Articles

Marxism, Socialism and the Theory of Law

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Collectivism, A.V. Dicey made evident more than seventy-five years ago in his classic Law and Public Opinion in England During the Nineteenth Century,¹ did not enter the world with a theory of law and still has not attained one. Even today, there is not much reason to disagree. In the Soviet Union and other Marxist-socialist countries, there was an initial radical rejection of law as by its nature an instrument of coercion and alienation, of bourgeois formalism or of moral hypocrisy concealing class rule. This rejection of law has been replaced by the elevation of the social, administrative and educative functions of law in socialist societies, and by the emphasis on the administrative imperatives and the social needs that make law necessary in any complex society. The classical Marxist belief that state and law will wither away once class rule has been overcome is dead. In post-industrial Western Europe, North America and Australia, Marxism (in some of its ill-digested varieties) has invaded law schools almost for the first time. The work of Karl Renner and E.B. Pashukanis—but not that of present-day Soviet theorists of law—excites some interest among radical teachers of law. “Marxist” or pseudo-Marxist “critique” of law, emphasizing class interest, social conflict, “the structure of domination” and the view of law from below, has become

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fashionable. Nevertheless, as one radical teacher of law wrote a few years ago:

Any serious examination of the few attempts which have been made in recent years to develop a radical theory of the legal process reveals a disturbingly high level of intellectual poverty and theoretical sterility. How else could one evaluate a theoretical project which seems to devote a major portion of its energy to measuring and emphasizing the political distance between itself and its object? Because radical legal theorists seem concerned above all else to establish their own authenticity as militant opponents of the legal system and a mainstream legal theory which is regarded as the servile hand-maiden of a repressive state apparatus, the task of actually comprehending the legal process as an important dimension of everyday social experience tends to be relegated to a second level priority, if it is not overlooked altogether. The most obvious manifestation of this tendency to reduce legal theory to the level of an elaborate war-cry is the prevalent radical image of the law as an external, repressive force which plays no essential part in our nature as social beings. As an external force imposed on the individual from without, the law need not be incorporated into any theory by which radicals seek to understand their personal needs and the relationship of those needs to the socio-historical process of which they are a product.  

The psychological as well as the intellectual gulf between radical legal theorists in the West and the “official” spokesmen of Soviet, Chinese, Eastern European and even Cuban “Marxist” legal theory is enormous. Yet neither group has succeeded in creating a serious and distinctive Marxist school of jurisprudence worthy of detailed consideration for its own sake. Neither group has produced or has had significant impact upon great modern expositors of a general theory of law. Moreover, neither group has developed great students of the philosophical and analytical problems of jurisprudence, or of legal traditions, legal institutions and the legal process. On the contrary, the attempts of Marxists to grapple with law have been among the factors leading to the intellectual disintegration of Marxism as a coherent system of thought. Insofar as radical legal theorists in the West now are beginning to recognize the accuracy of Fraser’s criticism and to think seriously about law and its future development,

2. Fraser, Legal Theory and Legal Practice, 45 ARENA 123, 123 (1976).
they are modifying or abandoning their legal nihilism and returning
to a pre-Marxian and non-Marxian socialist tradition of elevating
public law above private law, distributive justice above corrective jus-
tice and administration above adjudication. Yet these theorists still
draw upon the ideology of private law and the conception of due pro-
cess in their elevation of human, constitutional and other rights
against states and bureaucracies. At the same time, in Marxist-social-
list countries, serious theorists are stressing the complexity of state and
legal functions in class and socialist societies, the inheritability of legal
norms and concepts from one social formation to another, and the
role of the state, law and politics in organizing production, furthering
economic development and shaping a socialist culture.

I. THE HISTORY OF AND TENSIONS WITHIN SOCIALISM

The history of socialism is a complex story. The doctrines that
have been and can be incorporated within the term “socialism” are
not mutually consistent and are not always internally coherent. These
doctrines were shaped by people of differing circumstances and tem-
perament, in specific countries and specific historical situations. In
France, the extreme democratic wing that emerged from the upheav-
als of the 1790’s stimulated, through Gracchus Babeuf’s follower Buon-
arroti, the conspiratorial revolutionary socialism of Blanqui, with its
“dictatorship of true Republicans,” to be followed by an anarchist
and egalitarian communist society. Yet in the same France, Saint-
Simon and some of his disciples first expected their friends in French
banking circles to develop the planning and rationalization of indus-
try, bequeathing to socialism reformist, state-centered attitudes such
as those of Louis Blanc. These attitudes anticipated aspects of the
evolutionary democratic socialism that took shape in the 1860’s, but
were reflected in Marx and Engels’ abiding concern with centraliza-
tion of economic control as a necessary foundation for socialism. In-
deed, Fourier’s “phalanste res” and Proudhon’s rejection of the state
stood in direct contradiction to the technocratic ideals of the socialist
Saint-Simonians. In England, Robert Owen approached the conclu-
sion of his address to the inhabitants of New Lanark with the words:

Continue to obey the laws under which you live; and
although many of them are founded on principles of the
grossest ignorance and folly, yet obey them—until the gov-
ernment of the country (which I have reason to believe is in
the hands of men well disposed to adopt a system of general
improvement) shall find it practicable to withdraw those
laws which are productive of evil, and introduce others of an
opposite tendency.\textsuperscript{3}

Only fourteen years later, however, in conjunction with the agitation for the Great Charter, the "hewers of wood and the drawers of water" in England were demanding to know how the Reform Bill could benefit them, thus expressing through a wave of violent protest their lack of faith in the country's laws and institutions.

Socialism may be revolutionary or evolutionary, anarchist or étatist. Does it reject only "bourgeois" law or coercive class law generally, or does it reject even any conception of law as a social category? As a movement of the deprived and the oppressed, socialism of all types continues to reflect intense antagonism toward the existing system and toward those who seem to know how to manipulate the rules of the system to their own advantage. Socialism saw law as the bulwark of property and as the ruling class instrument for preserving its privilege and right to command. The Great French Revolution had swept away the centuries-old legal traditions of the \textit{ancien régime}, with their estates, privileges and feudal dues, and had enacted a series of constitutions followed by a Code that was to be the glory of modern Europe. American revolutionaries had proclaimed the rights to life, liberty and the pursuit of happiness and had enacted a great democratic Constitution, but they tolerated slavery and protected private property. Socialists radically criticized the rights of the citizen and the civil and political arrangements embodied in these constitutions and in the Napoleonic Code. They rejected not only feudal law, but bourgeois law as well, for socialists saw bourgeois law as the bulwark and embodiment of private interest, not social benefits.

Two fundamental tensions in the new socialism—Marx, if he were not committed, would have termed them contradictions—stood at the heart of the problem. First, socialism proclaimed itself to stand for the social interest as opposed to the individual, private interest, while socialism taken by itself stood for emancipation and human freedom. The relationship between private interest and social interest, the inherent conflict between private rights and public duties, has plagued socialism ever since. In practice, democratic socialists have proclaimed the ideal of striking a balance between private rights and public duties. Socialist theoreticians, including Marx, however, strove to persuade the world that there was no real conflict. The individual's "real" interest and "true" development, they argued, could be achieved only through his or her total immersion in the pursuit of the social, public good or in a society in which the concept of individual

\textsuperscript{3} Owen, \textit{An Address to the Inhabitants of New Lanark}, 1816, in \textbf{SOCIALIST THOUGHT: A DOCUMENTARY HISTORY} 154, 183 (A. Fried & R. Sanders eds. 1964).
rights had been overcome, in which men and women had become fully and unreservedly members of a community. In just this way had Rousseau argued that the "general will" was also the real, true will of the free individual.

The second tension or "contradiction" within socialism, or at least within Saint-Simonian socialism and Marxism, lay in its simultaneous affirmation and critique of the industrial revolution. Socialists combined a forward-looking conception of the future society as a rationally-organized, industrial workshop with a backward-looking longing for an idealized version of the face-to-face, cooperative and egalitarian village community that the industrial revolution allegedly had destroyed. This longing for preindustrial society, for its lack of atomization, impersonal relationships, abstract laws and dehumanized production, distribution and exchange, forms a strong theme in nineteenth-century and, to a large extent, twentieth-century social criticism and popular literature. Yet during the same period, the conception of the planned, administered, fully-industrialized society can be found in serious social theory and endeavor.

Part of the ideological impact of Marxism was its ability, for a period, to combine these two strands. As Adam Ulam has argued, Marxism deflected the worker's hostility away from the machines that appeared to ruin or enslave him and instead toward the owner of the machines. Marxism told him that the machines themselves, by the logic of history, would help create a society that was a preindustrial community in a higher form: a society of true communism in which the division of labor had been overcome, in which state and law had withered away, and in which there was direct democracy with full participation and face-to-face relations.

The result of these factors and tensions is a basic and underlying socialist ambivalence to law. Paradigmatically, one may say that the Rousseauist-anarchist strain in socialism, which drew more strongly on earlier anarchist and utopian pre-socialists, rejected the role of law in society altogether, though in his practical projects for reform and nation-building, Rousseau himself did not. The étatist, social-planning strain in socialism, exemplified by the Saint-Simonians and by later state socialists, clearly envisaged the future socialist society as having all sorts of written regulations. Since, however, the problem had not yet become an important one in the legal theory of their time, the Saint-Simonians and state socialists were not clear about whether such regulations were in any sense law. Thus, the generally anti-legal tradition in early socialism was clear and self-confident even if often
muddled and utopian, while the etatist strain was unclear and ambivalent.

The Rousseauist-anarchist strain in socialism believed in the fundamental and natural cooperativeness of men, and believed in the triumph of reason and the general will. In a truly human society, there would be no need for a coercive state and a system of law. Rousseau himself, in his *Discourse on the Origin of Inequality* \(^4\) portrayed the descent of man as passing through three main stages from natural cooperative bliss to the misery of contemporary civilization. The first stage was the establishment of the law and the right of property; the second stage was the institution of the magistracy or government; and the third stage was the transformation of legitimate power into arbitrary power. Law for Rousseau is essentially a device whereby those in possession protect themselves and their property against those who have nothing; it is an instrument of the governing social group that establishes and maintains inequality. In a truly happy and equal society, property and law would have no social role, although Rousseau’s later and more practical political and constitutional writings make it clear that he saw the need for both government and law in any conceivable modern democratic society of national proportions.

William Godwin, that later eighteenth-century eccentric but significant and influential anarchist thinker, saw government, state, law and property all as forms of tyranny. Even at their most democratic, government and law involve the coercion of minorities in the name of majorities whose unanimity is normally fictitious and whose wisdom is normally folly. Godwin reserved his most devastating attack specifically for law.

First, it is endless and therefore incomprehensible. Edict is heaped upon edict and volume upon volume. No matter how many times laws are multiplied, they cannot cope with the specific differences between one man and another, one action and another. Law must become a procrustean bed, from which individuals seek to escape by breaking the law or making new ones. Hence, the uncertainty of the law and its character make it an endless labyrinth. The law itself, therefore, makes lawyers dishonest, but if a lawyer were to be honest, he would be an even more pernicious citizen than a flexible and dishonest one.

Second, law pretends to foretell and control the future: a claim especially odious to Godwin. It partakes of the nature of prophecy

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and promises; it lays down what men will do and what will happen, forgetting that in the interval men may acquire new knowledge. The law therefore tends to produce stagnation and permanence in place of the unceasing striving toward perfection worthy of human kind.

Third, and above all, law is restraint and coercion. Whereas the beginning of virtue is that people should obey no one, the law tells people what to do. In any case, law cannot create justice or right, which exist before it or independently of it. The true principle by which the good community will live is that of “reason exercising an uncontroled jurisdiction upon the circumstances of the case.” There will be men whose wisdom is equal to the wisdom of the law and they will judge by doing what is right in the circumstances and at the moment. Naturally, Godwin accompanies this notion with the belief that criminals are the product of society and that once the criminal has been made to see the truth, and his wrongdoing has been presented to him “with calmness, perspicacity and benevolence,” his reformation would be almost infallible. More than fifty years later, in an 1845 speech to the German Workers’ Educational Association in London, the quasi-religious German communist Wilhelm Weitling declared: “In my opinion, everybody is ripe for Communism, even the criminals. Criminals are a product of the present order of society, and under communism they would cease to be criminals. Humanity is of necessity always ripe for revolution, or it never will be.”

For Proudhon, too, the state was a monster and all legislation was invalid unless it specifically was assented to and promulgated by the individual affected by it. In his ideal society, “[c]ommerce, the concrete form of contract . . . takes the place of law” and voluntary agreement takes the place of legal coercion. To be governed, he wrote in the General Idea of the Revolution, is to be “inspected, spied upon, directed, law-driven, numbered, enrolled, indoctrinated, preached at, controlled, estimated, valued, censured, commanded, by creatures who have neither the right, nor the wisdom . . . to do so.”

Marx soon was to have Weitling expelled from the Communist League for simple-minded utopianism and to attack Proudhon for ignorance and muddle-headedness. That anarcho-communism of

6. W. Godwin, supra note 5, ch. VI.
which Weitling was a simple-minded exponent, however, already had found its place in the infinitely more sophisticated Marxian system as the society of true communism.

If the anarchists and anarcho-communists clearly rejected law altogether, the connection between this rejection and socialism more generally as the critique of bourgeois society and bourgeois property remained unclear. Was the abolition of such property to be followed by legislation which would create a new legal system for a socialist society? The eighteenth-century attack of pre-socialists, such as Morelly, on property and on the desire for property, as the causes of all social evil, was followed by Morelly’s elaborate model code—the Code of Nature—with its sacred and fundamental laws, distributive or economic laws, agrarian laws, edile laws, police laws and sumptuary laws. The étatist socialists’ picture of the future clearly required state regulation that would direct and control the material foundations and social life of a socialist society. Even Gracchus Babeuf’s vision, as recalled later by his colleague and disciple Buonarotti, in the Conspiracy of Equals, of a communist society without private property and with collective administration of the production and distribution of goods, envisaged an elaborate and powerful body of administrators (magistrates) at the local and national level, with power to direct labor and control admissions to vocational courses. This administrative corps would be parallel in structure to the elected political structure. In the Communist Manifesto and in the programs and policies he proclaimed during the 1848-49 revolutionary upheavals in Europe, Marx, the revolutionary, was an étatist. He believed it to be fundamentally important for revolutionaries to seize state power and centralize government, to establish a dictatorship of the proletariat, to rule by decrees, and to use legal and state power to change the economic and social order. Decrees, however, are not identical to a legal system. Marx’s étatism was unquestionably a tactical one, a transitional step necessary to overthrow the bourgeoisie and bring the revolution to a successful end. As Marx grew older, he gradually recognized that the transition would be slower, and that bourgeois conceptions of law or right would have to be used for proletarian purposes, until relative abundance was created and people formed new social habits. Marx’s vision of the ultimate future, however, was always of a nonregulated society, or at least of a self-regulated society, in which state and law as coercive instruments had lost the medium of

9. F. BUONAROTTI, 2 CONSPIRATION POUR L’Egalite, DITE DE BABEUF 204-14 (1828).
their existence. The difference between Marxism and communitarian anarchism was a difference about how to achieve the emancipation of mankind, not about the ultimate character of that emancipation and the society based upon it.

Apart from the tensions and ambivalence noted above, two obstacles prevented Marx himself and many revolutionists and social theorists in the first half of the nineteenth century from fully appreciating the problem of law and administration in the future society. First, they identified law and government with a nakedly coercive state having no other functions (what Saint-Simon saw as the feudal elevation of the sword). They contrasted this with the natural rationality and peacefulness of free men and with the essentially pacific self-ordering of rational, scientific production. Second, these revolutionists and social theorists were convinced that society and not the state was the key to future developments. As Martin Krygier wrote:

Europe in the nineteenth century was crowded with theorists and ideologues who agreed that "society" rather than politics, was fundamental in human affairs . . . . [They], and especially the revolutionaries among them, were extraordinarily confident that they knew the direction of historical change and the stage which had been reached: they shared a profound faith in progress, and a belief that the goal of this progress—a transition from existing society to a new and in every way better society—was very near . . . . Common to much revolutionary social theory and to much nineteenth-century sociology was the belief that politics as commonly understood would be irrelevant to and transcended in the new society . . . .

Hence the slogan, "the government of men will be replaced by the administration of things," or as Weitling put it, "a perfect society would have not a government but an administration." Proudhon was able to trace the irksome situation of the day to "a certain malady of opinion" which Aristotle had called politics. There was a widespread belief in these circles that the future society would have no politics and therefore require no government. In part, this was because their conceptions of government, reflecting a simplistic view of its main functions at that time, were of government as an organized force, or as dominated, in Saint-Simon's phrase, by men of the sword and not by administrators or calculators. Saint-Simon certainly recognized

that the new society would involve much administration; still, he and so many inspired by him, including Karl Marx, seemed quite unable to take the nature and problems of administration seriously as requiring complex arrangements and systems of regulation. The closest Saint-Simon came to a theory of administration (for he knew full well that the new society would have to administer men as well as things) was in his aphorism: “In the old system society was essentially governed by men; in the new it is governed by nothing but principles.” To Saint-Simon, as Krygier writes:

When industrial society is fully developed, the whole basis and rationale of governmental domination will have disappeared. For industrial society is a co-operative activity of producers, all of whom play some productive role and all of whom have worth by virtue of their active participation. In the words of L’Organisateur, the leaders of this industrial co-operation do not need to regiment or command subjects, they combine with and give direction to partners (associés, sociétaires) and collaborators. The only commands exercised by the new leaders will be those strictly necessary “to maintain good order in work, that is to say very few. Industrial capacity of its nature loathes to exercise arbitrariness as much as to support it. . . . Besides, in a society of workers, everything tends naturally to order, disorder comes always, in the last analysis, from idlers.”

Another point worth noting relates to an early distinction—in the 1830’s and early 1840’s—between socialists and communists. Socialists proclaimed their concern with the general social good, while communists saw themselves more specifically as serving the interests of the “proletariat,” or those who have nothing but their capacity to labor. Marx sought to reconcile the two in his concept of the proletariat as the “universal” class, standing for the whole of humanity. Do socialists today, or even Marxists, feel the same faith in the character, role and future of the proletariat as the bearers of rationality, freedom and enlightenment? Or has Marxism become, as Machajski forecast, the ideology of the “white-handed ones,” or the intellectual “worker” tied to the public sector, helping the proletariat to live “properly” and deriving both power and satisfaction from that role?

12. Id. at 38; see also 20 ŒUVRES COMPLETES DE SAINT-SIMON ET ENFANTIN 151-52 (1963-64).

II. KARL MARX’S VIEWS OF LAW

The seventeen-year old Karl Marx, son of a lawyer, also began his university career as a law student when he enrolled in the Faculty of Jurisprudence in the University of Bonn in October 1835. There is some evidence that his legal studies did not engage his exclusive attention during the two semesters that he spent at Bonn. He was censured for drunkenness and duelling with “forbidden weapons” (pistols); he fell in love with Jenny von Westphalen; and he wrote a quantity of bad poetry, mainly to her. His official university record, nevertheless, shows that he attended—"industriously" and in several cases "very attentively"—courses on "the encyclopaedia of legal science," the Institutes of Justinian, the history of Roman law and the history of German law, as well as a survey of European legal systems and a course on natural law.

Moving to Berlin, the young Marx attended Savigny’s course on the Pandects and Gans’ course on criminal law in the winter semester of 1836-37, and courses on ecclesiastical law, general German civil procedure and Prussian civil procedure in the following summer semester. He also continued to write bad poetry and—according to his father and the official university record—to accumulate an unreasonable number of debts. The following academic year, 1837-38, he attended a course on criminal procedure and Gans’ lectures on the Prussian General Legal Code; the latter, according to Gans, with remarkable industry.

Meanwhile, however, Marx was becoming a Hegelian and moving to an interest in philosophy as the basis and sine qua non of all critical thinking. In a well-known letter to his father, dated November 10, 1837, Marx described his mental development during the first year of study in Berlin and the shifts that were taking place in his thinking.\textsuperscript{14} He had abandoned the Kantianism of his father and of most of his teachers in Trier and Bonn for the new Hegelianism. He had been disturbed, Marx said, to be confronted everywhere with the conflict between what is and what ought to be. The acceptance of this dichotomy, so prominent in the work of Kant and Fichte, and initially presupposed by Savigny, had led him to begin his legal studies by completely severing the philosophy of law and the setting out of legal concepts from actual, positive law. Marx claimed he had written a 300-page manuscript on the philosophy of law, which he abandoned when he found that it assumed throughout an unmediated and unrec-

\textsuperscript{14} See The Portable Karl Marx 11-17 (E. Kamenka ed. 1983). For a general account of Marx’s development, see the editor’s Introduction, especially pages xi-xiv, and corresponding notes.
onciled distinction between what is and what ought to be, between the material content and the formal, logical structure of law. The point of a legal concept, he now felt, was that it must act as the intermediary between form and content: form must be shown to arise out of content, to be a continuation of it. Recognizing this, Marx had plunged into positive law: Savigny on ownership, Muehlenbruch and Wenning-Ingenheim on the Pandects, Anselm von Feuerbach and Grolmann on criminal law, Lauterbach's works, books on civil law, ecclesiastical law and canon law. Yet Marx also had read widely in philosophy and classical literature, and it was the need for philosophy that he felt most at this stage. He could make his way no further without it. As to his future career, Marx wrote, he much preferred jurisprudence to any study of administration. He therefore would like to enter the judicial rather than the administrative service because the former opened the way much more quickly to an academic career in teaching law at the universities.

In fact, Marx was beginning to occupy himself more and more with philosophy. In the summer semester of 1838, in addition to Gans' course on the Prussian General Legal Code and a general course on geography, he attended Gabler's course in logic. He became friendly with Friedrich Koppen, who dedicated his study of Frederick the Great to his young friend "Karl Heinrich Marx from Trier." Marx also became friendly with the radical Hegelian theologian Bruno Bauer. Marx frequented the wine bars and coffee shops where discussions were held by a group of young Berlin intellectuals, including Koppen, Bauer and Rutenberg, who were known as the "Doctor's Club."

Marx gave up any serious thought of continuing with his study of law when his father died in May 1838; his final act of piety was to attend a course that winter on the law of inheritance. In the next two-and-one-half years at Berlin, he attended altogether two courses, one taught by his friend Bruno Bauer on Isaiah and another on Euripides. He had, by then, informed his family that he could not seriously consider practising or teaching law, and insofar as he thought of a career, it would be the pursuit of philosophy, i.e. of criticism.

The intellectual sources of the Marxian system, and the intellectual progress of Marx himself, are now much better known and more widely studied than they have been in the past. Marx came to communism in the name of freedom, not in the name of security or welfare. From his earliest days, he stood for universal freedom and self-determination, seeing social conflict and "contradiction" as the product of particularity and external determination. Marx's first writings
on law emphasized that “true law” must be universal, reflecting the inner laws of man's social being and the inner requirements of truly human activities. Before man's life as a life of universality, rationality and freedom, law retreats; it becomes unnecessary. During the period 1843-44, Marx discovered the proletariat as a philosophical concept, and alienation as the key to human progress, human misery and dependence. He saw law as a form of alienation, tearing human beings out of their social and material context, elevating formal equality while permitting substantive inequality, and separating the legal from the economic, the moral and the material. True communism would mean the overcoming of all alienation and therefore the overcoming of law.

The moral ideal that Marx always had set before him remained unchanged throughout his life. This ideal was the rational, free, truly human society; the cooperative fellowship in which men joined together spontaneously in the pursuit of activities and interests. The ideal was built from the Kantian conception of the universal kingdom of ends, and from its French counterpart, the cooperative fellowship envisaged by Rousseau, in which the general will as distinct from the mere sum of individual wills had come to prevail and to reshape the whole of human life. Marx's moral ideal incorporated the utopian dreams of the “utopian” socialists who preceded him. (Marx dismissed these socialists not for their picture of the future cooperative bliss of mankind, but rather for their failure to produce a realistic program for achieving it.) The ideal involves both logical and empirical difficulties, but Marx was never to reconsider the logic on which it was based. Already in his youth, he thought he had learned from Hegel that this moral ideal is not an external norm, but an empirical end implicit in history, in reason and in the nature of man. From that point on, Marx was to devote his entire attention to showing that the communist society was indeed the necessary end of historical development, that contemporary society was inexorably driven toward it by the logic of its own contradictions.

In 1843, Marx discovered in the proletariat—the most numerous, the most suffering and therefore the most radical class—the material agency that would overthrow the system of private property, and of economic and legal enslavement, and that would usher in the society of freedom and rationality. The suffering of the proletariat and its lack of material possessions and significant opportunity to acquire property were of fundamental, logical importance to Marx. He rightly recognized that only those without property were likely to usher in a society that negates property. The proletariat was for him a vital philosophical category; it was the truly “universal” class that
would overcome all the particularizing differences of standpoint associated with various points of view, and instead would at once know and act rationally. Marx’s vision of the proletariat was, in fact, the successor in logic to Hegel’s rational bureaucracy. It was seen, however, as a very different type of class, shaped by deprivation, not education, and by material work, not abstract “impartial” thought.

Between 1844 and the spring of 1845, when Marx was expelled from Paris to Brussels, he developed the main thesis of his “materialist conception of history.” This was the notion that the economic life of man in the world of industry and trade was the main theater of history in which politics, law, and the intellectual development and opinions of mankind could be understood. The varying formulations of this main idea found even in Marx’s work, let alone in the work of Engels and later Marxists, have caused a great deal of difficulty. The idea’s logical importance within the Marxian system was that it isolated what seemed to be a single, manageable factor as the determinant of social change. Indeed, it enabled Marxists to say that from the abolition of property a whole new society followed. If the theory was correct, it made a vast and pervasive revolution in the history of mankind a feasible proposition.

At the same time, in conjunction with the development of the “materialist conception of history,” Marx brilliantly invested the formal categories of classical economics—labor, capital, rent and trade—with sociological reality, unmasking them as classes engaged in production and in an inevitable struggle with each other. The history of society, Marx and Engels proclaimed in the Communist Manifesto, was the history of class struggles. The state and law were class-states and class-law; the modern capitalist state was merely the executive committee of the bourgeoisie. In the predominantly dire economic condition of his London exile, Marx spent most of the remainder of his life trying to show that the “logic of capitalism,” the principles and institutions on which its whole existence was based, led to “contradictions”—crises, slumps, concentration of capital and impoverishment of the proletariat—that would inevitably lead to its collapse. A proletarian revolution would place all economic production under social control and inaugurate a society in which rationality and freedom would prevail and in which the very concept of property ultimately would be forgotten. Marx was to argue that a transitional period of the dictatorship of the proletariat and of formal legal regulation, on behalf of all, would operate on the basis “from each according to his capacities, to each according to his contribution.” This period, called the “socialist stage” by his followers, would be followed by true communism, in which property, state and law had disappeared, in which
the ideal “from each according to his capacity, to each according to his needs” would prevail, and in which human beings would become creative, many-sided and fully free, forming “a free association of producers.”

Precisely because he thought that communism could be shown to be logically and historically inevitable, Marx saw himself, in Engels’ phrase, as a “scientific socialist.” In his mature communist period, Marx objected strongly to mere preaching and to what he saw as the illusion characteristic of the moralist and the legislator who thought that society could be reconstructed by moral appeals or legislative projects. As one of the present authors has written elsewhere:

The rejection of any appeal to “abstract” moral principles was for many decades one of the best-known features of the work of Marx and Engels. Marxism was distinguished from utopian socialism precisely by reference to its scientific character, to its refusal to confront society with moral principles and moral appeals. “Communists preach no morality at all,” Marx wrote (characteristically) in the *German Ideology* (1845-6). “They do not put to people the moral demand: Love one another, be not egoists, etc.; on the contrary, they know very well that egoism, like sacrifice, is under specific conditions a necessary [inevitable] form of the individual’s struggle for survival.” Throughout the remainder of his life Marx would object bitterly to any attempt to base a socialist programme on “abstract” moral demands embodied in such terms as “justice,” “equality,” etc. Marxism was a science; it did not advocate socialism, it showed that socialism was inevitable. It did not ask for a “just” wage, it showed that the wage system was self-destructive. Marxism did not confront society with moral principles, but studies the “laws of motion” that governed social change. It did not tell the proletariat what it *ought* to do, but showed the proletariat what it would be *forced* to do, by its own character and situation, by its position in “history.”

What applied to morality applied to law. Marx tried to demonstrate in *Capital* how capitalist employers and bourgeois parliaments enacted and manipulated law in their own interests and flouted those laws that stood in the way of profit. He disdained, however, with the iron logic of the thoroughgoing revolutionary, ever to appeal to the legalities of the old order or to a timeless concept of justice. Rights

and duties, Marx wrote in the *German Ideology*, are “the two complementary sides of a contradiction which belongs only to bourgeois society.” Private property, and the division of labor based upon it, found its consummation in the market economy of capitalism. It brought human beings into conflict with one another and increasingly forced them to live at one another’s expense. It introduced and intensified human alienation. External coercive law was a response to this conflict and alienation, but could not resolve it. A genuine Marxist or “scientific socialist,” therefore, would not appeal to law or justice, to temporary principles of accommodation. These concepts only obscured the “essence” of social relationships and social developments; they could not provide the basis for a revolutionary or a scientific program. With the supersession of private property, the conflict of interests and the whole structure of legal and governmental coercion called forth by this conflict would disappear. Marx still believed state and law would wither away (though the phrase itself is Engels’). “Communism [is] the positive abolition of private property . . . ,” Marx had written in his *Economic-Philosophical Manuscripts* of 1844, “and [is] the real appropriation of humanity by and for man, as the complete conscious . . . return of man to himself as a social, i.e., human, man . . . [and] is the genuine resolution of the conflict between man and nature and between man and man.” Law, Thrasymachus had said in Plato’s *Republic*, is the right of the stronger. Marx agreed with him, but believed that in the truly human society there would be no “stronger” to enslave the weak.

### III. THE DEVELOPMENT OF THE MARXIST AND SOCIALIST THEORY OF LAW

Those who have studied the writings of John Hazard with the attention they deserve will know well the enthusiasm with which Lenin and other communist leaders proclaimed, in the hour of revolution, that state and law would soon wither away and be replaced by communist self-administration and popular consciousness of justice. They will also know that every Marxist-socialist administration which survived in power has not only strengthened the state and built up an increasingly complex and formal legal system, but has also finally abandoned all pretense that state and law would ultimately disappear.

Marx’s conclusions concerning the fate of capitalism are at first sight the most specific of his doctrines. If these conclusions had less influence on the practical policies of the European social democratic movement than one might have expected, they did seem, to the more radical and revolutionary of his immediate followers, to be the doc-
trines most pregnant with contemporary significance and most con-
clusive in establishing that Marxism was the most "advanced" of all
sciences. In fact, this admittedly central aspect of Marx's thought
had its greatest impact in predominantly precapitalist societies, in so-
cieties where modernization, industrial development, and technical
and scientific attitudes faced severe and seemingly unrelenting barri-
ers based on religion, bureaucratic or state power, and agrarian or
traditional landholding attitudes. Marxism was to make its greatest
revolutionary impact on those societies which had more in common
with the Germany of Frederick William IV, in which Marxism was
born, than with the Germany of Bismarck and the age of accelerated
industrial development. It was in Russia, in 1917 and in the years
that led up to 1917, that the revolutionary side of Marxism appealed
to an intelligentsia that felt greater kinship with the Young Hegelian
radicals of the 1840's than with the intellectuals and professional men
of late nineteenth-century Germany or England who were drawn into
practical affairs and professional economic activity in a society that
was obviously moving forward.

To such an intelligentsia, and to those who have followed it in
the new centers of social upheaval today, the important thing about
Marxism was its revolutionary radicalism and the completeness of its
break with the old order; its thoroughgoing rejection of constitutions,
legalities, and the traditional structure of authority. For them, Marx-
ism (Marxism-Leninism, more accurately) is patently and primarily
an ideology. "Generally speaking," as Professor Kichitaro Katsuda
has pointed out:

a political ideology consists of three elements—first, a goal,
a future image or an ideal which it puts forth as the aim of
the political movement or political power; secondly, an anal-
ysis and judgment of the given political situations on which
the policies and programmes of the political power or move-
ment should be founded; thirdly, a philosophy of myth to
justify the formation of the party or the political power.\textsuperscript{16}

Soviet Marxism-Leninism, and communism generally, were able
to draw two of these components from classical Marxian thought in
quite a direct way: the utopian vision of the future communist society,
presented as the ultimate justification of the whole struggle (having
special appeal to an agrarian or recently agrarian population, and now
to a generation frightened of the new technology); and the Marxist

\textsuperscript{16} Katsuda, \textit{Dilemmas of the Soviet Totalitarian System}, 6 \textit{Review — A Journal for
the Study of Communism and Communist Countries} 1, 1-2 (1965).
analysis and critique of the class society showing the “old order” as both doomed and unworthy of respect or preservation. On the legal and ethical side, the utopian vision took the ethic of the spontaneously cooperative, free, self-determined human being, while the critique of bourgeois civilization placed special emphasis on the “materialist” critique of morality and law and on the “exposure” of moral codes and legal systems as serving class interests. The third element—the “philosophy” or myth justifying the Party’s seizure of power and the ensuing Party dictatorship—was provided by combining Marx’s vision of the role of the proletariat in history both with the specifically Leninist component in Bolshevism, the elevation of the Communist Party and of its cadres of disciplined, professional revolutionaries into “representatives” of the true, if not yet or by itself ever conscious, proletariat, into mouth-pieces of history and vehicles of “consciousness.” It was this element which provided on the ethical and legal side, the notorious Machiavellianism, the end-directedness of Leninism: the good is that which promotes the Revolution, i.e. the power of the Party. Morality and “legality”—even revolutionary “legality”—ultimately are completely subordinate to this final aim.

In the historical development of Bolshevism, as of political Marxism generally, there is an historically-conditioned tendency to emphasize one element of the ideological triad at the expense of others. This tendency is coupled, however, with an attempt to keep all options open and so prevent the system from tearing apart in an obvious way or from losing a politically useful flexibility. The utopian element in Russian Marxism reached its peak, as one would expect, in the periods immediately preceding and following the collapse of the old order, the revolution and the Bolshevist seizure of power. This element drew quite heavily on religious messianic and nihilist traditions: the Revolution was to be a bloody act of purification, a total destruction of the Old World and the inauguration of a radically new society, man, and human and social relationships. This was the theme of Aleksandr Blok’s famous poem, “The Twelve,” where the true Christ is seen emerging from the destruction, rapine and blasphemy of the Revolution. The men and women whose work culminated in the seizure of government in Russia, in Marx’s name, in October 1917, shrewd as they were in day-to-day political matters and the exercise and understanding of power, seemed to believe implicitly in the secular aspects of this image of the ultimate consequences of a Communist revolution. A free society, the romantic Communist V.A. Bazarov (Rudnev) wrote before the Revolution, “will not be walled off into miserable little cells of self-sufficient individualities.” Under communism, as Marx had seen, the very notion of “the individual”
and "his" interests disappears. One has only to reread Lenin's *State and Revolution*, written on the eve of the Bolshevik seizure of power, to realize the incredible simplicity of social relations under communism forecast by Leninist-Marxists. After a preliminary period of revolutionary dictatorship and growing economic expansion, the government of men would be replaced by the administration of things. Collisions between people would become a rarity; such disputes would be settled as they arose on the spot by the force of public opinion.

Upon first coming to power, the Communists had no theory or conception of a communist or socialist legal system. On the contrary, with the Marx of the *Economic-Philosophical Manuscripts* (which were not published until the late 1920's and were therefore unknown to them) they believed that there could be no such system. Lenin, himself a lawyer, wrote to the Commissar of Justice, D.E. Kurski, on February 28, 1922: "Not the corpus juris Romani, but our revolutionary consciousness of justice, ought to be applied to 'civil law relations'." The first President of the Russian Soviet Federated Socialist Republic (RSFSR) Supreme Court, P.I. Stuchka, quoted with approval the words of the Latvian poet Rainis: "*Perpet iustitia, fiat mundus*" (Perish justice, let the world prevail) and continued: "We say openly: we shall never have a written proletarian code of law. If we speak of proletarian law, we speak of it only as the law of a transitional period. . . . When there are no more classes, there will be no more class organizations—there will be no government and there will no longer be any law, there will no longer be a court." Another prominent jurist of the period, A.G. Goikhbarg, wrote in 1923: "We refuse to see in law a conception useful for the working-class. . . . Religion and law are ideologies of the exploiting classes, the latter having gradually taken the place of the former. . . . At present we have to wage the juridical battle even more strongly than the religious battle."

In the period of War Communism from 1917 to 1921, isolated decrees replaced the tsarist codes, and courts were expected to fill the


numerous lacunae with their own conception of socialist justice.\textsuperscript{20} The Ministry of Justice, in the earlier stage, seemed to hope that a popular "common law," closely linked with the sentiments of the peasantry, might arise from this and thus would begin the process of replacing the legal codes of the past with the popular will of the future. One of the prominent jurists of the period, M.A. Reisner, drew on Petrazycki's psychological theory of law as grounded in internal sentiments rather than external codes to argue that proletarian and peasant law were simply the outward manifestations of proletarian and peasant class morality, so that law was on its way to becoming merely the sentiment of the people. While Lenin feared and, to some extent, struggled against a bureaucratization of the state apparatus, while he insisted that Soviet laws were means of propaganda rather than administration, and while Pashukanis and A.G. Goikhbarg insisted that there was no such thing as a socialist system of law, other voices stressed the need for regular procedures, consistent court decisions, and administrative regularity. These voices represented the continuity of bureaucratic, administrative and, to some extent, middle-class values within the revolution; they were given a certain added strength by the requirements of the New Economic Policy (NEP) as well as by the exigencies of centralized planning. The vast majority of the professional cadres in the 1920's were not Bolsheviks, but professionals with a sense of the requirements of their subject, and not Leninists, but socialist or social democratic Marxists.

More than sixty years of Soviet rule have seen a series of remarkable shifts in the official version of the Marxist-Leninist theory of law and, though to a lesser extent, in the practical formulation and application of law. The utopian belief in the speedy withering away of law, and its replacement by the spontaneous and informal moral consciousness of the socialist citizen, which characterized the period of "War Communism," was accompanied by a much more hard-headed use of "law" as a means of propaganda and education. It was also accompanied by the recognition that any emphasis on legality and a stable legal system would hinder the government in its appointed task of rapid and ruthless transformation of the social and economic char-

\textsuperscript{20} Decree No. 1 on the Courts, promulgated by the Soviet Government on Nov. 24, 1917, permitted the new People's Courts to apply "the laws of the overthrown Governments only in so far as they were not abrogated by the Revolution and did not contradict revolutionary conscience and the revolutionary concept of justice." I SOBRANIE UZAKONENII I RASPORIAZHENII RABOCHEGO I KREST'IANSKOGO PRAVITEL'STVA RSFSR [COLLECTION OF ORDINANCES AND ORDERS OF THE WORKERS' AND PEASANTS' GOVERNMENT OF THE RSFSR], no. 4, item 50, sec. 5 (1917-1918). Reference to these laws was, of course, nonobligatory. A year later, any such reference was specifically prohibited by the Decree on the People's Courts of the RSFSR, Nov. 30, 1918.
acter of Russia. This was stated frankly in a classic paragraph from a speech by E.B. Pashukanis in 1930:

The relationship of law to politics and to economics is utterly different among us from what it is in bourgeois society. In bourgeois-capitalist society, the legal superstructure should have maximum immobility—maximum stability—because it represents a firm framework of the movement of the economic forces whose bearers are capitalist entrepreneurs. . . . Among us it is different. We require that our legislation possess maximum elasticity. We cannot fetter ourselves by any sort of system. . . . Accordingly, at a time when bourgeois political scientists are striving to depict politics itself as law—to dissolve politics in law—law occupies among us, on the contrary, a subordinate position with reference to politics. We have a system of proletarian politics, but we have no need for any sort of juridical system of proletarian law. . . .

We have a system of proletarian politics and upon it law should be orientated. Once we even wished to arrange the curriculum so that, for example, the course in land law would be replaced by a course in land policy and law, because among us law can play no independent and final part: this was the design when War Communism was going out. During the years of the New Economic Policy and of the rehabilitation period, the system of codes was introduced and began again to develop, and at the same time attempts to pack and to tie all law into a system were renewed. Now, when we have passed to the reconstruction period, the utmost dynamic force is essential. . . . Revolutionary legality is for us a problem which is ninety-nine per cent political.21

Soviet legal scientists today, in a very different formal climate of legal theory, write much about “socialist legality” and the steady strengthening of the socialist legal system from the moment of Lenin’s assumption of power in 1917. They are right in stressing that law did not wither away but that on the contrary, the new socialist State built

up, step by step, a Soviet system of law which in most respects plausibly can be treated, in its formal concepts and divisions, principles and procedures, as part of the continental civil law system from which it borrowed most of its provisions and all of its terminology. Pashukanis, however, gives a much more correct account of the attitudes and expectations of the time.

Immediately after the Bolshevik Revolution, economic decrees abolished private ownership of land, of most housing resources (such as apartment buildings and large private dwellings), of factories, mines, transport, banks, forests, mineral wealth and water, means of communication and of most other significant means of production. Private trade in consumer goods was prohibited, inheritance was abolished, at least formally, wages were paid partly in kind, and moneyless transactions were conducted between state business enterprises. Law, or at least civil law, was and could plausibly be regarded, in these circumstances as strictly transitional and was already, in many respects, deprived of its foundations. The primary continuing function of law in the transitional period to true Communism thus was seen as that of repressing enemies of the socialist order. It was therefore class law—proletarian law expressing the interests of the proletariat—and it would become unnecessary once the liquidation of the class enemies had been accomplished and all humanity had become workers. The *Leading Principles of Criminal Law* enacted by the People’s Commissariat of Justice in 1919 expressed these attitudes bluntly:

In the interests of economizing forces and harmonizing and centralizing diverse acts, the proletariat ought to work out rules of repressing its class enemies, ought to create a method of struggle with its enemies and to learn to dominate them. And first of all this ought to relate to criminal law, which has as its task the struggle against the breakers of the new conditions of common life in the transitional period of the dictatorship of the proletariat. Only with the final smashing of the opposing overthrown bourgeois and intermediate classes and with the realization of the Communist social order will the proletariat annihilate both the state as an organization of coercion, and law as a function of the state.

With the NEP of 1921-28 came the partial restoration of property relations and of a capitalist-type market for the purpose of stimulating the economy. Such a market and such property relations, it was recognized, would require codes of law close to the bourgeois codes in
content. The codes' "socialist" character would lie in the fact that they were frankly transitional, that the rights granted under them would be limited severely by state supervision and control, and that no right could be exercised contrary to the socioeconomic purpose for which it was granted, or in other words, contrary to state policy. The new codes employed concepts and principles frankly drawn from the codes of the non-socialist world, especially those of Germany, Switzerland, Imperial Russia and France. The dominant view at the time was that they did not create socialist law; socialism was a matter of economics, backed, at least ultimately, by popular participation and popular consciousness. In 1928, the NEP compromise was abandoned and replaced by the two Five-Year Plans, designed to turn the Soviet Union, independently of world revolution, into a socialist society (and a modern industrial state) as quickly as possible. As Professor Berman has put it:

Now for the first time positive content was given to the Marxist idea of the disappearance of state and law under socialism. It was thought that Law, an instrument of the class-dominated State, would be replaced by Plan, the manifestation of the will of a classless society. Through the Plan all the characteristics of the original Marxist dream would be realized. Planning would eliminate exploitation; money would be transformed into a mere unit of account; private property and private rights generally would be swallowed up in collectivism; the family would disappear as a legal entity, with husbands and wives bound only by ties of affection and children owing their allegiance and their upbringing to the whole society; crime would be exceptional and would be treated as mental illness; the coercive machinery of the state would become superfluous. The Plan would give unity and harmony to all relations. The Plan itself would differ from Law, since it would be an instrument neither of compulsion nor of formality but simply an expression of rational foresight on the part of the planners, with the whole people participating and assenting spontaneously. Society would be regulated, administered—much as traffic at an intersection is regulated by traffic lights and by rules of the road; but in a society without class conflict there would be few collisions and to deal with them it would be unnecessary to have a "system" of "justice." Social-economic expediency would be the ultimate criterion; disputes would be resolved on the
It was in that climate that the theories of E.B. Pashukanis became dominant for a brief period.

The brutal realities of the forced collectivization of the peasants in 1929 and of Stalin’s relentless drive toward military industrialization and massive prestige projects were, of course, a far cry from the alleged unity and harmony of a whole people spontaneously striving to fulfill a rational economic plan. The tendencies toward total intellectual control, inherent in Communist Party theory and in its practice from 1918 onward (beginning with the reestablishment of censorship and police measures against dissident socialist groups in the very hour in which freedom was being proclaimed), reached their peak with the consolidation of Stalin’s power in 1930-31. By 1936-37, Stalin had stifled virtually all public manifestation of independent critical thought in the Soviet Union. In all matters within the province of the secret police (variously known, during its Soviet history, as the Cheka, the OGPU, the NKVD, the MVD, and the KGB), legal procedures and legal rights formally recognized in the Soviet Union were manipulated cynically or openly disregarded without being replaced by any other form of public or at times even party control. Up until the 1930’s, however, such leading Bolshevik legal theorists as Reisner, Pashukanis and Stuchka had attempted to develop, with reasonable intellectual honesty, a radical Marxist account of the critique of law as a phenomenon characteristic of class society, to be dealt with in sociological terms.

In 1936, the second Five-Year Plan was completed and a major theoretical upheaval began. The period of the construction of socialism was over. The Soviet Union, it was proclaimed, had attained socialism, the first stage of the classless society. It now contained two “non-antagonistic” classes, the workers and the peasants, and a “stratum” serving their interests, the intelligentsia (Party and Government administrators, scientists, artists, professionals, and white-collar workers generally). These classes constituted friendly and mutually supporting sectors of the Soviet State; they were not the necessarily hostile economic groupings of the society of class antagonisms and exploitation.

Yet the conclusions that on earlier Marxist theory should have followed from this announcement did not follow. The state was not withering away, and law was not disappearing. On the contrary, Stalin now proved—by dialectic—that before the state and law could

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wither away they would have to be strengthened, their full potentialities would have to be exhausted. Pashukanis and Stuchka were denounced as traitors and wreckers who had "liquidated law as a specific social category, drowned law in economics, [and] deprived it of its active, creative role." (Stuchka had died in 1932; Pashukanis was arrested in 1937 and put to death before the end of the year.) The Stalin Constitution was drawn up and proclaimed to be the most advanced, the freest Constitution in the world. Under the new slogan of "socialist legality," Soviet law suddenly was portrayed as the finest, truest, most legal law.

Formally, the theoretical backing for this quite radical shift in Soviet theory lay in the doctrine of "socialism in one country." Official, "orthodox" Soviet theoreticians have at no stage openly denied that the state and law will ultimately wither away. From 1936 onward, however, the withering away was made contingent on the establishment of communism throughout the world, and this was pushed off into a more remote future. As communism gained more successes, the Stalinist line ran, the capitalist world became more, not less, hostile. Surrounded by this capitalist world, therefore, Soviet society needed the protection of a strong state and such a state inevitably needed law. During the Stalinist period, it was primarily the criminal, repressive functions of law that were elevated: the role of law was to root out and punish the enemies of the new order. Its role in organizing production and guiding economic development, however, also was emphasized as part of Stalin's new theory that under socialism the ideological superstructure together with state and law acquired a creative role, no longer merely reflecting the economic base. Since Stalin's death in 1953, the emphasis has centered much more on the civil, regulative and administrative functions of law, which led to yet another post-Stalinist, Soviet theory of state and law.

This new view of law began by integrating three primary theoretical proclamations made by Khrushchev between 1956 and 1961. First, Khrushchev stated that nuclear fission and the growing strength of the socialist world had made world war between the two systems unthinkable and that the Soviet Union and the capitalist world could and would, while capitalism was still extant, live in a relationship of peaceful (material, not ideological) coexistence. Second, the abuses of the cult of personality under Stalin, exposed in Khrushchev's secret speech at the Twentieth Party Congress in 1956 and proclaimed publicly at the Twenty-First Party Congress, showed the importance of protecting citizens by law. Third, Khrushchev asserted that the Soviet Union had now fully consolidated the achievement of developed socialism, created an All-People's State replacing
the Dictatorship of the Proletariat, and embarked upon the accelerated building of communism.

The fall of Khrushchev in 1964 led to a certain and continuing hardening of the police, bureaucratic and ideological controls which Khrushchev had fitfully relaxed, to a deemphasizing of criticism of Stalin and of the abuses of the cult of personality, and to a tendency to give less prominence and reality to the transition from socialism to communism. Still, the fundamental legal propositions of the Khrushchev view have not been repudiated. Law now is seen above all as regulative and administrative in character. Law is made necessary by the complexity of modern society in the Soviet Union and not by class domination. It recognizes and regulates an inevitable division of functions and fields of competence in even the most advanced communist society. No matter how much such rules and administrative procedures were internalized by Soviet citizens, and supported by them, they would always be complex enough to require written codes or regulations and professional interpretation and execution. In recent years, since the repudiation of the Cultural Revolution and the overthrow of the Gang of Four, the People’s Republic of China’s political and ideological leadership similarly has repudiated “legal nihilism” and emphasized the continuing role of law as a means of rational administration and modernization, and not simply as a tool for political repression and for waging the class struggle.

IV. LAW IN THE SOVIET UNION TODAY AND ITS INFLUENCE UPON WESTERN LAW

The detailed fortunes of law and legal theory in socialist societies are important, not only in the Soviet Union but also in China, in tracing the dissolution of the utopian dream and the recognition that societies where private property in the means of production, distribution and exchange has been abolished still remain complex. Further, in a legal sense, such pluralistic societies still require administrative and social relations much like law in the West. The late Wolfgang Friedmann, therefore, was quite right when he wrote in his Law in a Changing Society that no basically new concepts or legal relationships have developed in Soviet law or, for that matter, in the law of other Marxist-socialist countries.

The concepts of social harm and social danger were elevated in the 1920’s to provide a socialist, non-individualist conceptual foundation for Soviet tort law and Soviet criminal law, respectively. In fact, these concepts have come to play an increasingly less formal role in the Soviet legal system, while they have become increasingly more
prominent (though not through Soviet or Marxist influence) in the thinking of Western courts. Distinctions between persons, such as accused and tortfeasors, on the basis of class status or class origin have been excised from Soviet law as incompatible with its universal character, though legal distinctions between members of collective farms and others still survive. The concept of “operational management,” the traditional concept of ownership in the Soviet economy as a public sector economy, is fully paralleled by similar, though more varied and complex, provisions in Western law, which are based on the increasingly frequent and important divorce between ownership and control. The formal structure of Marxist-socialist legal systems, their hierarchy of courts and decisions, and the arrangement and content of specific codes remain those of Western (Germano-Romanic) law.

The specifically Marxist-socialist character of legal provisions in the Soviet Union does not lie in their conceptual structure, or the procedures associated with them. Rather, it lies in the general legal prohibition of private ownership of land, natural resources, and the means of production, distribution and exchange, in the prohibition of private profit and “exploitation” of labor, and in the refusal to put monetary value on such things as pain and suffering. The Marxist-socialist character of legal provisions lies also in a general but often discreetly veiled legal affirmation of the primacy of state policy and social interest over specific legal provisions. The primacy of the Communist Party, so pervasive and important a feature of all Marxist-socialist societies, either is not formally part of the law, as in some Marxist-socialist countries, or, as in the 1977 Soviet State Constitution, is enshrined as a general declaratory article in the Constitution. The extensive system of government economic planning, regulatory in character, is handled adjudicatively by the separate body of tribunals called Gosarbitrazh. That body, established in the late 1920’s, quickly became surprisingly legalistic and formal in its handling of the making and execution of contracts between enterprises.

Those who see Soviet law or Marxist-socialist law more generally as a different system from Western law, and those who argue that contracts serve a different function in the planned economy of the USSR from those in Western economies and are hence different contracts, are referring not to the concepts and institutions that make up the Soviet legal system, but to the system’s social substance, the social and economic context in which it operates, and the administrative and anti-commercial spirit with which the system breathes. The most striking thing about Soviet law for the professional lawyer, especially in the common law world, is the comparative crudity and simplicity
of its nevertheless traditionally Western conceptual apparatus. The extent of that crudity and simplicity varies from one Marxist-socialist country to another. Hungary and Poland belong to a different world than do the Soviet Union, the Mongolian People's Republic and China; Estonia, Latvia and Lithuania are also different, although within the very narrow limits permitted by Soviet centralized control. The variations simply reflect the complexity and sophistication of the legal culture prevalent in each country before the communist revolution or takeover.

"Official" Soviet textbooks of law, legal theory and jurisprudence have not attracted attention in the West nor have they had impact on other legal philosophy or scholarship, except as indicators of developments in Marxist-socialist countries or as a result of forcible imposition through Soviet power (as in East Germany). Their evolutionary treatment of law as passing through stages of slave-owning, feudal and bourgeois law, and their very crude handling of allegedly "primitive" stateless societies and their rules and customs, seems hopelessly dated and simplistic to Western writers. The emphasis on the connection between law and class struggles, and between law and economic development, also has been part of twentieth-century Western jurisprudence. In the best works, these connections have been handled in a much more detailed, scholarly and perceptive fashion, emphasizing complexity and rejecting the Soviet notion that past legal systems

23. Professor Hazard has devoted a lifetime to considering whether Soviet laws and Marxist-socialist legal systems generally should be classified as a separate "type" of law or family of legal systems, as is common law, European continental civil law and Islamic law. See generally J. HAZARD, COMMUNISTS AND THEIR LAW: A SEARCH FOR THE COMMON CORE OF THE LEGAL SYSTEMS OF THE MARXIAN SOCIALIST STATES (1969), and most recently some of Hazard's comments in MANAGING CHANGE IN THE USSR: THE POLITICO-LEGAL ROLE OF THE SOVIET JURIST (1983) (The Goodhart Lectures, 1982). Hazard, while recognizing the Germano-Romanic base, conceptual apparatus and structure of the Soviet model for the Marxist-socialist legal systems, is inclined to think that the combination of general (administrative and anti-commercial) spirit, state dependence and specific provisions of a "socialist" character has resulted in a different type of legal system. He is encouraged in this view by noting the way in which the Soviet model has spread directly to other societies, gaining special appeal for developing societies through its elevation of the state, policy and mobilization concerns, and its lack of a daunting, and in context unrealistic, complexity. Detailed discussion would require a work of the scope of Professor Hazard's and would be heavily parasitic on his achievement. It should be noted, however, that classifying is always done for an intellectual purpose. It takes place in the context of elevating some issues and concerns as centrally important and others as peripheral. Thus, common law and Western European legal systems form part of one legal system for some purposes and are different systems for many others, just as Germano-Romanic and Franco-Romanic can form bases for further distinctions within Continental European law. Hazard's work confirms the author's view that the differentia specifica of Marxist-socialist legal systems does not lie in the concepts, procedures, structure and basic provisions of Soviet law, but in the extra-legal presuppositions about the nature and function of law in the economic context, and in the rejection of law as independent of the state in practice.
have had a single overriding social function. The recent improvement in Soviet jurisprudence and the great superiority of Polish, Hungarian, Rumanian and Czech jurisprudence over the Soviet work lie entirely in the extent to which this social and intellectual recognition of complexity (found in the work of Marx himself) is replacing and modifying the official ideology of Stalinist dialectical materialism and Marxist-Leninist theory of state and law.

Only two Marxist writers on legal theory have had any significant respect from Western legal theorists. Karl Renner (1870-1950), the distinguished Austrian Social Democrat and Austro-Marxist, Chancellor of his country after the First World War and President after the Second World War, published in 1904 "The Social Function of Legal Institutions, especially of Property," under the pseudonym Dr. J. Karner. The revised 1929 version, translated into English in 1949 as The Institutions of Private Law and Their Social Functions (the subtitle A Contribution to the Critique of Bourgeois Law was omitted), was noticed in English-speaking countries principally because of the long introduction by Otto Kahn-Freund and references to it by Wolfgang Friedmann, both originally active as German lawyers with Social Democratic sympathies. The Communist Marxist tradition of treating Renner and his Party as traitors to the Revolution, as Social Democratic opportunists guilty of "revising" Marxism and believing in a peaceful evolution to socialism, ensured that it would have no impact on Western Marxist writers, though in recent years Renner's often unacknowledged influence within the Marxist fold is increasing as the development of Marxist-socialist systems bears out, in many respects, the fundamentals of his view of law.

The Institutions of Private Law and Their Social Functions is a rambling book, stronger in illustrative details than in careful analysis of concepts. Much of the book is devoted to expounding and vindicating the Marxist understanding of capitalist society as dehumanizing and depersonalizing, as abstracting social functions from concrete people and organic households and as making man an appendage to the commercial share. In the process, property is converted from a tangible object controlled by an individual to a pervasive public function.

Two points are of lasting importance in Renner's book. The first

is that law as an intellectual system consists of fundamental concepts and institutions that are sociologically neutral. These concepts and institutions have persisted with comparatively little change in their conceptual definition since Roman times. They cannot be reduced directly to an economic base or to class interests. They can be and are used for quite different purposes and in quite different ways in societies that have different modes of production. The intellectual apparatus and structure of a legal system, in short, are made up of comparatively unchanging and neutral legal norms, which are rearranged to serve different social and economic functions at different times. Thus, the legal definition of property, so important in the feudal period, does not change in the capitalist period. It must be supplemented, however, with greatly increased prominence for the mortgage, the lease and the contract of service to make it capable of becoming the legal basis of a capitalist economy.

Renner's second point is that the development of capitalism, and the increasing role of the democratic state in protecting the general social interest, enable us to predict the shape of law under socialism by looking at contemporary legal developments. These consist of a socialization from within, the ever-increasing role of public law, and the conversion of more and more areas of private law into areas of public concern and public regulation. Property as a legal concept, defined in traditional terms as the power to dispose of it and to exclude others from it, would remain a necessary concept in any legal system, if only because in the end somebody has to be responsible for that legal power of control. Property was not only an advantage in the law but also a disadvantage: the basis of liability. The need for liability, like the need for an administrative order, an order of labor and an order of the distribution of goods, could not be excised from social life. Law would not wither away. Its functions and the comparative importance within the legal system of particular norms or institutions might change radically; the norms themselves would not. That, the present authors submit, is precisely what has happened in the Soviet Union and in other socialist countries, with but one exception. Changes in the comparative importance of legal norms within the legal system have been less than one might expect and have been closely paralleled by similar changes in the West, where state regulations, terms of contracts dictated from above, the role of public policy, and the erosion of the power or importance of private property all have been prominent features of contemporary legal practice and theory. The discussion in the Marxist-socialist countries of what now is recognized as the patent inheritability of legal concepts, provisions, procedures and problems from one socioeconomic formation to an-
other comes close to Renner's view of many legal norms as incorporating human purposes and infra-legal facts that transcend modes of production and particularly class formations; modes that provide general administrative imperatives reflected in any legal system.\(^{25}\)

The other outstanding Marxist legal thinker was the Soviet theoretician E.B. Pashukanis (1891-1937), whose *General Theory of Law and Marxism* first was published in Russian in 1924. It went through three editions in five years and was translated into various foreign languages, including German in the 1920's and English in the 1950's. The book was rightly recognized as an original, fresh and imaginative work, both scholarly and creative, even though few non-Marxists have been convinced by its arguments.

Pashukanis sees law as a bourgeois phenomenon; an adjudicative system concerned with reducing all issues to the determination of the rights of abstract, equal and equivalent juridical persons, invested with free will as right-and-duty-bearing individuals. Law stands in fundamental contradiction to the custom of status-based societies and groups and the regulations of administrative or administered bodies, such as work teams or armies. The essence of law, for Pashukanis, is contract law. The judicialization of human affairs associated with the bourgeois revolution dissolves all social relations between individuals and the state, between nations, between husbands and wives, between workers and employers, and between criminals and society, into contractual relations which reject any difference of status, hierarchy, power, degree of social importance or interest. Crime is treated as something that has to be "paid for." Law is, in short, a system of abstraction and individualization, based on fictions that reflect commercial exchange and not social reality generally. The Republic of the Market reduces all persons, companies and corporations, and even the state, to the categories of buyer and seller, confronting each other on the basis of abstract equality and equivalence.

Law, in this sense, must be distinguished sharply from administration, which reflects (as Gustav Radbruch also argued, calling administration "public law") a *hierarchy of interests* and which elevates public policy, the socio-technical norm, above the concept of the abstract individual and his abstract rights and duties. Administration substitutes vertical relations of subordination for horizontal relations of equivalence. In a socialist society, Pashukanis argued, the assump-

\(^{25}\) See Nenovski, *Preemstvennost' v prave [Heritability in Law]* (V.M. Safro

tions of (private) law—the formal equality and equivalence of all interests and legal parties, and their free will—would be recognized as fictions that had in the past concealed and facilitated actual inequality and dependence. The Republic of the Market, as Pashukanis believed, conceals the Despotism of the Factory. In a socialist society, law would be replaced by Policy and Plan. The concepts of social harm and social danger would replace the individualistic bourgeois concepts of fault and *mens rea*; criminals would not “pay for” their crimes, but undergo reformation and rehabilitation. They would be released when they were cured.

Pashukanis was arrested and denounced as a traitor and wrecker who liquidated law in economics. He was killed at Stalin’s order in 1937. His theory of law since has been rejected by Soviet legal theoreticians, though it was utilized for a period in Mao’s China without acknowledgment and with much emphasis on the connection between the socialist view of society and the legal elevation of reformation and rehabilitation, in other words, of indeterminate sentences.

Much of the earlier discussion of Pashukanis’ work by Western writers was excessively colored by the most uninteresting of all jurisprudential disputes: competing prescriptions for the use of the term “law.” Pashukanis correctly grasped the central ideology and presuppositions of Western (Roman) law as elevating and concentrating on the advantage of the individual and his rights and duties vis-à-vis other individuals. Pashukanis reserved the term “law” for that legal tradition and those legal arrangements which the present authors call the rule of law, which is quite different from administrative correctness or socialist legality. Pashukanis clearly perceived a fundamental tension between this Western legal tradition and the administrative and social concerns of socialism, or what the present authors have elsewhere called the tension between *Gesellschaft* and bureaucratic-administrative paradigms of law.26

Common law and perhaps Western law generally, because of the strength of this *Gesellschaft* strain, have not had a general theory of public law. It is only now beginning to emerge, linked by some theorists, such as Radbruch, to the difference between distributive and corrective justice, and by others, such as Pashukanis, to the elevation of public policy, community requirements and planning rationalities (socio-technical norms), as well as the overcoming of abstraction, de-

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humanization and alienation. The attack on abstract legalism and on the elevation of legal conceptions drawn from private law now is much more prominent in Western legal writing and thinking than in that of Marxist-socialist countries. There, the official ideology elevates "socialist legality" (formalized rules, administrative correctness, certainty and predictability) and views law as a technical and complex instrument in "steering society" and protecting both social and individual interests. Dissidents—and this term includes the entire thinking intelligentsia of most East European countries—seek to convert the concept of socialist legality into the concept of the rule of law; a concept that involves both meaningful rights against the state and a concept of justice.

The absence of any concept or theory of justice in Soviet legal theory is the most striking legacy of Marxist end-directedness and the most obvious indicator of the Soviet State's continuing unwillingness to see rights or laws as derived from anything but itself. Precisely because this is not the case in the West, Western Marxist radicals have returned to earlier Marxist critiques of the formalism of bourgeois law and of the social inequality behind legal equality and have ignored the development of both law and legal theory, not to mention legal realities, in Marxist-socialist countries. In doing so, however, they are simply becoming more strident and often cruder representatives of a wider contemporary legal trend, that of legal realism, conflict sociology, the setting of laws in a social context and the emphasis of the view from below. The realities behind all this—the increasing inability of the Gesellschaft paradigm to cope with inequalities of power, education and understanding, and with urgently felt public interests and social consequences—are leading to a marked development of public law globally at the expense of private law, and of Gemeinschaft and bureaucratic-administrative structures and procedures at the expense of Gesellschaft structures and procedures. Yet the increasing declaration and pursuit of "rights" (to benefits or non-discrimination for example) militates in favor of the Gesellschaft paradigm at the theoretical level and of the bureaucratic-administrative at the practical level. All this, while keeping Western legal systems and legal theory much more complex than those of the Soviet Union, brings the two legal systems (except with respect to civil and political freedoms) conceptually closer to each other, not further apart.