The "Withering Away" of Law
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THE “WITHERING AWAY” OF LAW

Is a socialist jurisprudence possible? Many thinkers on the Left, especially Marxists, would answer no. Radical thought has long been committed to the view that law will “wither away” under socialism, that is, that political and legal institutions will cease to exist with the emergence and development of socialist society. As a consequence of this view, thinkers on the Left tend to limit their interests to law’s role in reinforcing capitalist exploitation, or, less typically, its potential for yielding short-term gains for the exploited. Thus Marxists do not consider the role law might play in post-capitalist society, and a socialist jurisprudence is virtually non-existent. This paper examines the withering away thesis, as it was originally articulated in the works of Marx and Engels, and as it has since been interpreted by Soviet and Western thinkers in the Marxist tradition. The purpose of this examination is two-fold: first, to understand the nature of the obstacles to a radical contribution to legal theory; and second, to discover whether these obstacles are irremovable, or whether there is in fact room for a socialist theory of law. I will suggest that legal institutions could exist under socialism, and thus that a socialist jurisprudence is possible.

Perhaps the most perspicuous statement of the withering away thesis is that made by Engels:

State interference in social relations becomes, in one domain after another, superfluous, and then dies out of itself; the government of persons is replaced by the administration of things, and by the conduct of processes of production. The state is not “abolished”. It dies out.¹

This suggests that the way the legal and political institutions of capitalism meet their end is to be distinguished from the actual overthrow of capitalist relations of production. While capitalist economic structures will be removed either by violent revolution or deliberate public policy, the state and its laws will automatically disappear once the conditions for their existence have been removed. This is because law and state are

superstructural phenomena. That is, for classical Marxism, they are (in some sense) determined by the economic structure of society, “the real foundation”. Thus, upon the destruction of this economic foundation, the superstructure, without itself being directly attacked, ceases to exist.\(^2\) State and law wither away because they cannot be sustained by the new social context; like the dinosaur, legal and political phenomena become extinct.\(^3\)

The nature of the relationship between law and state and the mode of production remains a matter of some debate. Does the emergence of socialism mean that law and state are without utility, and hence, while theoretically conceivable, become archaic in a \textit{practical} sense? Or is the existence of legal and political concepts and institutions under socialism a matter of \textit{logical} impossibility, so that it no longer makes sense to use the vocabulary of politics or law to describe socialist society? On the former view, for the withering away thesis to hold, it is enough that criminal behaviour is rare; on the latter view, manifestations of what under capitalism one would call a crime must, under socialism, be viewed as an entirely different kind of phenomenon.

To answer these questions one must first grasp what functions the Marxist tradition attributes to law in capitalist society, for this will determine one’s stance on how and why law becomes redundant under socialism. Marxism has various perspectives on this issue, but I will focus on three, as follows. Law is:

(1) an expression of egoism, a means of reconciling antagonistic, alienated and self-interested wills;
(2) a means of consolidating the interests of the ruling class, of capital, against the interests of the proletariat;
(3) a form of ideological mystification, offering formal, equal rights to liberty and security, thereby clouding substantive inequalities in social and economic relations.

Of course, these conceptions overlap to a considerable degree. However, I will argue that one can make analytical distinctions between them which have significance for the withering away thesis. My concern is thus to examine the different arguments offered within these categories in terms of their consequences for the future of law in post-capitalist society.
We find Marx's definition of law as the reflection of the distorted, self-directed interests of capitalist man in the Critique of Hegel's Philosophy of Right and On the Jewish Question. For Marx, law arose with the division of human society into the spheres of state and civil society, and in turn, became necessary to maintain the demarcation between these two spheres. Marx maintains that this division is peculiar to capitalist society: a result of the political revolution which accompanied the emergence of capitalist relations of production. With this, the traditional relationship between the public and private was reversed, so that civil society prevailed over the state, the bourgeois over the citizen.

Marx adopts the dichotomy between state and civil society from Hegel's Philosophy of Right. For Hegel, civil society is the world of private contracts, market transactions and property. Its moving force is self-interest. The political state mediates the divisiveness of the private realm as the embodiment of community, public duty and collective will. But for Marx, the law of the state mediates the private sphere not as the ethical expression of the collective will, but as the arbiter of private disputes. Law sets the terms for the conflict of private interests, and in so doing it reinforces and protects them.

In On the Jewish Question, Marx develops the distinction between state and civil society in terms of man's dual identity as citizen and bourgeois. The formation of a political state enables the "reduction of man on one hand to a member of civil society, to an egoistic, independent individual, and, on the other hand, to a citizen, a juridical person". Law distinguishes between the rights of citizens and the rights of man, but for Marx, the latter are no more than "the rights of a member of civil society, that is of egoistic man, of man separated from other men and from the community".

The so-called natural rights to equality, liberty and security that are enumerated in the French and American constitutions have value only for the egoistic individual endemic to capitalist property relations, who is "wholly preoccupied with his private interest and acting in accordance with his private caprice". Under capitalism, community and citizenship are not genuine expressions of man's social being. Rather,
they are contrived and formalistic. The citizen is the servant of egoistic man, as it is “man as a bourgeois and not man as a citizen who is considered the essential and true man”.6

This treatment of law as egoism is developed into a systematic jurisprudence by the Soviet legal theorist, Evgeny Pashukanis. In focussing on the formal aspects of the legal “superstructure”, Pashukanis seeks to rectify Marxism’s neglect of “the formal side — the manner in which these [ideological] notions . . . come about”, which Engels suggested was the result of an excessive emphasis on the economic basis.7 Pashukanis’s study of the origins of the legal superstructure is concerned not just with how the content of particular statutes reflect particular economic circumstances, but with the manner in which economic relations are embedded in the very concept or ideal of law. To this end, his Commodity Theory of Law employs Marxian economic theory in order to explain the development of legal notions.

Referring to Marx’s analysis of the commodity in Capital, Pashukanis maintains that as the product of labour becomes a commodity and a bearer of value, so man acquires the capacity to be a legal subject and a bearer of rights.

If economically an object dominates man, since as a commodity it embodies in itself a social relationship not under the authority of man, then man legally dominates the object because as its possessor and owner he himself becomes merely the embodiment of the abstract, the impersonal subject of rights. Expressing this in the words of Marx, we say: “In order that these objects may relate to one another as commodities, their guardians must relate to one another, as persons whose will resides in those objects; and must behave in such a way that each does not appropriate the commodity of the other, and part with his own, except by means of an act done by mutual consent. They must, therefore, mutually recognise in each other the rights of private proprietors”.8

The legal subject is an abstract owner of commodities “raised to the heavens”.9 Pashukanis argues that the relationship between the parties in a contract constitutes the model for all other social relationships under capitalism, so that the values of the market permeate all dimensions of human existence. Even man’s ethical life under capitalism is shaped by the norms of exchange (rather than the reverse). For Pashukanis, Marx’s position in On the Jewish Question reveals three fundamental notions at the heart of law under capitalism: egoism, autonomy and equality.
The party to the exchange must be an egoist, i.e., be guided by naked economic calculation, otherwise the value relationship cannot appear as a socially necessary relationship. The exchanging party must be the bearer of a right, i.e. have the possibility of making an autonomous decision, for his will must “be embedded in objects”. Finally, the exchanging party must embody the basic principle of the equality of all human personalities, because in exchange all types of labour are equalised and are reduced to abstract human labour.10

It is only those whose primary concern is self-interest, defined as distinct from and in opposition to the interests of other individuals and the state, who are equipped to bargain in the market and in the law court. Autonomy is also a condition for the operation of bourgeois legal institutions: all have rights to liberty in order to assert their interests in property in competition with other private interests, but free from the interference of any public authority. Legal and economic procedures rest on the assumption that there is no interest greater than that of the private individual, and that these private interests are to be treated as equal in value.

SOCIALISM AND EGOISM

If the source of law is the egoistic interests of market men, what is the fate of law under socialism? For Marx, the political emancipation of capitalism, which displaces religion’s political authority and divides man into the public and private persons, is to be followed by a human emancipation, that is, by socialism. With this, distinctions between private and public are obliterated, thus precipitating the demise of law, which maintained these distinctions. The human personality will be transformed and united; no longer will citizenship be secondary and instrumental to the private interests of individuals. Instead, private interests, if it makes sense to refer to them at all, will become in some strong sense inseparable from the interests of the community. And, once “the real, individual man has absorbed into himself the abstract citizen”, political authority and legal right will cease to be necessary. Although state power and legal institutions are temporarily appropriated by the proletariat in the building of socialism, both will die out when the socialist project is complete. The end of bourgeois law must necessarily mean the end of law in general; there can be no proletarian
law just as there can be no proletarian capital. The governing of
people will be supplanted by the administration of things; relations
among individuals need be ordered by no more than mere “technical
rules”.

Thus we see that insofar as men lose their character as egoistic
monads and owners of commodities, law is denied the kind of human
subject which is its foundation. As rights reflect and are instrumental to
the economic relationships of bourgeois society, a society which is
emancipated from the distortions imposed by the market will not need
law. But is this to say that heretofore “illegal” activity is just unlikely
under socialism, or in a stronger sense, theoretically inconceivable?
Pashukanis claims the latter: law can have no existence under socialism
for reasons of logical consistency. Law’s sole point of reference is
market society; take away the market and law becomes inconceivable.
This strong view is evident in Pashukanis’s resistance to understanding
post-1917 law in Russia as genuinely socialist. For him, the system of
law operating under the New Economic Policy, a development plan
based on capitalistic forms of economic enterprise, could only be
considered “mere bourgeois law”. Indeed, the general feeling among the
Bolsheviks at that time was that the NEP was a “temporary, necessary
and regulated retreat” from the principles of socialism, and would soon
give way to a fully socialist community devoid of law. Law was being
used to pave the way to its own elimination.12

A natural consequence of this position is that interpersonal disputes
are deemed a contingent aspect of social life. Like illiteracy or “bad
manners”, conflict is a result of ignorance or insensitivity; once fully
educated to live by socialist norms of behaviour, man would live in
harmony with his fellows, co-operating in collective projects almost
instinctively, without external regulation.13 Hence, according to Marx’s
optimistic appraisal of man’s potential perfectibility, and his denial that
interpersonal disputes have an ineradicable utility in a socialist ideal, it
is not merely that the odds are such that the conditions for a legal
system will not arise. Rather, upon the complete destruction of capital-
ism, even those rare incidents of anti-social behaviour (which a society
with a legal system would term unlawful) would be instances of
deviance qualitatively different from crime, and would require other,
non-legal forms of social control.
If law has its real origin in commodity exchange, and if socialism is seen as the abolition of commodity exchange and the construction of production for use, then proletarian or socialist law was a conceptual, and therefore a practical, absurdity.  

To sum up. The theory of law expounded here explains the relationship between law and society in terms which define each side of the relationship as shaped, in a fundamental sense, by the economic relations of capitalism. The human activities which require legal regulation are essentially the manifestation of a certain configuration of economic relationships; there is no sense in which law punishes or controls anti-social behaviour which does not ultimately stem from the ethos of the market. But not only is the society which requires law intrinsically capitalist, so too is the legal form itself. In Marx's discussion of rights and Pashukanis's Commodity Theory, the very form of law, not just the content of particular statutes, is considered the reflection of bourgeois economic relations. Because the egoism of man is derived from the capitalist market, and because this egoism is the foundation of law, the question of the withering away of law cannot be merely a matter of predicting that, given transformed economic circumstances, legal regulation will be unlikely. Rather, the withering away of law must refer to a situation where these new circumstances are such as to deny a conceptual basis for any legal structure, whatever its content.

LAW AS IDEOLOGY

Another interpretation of the role of law under capitalism, also prominent in the writings of Marx and Pashukanis, is the conception of law as the mystifying representation of economic relations. Indeed, Marx and Pashukanis refer to the ideological nature of law in their discussion of the way in which law reflects the egoistic relations of the market. It may seem then that the conception of law as ideology cannot be analysed distinct from the theory of law as bourgeois egoism. But while both perspectives analyse law as a reflection of economic relations, the conception of law as ideology examines the way in which law mystifies and thus legitimates these relations, a consideration which is not essential to the view of law as the embodiment of egoism. Moreover, the ideology perspective opens up the possibility that the moral claims
of law can have some substantive reality. Hence, whether class domination or market conflict is stressed as the source of law, the ideological function of legal institutions can be analysed as a concern separate from the egoism and class rule perspectives.

Marx writes that political emancipation ended religion’s dominance in the ideological sphere. Religion offered illusory happiness, moral sanction and justification; but the political emancipation which ushers in capitalism and dethrones religion does not abandon the condition which requires illusions. For Marx, law enters as a new form of illusion, performing an ideological role functional to the new era of capitalist domination. The power of legal ideology is such that it presents a claim to truth, so that even the learned “take every epoch at its word and believe that everything it says and imagines about itself is true”. Law as ideology has the power to set the terms for the economic forces it serves, so that the bourgeoisie is often “constrained by its own rules of legality, its own ideology”.

In his discussion of the state as a parasitic body, Marx notes that in order to sustain their ideological functions, political and legal institutions must acquire some autonomy from the dominant economic forces; as a consequence, rather than an instrument of one class over another, the state becomes a source of general domination. The legal system and bureaucratic machinery of the parasitic state stifle the liberty of both bourgeoisie and proletariat: “every common interest was straightaway severed from society, counterposed to it as a higher, general interest, snatched from the activity of society’s members themselves . . .”. As an alienated social power, as ideology, law and state come to dominate their creator. Ideology falsifies reality, but it also reflects and regulates it.

For Pashukanis, social reality exists in law, but in a mystified form. He argues that this mystification develops into legal fetishism, the political counterpart to the commodity fetishism of the economic sphere, wherein man ascribes to his creations a power over and above his own agency. Legal institutions are endowed with an independent, eternal authority, which stands above human powers, with the result that we automatically conform to the seemingly all-powerful strictures of law, rather than change the law to conform to our needs, desires and
powers. Hence even in its illusory aspect, as ideology, law has an efficacy that the notion of simple mystification cannot grasp.

Attributing efficacy to ideology in no way conflicts with any sensible orthodox reading of law as part of a superstructure, which is determined in a fundamental sense by a base of productive relations, which in turn are the consequence of productive forces. To be sure, G. A. Cohen insists that however efficacious the capitalist legal system may be, it is determined, rather than determining, a legal aspect of the facts, secondary to the economic facts themselves. That the legal system is functional to the economy may be a manifestation of the priority of the latter, but it is also evidence of the efficacy of the superstructure.

Although the material mode of existence is the *primum agens* this does not prevent the ideological spheres from reacting upon it and influencing it in their turn, but this is a secondary effect.  

If the superstructure is to be functional to the base, we must attribute to it enough power to ensure the stability of the base’s economic relations.

Gramsci’s theory of hegemony gives a clear sense of the agency of law as a part of the ideological superstructure which is necessary to the life of its economic foundation. Law performs an educative role:

If every State tends to create and maintain a certain type of civilization and of citizen (and hence of collective life and individual relations) and to eliminate certain customs and attitudes and to disseminate others, then the Law will be the instrument for this purpose.

For Gramsci, law is ideological insofar as it claims to be willing and able to act affirmatively on behalf of society as a whole. Is this claim of law borne out by reality? E. P. Thompson has argued that in order to succeed as ideology, the claims of legal institutions must be capable of being realised; if liberty and justice are perceived as merely empty promises made by the law, then no ideological function is served. Likewise, Engels states:

In a modern state, law must not only correspond to the general economic condition and be its expression, but must also be an *internally coherent* expression which does not, owing to internal conflicts, contradict itself. And in order to achieve this, the faithful
reflection of economic conditions suffers increasingly. All the more so the more rarely it happens that a code of law is the blunt, unmitigated, unadulterated expression of the domination of a class — this in itself would offend the conception of right.25

The analysis of law as ideology thus moves from a conception of the mystifying role played by legal relations, to an understanding that law is not solely illusory, since in order to be effective it must be real to some extent, and finally, to the view that law's ideological function requires that the ideals promised by legal institutions figure as something of real value. Thompson goes so far as to say that intrinsic to the ideological force of law is its capacity to impose inhibitions on class power:

The rhetoric and rules of a society are something a great deal more than sham. In the same moment they may modify, in profound ways, the behaviour of the powerful, and mystify the powerless. They may disguise the true realities of power, but, at the same time, they may curb that power and check its intrusions. And it is often from within that very rhetoric that a radical critique of the practice of society is developed . . .26

Thus, according to the view of law as ideology, in order for law to conceal the power relations of the economic basis, it must offer juridical guarantees which are capable of being realised. Both the illusory and genuine components of law derive from law's function of stabilising the economic basis. Hence, paradoxically, one of the important ways in which law buttresses the power of the state is in the setting of limits to this power.

IDEOLOGY AND SOCIALISM

The conception of law as ideology may provide grounds for challenging the withering away thesis. The ideological function of law requires that liberal legal institutions have discernible positive effects. Could one go further and consider legality a feature of the human emancipation promised by socialism? While the Marx of On the Jewish Question contends that rights to liberty and security are merely the instruments for bourgeois egoists, when Marx develops the view of law as ideology, he is less willing to dismiss legal rights, for instance, as merely “bourgeois”. In The Eighteenth Brumaire of Louis Bonaparte, he suggests that the weapons the bourgeoisie forged against feudalism could be turned against itself; “so-called bourgeois liberties” could,
under certain circumstances, become “socialistic”. This suggests a stronger view still, that legal notions have positive value not just in building socialism, but in the fabric of socialist life itself.

To suggest that the Marxist analysis of law as ideology is perfectly consistent with the idea of socialist law may seem like wishful thinking. Of course, if ideology is understood, as Daniel Bell would have it, as any system of beliefs that call for radical social change, or, even less specifically, as any action-oriented system of political beliefs, then a socialist appropriation of legal notions would seem quite possible. Moreover, some Marxists offer a similar interpretation. One study depicts ideology as, not a form of illusion, but simply “thought which serves class interests”. On this view, a (proletarian) socialist ideology is possible. This reading seems plausible in light of the Marxist understanding of the proletariat as a universal class, the first class to promote the interest of society as a whole. Hence, in the hands of the proletariat, ideology is transformed and its class nature overcome. So Lenin writes that socialism is “the ideology of the class struggle of the proletariat”. In the Soviet Union, it is this less pejorative concept of ideology which has gained ground, so that Soviet thinkers today refer to Marxist-Leninist “ideology” as a vehicle for consolidating society. On this interpretation, as an ideological form, socialist law is conceivable.

However if, as I have argued, Marxism is committed to a view of ideology as part of the superstructure which stabilises the capitalist order by means of illusions, then ideology must stand as a form of domination. This Marxist analysis has a “critical edge” which is lacking in the rival arguments. According to this perspective, ideology legitimates reality by camouflaging its most brutal features.

If in all ideology men and their circumstances appear upside-down as in a camera obscura, this phenomenon arises just as much from their historical life-process as the inversion of objects on the retina does from their physical life-process.

In any case, even if one accepts the wider definition of ideology proposed above, ideology as it manifests itself as law is considered a form of illusion in Marxist writings. Moreover, domination is intrinsic to legal ideology insofar as law is functional to the continued existence of capitalist economic structures. Law is integrally related to the division of society into classes; by disguising and containing class
conflict, law furthers the interests of the dominating class in maintaining the capitalist system of production.

Socialism is premised on the elimination of all classes. Hence, a social form which owes its existence to the class divisions endemic to capitalism cannot persist beyond the life of capitalism itself. According to the Marxist canon, the proletariat mobilises ideological forms in the process of abolishing class society, but thereafter they have no purpose:

... every class which is struggling for mastery, even when its domination, as is the case with the proletariat, postulates the abolition of the old society in its entirety and of domination of itself, must first conquer for itself political power in order to represent its interest in turn as the general interest...34

Ideology is precisely this vehicle for domination which conceals its purpose in order to fulfil it, so that the interest of the dominating is rendered the interest of all. Thus, “the expose of the roots of an ideology is a true sign of its imminent end”.35 One of Pashukanis’s contemporaries, the Soviet legal theorist Reisner, remarks that socialists must not forget that law is an ideological form, and as such is not just the technical expression of given relationships, but refracts reality. Ideological thinking must be replaced by social structures which are wholly rational and express reality with precision.36

The socialist vision of community free of illusion requires conscious, collective control over the institutions of social life. Socialism must restructure the relations of production in such a way as to prevent social institutions from being created and determined by economic forces over which the community has no control. Marx avers:

Communism differs from all previous movements in that it overturns the basis of all earlier relations of production and intercourse, and for the first time consciously treats all natural premises as the creatures of hitherto existing men, strips them of their natural character and subjugates them to the power of united individuals.37

The argument that law is part of a realm of ideas determined by the prevailing market forces is ultimately an argument about the impossibility of law where economic forces are collectively controlled. Thus, in socialist society legality could not arise.

But Marx does not maintain that all phenomena which emerge with capitalist economic relations cannot survive a socialist revolution.
Capitalist technology, for example, is considered an outstanding accomplishment, which can transcend its historical epoch. Marx exclaims in the *Communist Manifesto*:

The bourgeoisie, during its rule of scarce one hundred years, has created more massive and more colossal productive forces than have all preceding generations together. Subjection of Nature’s forces to man, machinery, application of chemistry to industry and agriculture, steam-navigation, railways, electric telegraphs, clearing of whole continents for cultivation, canalisation of rivers, whole populations conjured out of the ground — what earlier century had even a presentiment that such productive forces slumbered in the lap of social labour?38

Capitalist forces of production are not to be destroyed along with capitalism itself. On the contrary, the proletariat, rescued from the “idiocy of rural life”, will wield the weapons forged by the bourgeoisie in order to destroy bourgeois society. And, upon the socialist revolution, these productive forces will not be dismantled, but harnessed, so that accumulated labour may be used as “a means to widen, to enrich, to promote the existence of the labourer”.39

It thus seems available to Marxism to consider appropriating other institutions of capitalism in the socialist project. I have noted that some versions of the view of law as ideology do grant legal institutions power over the economic substratum. Law affords even the dominated some tangible benefits under capitalism, and thus may be capable of being detached from its context of capitalist domination. Stripped of its ideological (mystifying) role, law could then offer rational procedures for ordering interpersonal relations under socialism.40 After all, if the technology of the bourgeois can be put to positive use in an emancipated society, why not the law of the bourgeois?

It may be objected that the viability of a socialist appropriation of legal institutions requires more argument than this. The law as ideology argument, even in its depiction of law’s role as an agent rather than a product of economic relations, considers this a “secondary effect”. Law is considered a legitimating structure for economic relations that are more fundamental and established prior to it. Moreover, while Marx considers how capitalist technology is to be retained and extended in post-capitalist society, his silence on the mechanisms for doing likewise with law suggests that the *onus* of proof is on those who would consider legality an analogous case. But it can be replied that the *onus* of proof
is equally on the orthodox Marxist, to show why the ideological role of law need not be performed in socialist (and Communist) society.

The orthodox Marxist view rests on two assumptions: first, that there would be material abundance under socialism, so that legal rules regulating scarce resources would be superfluous; and second, that socialism would be devoid of interpersonal conflict (because there would be no competition for scarce resources), and thus would have no need for the mediating role performed by legal institutions. But neither of these assumptions seems plausible. First of all, since Marx, the Left has become increasingly aware that the question of who owns the means of production does not automatically settle the question of whether man’s exploitation of his natural environment will jeopardize the supply of resources for present and future generations. In any case, that socialism could result in a great abundance of goods remains to be proved. Furthermore, even if the elimination of scarcity were possible, it is not at all clear that conflict would thereby disappear. Marx assumed that all conflict is based on the division of society into classes, into those who labour, and those who accumulate. But it is possible that members of a socialist society could still disagree about how resources are to be mobilized and distributed, even in a context of consensus about their society’s egalitarian premises. It thus seems conceivable that conflict would outlive capitalism, and that law would continue to be necessary to mediate conflict.

The analysis of law as ideology is thus inconclusive as to the validity of the thesis of the withering away of law. On the one hand, law’s mystifying role and its connection with capitalist relations of class domination render law theoretically inconceivable under socialism. On the other hand, the ideology view reveals positive aspects of law, suggesting that legal institutions could, like capitalist technology, have a role to play in post-capitalist society. In the face of the unconvincing assumption that a socialist community would be free of the conditions of scarcity and conflict which underlie law, there may yet be room for a socialist jurisprudence which repudiates the withering away thesis.

LAW AND CLASS RULE

This section looks at one interpretation of the social relations which
legal ideology could be said to serve: the domination of the proletariat by the capitalist class.

When the chips are down, the essential function of the legal system is revealed as itself: the reproduction of class power.42

On this view, legal discourse is

a powerful ideology which is directed against the awareness of the presence of class rule,43

or,

the emblem of the universal pretensions of the ruling class, and an abstracted expression of the concrete interests of that class and its allies.44

I have discussed how ideology is functional to the capitalist system, by providing an embellished story about the possibility of equity and fairness in that system, and by giving some credence to this by constraining economic forces, mitigating the “harsher effects of class structures”.45 The analyses of law as the reflection of egoism and ideology grasp the complexity of law, in terms of its formal significance, the relevance of its individualist basis, and the necessity of its relative autonomy from capitalist economic forces. An analysis of law as an instrument of the dominant class, however, is less subtle theoretically: at issue is not the nature of the legal form, but how the substantive content of law secures the political rule of the bourgeoisie.

Marx’s view that law embodies the interests of individual bourgeois commodity owners is extended in this approach, so that it is the bourgeois as a member of a hegemonic class whose interests are represented by law. The thought of Marx and Engels gives evidence of a shift in emphasis, from an interest in the legal form and the very possibility of legal discourse in the early writings, to a concern in later works with the content of law, and the class interests that lie at the heart of particular pieces of legislation. They argue that in nineteenth-century England, such statutes as the poor laws, factory legislation and the corn laws were used to consolidate the power of the capitalist class, albeit disguised as an ideological expression of society’s “communal interests and needs”. Marx writes of the Factory Act of 1867 that
what strikes us . . . is on the one hand, the necessity imposed on the parliament of the ruling classes, of adopting in principle measures so extraordinary, and on so great a scale, against the excesses of capitalistic exploitation; and on the other hand, the hesitation, the repugnance, and the bad faith, with which it lent itself to the task of carrying out those measures in practice.46

At his most polemical, Marx proclaims that law is but “the will of your [the bourgeois] class made into a law for all”.47 Eternal right is no more than bourgeois justice, equality no more than bourgeois equality before the law, the right to property the bourgeois right to capital. Legality provides the bourgeoisie with a means of securing its class interests by first, setting out rights to property and exchange, and second, by constraining the proletariat’s sphere of movement in order to maintain that class’s role as a source of labour.

The depiction of law and state as instruments of the ruling class is particularly characteristic of Lenin’s State and Revolution. With Engels as his authority, Lenin argues that the state is a product of the irreconcilability of class antagonisms and will wither away with the abolition of classes:48

people will gradually become accustomed to observing the elemental rules of social intercourse . . . they will become accustomed to observing them without force, without compulsion, without subordination, without the specific apparatus for compulsion which is called the state.49

For Lenin, classless society lacks the deep-seated conflict of interest inherent in a society of private ownership. This is because human psychology will be so transformed that formal mechanisms of mediating disputes will be rendered superfluous. Contemporary theorists such as Mandel and Coletti affirm this Leninist theory of the state; law emanates from a “bourgeois state” and is the instrument of bourgeois interests.50 Though critical of the undemocratic strain in Lenin’s writings, Ralph Miliband also argues that law and state are instruments of the bourgeoisie, evident in the class and ideological make-up of state actors.51

Pashukanis’s later writings offer a theory of law as a political instrument of the ruling class. The Soviet thinker faced a political and theoretical environment in the 1930s radically different from the decade before when he wrote The General Theory of Law and Marxism. Sensitive to the practical difficulties and political dangers his work now
confronted, Pashukanis began to revise his Commodity Theory of law. In his *Doctrine of State and Law*, Pashukanis identifies relationships of production, as well as those of commodity exchange, as the basis for law under capitalism. Law is redefined as “the form of regulation and consolidation of production relationships and also of other social relationships of class society”.

The state deploys law, not as a vehicle for the exchange of commodities by private owners, but to facilitate the economic needs of the dominant class as a whole.

Pashukanis’s concession to orthodoxy brought his theory in line with the work of his colleagues in the academic institutes of Moscow. One of Pashukanis’s critics, the Bolshevist jurist Stuchka, stresses the need for proletarian law in the period of transition to socialism, “in the service of furthering the socialist offensive and socialist construction”. For Stuchka, Pashukanis’s Commodity Theory suffers from a one-sidedness insofar as it reduced all law to only the market, to only exchange as the instrumentalization of the relations of commodity producers — which means law in general is peculiar to bourgeois society.

Yudin also describes law as the result of class contradictions, and thus an instrument for “holding the oppressed class within the bounds of ‘order’ created by the dominant class”. The Soviet Procurator General in the Stalin period, Vyshinsky, also rejected the commodity exchange theory of law for a view of law as “an expression of the will of classes dominant in society”. According to two other theorists of the time, Golunskii and Strogovich, law dictates the will of the dominant class to the subordinate classes in order to hold them obedient.

However, Pashukanis’s attempts to modify his theory were not enough to survive the pressures of Stalinism. In 1937 the scholar was named an enemy of the people and disappeared. His writings banned, his disciples dismissed and arrested, sadly, Pashukanis is most remembered in Soviet circles today for the most heavily reformulated versions of his doctrine.

**SOCIALISM AND CLASS RULE**

What is it about the definition of law as class rule that rendered it attractive to post-NEP Soviet legal theory? If law is viewed as a means
of organising productive relationships in the interest of the dominant class, then it could be instrumental for the dictatorship of the proletariat in the transition to socialism. Paradoxically, the view of law as a mechanism for the maintenance of exploitation is the only conception that is rehabilitated in socialist legal theory in the U.S.S.R. I will argue that it is precisely the repressive element of law which is attractive to the proletarian state, as a club with which to beat down counter-revolutionary classes, justified by the assumption that such measures are merely temporary.

Pashukanis himself confirms the need for socialist law, in a statement where the effect of political pressures on his intellectual revisions are the most obvious:

Bourgeois legality is directed, naturally, at the defence of the basic conditions of the capitalist mode of production . . . socialist (revolutionary) legality expresses the will of the last of the exploited classes, which has taken power — the will of the proletariat.57

Were it not for the fact that Pashukanis adopted the idea of socialist law in response to political factors, it would seem that the most compelling impetus for revision of the withering away thesis was the practical urgency of finding a legal solution to deal with the Soviet mandate of economic development. However, because the idea of socialist law was devised as an expedient for the socialist state, those “ideological” aspects of legality which offered the individual some measure of security and liberty could be conveniently disregarded.

It should be noted that Marx invokes the idea of proletarian dictatorship infrequently, and his usage is ambiguous between the specific notion of defence of the socialist revolution’s gains in the face of vestiges of opposition, and the broader, undeveloped idea of the entire transition period between capitalism and socialism. And, although the concept of a working class dictatorship was of paradigmatic significance for him, Lenin cautiously argued that, as a vehicle for coercion and violence, the state would have only a revolutionary, transient role to play in cementing the victory of the workers’ revolution.58 But under Stalin, Lenin’s doctrine was bolstered by the increasingly authoritarian nature of the Soviet revolutionary project. The rehabilitation of the superstructure reflected the view that
without a legal system and a legal order — without Law with a capital L — the Stalinist regime could neither control the social relations of the people nor keep the economy going nor command the political forces of the country as a whole.59

The systematic use of political and legal resources no longer figured as a short-term measure of revolutionary society, but as an established feature of the socialist phase in the development of Soviet Communism.

The view that law was unambiguously an instrument of class rule and the coercion necessary to sustain it, and that hence law would disappear upon the full flowering of socialist society, justified an epoch of legalised repression under Stalin. Political terror was institutionalised and routinised in the name of legality as class hegemony. And, Soviet legal academics confirmed the legitimacy of this course. Stuchka argues that the proletarian class state, like the bourgeois one, needs the coercive support of law, an element of constraint and persuasion in the transition period which is of a “frankly class character”.

The definition of law as a form of class rule is radically distinct from the two other definitions discussed here in that it provides a theoretical basis for socialist law. Vyshinsky thus went further than his academic rivals and predecessors in constructing a theoretical apologia for Stalin’s manipulation of legal institutions. Soviet law would not just be proletarian, but socialist, in form and content.60 Paradoxically, then, the result of the admission of legal institutions into the socialist enterprise is pernicious, even reactionary, insofar as it interprets law in bourgeois society in the worst possible light only to mobilise law, defined most negatively, for socialist purposes. Capitalist legal forms are adapted to intensify their coercive potential, and then justified by the long-term objective of a socialist utopia, which, the orthodoxy claims, will need no law.

Hence, this admission of the possibility of socialist law does not repudiate the withering away orthdoxy. Soviet writers of the Stalin period insist that once the building of socialism is complete, law will no longer be necessary. Vyshinsky states that “when communism triumphs throughout the world, we shall consign [law and state] to the museum of antiquities, together with the ax of the stone age and the distaff”.61 Jurists and statesmen in the post-Stalin period echo the view that law would eventually be inconceivable. Since Khrushchev’s 1961 proclama-
tion, in which he stressed the need for informal social organisations, the idea that law and state are being gradually replaced by people's self-government continues to recur.

Although state control of political and legal philosophy in the Soviet Union is nothing like as severe as it was under Stalin, it is still the case that a great deal of Soviet writings on state and law are devoted to explaining and justifying shifts in state policy. Under Khrushchev, the term “socialist legality” resurfaced to describe the existing system of law in contrast with the extra-legal excesses of the Stalin era. Law was considered an ethical force, an instrument for the creation of the material and moral prerequisites of Communism. With this incursion, the withering away thesis would seem to have run completely amuck. Yet, legal scholars continued to hold that, although law was essential in preparing for the self-administration of Soviet society, once this was achieved, the legal nature of interpersonal relationships would disappear.

The Brezhnev era introduced another innovation to the Marxist theory of state and law. Instead of a dictatorship of the proletariat, or a state of workers and peasants, the Soviet state was decreed an “all-people’s state”. Like Brezhnev's idea of “developed socialism” of the early 1970s, the people’s state was considered a higher, socialist phase before the emergence of Communism. The will of the people's state was termed the people’s law, and sanctified in the 1977 Constitution:

Having fulfilled the tasks of the dictatorship of the proletariat, the Soviet state has become an all-people’s state... a socialist all-people’s state which expresses the will and interests of the workers, peasants, and intelligentsia, the working people of all the nations and nationalities of the country.

Like the idea of developed socialism, the introduction of the all-people’s state precipitated a barrage of academic material describing and analysing the concept, not as a policy, but as a reality in contemporary Soviet society. That Marx and Engels had derided the very idea of a free or people’s state as a contradiction in terms, given the inherent class character of all states, did not seem problematic. “People” turned out to refer, not to the Soviet population, but those with the goals and interests of Communism at heart. Indeed, not only do Soviet writers posit such terms as “developed socialism” or “the people’s state” as
both consistent with the doctrine of withering away and representative of Soviet reality, some laud these achievements as surpassing political and legal achievements in the West. It has been argued that as the best protector of human rights and liberties, the Soviet state offers greater and more extensive juridical protection to the individual.67

Insofar as it contends that law does ultimately come to an end, the definition of law as an instrument of the ruling class, like the other definitions discussed in this paper, asserts that a conceptual tension exists between fully developed socialism, or what Soviet Marxists would call Communism, and law. Indeed, there is a sense in which the class rule theory, despite its apparent reversal of the "legal nihilism" represented by the ideology and egoism arguments, is the most anti-legal. For in its admission of the temporary utility of legal institutions for socialist society, it narrowed the scope of law. Law disappears in a future ideal society because in the interim only the most oppressive features of the legality of capitalism survive. Law seeks only to contain class conflict; it does not, as an alternative view supposes, offer an ideological dimension of formal security and liberty for individuals, nor, as Pashukanis first affirmed, does law constitute a formal system mediating the interests of individuals as exchangers of commodities. The class rule perspective defines law as devoid of any genuinely liberal aspects, thus justifying the omission of these aspects in the legal system of the dictatorship of the proletariat. In the 1930s, John Hazard observed that at the Moscow Institute of Soviet Law,

law, concerning the rights of the individual was relegated to a few hours at the end of the course in economic-administrative law and given apologetically as an unwelcome necessity for a few years due to the fact that capitalist relationships and bourgeois psychology had not yet been wholly eliminated.68

CONCLUSION

This paper has presented three conceptions of law in the Marxist tradition. Despite their differences, it was found that each perspective often encompassed aspects of another. In particular, all three conceptions shared a commitment to the doctrine of the withering away of law and state, purporting that under perfect socialist conditions law would be inconceivable. The Marxist tradition considers the source of law to
lie in relationships of conflict, domination and alienation intrinsic to capitalism. According to the first view, these relationships can be located within the capitalist class itself, in the interaction of commodity exchangers. The second view considers these relationships the basis for law as ideology, which regulates and legitimates the capitalist mode of production. The third view identifies the distorted relationships between classes as the conditions of capitalism which require legal institutions; law is a form of class rule.

In all three positions, a phenomenon which would have been described in legal terms under capitalism, must, upon the withering away of law, be understood as something qualitatively different. There are two arguments to be made against this view; the first, a modest one, from an immanent or internal perspective, and the second, a more ambitious one which challenges the core of the withering away doctrine.

To start with the minimal tactic first, even if one accepts that law will eventually disappear under socialism, it remains that law will have a role to play in the transitional period before post-capitalist society reaches its fullest development. Evidence of this was found in the experiences of the Soviet Union, in which the idea of law as class rule justified the deployment of law to cement the proletarian revolution.

One may want to go further, however, and make a stronger critique which finds a moral danger in the withering away thesis, and urges that law should have a permanent, positive role to play in a flourishing socialist society. In a sense, despite its avowal that socialist law is for a time necessary, the argument that law embodies the rule of the dominant class contributes to the idea of the definitional extinction of law. Just as, upon the disappearance of law, crime-like things are no longer candidates for legal mediation, so too are legal concepts applied to procedures which, even according to the ideology and egoist views, are not law. Hence, in the Stalinist period, extra-legal repression and political coercion were defined as law. Similarly, the supposed end of law may enable hitherto legal claims and institutions to be redefined and restructured and thus manipulated in the aid of political concerns. For example, “re-education”, which centres on eliminating the supposed criminal tendencies inherent in the personalities of those convicted, replaces punishment, as anti-social behaviour is treated as “mental deviance” by psychologists. Even today this tendency is in evidence,
insofar as the Soviet state’s practice of using legal weapons to fight political problems is the other side of the coin of legal nihilism. There is a great deal to be said for the rule of law, insofar as it handles interpersonal conflict and conflict between state and citizen, in a public forum, to be discussed and decided in full view of the citizenry, rather than in the unseen world of hospitals and asylums.

Yet most Marxist critiques of Soviet authoritarianism consider the lack of individual liberties in that system as a consequence of the Soviet revolution’s departure from the doctrine of the withering away of law and state. David McLellan, for example, points to the uniqueness of Russian conditions and the authoritarian tendencies of Lenin, to explain how the state, instead of eliminating its presuppositions, transformed itself from the rule of the majority class to rule by a Party elite. Draper and Hunt argue that the idea of “dictatorship of the proletariat” was reinterpreted and took on a much more important role in Soviet Marxism, in order to justify totalitarian democracy, as opposed to the more authentic democratic vision of Marx and Engels. In the place of a stateless ideal of socialism, there grew a vanguard doctrine of the state as the organ of the majority, insofar as it speaks for proletarian interests, without a democratic procedure to ascertain how the working classes themselves perceive their interest. Marx’s vision of a deprofessionalised socialism is abandoned, since the state persists as both a self-serving hierarchy and a vehicle of coercion. Elsewhere it has been argued that Soviet-style authoritarianism could have been avoided if the true meaning of the dictatorship of the proletariat as a withering power was preserved. Only then could socialist society realise the Marxist aspiration of human emancipation, in which there is liberty without law and democracy without political structures. Affirming Marx’s equation of law and state with domination and the division of society into classes, a recent study poses the rhetorical question:

If certain types of opposition are not explicitly protected, and if the dictatorship of the proletariat increasingly takes on the character of an armed camp, obsessed by real and imaginary enemies of its own making, will the state ever “wither away”? 

My study here has singled out the doctrine of the withering away, not as an abandoned ideal, but as a continuing theoretical standpoint in the history of existing socialism which, analysing law as a vehicle of
domination, has been unable to prevent or even inhibit repressive developments in Soviet legal history. Indeed, the doctrine of the disappearance of law and state under socialism has sometimes been used, doubtless contrary to the original Marxist vision, to justify authoritarian brands of socialism. In seeking to understand the failure of Marx's emancipatory project in Eastern Europe, Marxism should be concerned with the inadequacy of an ideal of socialist society as offering both liberty and democracy with neither the legal nor political mechanisms which, in bourgeois societies, have been their guarantee.

In any case, the definitions of law as mediator of egoism, or an ideological representation of capitalist society, provide some ground for a socialist jurisprudence which does not foresake all liberal ideals. The view of law as a social structure which regulates bourgeois egoism grasps the interpersonal conflict which underlies law, but it denies the possibility of conflict which is not the result of selfishness. A socialist jurisprudence must demonstrate the possibility that interpersonal conflict may arise in socialist society which is not connected with egoism and class divisions. Even in a socialist society without self-interest, narrowly construed, legal institutions may be necessary to adjudicate various (selfless) conceptions of socialist goals and their means of implementation.

The view that law is a form of ideology also reveals the positive components of legal institutions. I have noted Thompson's view that "law does not only deceive and conceal ... it also organises and sanctions real rights of the dominated classes". A socialist jurisprudence must begin with a grasp on the ambivalence of legal ideology, which, in its very role as a legitimating force, offers moral values. The weakness of the withering away argument, in all its manifestations, lies in its inability to explain why the positive aspects of law in capitalist society are without utility in socialist society. After all, Marxism envisages a socialist future which exploits capitalist technology, arguing that the technological resources of capitalism will be more fully developed under socialism. It would seem to be available to Marxism likewise to embrace law as an emancipatory feature of capitalism which would continue to exist, albeit in an altered form, in a socialist future.

One can accept the view that the abstract and formal liberties offered by law leave unchallenged the exploitation and domination
intrinsic to the capitalist system, or even worse, that in providing such liberties, law legitimates and thereby serves the injustice of the economic order. But if these liberties nonetheless stand as a framework for mediating individual differences, or fragments of genuine justice, as the ideology and egoist views, taken together, concede, then socialists would do well to consider how to preserve and develop them in post-capitalist society. “Existing socialism” has demonstrated the impossibility of law “withering away”; conflict will outlive classes and disputes will continue to need regulation long after the demise of bourgeois market relationships. In the absence of legality, it is a repressive extra-legalism that will regulate socialist society, nakedly, or masquerading as law.74

NOTES

1 ‘Socialism: Utopian and Scientific’, in Karl Marx and Frederick Engels, Selected Works in three volumes, Progress, Moscow, 1970, vol. 3, 147. References to the writings of Marx and Engels will be made, wherever possible, to these volumes, with the abbreviation of MESW; failing that, references will be made to the Collected Works, Lawrence and Wishart, London, 1975, with the abbreviation MECW.
3 Although Shlomo Avineri claims that capitalist economic structures themselves will wither away, suggesting that Marx’s vision of socialism is much less revolutionary than is commonly supposed. See The Social and Political Thought of Karl Marx, Cambridge University Press, 1968.
5 Ibid., 162.
6 Ibid., 164. For a critique of Marx’s analysis of rights, see Steven Lukes, Marxism and Morality, Clarendon Press, Oxford, 1985, Chapters 4 and 5.
8 Pashukanis: Selected Writings on Marxism and Law, Piers Beirne and Robert Sharlet (ed. and intro.), Academic Press, London 1980, 76. The quote from Marx is cited as Capital, International Publishers, New York, 1967, vol. 1, 84. It is interesting to note that Pashukanis uses the conceptual apparatus of Capital, a work of the later Marx, to flesh out the analysis of law found in Marx’s earlier works.
9 Ibid., 81.
10 Ibid., 102. See also Issac Balbus, ‘Commodity Form and Legal Form: An Essay on the “Relative Autonomy” of the Law’, in Law and Society, Winter 1977, for a recent analysis of law along the lines of Pashukanis’s commodity theory.
11 Pashukanis, Selected Writings, 46.
14 Beirne and Sharlet, 'Introduction', in Pashukanis, Selected Writings, 12—13, my emphasis.
15 The German Ideology, in MESW, vol. 1, 50.
18 Joe McCarney, however, argues that the Marxist concept of ideology must be distinguished from Marx's critique of German ideology. Thus ideology per se need not be illusory nor even serve to stabilise the status quo; Marxism can thus be considered an ideology. See The Real World of Ideology, Harvester, Sussex, 1980.
19 Pashukanis, Selected Writings, 54—5.
20 Ibid., 79.
27 MESW, vol. 3, 435. Contemporary exponents of the ideological view also consider legality to be important for the proletariat in the class struggle as an instrument for social change. See Colin Sumner, 'The Rule of Law and Civil Rights in Contemporary Marxist Theory', Kapitalistate, No. 9, 1981.
30 Quoted in Ibid., 126.
33 The German Ideology, MESW, vol. 1, 25.
34 The German Ideology, MESW, vol. 1, 35.
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35 Selected Writings, 49.
37 The German Ideology, MESW, vol. 1, 68. Althusser’s contention that as illusion, ideology will persist in Communist society, thus looks rather suspect.
38 MESW, vol. 1, 113.
39 Ibid., 121.
40 Or, on McCarney’s view of ideology as simply the representation of class interests, a socialist legal ideology could express proletarian interests.
41 This doubt about the abundance assumption also challenges the Marxist optimism about the ethical neutrality of capitalist forces of production; some critics complain that Marx paid too little attention to the possibility that industrialisation itself is morally problematic, as a source of both workers’ alienation and environmental havoc.
44 Sumner, Reading Ideologies, 277.
47 Manifesto of the Communist Party, MESW, vol. 1, 123.
48 Lenin, State and Revolution, Selected Works, 204–6; 261–3.
49 Ibid., 292.
52 Pashukanis, Selected Writings, 287.
53 Quoted in Beirne and Sharlet, ‘Introduction’, Pashukanis, Selected Writings, 22.
57 Selected Writings, 314.
60 The Law of the Soviet State, 58.


Scanlon, Marxism in the U.S.S.R., 240—1. Interestingly, in 1966, Laszlo Revesz wrote that the concept was of “meagre practical significance”, noting that the idea that Soviet law expresses the will of the whole people had appeared sporadically since 1936. See Laszlo Revesz, ‘Open Questions in Contemporary Soviet Philosophy of Law and State’, Studies in Soviet Thought, VI, 3, September 1966, 215.

Ibid., 215. Although some uneasiness with this doctrinal twist is evident in V. Chkhikvadze’s contradictory remarks that Soviet law is both the law of the people as a whole and retains its class character as the law of the proletariat. See The State, Democracy and Legality in the U.S.S.R.; Lenin’s Ideas Today, Progress, Moscow, 1972.


Lovell, From Marx to Lenin, 87.

Whigs and Hunters, 258—69.

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