To complete his philosophy of history, Marx blended with Hegel's dialectics the prevailing English economic theories of the period. Marx viewed economic development from the purely materialistic concept. A materialist in the Marxist sense is one who views matter or nature as the ultimate reality, upon which the ideal and spiritual depend. Thus all consciousness is a reflection of material conditions of existence. Man is the product of nature and is bound by its laws. The material aspect of man as a social being is basically the mode of production and of distribution. Economic activity underlies all social beliefs and values. Institutions which manifest the beliefs and values of society are determined by economic activity.⁷ Marx emphasized that material and economic circumstances determined the momentary construction of the state, and the inevitable result is the rise of a special class or classes which exploit others.⁸ The mode of production creates relations of production. The latter in turn creates classes of society which determines ideology or class consciousness.⁹ Marxist evolutionary theory attributes all cultural phenomena including law to what is essentially a single cause, the method of production.¹⁰ Law is defined by economics. It has no history of its own—the history of the development of law is organically connected with the development of "civil society"—that is to say, of the economic production relationships.¹¹ Law, therefore, can not be higher or lower than the economic level of a given society.¹² It must correspond to it or be inwardly in accord with it. This circumstance completely refutes the idea of legal development which starts from the possibility of mechanically transferring legal institutions from one economic epoch to another.¹³ Marx claimed not only the predominance of economic factors in the determination of law but believed it to be the sole cause of society. His philosophy of history is termed for this reason "dialectical materialism" or "economic determinism."

⁵ RUSSEL, B., *HISTORY OF PHILOSOPHY*, 732 (1945).

⁶ *Ibid.*, 785.

⁷ BERMAN, H., *The Challenge of Social Law*, *Harv. L. Rev.*, 220, 224 (1948).

⁸ WORMSER, R. A., *THE LAW*, 232 (1949).

⁹ *Ibid.*, 225.

¹⁰ PATTERSON, *loc. cit.*, 707.

¹¹ VYEMINSKY, A., *THE LAW OF THE SOVIET STATE*, 57 (1948).

¹² SCHLESINGER, R., *SOVIET LEGAL THEORY*, 19 (1945).

¹³ *Ibid.*, 58.

Society as seen by Marx is a dynamic process undergoing constant change or evolution, continuously experiencing the growth, development, and decline of its forces. Each phase of history or stage contains elements of the preceding phase and in turn furnishes the element for the next stage. This historical development springs from the interaction of men with the material condition in which they live. Man utilizes natural forces to provide goods usable for mankind. There arises out of necessity a social organization through which the forces of production may operate. In turn, the whole complex of human relationship or the institutions of civilized society are erected from the social organization. The whole structure as pictured by Marx is conditioned on its economic base. The function of law is to protect existing property relationship and the state must reflect the will of the dominant group.¹⁴ The ideas of the dominant group are the ruling ideas in any given period. In a capitalist society, law, morality, religion, and education are all controlled by the capitalist. This explains why the Soviets call American newspapers as "Wall Street newspapers" and American soldiers as "Wall Street soldiers."¹⁵ According to Marxist theory, progress is achieved by class conflicts, the conflicts of opposites. For example, the capitalist class arose and destroyed feudalism. The capitalist class exploits the proletariat but the latter, in some distant future time, will arise and destroy the capitalist class.¹⁶ At present, the struggle is between the capitalist as the thesis and the proletariat as the anti-thesis. The capitalist attempts to hold by force the privileged position which he has ceased to merit. Then the proletariat repays injustice with resentment, fear with hate, violence with violence. The class war ends with the birth of a classless society.¹⁷ Marx had an all-consuming faith in the inevitable triumph of the working class. In the historical process of coming into and coming out of being, the result of the class struggle is predetermined. Although history is a prison, it is on the working class' side. This apocalyptic element of Marxism has magnetic appeal to Soviet leaders.¹⁸ While Soviet leaders keep their feet on the ground of reality, they fix their eyes in search of the vision in the firmament. But being the realists that they are, the Soviets try to give history a helping hand.

Historical materialism offers a critique of law rather than a science of law. It paints the evil without tendering the remedy. It diagnoses

¹⁴ WASSERMAN, *op. cit.*, 71.

¹⁵ PATTERSON, *loc. cit.*, 707.

¹⁶ *Ibid.*, 708.

¹⁷ TOYNBEE, A., *A STUDY OF HISTORY*, 369 (1947).

¹⁸ Rubashov to Richard: "History knows no scruples and no hesitation. Inert and unerring, she flows towards her goal. At every bend in her course she leaves behind the mud which she carries and the corpses of the drowned. History knows her way. She makes no mistakes. He who does not have absolute faith in History does not belong in the Party's ranks." KOESTLER, A., *DARKNESS AT NOON*, 36 (1952).

the ills of existing legal systems without scribbling the prescription. Marxist concept of law is diametrically opposite that of Hegel's. While Hegel believes that there can be no freedom without law, Marx believes that there can be freedom only in the absence of law. Hegel's concept of law may be summarized as follows: where there is law, there is freedom; freedom is to obey the law.¹⁹ Marx on the other hand stressed the coercive character of the state and law.²⁰ This is typical of Marx' boast that he put Hegel's theory right side up. While in his mission of putting things according to his idea of order, he took occasion to throw a few jeers at Savigny, the father of historical jurisprudence. Marx said Savigny was so engrossed in the source of law that he forgot the stream.²¹ Savigny's theory of law as the product of class consciousness, however, is an accepted principle among many Soviet legal philosophers.²² Marxist theory that law is a by-product of economics is a repudiation of the metaphysical theory of the origin of law as expounded by the Natural school. Critics have pinpointed contradictions in Marx' attitude towards natural law. He preaches the destruction of the idea of law or justice and at the same time he raves like an old testament prophet against the injustice of the bourgeois society.²³

PRE-REVOLUTION RUSSIAN LEGAL THOUGHT

The Soviets take pride in describing their mission as one of tearing away "the old skin of mankind and giving it a new one." Their scornful attitude towards pre-revolution Russian scholars and bourgeois intellectuals qualified them as men "born without umbilical cords." But while Soviet legal theories show peculiar features which have no precedent, still most of their theories have been taken from pre-revolution Russian scholars and earlier European jurists. Man's attitude is the sum total of his emotional and intellectual experience. He cannot escape the past more than he can escape his shadow. The myriad forces that penetrate and beat their impressions on the mind somehow channel one's thought along a determined path. Soviet law is not the product of Marxist socialism alone. It is also the product of Russian history evolved slowly over the centuries.²⁴

¹⁹ RUSSEL, *op. cit.*, 737.

²⁰ SCHLESINGER, *op. cit.*, 22, citing Engel's letter to Bebel: "As the State is only a transitional institution which is used in the struggle in the revolution, in order to hold down one's own adversaries by force, it is pure nonsense to talk of a "free people's state"; as long as the proletariat still uses the State it does not use it in the interests of freedom but in order to hold down its adversaries, and as soon as it becomes possible to speak of freedom the State as such ceases to exist."

²¹ SEAGLE, W., *HISTORY OF LAW*, 377 (1946).

²² Note 7, 220, 224.

²³ ROMMEN, H. A., *THE NATURAL LAW*, 91 (1948).

²⁴ BERMAN, H., *JUSTICE IN RUSSIA*, 121 (1950).

Before the Bolshevik revolution Russia's system of legal education was modelled on that of France; Russian lawyers were frequently trained in Paris. One of the first

About a decade before the outbreak of the revolution, Korkunov finished his treatise, the "General Theory of Law." This work assumes greater importance now as it serves to throw some needed clue to the mystery of the Soviet riddle, more particularly in the field of Soviet law. Korkunov is of the opinion that juridical norms are not the product of the free choice of men, neither are they the voluntary and intended work of humanity. Rather they are the imposition of objective necessity. Law is not the product of nature. It is created by the steady inevitable advance of human development. Being neither arbitrary, nor natural, law is a historic necessity.²⁵ Korkunov, therefore, repudiated both the analytical and the natural law theory of law. On the other hand, he did not accept the historical concept of law because this school regards law as a product of each separate people; he saw law as the product of human society. The historical school of law views the development of law as an organic, and not an evolutionary, phenomenon. This school understood law's historic development in a narrow way. It fails to take into account the existence in law of the necessary elements.²⁶ Is not the shifting and twisting of Soviet legal theories which seem to confuse observers of the course of Soviet law explained by Korkunov's theory of objective necessity? From 1919 to the present, in a short space of 33 years of Soviet control, Soviet law has seen radical changes in its theories for about five times, starting with the period of anarchy during the revolutionary days, passing through the NEP and the Plan, up to the Stalin and post war periods. Soviet law in general passed through several stages, each reflecting a distinct turn in the major lines of Soviet economy and social policy.²⁷ The Soviets look at law as the necessary product of the conditions which the law govern. Law is a reality, a fact. Considerations of morality are out of place in the study of law although lately a departure has been made from this line. Soviet jurists are mere drivers of chariots hitched to teams of wild stallions let loose by a pack of firecrackers. All they do is to hold the reins. Where they are going is not their concern; it is the stallions'. They have to hold fast, however, as those who fail to follow the turning and twisting of the wild journey go the way of Bukharin, Pashukanis, Kryvenko and a host of others. Although their pull on the reins may influence the speed and direction of the journey, such influence is

acts of the Soviets was an attempt to abolish completely the entire profession of law. As far as formal teaching of law is concerned the prohibition is still in force, but in view of the constantly mounting accumulation of new legal material in the form of codes, commentaries and reported cases, the gradual rise of self-trained specialists in these matters is almost inevitable. A recognizable group of such specialists is in fact already to be found in Soviet Russia. (Max Radin, *Legal Profession and Legal Education*, Ency. of Soc. Sc., 324, 339 (1948).

²⁵ Cf., Marx theory of historical development.

²⁶ Korkunov, *General Theory of Law*, HALL'S READINGS IN JURISPRUDENCE, 106-111 (1938).

²⁷ I GROVEK, V., *SOVIET CIVIL LAW*, 14 (1948).

nil. This line of Soviet thinking is in conformity with Marxist traditional concepts. Marx believed that while law is the product of economic conditions he did not altogether deny the fact that law has an interacting effect on the subsequent cause or condition. Plekanov who translated Marx into Russian admits that the legal structure reacts in turn upon the economic basis and may even modify it.²⁸ A contemporary of Korkunov but who does not share the fame of that distinguished scholar is Pobedonostsev. In his treatise on civil law, he preached that law arises from real economic and social relations and therefore positive legislations have only to give form to these relations and guarantee their applications.²⁹ The French writer Duguit who enjoyed great popularity among the Soviet legal scholars, also spoke of law as based on reality or objectivity. A problem confronting every Soviet legal theorist is whether judicial policy is a mere aspect of the general policy of the day.³⁰

How much Soviet legal philosophers have been influenced by the non-Soviet Russian legal philosophers can only be surmised. Many of the Soviet leaders had been exposed to the influence of pre-revolution legal scholars like Korkunov. Lenin finished his law at the University of St. Petersburg, the center of Russian legal learning of the period,³¹ where Korkunov had professed from 1878 to 1899. The pre-revolution Russian jurists were in turn steeped in Western law.³²

Two Russian scholars provided fuel to Soviet theory in the same manner that Korkunov supplied fuel to Soviet tactics. Bakunin introduced Marx to the Russians as "an authoritarian and centralizing communist." Bakunin promised the complete triumph of economic and social equality through the dictatorship of a very strong and provisional government by the negation of liberty. Parroting Marx, he preached that the ultimate goal is the abolition of the state and "juridical right."³³ Kropotkin, the anarchist, followed the Marxist line. To him, the work of the ignorant masses is the one chiefly responsible for production and progress. His anarchial view toward the law has contributed much to the views of early Soviet leaders. Law to him protects the privileged

²⁸ Note 24, 12.

²⁹ ENCY. OF SOC. SC., 103.

³⁰ Note 12, 227.

³¹ SHUB, D., LENIN, 22 (1951).

³² The Russians came into contact with Roman Law in 486 A.D. when Vladimir, emperor of Russia kiev, was converted into Christianity. Tartar domination for over 250 years broke the headwaters toward Western Law. The Petersburg emperors led by Peter the Great strove to implant Western Law firmly on Russian soil with little success. Napoleon in his retreat left behind not only the shards of his broken army but his Code Napoleon—the most valuable booty of the Russians. (For a detailed study of Western Influence on Soviet Law, read Berman, *Challenge of Social Law*, 62 Harv. L. 220, 246-264 (1948)).

³³ ENCY. OF SOC. SC., 394.

usurpers rather than individual rights and liberties. For the principle of wages, he substituted the principle of needs.³⁴

The repudiation of all things Western which reached its greatest fury during the revolutionary period was a mere expression of the "Slavophilism" movement founded by Kereyosky (1806-56).³⁵ The movement advocated wholesale abandonment of western culture and urged the development of Russian nationalism. Other leaders of the movement like Khomyakov³⁶ developed the idea of the communal ownership of land as peculiar to the Slavic people, particularly to the Russians.

The relations of law and economics have been the object of intensive study by pre-revolution Russian scholars like Vladinsky and Karishev.³⁷ Family relations according to Vladinsky are almost determined by economic aspects of law. Karishev, a Russian economist, preferred the development of cooperative societies as the basis of land commune rather than the capitalistic large scale farming or small scale peasant proprietorship.³⁸

In the field of civil rights, Kavelin upheld the doctrine that the personality of an individual can be emancipated only when the individual is completely submerged to political society.³⁹ Pobedonostov sarcastically remarked that freedom of press and speech is the freedom of every rascal to poison and pervert the minds of the people.

Andrei Vyshinsky called down pre-revolution Russian thinkers for their "unscientific views" which they shared with those of the bourgeoisie.⁴⁰ But the ideas of these early Russian writers have so permeated Soviet theories that any attempts by the Soviets to disown them shall only serve to magnify the indebtedness due them.

SOVIET LEGAL THOUGHT DURING THE MILITANT COMMUNISM (1917-1921)

The first stage of the Soviet regime is called War Communism or Militant Communism. It was a period of War Communism because the Soviets were engaged in a struggle against both the opponents of the Soviet Regime and foreign interventions. It was a period of Militant Communism because the Soviet government tried to enforce a rigid

³⁴ Ency., Vol. 8, 603.

³⁵ *Ibid.*, Vol. 8, 573-574.

³⁶ *Ibid.*, Vol. 8, 562.

³⁷ The study of the relation of law and economics was paid scant attention among the natural law jurists. These writers paid exclusive attention to the essential rights of man without studying the nature of things over which human activity expands. Wolff in his "Jus Naturae Methodo Scientifico Tractatum" speaks of business, immigration, population, and mendicity. Hegel, Trandelenburg and Ahrens considered the economic order of society in relation to natural law. A great part of the content of law is economic matter, because law is the measure, the proportion of the advantages, utilities, and wealth. (Miraglia, *Comparative Legal Philosophy*, 267-268.)

³⁸ 3 ENCY. OF SOC. SC., 546.

³⁹ *Ibid.*, Vol. 8, 552.

⁴⁰ VYSHINSKY, *op. cit.*, 35.

social order by radical measures to obliterate all existing pre-revolutionary institutions.⁴¹ Soviet legal thought of this period was characterized by deep distrust of law, following the lines of classical Marxist theory which looked upon the State and Law as superstructures erected upon the foundation of Bourgeois society.⁴² Marxist theory hold that a bourgeois government utilizes the courts and law, together with the army and police as instruments to preserve its existence. If Communism must succeed, these weapons must be destroyed.⁴³ The courts of law were considered as the barricades of reaction. The Soviet thesis was that in a capitalist society the courts represent the conservative class and act as restraints upon the wishes of the masses insofar as those wishes are reflected by legislation issuing from the popularly elected legislature. Tsarists courts were replaced by revolutionary tribunals whose only law was "revolutionary legal consciousness" and terrorism.⁴⁴ During the hectic days of the revolution, proletariat fury was unleashed against all legality with the original vision of attaining at the shortest possible time a society free from the very idea of Law.⁴⁵ On 22 November 1917, a month after the Soviets seized power, a decree abolished existing courts and created People's courts presided mostly by laymen. As an expedient, these courts were to apply Tsarist laws insofar as they were not abrogated by revolutionary concepts of law and did not contradict "the revolutionary conscience."⁴⁶ The attitude towards law is epitomized by the preamble of the Soviet decree of 1919 on criminal law. It was there stated that the "proletariat shall destroy the State as an organization of coercion and law as a function of the State." Laws were to be utilized only for the relatively short transitional period preceding the achievement of collectivism. Law, according to Hoichberg, was merely a bourgeois fetish bound to "wither away."⁴⁷ Thus no specific theory of Soviet law was possible under these circumstances.⁴⁸ The negative attitude of Marxism rather than positive problems of the new order was stressed. All reference to Tsarist laws were forbidden.

While the early Soviet writers were trained in civil law concepts, there was no desire on their part to join any legal tradition. Soviet leaders of this period candidly admitted that they had no definite idea of the status and operation of law under their rule.⁴⁹ The first decrees issued by the Soviet government, according to Trotsky, were not

⁴¹ I GSOVEKI, *op. cit.*, 10.

⁴² DONNELLY, R., *New Yugoslavia Criminal Code*, 61 *Yale Law Journal*, 510-511 (1952).

⁴³ *The Principles and Practices of Communism*, USIS Publication, 4 (1952).

⁴⁴ Note 7, 231.

⁴⁵ BERMAN, H., *Spirit of Soviet Law*, 23 *Wash. Law Rev.*, 152-153 (1948).

⁴⁶ I GSOVEKI, *op. cit.*, 153.

⁴⁷ Note 12, 147.

⁴⁸ DONNELLY, *loc. cit.*, 510-512.

⁴⁹ I GSOVEKI, *op. cit.*, 153.

laws but mere "programs of the party uttered in the language of power." But to the layman who knows law only as it is enforced by the end of a nightstick, it is easily discernible that these decrees were laws in sheepskin, Trotsky notwithstanding. The War Communism was a period of great stress. A new society was in the process of being built from the bottom. Lenin as leader of the reaction of Russian soul against Western Civilization was bent on repudiating the whole Western order of society.⁵⁰ Under Marxism, there is no place for law. Law has been identified with Western civilization since Roman times. It was a precious heritage of the West.⁵¹ As Miraglia aptly remarked, the Aryan is a juridical race.⁵² The Soviet leaders, however, found that theory does not fit practice. Law, although a bourgeois weapon, was a necessity, at least during the transition period. Out of the confusion of this nebulous era, one can find that the Soviets tried to attain Marxist dream of a classless society and at the same time took the liberty of departing from its tortuous path, by compromising with the use of Western law, as an instrument of governmental policy. While they had to junk the Tsarist legislation to give way to the new order, they had to enact new laws to realize the new concept of justice. They found it technically impossible to enact more than a few fundamental laws. Many of these laws were bourgeois laws veiled in a phraseology conditioned by the feelings aroused by the recent upheaval.⁵³ A reception of old notions of justice, courts and laws was forced on the Soviets by circumstances, but to these old notions, adjectives like "soviet," "revolutionary" and "people" were added.

The institutions of property and inheritance were abolished. Banks, industries, and foreign trade were nationalized. A policy to disrupt family ties was instituted. Labor relations were regulated on the basis of labor duty, that is to say, conscript labor, a principle declared in the Labor Code of 1918. All these measures were aimed at the realization of a classless society, where freedom and equality without law reign. In the meantime, law was used openly but with apology that it was to be discarded when the transition ends. The new regime could not proclaim itself to be entirely lawless. A reception of bourgeois law had to be made.⁵⁴

The Soviet idea of law of the period was formulated by a group of legal scholars led by Stukha, who defined law as a system of social relations corresponding to the interest of the ruling class and protected by force by the class.⁵⁵ Stukha adopted Rudolf von Jhering's definition

⁵⁰ TOYNEEE, *op. cit.*, 204.

⁵¹ SEAGLE, *op. cit.*, 3.

⁵² MIRAGLIA, *op. cit.*, 120.

⁵³ Note 12, 82.

⁵⁴ LASERSON, M. M., *The Work of Leon Petrazhitzky: An Inquiry Into the Physical Aspects of the Nature of Law*, 51 Columbia Law Review, 51-80 (1951).

⁵⁵ I GIOVEKKI, *op. cit.*, 166.

of law as the "form of the security of the conditions of social life, procured by the power of the State."⁵⁶ He described the Soviet law of the period as "bourgeois law without a bourgeois society"⁵⁷ thereby impliedly admitting that bourgeois elements in the new Soviet law still predominated.

THE NEW ECONOMIC POLICY (1922-29)

By 1921, the fury of the revolution had spent itself. But as the smoke of chaos cleared and settled, it revealed a gruesome economic spectacle. The wild and radical experiments made during the War Communism made a mess of Russia's economy. Fantastic inflation and hopeless deficits followed the abandonment of conventional principles of exchange. Industry was more than five-sixths gone after three years under the mass control of inexperienced workers. Transport broke down almost completely for failure of repair. Production had almost stopped. The confiscation of private property and the repudiation of foreign indebtedness were prohibitive of foreign trade. Private trade which had been suppressed at the outset reared its head through illegitimate channels. In answer to the order of surrendering surplus produce to the government peasants just produced enough for their consumption. The resulting famine reduced urban population with alarming rapidity. Lenin admitted that extreme nationalization of commerce and industry was a blunder and he called a "strategic retreat."⁵⁸

In 1921, Lenin inaugurated his New Economic Policy (NEP) which attempted to retain Communism as the principle of government while shelving it as far as was necessary in practice.⁵⁹ The general characteristic of the period was a partial denationalization. The new policy was a concession to private initiative in business and private rights. Private enterprise and property rights were revived under the new laws enacted.⁶⁰ Stalin described the period as a resurrection of capitalism under the regulative activity of the State while Kantorovitch described the period as the combination of fundamentally opposed elements but which had to co-exist out of necessity.⁶¹ The direct attempt to achieve a socialist order as visualized by the pre-revolution theorists, which had been followed during the first years of the Soviet regime, was suspended.⁶² Radical legislation of the War Communism was discarded with the apology that it was the necessary product of emergency. The one-man

⁵⁶ Jhering, R., *Law As A Means To An End*, Hall's Reading in Jurisprudence, 136 (1938).

⁵⁷ Note 12, 204.

⁵⁸ Note 24, 158.

⁵⁹ PARES, B., *HISTORY OF RUSSIA*, 468-487 (1944).

⁶⁰ I GZOVSKI, *op. cit.*, 193.

⁶¹ *Ibid.*, 23.

⁶² *Ibid.*, 5.

management of industry was restored and state distribution was replaced by private trade. To handle private trade, private businessmen (Nepmen) were licensed to do business under heavy taxation.⁶³

This third period of the Soviet regime portended great significance in the field of Soviet law. The encouragement of trade under private initiative and the desire to attract foreign capital made necessary the construction of a legal system. It was realized that law could be useful to the proletarian State and with the temporary postponement of the full Socialism, the theoretical obstacles to the development of law were removed.⁶⁴ It must be remembered that most of the essential elements of the Soviet legal system had been developed during the period of War Communism. That period was not so "Communist" as it appeared in some of its ideologies.⁶⁵ As Stukha, one time Chief Justice of the highest Soviet tribunal confessed, "We only imagined that we abolished the law."⁶⁶ Soviet leaders found that they could not altogether do away with law nor fill the "juridical vacuum" created with new legislation. Several codes were enacted during this period including the Civil Code,⁶⁷ Land Code,⁶⁸ Criminal Code,⁶⁹ Code of Civil Procedure,⁷⁰ Labor Code,⁷¹ Code of Criminal Procedure,⁷² and the Judiciary Act.⁷³ The Soviet Labor Code of 1922 amended the first Soviet Labor Code, considered the first of its kind. The Soviet framers of these codes were greatly influenced by German jurists. However, the Soviet jurists were ever alert to deny any claim of foreign elements being injected into the Soviet legal system. Kareva boasts that Soviet law is "a law of a new type, essentially different from all types known to history, particularly bourgeois law."⁷⁴ While the groundwork for the development of Soviet law was laid down during the War Communism, the foundation stones were laid during the second period. The atmosphere during the first period was such as to stifle any growth of Soviet law, considering the objective of reaching the apocalyptic state of a classless society with the least possible delay.

The leading legal philosopher of the period was Pashukanis, the founder of the "Commodity Exchange School." Strangely enough, the Pashukanis School did not attempt to justify the NEP but rather made aly criticism against the whole system. The theory of the school was

⁶³ PARKS, *op. cit.*, 487.

⁶⁴ Note 24, 158.

⁶⁵ Note 12, 92.

⁶⁶ I GSOVSKI, *op. cit.*, 280.

⁶⁷ May 22, 1921.

⁶⁸ October 30, 1922.

⁶⁹ January 1, 1923.

⁷⁰ October 31, 1922.

⁷¹ November 9, 1922.

⁷² May 25, 1922.

⁷³ December 22, 1918.

⁷⁴ Note 24, 153.

that law exists only because of the commodity exchange system prevailing in capitalistic countries.⁷⁵ Therefore, the school insinuated that the sooner the NEP was terminated the earlier would law become obsolete. The Pashukanis theory is clear: Commodity exchange demands mutual recognition of rights, and legal relations. In order to exchange commodities their possessors must assume the character of subjects of law, and appear as bearers of rights. The owners must have the right to dispose of their goods freely. Parties give and receive equal values.⁷⁶ There exists, therefore, a contract out of the free agreement of wills. The idea of rights and consequently of law appears wherever exchange of commodities and production for market develop. It was Pashukanis' conclusion that law can reach its highest point of development only in capitalist countries because that is where exchange of commodities is extensively practised.⁷⁷ The postulate of law of this school was the idea of an abstract individual endowed with rights and of men equal in the exercise of their rights. Rights arise from the economic transactions and the function of law is to regulate conflicting rights. He formulated the theory of "withering away of law" which holds that NEP law which is a mere concession to capitalism is bound to disappear. Pashukanis made the most daring attempt to create a Marxist theory of law.

THE PLAN (1930-35)

During the Plan years, the Theory of "withering away" of the State and law was condemned by Stalin as "justification of laziness and good nature, as justification of counterrevolutionary doctrine of extinguishment of the class war and the weakening of the governmental powers."⁷⁸ The withering away of the State was therefore postponed and during the suspension; such theory was even condemned. The objective of the plan was to convert the U.S.S.R. into an industrial country, to eliminate fully the capitalist elements, to widen the front of socialistic economy, and to create an economic basis for the construction of a socialistic society. Side by side with the feverish efforts to industrialize the country, was the new "socialistic offensive on all fronts" with "ruthless war" and a ruthless "class policy." By a decree of February 1930, about a million peasants, with their families, were eliminated as farmers, and all their possessions confiscated. Attack against religion was renewed. The Constitution was amended to exclude the freedom of religious propaganda. A new law forbade any kind of religious activity except worship. The policy of non-religious teaching was replaced by orders for

⁷⁵ Schlesinger R., *Justice in Russia: A Dissent*, 60 Yale Law Journal, 976 (1951).

⁷⁶ Note 12, 152.

⁷⁷ I GOVBEK, *op. cit.*, 168.

⁷⁸ *Ibid.*, 169.

⁷⁹ *Ibid.*, 173.

a definitely anti-religious instruction. The Academy of Sciences, the highest institution of learning in the country, was remodelled on Communistic lines. The middlemen of the NEP were suppressed.⁸⁰

In the field of Soviet law, there was an abandonment of the nihilistic attitude toward law. Vyshinsky accused Pashukanis of preaching anti-party subversive theories intended to disarm the working class in the face of its enemies and to undermine the might of socialism.⁸¹ Pashukanis recanted and disavowed his theory of "withering away" of law. Following the Commodity Exchange School of Pashukanis, once capitalism is abolished, there will be no more law. In the transition period, the sole alternatives are bourgeois law or no law at all. From such point of view, the abolition of NEP implied the abolition of Law. It is not difficult to understand why the Soviets dropped this theory which could only be interpreted as an apology either for capitalism or for lawlessness.⁸²

STALIN ERA OF LAW

Socialization was declared to be accomplished by 1936 and a new Constitution was established according to which the U.S.S.R. was a socialist state of workers and peasants. The main task of the period was to stabilize the existing order and to prepare the country for the transition to communism.⁸³ Since 1936, Soviet jurists have not hesitated to point to the moral validity of their system of laws. They have had no embarrassment in talking about "justice and injustice" and "good and bad" law. They have also recognized the distinction between law in the sense of right and law in the sense of power of the state to the use of sheer force. The term for the former is *pravo* and the latter is *zakon*.⁸⁴ Thus began the Stalin Era of Soviet Law. For the first time, law became a recognized and indispensable institution of the Soviets.⁸⁵ Fundamental concepts in different branches of law have become delineated. There are no clear manifestations as yet that Stalin's successors have launched a new era in Soviet Legal History.

SOVIET POLITICAL LAW

The Stalin era demanded a new definition of Law, and Vyshinsky, the nemesis of Pashukanis and Krylenko furnished the accepted definition of the period. Vyshinsky defined it as "the corpus of rules of behavior expressing the will of the ruling class, established by legislation,

⁸⁰ PARES, *op. cit.*, 508.

⁸¹ I GROVSKI, *op. cit.*, 174.

⁸² Note 12, 164.

⁸³ GUINS, G., *SOVIET LAW AND SOVIET SOCIETY*, 44 (1954).

⁸⁴ Schlesinger, R., in his review of Berman's *Soviet Legal Theory, Its Social Background and Development*, 35 *Cal. Law Review*, 618-619 (1949).

⁸⁵ "The need for State and Law even under a completely communist order of society with the continued existence of State and Law forms since Stalin's letter to the propagandist Ivanov and his report of the 1939 Party Congress, a recognized part of the Bolshevik creed." (Schlesinger, *Soviet Legal Theory*, 244).

and also of custom sanctioned by the state, and secured by its coercive power in order to protect, to strengthen and to develop such social relations as are favorable for the ruling class."⁸⁶ In the Soviet theory of government the doctrine of Proletariat dictatorship of the Marxist vintage occupies a central point. The Marx-Engels doctrine of law as an instrument of class domination, reflecting the will of the ruling class and supported by coercive force, has been adapted by Soviet jurists to the conditions and needs of the classless society. Soviet law is still class law because it expresses the will of the class of toilers, which is said to be at the same time the will of the entire nation.⁸⁷ Vyshinsky's definition meant the proletariat dictatorship when it spoke of the "ruling class." Lenin gives his idea of dictatorship as "a power with no restriction whatsoever absolutely unbound by any rules of law and based upon violence unlimited power based upon force and not law." The element of force predominates in the theory of Lenin. The resistance of the capitalists must, according to him, be suppressed by force and he agreed with Engels that the proletariat needs the State for the purpose of crushing its opponents.⁸⁸ This definition of Lenin forms the background of Soviet legal writings both before and after 1936.

A pre-revolution Russian scholar, Peter Lavrov, had predicted that the new Russian society shall have the intelligentsia as the leaders and the large masses of workmen and peasants as followers. The dictatorship of the proletariat is exercised by the Communist party which has a monopoly on political activities and its power of government may not be restricted. Therefore principles of democratic countries which tend to restrict the power of the executive, like separation of powers, doctrine of checks and balance, principle of government of laws, are repudiated.⁸⁹

The idea of proletarian dictatorship as expounded by Lenin and Stalin is not very different from the Western jurist's concept of sovereignty. Among the Westerners, Duguit approaches more closely the Soviet concept. According to Duguit, the term "will of the State" is a mere metaphor and a mode of expression. In his "The Law of the State" he says, "It is said that there is a State in human society when an individual or group of individuals have succeeded in monopolizing the power of constraint in that society and within definite boundaries. There is no will of State; there are only individual wills of those governing. When they act, they are not the mandatories or the subordinate parts of a supposed collective person, or an assumed personality, the State, whose will they express and execute. They express and carry

⁸⁶ Note 12, 243.

⁸⁷ Note 83, 44.

⁸⁸ SIMPSON AND STONE, CASES AND READINGS ON LAW AND SOCIETY, 1638 (949).

⁸⁹ I GROVEKI, *op. cit.*, 62.

out their own wills; there is no other. Any other conception of the State is fantastic."⁹⁰

A specifically Russian feature that is found in the Soviet legal system is the restriction of the freedom of dissent even among the members of the ruling party.⁹¹

SOVIET CIVIL LAW PRINCIPLES

Recent trends show that Soviet legislators have come to realize the importance of a stable family for sound morals and the restoration of the vital strength of a nation which has been sapped away by a devastating war.⁹² A policy of interference with family life is also evident. In 1947 a law was enacted prohibiting marriage between Soviet citizens and aliens. Divorces must be passed upon by Soviet courts according to the general policies of the government. Before, divorces were left to the discretion of the parties. The general features of the Soviet matrimonial law correspond to the Western system.⁹³ Mikolenko enumerated the main features of the present Soviet Matrimonial Law: monogamy; complete equality of rights between husband and wife; absolute freedom to enter or not to enter wedlock; freedom of divorce; equality of rights between legitimate and illegitimate children; parental right to be realized exclusively in the children's interest and only insofar as they are exercised in the children's interest; mutual obligations to maintenance, if necessary between husband and wife, parents and children, brothers and sisters.⁹⁴

The Textbook of 1944 in Civil Law emphasizes the active role of the State in legal relations. While this textbook admits that civil legal relations include an element of will, it makes clear the supremacy of law over the will of the parties.⁹⁵ As a check on the growth of capitalism, the Soviets have adopted the Roman law theory of unjust enrichment or *abuse de droit*.

In outlining the law on contracts, the framers of the Soviet Civil Code followed the theoretical constructions of European law, of German law, in particular, as developed by Prof. Shershenenich, Gmabanov, and Kornukov.⁹⁶ In contrast to the Roman Law principles on the subject, the Soviet law of contracts contains no requirement of consideration. The contract becomes enforceable upon concurrence of the wills of the parties of the basic elements of the contracts. Principles of specific performance, impossibility of performance, and danger for failure to perform are highly developed.

⁹⁰ Duguit, *Law and the State*, 31 Harv. Law, 1, 8 (1917).

⁹¹ Note 12, 261.

⁹² I GSOVSKI, *op. cit.*, 135.

⁹³ Note 12, 265.

⁹⁴ Note 12, 235.

⁹⁵ I GSOVSKI, *op. cit.*, 421.

⁹⁶ *Ibid.*, 260.

Surprisingly enough, the Soviet code on property practically shows no departure from civil law tradition. One would look in vain for a new concept of ownership in the Soviet Civil Code.⁹⁷ The basic concepts of Soviet law on property are still anchored deep in the soil of Roman law. The peculiarly Soviet features in the institution of property are disclosed only in a set of provisions barring private ownership of certain properties. Contrast is made between personal property and government property.

The 1936 Constitution declares that "economic foundation of the USSR shall consist in the socialist system of economy and socialist ownership of the instruments and means of production and in the abolition of private ownership of the instruments and means of production."⁹⁸ All other things which are not tools of production may therefore be the object of ownership. As Gohberg, codifier of the Soviet Civil Code, pointed out, the Soviet concept of ownership is new at least in these respects as it limits private ownership to articles of consumption and comfort. Ownership is therefore recognized as an institution of human society. While a person may own a car or a house for his own use, that individual cannot use the car for hire or have it rented. Personal ownership must be used in a manner consonant to Socialist institutions. The theory that rights of ownership should be respected only as long as it serves society has a bourgeois origin. In 1908, Gustaf Schwarz stated that the real purpose of the protection of a right to a thing is the desire to secure the use of the thing in accordance with its purpose.⁹⁹ Sa-
leilles had denied legal protection of a right when it is exercised against the social and economic purpose of the right.¹⁰⁰ Duguit reminded property owners of their social function and he extended the protection of the law only insofar as the owner performs such function.

SOVIET LABOR LAW PRINCIPLES

When private enterprise disappeared, the government became the principal employer in industry and commerce. All persons engaged in industrial production are the employees of a single owner—the State. Instead of a distinction between labor and capital, the Soviets made a distinction between labor and management. The Labor Code of 1922 allows collective agreements between management and labor as represented by trade unions. Negotiations and arbitrations are followed to settle disputes. The need for collective agreements was recognized as an important measure to achieve and to exceed production plan.

⁹⁸ Section 4.

⁹⁷ *Ibid.*, 558.

⁹⁹ I GSOVSKI, *op. cit.*, 317;

"The law protects private rights except as they are exercised in contradistinction to their social and economic purpose." Sec. 1; Soviet Civil Law Textbook (1938).

¹⁰⁰ I GSOVSKI, *op. cit.*, 318.

There was a marked tendency to abandon the last vestiges of contracts between labor and management for the sake of outright government regimentation.¹⁰¹ In the 1946 Soviet Textbook on labor law, collective agreement as a special form of legal regulation of labor relations of manual and clerical employees was said to have outlived itself. This tendency was a return to the first Soviet Labor Code of 1918 when labor relations were regulated on the basis of labor duty or conscript labor. Since March 1947, a new development took place. This time collective agreements have been declared to be the most important measure to achieve and exceed production.¹⁰² The new approach is based on the assumption that the interests of the workers are the same as the interests of production and the collective agreements are designed to be the juridical form of expression of this unity. In practice, however, the agreements are not the result of free contract but are directives from the State.

The main characteristic of the 1936 Constitution is indeed the recognition of certain social rights, the most important of these being the right to work. The State undertakes to maintain full employment. The other basic social rights guaranteed by the Constitution are the right to social security in case of incapacity to work, to leisure, to education and those other rights are complementary to the Right to Work.¹⁰³

SOVIET CRIMINAL LAW PRINCIPLES

Marx regarded criminal sanction in general not in the sense of injury for injury but rather as the "self defense of society against all violations of the conditions of its existence." In line with this principle, Soviet criminologists adopted the "principle of analogy" in place of the doctrine of *nullum crimen nulla poena sine lege*. The words "crime" and "punishment" were substituted by "socially dangerous act" and "measure of social defence." If an act or omission was considered dangerous, although no specific statute prohibited it, a Soviet judge can apply a statute prohibiting an analogous act or omission.¹⁰⁴ A "socially dangerous act" is defined as an act directed against the Soviet system or infringing the legal order established by the workers and peasants in the period of transition to Communism.¹⁰⁵ This aspect of Soviet criminal law has been the subject of criticism by the manifesto on intellectual and cultural freedom in the Congress for Cultural Freedom in June 1950 at Berlin.¹⁰⁶ A free man who has lived under the aegis of such

¹⁰¹ *Ibid.*, 794-795.

¹⁰² *Ibid.*, 798.

¹⁰³ Note 12, 221.

¹⁰⁴ Berman, *Principles of Soviet Criminal Law*, 56 *Yale Law Journal*, 803-804 (1946).

¹⁰⁵ Soviet Criminal Code, Art. VI.

¹⁰⁶ "We hold the danger represented by these regimes to be all the greater since their means of enforcement far surpasses that of all previous tyrannies in the history of mankind. The citizen of the totalitarian state is expected and forced not

benign principles like "due process," and "government of laws and not of men," will shudder at the wide discretion given the Soviet judge in trying persons accused before them. A drop in the production output in a factory may be construed as economic sabotage and the manager may be convicted of treason. A delay in train schedules may similarly be punished. Under the roving power granted the Soviet judge an accused might run the risk of getting a prison term for no reason other than that the judge does not like the way the poor fellow wears his mustache. Culpability is subordinated to political interest. And political interest is a very demanding mistress. The supremacy of law is replaced by the revolutionary legal conscience. Actions seriously threatening the whole working of Soviet society are regarded as counter-revolutionary even if an actual counter-revolutionary intention is lacking, provided the defendant could foresee the danger for the State involved in his action or inaction. Negligence is subjected to the heaviest sanctions provided by law for a crime the essential element of which under our law is intention. Lack of foresight is a common charge against government officials.¹⁰⁷

CONCLUSIONS

What lessons have we learned from the Soviet experiments in the field of Law? We have learned that man's freedom cannot be bargained away for the price of a piece of bread. We learned that man's intellectual and spiritual advancement must move side by side with his material development and those freedoms which we have cherished like freedom of speech and the press, freedom of worship, and other great freedoms cannot be postponed for material security. But we have also learned that freedom is a meaningless shibboleth when man is hungry. In the progress of man to greater horizons, law is a potent weapon just as it is in the nefarious scheme to crush man's noble aspirations. We have also learned that the best written constitution would be useless unless the people are militant enough to breathe life into it and the leaders are patriotic enough to respect it. These things we have learned and must not forget.

only to abstain from crime but to conform in all his thoughts and actions to a prescribed pattern. Citizens are condemned in such unspecified and all embracing charges as "enemies of the people" or "socially unreliable elements."

¹⁰⁷ Note 12, 209.