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# THE IMPASSE OF SOVIET LEGAL PHILOSOPHY

*Edgar Bodenheimer\**

## I. INTRODUCTION

In 1951, the Harvard University Press published a volume entitled "Soviet Legal Philosophy" as part of its 20th Century Legal Philosophy Series.<sup>1</sup> The volume is designed to trace the development of Soviet legal theory from its early beginnings to the present time by offering to the reader a representative selection of the works of influential Soviet authors in translation. In view of the importance of the publication for our understanding of Soviet mentality, and because of the interesting lesson which the tortuous path of Marxist-Leninist legal thought teaches to the social scientist and jurist, the volume merits a comprehensive analysis transcending the confines of the ordinary book review. It is the purpose of this article to summarize the theories of the various Soviet authors included in the publication, to evaluate them critically, and to consider the possible political and ideological implications of the contemporary state of Soviet official legal doctrine.

An undertaking of this kind would not be worth the time and effort spent by the reviewer and the reader unless we can assume that the axioms and theorems of Soviet leaders in the legal world, however erroneous they may be, are worked out in a serious effort to arrive at true conclusions with respect to the nature and functions of law. Rational argument would be futile and out of place if the doctrines of these authors were nothing but a smokescreen to cover up and justify opportunistic political practices. It is believed that this is not the case. Most of the Soviet leaders appear to be fanatics and zealots who are convinced of the universal validity of the Marxist-Leninist world view and who employ, much like the Jacobins did in the period of the French revolution, ruthlessness, cunning, and violence for the sake of an ideological cause. This article will attempt to show that their faith in the verity of Marxian legal dogma led these men in fact to the official propagation of doctrines which, from the point of view of their self-interest as government officials, were awkward and disadvantageous to them. Although a decided effort to remedy this situation was made, the cure was not sought in an abandonment or essential revision of the inconvenient doctrine, but in an artificial and strained re-interpretation designed to

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\* See Contributors' Section, Masthead, p. 73, for biographical data.

<sup>1</sup> SOVIET LEGAL PHILOSOPHY, by V. I. Lenin and others. Translated by Hugh W. Babb, with an introduction by John W. Hazard, (Harvard University Press, 1951) pp. xxxvii, 465.

preserve the purity of Marxian orthodoxy. We shall see that this dogged adherence to an ideology is responsible for the dilemma and impasse in which Soviet legal philosophy finds itself today. The Soviet leaders and their legal spokesmen, by trying to remain faithful to basic Marxist-Leninist doctrine, were caught in an ideological net from which they may not be able to extricate themselves by the most ingenious intellectual effort.

The violence and fervor marking the Soviet battles waged in the legal-philosophical field cannot be understood unless the all-pervasive role of *doctrine* in Soviet life is realized. In this country, we are accustomed to assign a relatively subordinate place to the general theory of law, and we do not get overly excited about the controversies engaged in by different schools of jurisprudence. The reason lies partly, though not exclusively, in the fact that legal philosophies in this country are merely expressions of the private views of scholars to which no official status or recognition is accorded. Under the monolithic structure of Soviet Russia, on the other hand, there is no room for the clash of private views in matters that are considered to be of vital concern to the government. There is an official "party line" in legal doctrine as well as in politics, and deviation from this line, if considered detrimental to the interests of the state, is not tolerated. Thus fame or oblivion, honor or disgrace, even life or death of a legal philosopher may depend on conformity of his view with state-approved dogma.

Undeviating orthodoxy and the obedient toeing of the official "line", however, also entail dangers and risks under the Soviet system. As John Hazard points out in his introduction, Marxian doctrine, although its fundamentals are regarded as unchanging, has been in a state of flux since the time of the Revolution.<sup>2</sup> Whenever the party line takes a new sharp turn, the orthodoxy of yesterday becomes the heresy of today, and the honored hero of the N.E.P. period<sup>3</sup> may find himself in the position of the despised villain in the period of Stalinist socialism. Such changes in the official theology occur most frequently when a previously accepted tenet of faith is found to accord ill with a new political situation; since Marxian dialectics is supposed to reflect reality without error or refraction, it then becomes necessary to discard the old dogma as a "perversion" of Marxian truth and to replace it by a new interpretation of the Marxian "scriptures." The result is a constant interaction between dogma and

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<sup>2</sup> *Op. cit. supra* note 1, pp. xviii, xxxvi.

<sup>3</sup> Period of the New Economic Policy, marked by concessions to the capitalistic system of economics (1921-1927).

practice, and the oscillations, about-faces, and dramatic purges in the field of Soviet social science frequently cannot be properly appraised without linking them to developments of a political nature. Of course, significant events and shifts of attitude in the social sciences have in all periods of history had some counterpart in political or social reality, but in the Soviet Union, because of the totalitarian direction of the entire social life and the attempt to create unified patterns of thinking, the correlation between political and intellectual developments is particularly conspicuous. With these general considerations in mind, we shall turn now to an examination of the contents of the volume under review.

## II. THE DEVELOPMENT OF SOVIET LEGAL THEORY

The first translation in the volume comprises the text of a lecture on "The State" which Lenin, the founder of the Soviet state, delivered at Sverdlov University in 1919. The lecture throws little light on Lenin's view of the law, but shows that he regards the state as a special mechanism of constraint which subjects people to the systematic application of violence. It is obvious that the essence of the state, under this view, lies in the prisons which it maintains, the sheriffs and policemen which it employs, and the army and navy which it supports. It is Lenin's view, however, that the institution of the state is merely a transient phase in the history of human political life. Before society was divided into classes, he believes, people were held together, not by the application of governmental force, but by self-discipline, habit, tradition, and the authority enjoyed by the elders of the sib or clan. He intimates that, after the full success of the proletarian revolution, a new era will dawn in which again the need for a state apparatus and a special class of persons designed to rule over others will vanish.<sup>4</sup>

Because of the close interrelation existing in Soviet thinking between the general theory of the state and the general theory of law, Lenin's view was bound to have a far-reaching influence on the development of Soviet jurisprudence. The authority of his view did not, however, in itself foreclose semi-independent speculation regarding the nature of law, since Soviet theory has never supported the complete identification of State and law which was advocated by Kelsen in his Pure Theory of Law.<sup>5</sup> The formulation of a legal philosophy serving the aims and objectives of the Soviet state was largely left to the specialists in the field of the law, although the most influential of these were men who at the same time occupied high posts in the hierarchy of Soviet officialdom.

<sup>4</sup> See *op. cit. supra* note 1, pp. 4-5, 15.

<sup>5</sup> KELSEN, GENERAL THEORY OF LAW AND STATE 181 *et seq.* (1945).

The first Soviet attempt to elaborate a theory of law was made by one of the early Bolshevik Commissars of Justice, P. I. Stuchka. He defined law as "a system (or order) of social relationships which corresponds to the interests of the dominant class and is safeguarded by the organized force of that class."<sup>6</sup> This definition was adopted officially by the governing body of the Commissariat of Justice in 1919, and it was in the same year incorporated into a statute.<sup>7</sup>

The noteworthy fact about this definition—and the one which is responsible for its later repudiation—is the emphasis, in its first part, on the social basis of the law. Law is conceived as a system of *social relations* rather than an aggregate of state-imposed norms. The "natural law" of society, growing out of the facts of human social intercourse, is given sociological precedence over the "artificial law" of statutes and governmental decrees. The statutory law, called by Stuchka the law of "volitional imperatives," is regarded by him merely as the shadow or reflection of the actual social and economic activities of human beings.<sup>8</sup> If Stuchka's definition had stopped at this point, it would have been little more than a reiteration and restatement of Eugen Ehrlich's well-known sociological theory of law.<sup>9</sup>

Such a view of the law is unacceptable, however, to Marxian social doctrine because it omits any reference to the central phenomenon of the class struggle. We find, therefore, that Stuchka introduces the class concept in the second part of his definition. The system of mutual relationships of human beings which he calls law "corresponds to the interests of the dominant class and is safeguarded by the organized force of that class." This brings *the state*—regarded as a mechanism designed to execute the aims of the ruling class—into the picture and makes organized *constraint* (which Ehrlich described as a merely secondary and subordinate factor in law) an essential ingredient of the definition. "The second *indicium* of law is its safeguarding of the dominant class (ordinarily, the state) by organized authority, and the chief (if not the sole) objective of this authority is the safeguarding of this order as corresponding to the interests (or rather, as assuring the interests) of this same dominant class."<sup>10</sup>

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<sup>6</sup> *Op. cit. supra* note 1, p. 20.

<sup>7</sup> R.S.F.S.R. LAWS 1919, § 590.

<sup>8</sup> *Op. cit. supra* note 1, pp. 22-28.

<sup>9</sup> See EHRlich, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF THE LAW (translated by W. L. Moll 1936). For a more recent view regarding law essentially as "human conduct in its intersubjective interaction," see Cossio, *Phenomenology of Decision*, in *LATIN AMERICAN LEGAL PHILOSOPHY* 348 (1948).

<sup>10</sup> *Op. cit. supra* note 1, p. 24.

It might be asked whether the two chief elements emphasized in this definition are not mutually contradictory. How can law be a mirror of the spontaneous social relationships of human beings and, at the same time, a compulsive order instituted for the benefit of the ruling class? From the point of view of the Marxian dialectical doctrine of the synthesis of opposites, the contradiction can perhaps be resolved by arguing that class relationships are an inherent part of the natural order of pre-communist society, and that the entire social order is permeated and tainted by the phenomenon of class appropriation and class control of the means of production. Under the amoralistic outlook of Marxist determinism, such a result would not be brought about by the evil "will" or insidious machinations of the dominant minority, but by the inexorable course of the "natural" history of production relationships. From this viewpoint it is logical to regard the law not primarily as a volitional command of the rulers of society, but as an external expression of the inevitable and pre-determined movements of history which include class antagonisms as a necessary factor of development. If this interpretation is correct, it might well be asked whether Stuchka's view of the law did not reflect the spirit of original Marxism more genuinely than some of the subsequent Soviet versions of the doctrine.

The two essays following Stuchka's exposition were written by M. A. Reisner, an author who had made a name for himself already in pre-revolutionary Russia.<sup>11</sup> Reisner was strongly influenced by the psychological theory of law propagated by Leo Petrazhitskii, a non-Marxian thinker, and the first essay reprinted in the volume, published in 1909, clearly identifies the source of Reisner's inspiration.<sup>12</sup> Petrazhitskii had explained legal conduct in terms of the psychological experiences of men, and had seen its chief sanction not in the application of force, but in the "legal consciousness" and instinctive sense of justice of men. Although Reisner, in his second and post-revolutionary essay, considered it expedient to criticize Petrazhitskii for seeking the origin of law in the intuition of individuals rather than in the collective experiences of communities and peoples, he attempted to put a Marxian foundation under Petrazhitskii's idea of an "intuitive law" and to find the driving force of Soviet law in the "revolutionary legal consciousness" of the workers, inspired by the idea of universal equality. John Hazard points out in his introduction that Reisner's idealistic conception of law

<sup>11</sup> REISNER, *THE THEORY OF PETRAZHITSKII, MARXISM, AND SOCIAL IDEOLOGY*, *op. cit. supra* note 1, pp. 72-82; REISNER, *LAW, OUR LAW, FOREIGN LAW, GENERAL LAW*, *op. cit. supra* note 1, pp. 83-109.

<sup>12</sup> On Petrazhitskii, see Babb, *Petrazhitskii*, 17 *B. U. L. REV.* 793 (1937).

had no lasting influence on the course of Soviet legal philosophy.<sup>13</sup> The only element which his theory appears to have in common with that of Stuchka is the non-imperative approach to the law. This feature is perhaps characteristic of the early period of the Bolshevist revolution in which the power of the state was not as yet firmly consolidated, and where it was still possible to question the all-pervasive and exclusive authority of the government in the field of law-making.

The anti-normative attitude towards law reached its peak in the teachings of E. B. Pashukanis, the leading jurisprudential authority during the N. E. P. period, whose tragic fate makes him an interesting figure in the history of legal thought. The main conclusions of his "General Theory of Law and Marxism,"<sup>14</sup> which immediately suggest the reasons for his later fall from grace, may be summed up by stating that he considered law, in its most developed form, as a typical product of bourgeois economics and bourgeois culture; that the Soviet state, prior to the attainment of full-fledged socialism, could not and should not dispense with bourgeois forms of law; that any attempt to develop an original type of "proletarian" or Socialist law was doomed to failure; and that the gradual dying out of bourgeois categories of law in the Soviet Union, accompanying the transition to a truly socialist society, would result in the dying out of the law itself as an instrument of social regulation.

Pashukanis was convinced that the institution of law reaches its highest and fullest development in a market economy in which isolated and independent private producers and owners of commodities exchange their products by means of contracts. The interests of these individual producers or owners frequently come into conflict, he says, and it is the function of the law to regulate and adjust these conflicting interests. The opposition and clash of private claims and demands is considered by him the lifeblood of the law; where such conflict is entirely absent in the social order, we move outside the sphere of the law. "Law, like barter, is a means of intercourse between disunited social elements."<sup>15</sup> Where there is complete unity of social purpose, undefiled by the clash of contradictory interests, law is out of place according to this theory. Thus, a railroad timetable, a hospital direction for the treatment of sick persons, or a mobilization plan cannot be called documents of a legal character, since they do not involve the adjudication of opposing

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<sup>13</sup> *Op. cit. supra* note 1, p. xxvi.

<sup>14</sup> *Id.* at 111-225.

<sup>15</sup> *Op. cit. supra* note 1, p. 180; see also p. 137.

private claims; they are regulations of a technical character, designed to accomplish a collective purpose.<sup>16</sup>

It is obvious that under this view private law expresses the essential objective of the law much more forcefully than public law. Where authority is exercised from above in order to carry out a public purpose without regard to adverse private interests, there is little room for law. The theory, therefore, makes a sharp distinction between public expediency (*raison d'état*) and law.<sup>17</sup> In the field of public administration, the law plays a part only in those relationships between the individual and the state in which the private-law procedures of impartial adjudication of controversies by judicial or quasi-judicial tribunals are followed or imitated.

It is in bourgeois society that ownership of private property, the exchange of commodities on the market, and the adjudication of controversies between individuals form a very large part of all social activity. Hence, according to Pashukanis, law reaches its climax and highest flowering in this form of society.<sup>18</sup> The more variegated the types of private interests requiring adjustment are, the more opportunity is there for the application of the categories of the law.

On the other hand, in a society in which the private ownership of goods and the exchange of commodities between free and independent producers is proscribed, technical regulation, in the view of Pashukanis, will tend to supplant law. It is for this reason that he anticipates the demise of the law under the conditions of full-fledged socialism. There is no room for this institution in a society in which opposing private interests are not tolerated and where collectivised human beings, acting in concert rather than in competition, are no longer in need of the adjustment of antagonistic and mutually contradictory claims. Pashukanis believes that for this reason any attempt to devise a typically "socialist" or "proletarian" theory of law is futile and unnecessary.<sup>19</sup>

An interesting facet of Pashukanis' theory of law is his minimization of the constraint function of the law. In a society dominated by the market, he argues, constraint in the sense of a command by one person addressed to another and confirmed by force is not frequent and, in fact, "contradicts the basic condition precedent to the intercourse of goods-

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<sup>16</sup> *Id.* at 135-36.

<sup>17</sup> *Id.* at 183. Pashukanis necessarily denies, therefore, the possibility of a juridic theory of the State (such as propounded by Kelsen) which embraces all of the state's functions.

<sup>18</sup> *Id.* at 119-20, 169-70.

<sup>19</sup> *Id.* at 200-01.



possessors.”<sup>20</sup> Law represents the desires and claims of commodity-producing and commodity-exchanging individuals, which are merely recorded by the objective norms promulgated by the state. To him, law is produced by the economic arrangements of bourgeois society, and not by the will of the state. The necessity for compulsive enforcement arises only in those cases where the peace has been broken or where a contract has not been voluntarily fulfilled.<sup>21</sup> The classical natural-law doctrine, which reduces the function of governmental authority to the preservation of peace and the enforcement of promises, and which declares that the sole aim of the state is to be an instrumentality of the law, represents to Pashukanis an adequate description of the postulates as well as the reality of classical bourgeois “Rechtsstaat.” On the other hand, the abandonment in the Western World of the natural-law doctrine in favor of a juridical positivism which stresses the predominating role of command and force in law is interpreted by him as a sign of ruling-class fear that classical liberalism might endanger its power.<sup>22</sup> Under the domination of a normative-imperative theory of law, the idea of a “government of laws”, while maintained in theory, becomes a “mirage”, a development which in Pashukanis’ mind heralds the decline of law in Western capitalistic civilization.<sup>23</sup>

It is somewhat astounding that this view of the law was in vogue in Soviet Russia for a considerable period of time, and that its author was showered with honors as the dean of Soviet legal philosophers. The argument actually sounds like an apotheosis of the free and liberal capitalistic state. However, strictures against bourgeois society and forecasts of its disintegration were inserted in the argument in appropriate places, and Pashukanis judiciously intimated that the condition of “no law” following the establishment of full socialism would be even more beneficial to mankind than the rule of law under an advanced form of capitalism. As long as the Soviet leaders believed that the retention of law in the social order was merely a fleeting condition made necessary by temporary concessions to capitalistic principles, and that the nationalization of industry and agriculture would bring about the final downfall of the law, the theory was not detrimental to its interests. But when the government discovered, during the period of the first two Five-Year Plans, that contracts, leases, family law, penal law, and tort liability

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<sup>20</sup> *Id.* at 187.

<sup>21</sup> *Id.* at 188.

<sup>22</sup> *Id.* at 189.

<sup>23</sup> *Id.* at 190, 193.

could not be conveniently discarded in favor of a pure "administration of things", and that socialization of production did not automatically end the need for some form of law, a new wind, turning into a devastating storm, began to blow in Soviet jurisprudence. Pashukanis, the ardent advocate of the "withering away" of the law, became the chief victim of this turn of events.

The attack began with a speech by Stalin delivered in 1929, which did not mention Pashukanis by name, but was directed against "the right deviation in the Communist Party," or, more particularly, against Nicolai Bukharin and his followers.<sup>24</sup> The Bukharinites, Stalin charged, had been "weltering in a puddle of semi-anarchism."<sup>25</sup> They had, surreptitiously and traitorously, preached the early disappearance of state power in Soviet society. "In Bukharin's opinion the worker class must *in point of principle* be hostile to *every sort* of state—not excepting the state of the worker class as well."<sup>26</sup> Stalin violently denounced this attitude. The political situation, he said, demanded a strengthening rather than weakening of state authority, and it was ridiculous under these circumstances to discuss or advocate the "withering away" of the state.

This attack on the "Bukharinites" was carried into the legal field by some of Stalin's lieutenants, and Pashukanis was identified with the "subversive" doctrine of Bukharinism. Violent attacks were launched against him, and in 1930 he considered it necessary to make at least a partial recantation of his views.<sup>27</sup> He admitted the infiltration of Bukharinite conceptions into his theoretical works and confessed to his failure to correct the mistakes in doctrine caused by the absorption of erroneous ideas. He expressed regret that all discussions and criticisms of his theory were based on his "General Theory of Law and Marxism," which he characterized as a not wholly mature book, but added that this was inevitable since he had been unable to produce a more balanced work.<sup>28</sup> He deplored the fact that the criticism of his theories had not come earlier, since this might have brought him back to the path of truth and virtue. He lamented his insufficient training in Marxian dialectics and pointed out that the shortcomings of his book demanded the sternest condemnation since "in the absence of this there can be no

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<sup>24</sup> For the text of the speech see *op. cit. supra* note 1, pp. 227-234.

<sup>25</sup> *Id.* at 229.

<sup>26</sup> *Ibid.*

<sup>27</sup> Reprinted *op. cit. supra* note 1, pp. 237-80.

<sup>28</sup> *Id.* at 249.

further movement forward."<sup>29</sup> He pleaded for benevolent forbearance in appraising his writings, of which he considered himself deserving because the basic motive running through his work had been "detestation of the commercial spirit, and a yearning to unmask it in all its more concealed, subtle, and—as it were—elevated forms."<sup>30</sup> His basic error, he stated, was "to confuse the specific *indicia* of the bourgeois juridic form with law in its entirety."<sup>31</sup> He bemoaned the fact that his analysis of the state, especially the bourgeois state, was "a muddle from beginning to end," that his arguments were "unfortunate in the highest degree," and that his faulty analysis resulted in "a one-sided and narrow approach to law."<sup>32</sup>

In spite of this abject denunciation of most of his life-work, he remained firm on one point: in his insistence, namely, that it was unnecessary for the Soviet state to develop a specific form of proletarian or socialist law, since with the socialization of production the disappearance of the law would immediately begin. "How do you wish to build a final legal system when you start from social relationships which already comprise the necessity that law of every sort wither away? This is a task completely unthinkable."<sup>33</sup> This was an affirmation of a vital point of his theory since one of the chief reasons for the official repudiation of Pashukanis was the determination of the Soviet leaders to stabilize their rule by some form of law and to picture this law as a new and original product of socialism rather than a jaded copy of a bourgeois institution.

The retraction did not have the effect which Pashukanis may have hoped for, and it did not prevent his final fall from power. Whether Pashukanis would have escaped the worst if his recantation had been wholesale and unqualified, is a matter for speculation, but the odds are against such an assumption. It is a tested technique of totalitarianism to put a major heretic to death after he has delivered his *pater peccavi* and confessed to his sins. Since it is possible that the works of the heretic may survive his physical death, the disavowal of his ideas must come out of his own mouth and he must be made to acknowledge his errors in order to weaken or destroy the authority of his thoughts.

In 1937 *Pravda*, the principal organ of the Communist Party, denounced Pashukanis as a traitor and enemy of the people. Shortly there-

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<sup>29</sup> *Id.* at 252.

<sup>30</sup> *Id.* at 253.

<sup>31</sup> *Id.* at 261.

<sup>32</sup> *Id.* at 264-65.

<sup>33</sup> *Id.* at 278.

after, he was dismissed from his various high offices, and he finally disappeared without trial. It is highly probable that he was executed during the great purge of 1937.<sup>34</sup>

John Hazard points out in his introduction that "from the outside it is difficult to tell whether Pashukanis and his school devised their theories to wreck the Soviet system as Stalin conceived it, or whether they were a sincere group of legal philosophers who followed their ideas into a channel which proved to be dangerous."<sup>35</sup> The chief work of Pashukanis is, on the whole, written in the detached and impartial style of the scholar. It is open to the interpretation that the author was a secret admirer of the liberal capitalistic order, but it is more likely that he was a fervent Marxist who believed in the early advent of a Socialist utopia characterized by the absence of any coercive authority, to which the legal order of the bourgeois state was merely a prelude.

The next two essays in the volume—an article by P. Yudin<sup>36</sup> and the text of a speech by Andrei Vyshinsky<sup>37</sup>—are vitriolic diatribes against the legal views of Pashukanis. Both of these papers signalize a basic shift in Soviet legal policy, which manifests itself in five different directions: (1) the economic concept of law, evident in Stuchka as well as Pashukanis, is replaced by a primarily normative notion of law; (2) an attempt is made to dilute the class element in the Marxian view of the law by equating the interests of the dominant class in Soviet Russia with the will of the people; (3) law is pictured as a stabilizer of the social order rather than an innovating force; (4) Socialist law is proclaimed to be a new and distinct form of law, superior to capitalist law; and (5) the "withering away" of the law is deferred to an indefinite future time. Let us analyze each of these new doctrinal developments.

Both Yudin and Vyshinsky regard law as a system of *norms* established by the state.<sup>38</sup> This signifies an abandonment or revision of earlier views which regarded law principally as a reflex of economic or social relationships. Vyshinsky is quite explicit on this point:

It is . . . incorrect to define law—as Stuchka did—as a system of

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<sup>34</sup> This may be surmised from a speech by Andrei Vyshinsky, in which he denounced Pashukanis and his friends as leaders of a "Trotsky-Bukharin gang," "wreckers," "fascist agents," "thieves," "scoundrels," adding significantly that "we have driven the last aspen stake in the grave of the traitors who have befouled our science." See *op. cit. supra* note 1, pp. 310-11, 315, 325, 331, and particularly p. 304.

<sup>35</sup> *Id.* at xxxii.

<sup>36</sup> YUDIN, *SOCIALISM AND LAW*, *op. cit. supra* note 1, pp. 281-301.

<sup>37</sup> VYSHINSKY, *THE FUNDAMENTAL TASKS OF THE SCIENCE OF SOVIET SOCIALIST LAW*, *op. cit. supra* note 1, pp. 303-41.

<sup>38</sup> See *op. cit. supra* note 1, pp. 284, 336-37.

social relationships. As everyone knows, Stuchka's viewpoint prevailed at the first Congress of so-called Marxian political scientists and for a number of years thereafter. In reducing law to economics, Stuchka and his followers put an end to law as a specific and particular social category—they drowned law in economics and robbed law of its active and creative role. From the viewpoint of such an understanding of law, the independent study of law as a special science loses every sort of meaning.<sup>39</sup>

This accentuation of the "independence" of law and legal science indicates some retreat from the strict Marxian position which sees in the concepts and principles used by the lawyer nothing but ideological reflections of economic conditions and production relations.<sup>40</sup> Although this "superstructure" theory of law was to some extent qualified by Engels by an admission that the law, though born of economics, may in turn exercise a reciprocal effect upon the economic substructure,<sup>41</sup> this modification was not nearly as far-reaching a revision of basic Marxian dogma as Vyshinsky's warning against "drowning the law in economics." His characterization of law as an independent normative discipline must be regarded as a significant dent in the armor of Marxian social theory.

We saw earlier that the emphasis on the class character of the law is one of the cornerstones of the Marxian legal credo. This emphasis is retained in the general definitions of law given by Yudin as well as by Vyshinsky.<sup>42</sup> Law serves the advantage of the economically dominant groups of society, but these ruling classes manufacture the law not directly, but through the instrumentality of the state, their main tool of domination. The constraint element in law comes prominently to the fore under the new theory. "Law is nothing without a mechanism capable of *compelling* observance to the norms of the law," says Yudin, quoting a statement by Lenin,<sup>43</sup> and Vyshinsky expresses agreement with this view.<sup>44</sup>

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<sup>39</sup> *Id.* at 330.

<sup>40</sup> Legal relations as well as forms of the State could neither be understood by themselves, nor explained by the so-called general progress of the human mind, but they are rooted in the material conditions of life. . . . With the change of the economic foundation the entire immense superstructure is more or less rapidly transformed.

MARX, A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY 11 (translated by N. I. Stone 1911). Cf. also ENGELS, LUDWIG FEUERBACH 63 (ed. Dutt 1934), where it is held that law "sanctions only the existing economic relations between individuals which are normal in the given circumstances."

<sup>41</sup> See Engels letter to J. Bloch, Sept. 21, 1890, MARX AND ENGELS, CORRESPONDENCE 1846-1895, A SELECTION 475 (1934).

<sup>42</sup> *Op. cit. supra* note 1, pp. 284, 336.

<sup>43</sup> *Id.* at 286.

<sup>44</sup> *Id.* at 336-37.

Although law is thus generally regarded as an institution designed to safeguard and perpetuate the interests of the dominant class, a significant dilution of this fundamental Marxian dogma is undertaken with respect to the character of law in the Soviet Union itself. For obvious political purposes, an attempt is made today to identify the interests of the dominant class with the will of the whole Soviet people. It is true, says Vyshinsky, that under Marxian doctrine law can never be anything except the will of a ruling class, but in the Soviet Union the dominant class has been expanded and broadened so as to include practically the entire toiling masses. "Our law is the will of our people elevated to the rank of a statute," he says.<sup>45</sup> Similar sentiments are voiced by Yudin. Soviet law, he asserts, is "democratic law which protects the interests of each and every one of the majority of the people: the toilers."<sup>46</sup> We shall later appraise the significance for Soviet legal theory of this strange metamorphosis of the class concept of law.

The post-1937 shift in official Soviet legal philosophy manifests itself further in an endeavor to picture the law as a stabilizing force in Soviet society. Vyshinsky is particularly insistent upon this point. He distinguishes law sharply from policy, and excoriates Stuchka and Pashukanis for having failed to recognize this important distinction.

In reducing law to policy, these gentlemen have depersonalized law as the totality of statutes—undermining the stability and authoritativeness of the statutes, and suggesting the false idea that the application of the statute is defined in the socialist state by political considerations, and not by force and authority of the soviet statute. Such an idea means bringing soviet legality and soviet law into substantial discredit, since on this hypothesis they are evoked to develop a "policy" and not to defend the rights of citizens and must start from the demands of policy (and not from the demands of the statute) in deciding any problems of court practice. To prate of soviet law as a mere form of policy is to intimate that in soviet statutes, in soviet justice, and in the activity of soviet courts, the force of a statute and the force of law are made to depend upon the political demands of the state. . . . Law can no more be reduced simply to policy than cause can be identified with effect.<sup>47</sup>

The notion that judges are policy makers is strongly rejected: their work "is subordinate to statute and nothing else."<sup>48</sup> Language creeps into the discussion which might be used in this country by a spokesman for the American Bar Association:

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The vast domain of the individual and property interests of citizens,

<sup>45</sup> *Id.* at 339.

<sup>46</sup> *Id.* at 290-91.

<sup>47</sup> *Id.* at 329.

<sup>48</sup> *Id.* at 329.

which are defended by law, cannot be contained within the concept of policy, which has its own special content. To reduce law to policy would be to ignore such tasks confronting law as that of the legal defense of personal, property, domestic, and succession rights and interests and the like.<sup>49</sup>

While we may have serious doubts whether such benevolent concern for the individual and property rights of the citizens comports with the actual political practice in the Soviet Union, it is interesting to note that the Soviet leaders deem it expedient today to express such conservative views in their theoretical writings. Here again a departure from Marxian orthodoxy is noticeable which injects an element of confusion into the continued effort to uphold the universal validity of the Marxian world outlook.

The new orientation in Soviet legal theory further expresses itself in the vigorous propagation—coincident with a general nationalistic upsurge in the Soviet Union—of the view that Soviet socialist law is an original type of law not derived (as Pashukanis had asserted) from bourgeois categories of law and in fact far superior to capitalistic law. "In the conditions of socialism victorious," Yudin contends, "our law is entirely and completely the law of socialist society in form and content alike."<sup>50</sup> Vyshinsky agrees that Soviet law has displaced and ousted the remnants of bourgeois law, and boasts that law under socialism has been elevated to the highest stage of its development.<sup>51</sup> Pashukanis, "the wrecker," is taken to task for having preached that law had reached its zenith in capitalist society and was superfluous under the social order of Soviet socialism. On the contrary, says Vyshinsky, "only in socialist society does law acquire a firm ground for its development."<sup>52</sup>

The Marxian idea that law will "wither away" under socialism is not abandoned under the new doctrine, but its realization is put off to an indefinite and seemingly remote future. Both Yudin and Vyshinsky agree that, for the time present, the advocacy of the theory must be regarded as undesirable and dangerous, since it undermines the authority of state and law.<sup>53</sup> The new doctrine proclaims that *only after Communism has triumphed throughout the world* will it be possible to relegate the state and the law to the museum of antiquities. Stalin himself put the final imprimatur of approval on this view in his Report

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<sup>49</sup> *Id.* at 330.

<sup>50</sup> *Id.* at 295.

<sup>51</sup> *Id.* at 328.

<sup>52</sup> *Id.* at 328.

<sup>53</sup> *Id.* at 295-96, 332.

to the XVIIIth Party Congress, which is reprinted in the volume.<sup>54</sup> As long as the Soviet Union is threatened by capitalist encirclement, he points out, no thought of abdication of law or state power can be permitted. Spies and saboteurs may be sent into Russia by the Western powers, and the law is indispensable as a defense against their subversive activities. But as soon as socialism has won in all or at least in all major countries of the world, as soon as the "capitalist encirclement" of the Soviet Union has been broken or replaced by "socialist encirclement," there will no longer be any need for coercive public authority.<sup>55</sup>

A comprehensive excerpt from "The Theory of the State and Law" by S. A. Golunskii and M. S. Strogovich<sup>56</sup> and an article by I. P. Trainin on "The Relationship between State and Law"<sup>57</sup> form the two major remaining items in the book. Golunskii and Strogovich restate the present official legal doctrine in text-book form for the use of law students. All the ingredients of "Vyshinskyism" are found in the exposition: the abandonment of the sociological concept of law in favor of a normative one,<sup>58</sup> the emphasis on the stabilizing function of the law,<sup>59</sup> the chauvinistic glorification of Soviet law as a "completely unique" system of law,<sup>60</sup> and the dilatory treatment given to the "withering away" theory.<sup>61</sup> An interesting feature of the book is the elaborate presentation and criticism of "bourgeois" theories of law, among them the natural-law doctrine, Savigny's historical school, Hegelianism, the psychological view of the law, and Kelsen's Pure Theory of Law.<sup>62</sup>

The article by Trainin undertakes to define the relationship between law and policy. Law originates out of public policy, he argues, but is not identical with it. "Through the state, law assures the stability of the relationships dictated by policy."<sup>63</sup> Once a statute has been put into effect, it freezes the policy and makes its execution mandatory on the judge. Policy is thus regarded by Trainin as the dynamic factor in statecraft, while law introduces a static element in the social order. This is a far cry from Lenin's statement "Law is politics"<sup>64</sup> and evinces a retreat

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<sup>54</sup> *Id.* at 243-49.

<sup>55</sup> *Id.* at 343, 345, 349.

<sup>56</sup> *Id.* at 351-425.

<sup>57</sup> *Id.* at 433-56.

<sup>58</sup> *Id.* at 370.

<sup>59</sup> *Id.* at 386, 392.

<sup>60</sup> *Id.* at 385.

<sup>61</sup> *Id.* at 400.

<sup>62</sup> *Id.* at 400-24.

<sup>63</sup> *Id.* at 445.

<sup>64</sup> The sources for this statement are given by Hazard, *Soviet Agencies of Law*, 21 NOTRE DAME LAW. 70 (1945).



from the revolutionary analysis of the role of the law which characterized the earlier phases of Bolshevist rule.

### III. EVALUATION OF THE DEVELOPMENT

The orthodox Marxian doctrine regarding the law rests on three basic suppositions: (1) that law has always been used by dominant and exploiting classes as a whip to keep the majority of the people in subjugation; (2) that in the period of the proletarian dictatorship the law serves the purpose of ensuring the firm domination of the toilers and the liquidation of the remnants of capitalism; (3) that after this task has been accomplished, the need for law will disappear. As long as the Soviet leaders believed that after a transitional period of proletarian dictatorship full-fledged communism would emerge and the law would then become superfluous, their interest in legal theory was of a secondary character. Law, as Engels had predicted, would soon be consigned to the museum of historical antiquities, along with the bronze axe and the spinning wheel.<sup>65</sup> This conviction that the whole field of legal doctrine would in the near future attain a purely antiquarian interest may perhaps in part explain the Soviet government's acquiescence in Pashukanis' "bourgeois" theory of law.

The Soviet government's realization that even a socialistic organization of production cannot dispense with the law as an instrument of social control lies at the bottom of the present dilemma of Soviet legal philosophy. Contracts have to be entered into between private persons as well as between government enterprises, family relations have to be regulated, real property has to be leased, crimes have to be punished, damage awards for tortious conduct have to be made. Although there are, under a dictatorship, areas of the political and social life where prerogative rather than law furnishes the standard of decision, and although these areas appear to be comprehensive in the Soviet Union, this does not mean that normative regulation, in the sense of a disposition of individual cases by the application of pre-existing general rules, is absent under such a system. No government able to perpetuate its power for a substantial period of time can exercise its control without making some use of the institution of law.

If this is true, and if the Soviet government is convinced that the law is not going to "fade away" in a foreseeable future, then it has a stake in a theory of law which suits its interests and political aims. It may be seriously doubted whether the Marxian theory of law, with its emphasis

<sup>65</sup> ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE* 158 (1942).

on the oppressive character of law as a "class-whip", is today a convenient tool by which the Soviet government can explain and rationalize its legal policies to the Russian people. It is contrary to its self-interest to maintain that Soviet law is a club held over the masses by their Communist rulers for the purpose of keeping them subdued. Since the Marxian theory of law requires this uncomplimentary explanation of the aims of the law, it has in fact turned into a snare in which the Government has become entrapped.

In its effort to escape the snare, the Soviet Government, as we have seen, has made an attempt to dilute the class theory of law in its application to Soviet conditions. While the general definition of law under the present official "line" continues to describe the law in terms of ruling-class advantage,<sup>66</sup> the new definition of *Soviet law* tries to take the sting out of this unfavorable portrayal of the institution by identifying the will of the dominant class with the will of the Russian working class.<sup>67</sup> Since the Soviet state, according to the assertion of its leaders, is today a state of the toiling masses in which the "exploiter" elements have been liquidated, the law of the Soviet Union is thus alleged to have merged with the "general will." This introduces a form of Rousseauism into Russian legal theory which is completely alien to the original tenets of Marxian legal doctrine. The true Marxian, who sees and interprets the entire human history in terms of the struggle of hostile classes, cannot conceive of law as anything but an oppressive weapon used by the winner in this class struggle. The Soviet leaders, on the other hand, are reverting to the formerly despised "bourgeois" view according to which law embodies the common consent of the people. The paradox is thus presented that, while the Western World is inclined to see in Soviet law an example of Marxian class terror, the Soviet leaders are trying to depict it as an efflorescence of social harmony and class unity, which according to orthodox Marxism it could never be. Neither picture is correct. While there are large areas in Soviet life in which political terror untempered by law is the order of the day, there exist fields of legal regulation, such as tort law, contract law, agency law, sales, nego-

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<sup>66</sup> The present official definition by the Institute of Law of the Academy of Sciences, reiterated by Vyshinsky as well as Golunskii and Strogovich, reads as follows:

Law is the aggregate of the rules of conduct expressing the will of the dominant class and established in legal order, as well as of customs and rules of community life confirmed by state authority, the application whereof is guaranteed by the coercive force of the state to the end of safeguarding, making secure and developing social relationships and arrangements advantageous and agreeable to the dominant class.

*Op. cit. supra* note 1, pp. 336, 370.

<sup>67</sup> *Op. cit. supra* note 1, pp. 339, 386.

tiable instruments law, and non-political criminal law, which are governed by standards which the people in general would probably tend to regard as acceptable and reasonable.<sup>68</sup> In fact, the legal principles in these fields are not very basically different from those prevailing in the countries of Western civilization, and the class-struggle interpretation of law contributes nothing to their understanding.<sup>69</sup>

The question might be asked why the Soviet government, instead of straining and twisting the Marxian doctrine of law in a way incompatible with its original meaning, does not abandon this theory altogether in favor of one better suited to its political objectives. The answer is that Soviet leaders, in their attempt to foist a unified Marxian world outlook upon the Russian masses, have become the captives of their own ideological propaganda. Because of the value placed on "Weltanschauung" in a country governed by a totalitarian philosophy, the Soviet leaders cannot abandon Marxism, proclaimed to offer the key to the ultimate truth for all phases of human life, without impairing their own authority and prestige. They cannot with impunity retrace their steps and, by some ingenious piece of mental gymnastics, find a way out of the blind alley into which their efforts to preserve the Marxian doctrine of law by strained and artificial interpretations have driven them.

The Marxian legal theory is guilty of four major errors, and only a recognition and rectification of these errors could lead legal philosophy in Russia back to a sound path. These four errors are the following:

(1) The view that law is an expression of class selfishness is an entirely insufficient explanation of the phenomenon of law. Although there are elements of truth in the theory making it apt to furnish the answer to certain judicial and legislative developments in our own law and the law of other countries, it fails as a universal test for an interpretation of the law.<sup>70</sup>

First of all, even in social systems characterized by the existence of definite social classes the law serves to mitigate rather than to accentuate class antagonisms. By regulating the relations between the classes and assigning specific rights and duties to their respective members, it protects, to some extent at least, the lower classes against lawless and arbitrary acts of the dominant classes. The point becomes clear when

<sup>68</sup> See the analysis of the Soviet legal system in BERMAN, *JUSTICE IN RUSSIA* (1950).

<sup>69</sup> *Id.* at 200.

<sup>70</sup> For specific examples disproving the class theory, see POUND, *INTERPRETATIONS OF LEGAL HISTORY* 92-115 (1930); Burdick, *Is Law an Expression of Class Selfishness*, 25 *HARV. L. REV.* 349 (1912); Bodenheimer, *Some Recent Trends in European Legal Thought—West and East*, 2 *WESTERN POL. Q.* 55-57 (1949).

we compare slavery as a social system with the feudal order of the Middle Ages. The slave, under a system of pure and uncontrolled slavery, is completely at the mercy of his master and unprotected against capricious invasions of his bodily integrity or other personal interests by the master. As Pashukanis correctly saw, such a relationship is outside the pale of the law.<sup>71</sup> Under feudalism, on the other hand, the serf had certain limited rights against the lord of the manor, such as the right to life, sustenance, and protection against attacks by third persons, and these rights would, at least in England, be enforced by the courts. It is obvious that the law, by conceding such rights to the lower classes, serves to curtail the prerogatives of the dominant class and to that extent furthers the interests of the weaker groups of society.

Secondly, the class concept of law ignores the fact that the law, in ancient as well as modern democracies, has frequently been used for the purpose of establishing an equilibrium between previously warring classes and to place them on a scale of parity or near-parity. Historical examples of legislation designed to bring about class conciliation by the grant of privileges to the lower classes are Solon's legislation in 6th-century Athens, enacted for the purpose of raising the status of the peasants in a society largely controlled by the wealthy landowners, the XII Tables in Rome, ending the class war between patricians and plebeians by substantial concessions to the latter, the various suffrage reform acts passed in 19th-century England, extending the franchise to the working class, and the Wagner Labor Relations Act of 1937, designed to equalize the bargaining power of capital and labor in the United States. Such measures have formed important stages in the emancipatory struggle of previously disfavored classes, and they do not fit into the framework of Marxian thinking which sees in law, like Thrasymachus in Plato's Republic, merely "the advantage of the stronger."

A Marxian might try to refute such an argument by suggesting that it may, under certain circumstances, be "advantageous" to the dominant class to appease the lower classes in order to avoid disruptive social strife. Such an answer ignores the fact that in a modern democracy legislation benefiting the economically weaker strata of the population is by no means always a grant or bounty by the wealthier classes; it is often the result of pressures brought upon a legislature by numerically strong groups carrying substantial voting power.<sup>72</sup> Furthermore, if the term "ad-

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<sup>71</sup> *Op. cit. supra* note 1, p. 161. Cf. BODENHEIMER, JURISPRUDENCE 20 (1940).

<sup>72</sup> For some strange reason, the Communist assumes that nothing can happen in a

vantageous" is used to describe selfish class interest as well as (egotistically motivated) interest in the social betterment of the lower classes, the class concept of law becomes rather meaningless from the Marxian point of view and loses much of its revolutionary aggressiveness. If history proves that those in power may consider it to their advantage to be just, the validity of the Marxian indictment of law and economic power is seriously undermined.

(2) Marxian theory also fails to see that the law, far from being primarily an instrument of class oppression, corresponds to a deep-seated need of the human race. Law is an external expression of the human yearning for order, regularity, stability, and social adjustment. To the extent that it satisfies these propensities of human nature, it is an inertial rather than a dynamic force, and cannot be adequately accounted for by a philosophy which sees dialectical change, accomplished through the clash of antithetical forces, as the ultimate cause of all events. The slow growth and the retarding tendencies of law, especially in a custom-ridden primitive or stationary society, cannot be explained in terms of Marxian dialectics, and the process of slow maturation and reluctant adaptation of the law to a gradually changing social scene cannot be comprehended by a social theory which interprets human history exclusively in terms of the violent struggle of classes. Law is an instrument of cooperation and equalization rather than of domination and subjugation. Though it may be engendered by force or revolution, it tends to "legitimize" itself by general acceptance and voluntary observance. If this is not the case, if there is widespread non-observance, sabotage, and evasion of the norms imposed from above, we may be in doubt whether we are still confronted with a "legal order" in the true sense of the term.<sup>73</sup>

(3) Because of its failure to see that the institution of law is deeply rooted in human nature, Marxian theory erroneously assumes that law is merely a concomitant of undesirable social conditions and will "wither away" as soon as these conditions have been removed. This view is unrealistic and proceeds from a warped conception of the nature of law. It is true that law may "wither away" temporarily and be replaced by naked power or anarchical turmoil and disintegration. Such a condition,

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democratic capitalistic state without the assent or connivance of bankers and industrial tycoons, and that their will prevails in every piece of legislation. The capitalistic leaders in the United States, under the Roosevelt and Truman administrations, would have been happy if the Soviet image of their wizardry and omnipotence had its counterpart in reality.

<sup>73</sup> See Bodenheimer, *The Natural-Law Doctrine before the Tribunal of Science*, 3 WESTERN POL. Q. 335, 355 (1950).

however, can never be permanent or of long duration. In the universe as well as in human social life, order has the tendency to prevail over disorder. Although the forces which disturb and disrupt equilibrium and harmony in nature as well as in society are potent and ever-active, there is, for some reason not directly cognizable to science, an inevitable reversion to orderly patterns after events of cataclysm and violence have taken place. Stars may explode, but the pieces ejected into space tend to return to regular movements in gravitational orbits. Nations may be convulsed and torn apart by revolutions and civil wars, but every revolution burns itself out and gives way to new forms of regularized and orderly social life. This predominance of order over disorder, of rule over exception, of pattern over deviation, is the deepest reason for the political and social necessity for law. The idea of a "permanent revolution," conceived by Trotsky, is in contradiction to life itself. Without the inertial and conserving forces which put a brake on continuous and indiscriminate change, life would consume itself in a "heat death" caused by the frictions engendered by incessant motion. In this sense, law is an institution of "nature," serving basic human needs rather than an artificial device contrived by the human will.

A Marxist might possibly concede that law, in the sense of a pattern of social life meeting the natural needs of a community, would continue to exist in an ideal communistic form of organization. He would argue, however, that any governmental mechanism of compulsion designed to enforce compliance with this social pattern would be dispensable under such conditions. Thus far, we have no reason to believe that society can wholly do away with external sanctions set up to guarantee, as far as possible, the observance of the law by all members of society.

(4) The last fundamental error of Marxian legal philosophy is the refusal to link the notion of law with the idea of justice. This refusal is a logical corollary of a view which sees in law merely the advantage of dominant classes. It has already been pointed out that history does not force us to accept this deeply pessimistic approach. Law has often served as an instrument for the total or partial emancipation of disfavored social groups, such as slaves, serfs, workers, women, children, and racial or national minorities. While such emancipation has sometimes taken place through revolution or violent upheaval, i.e., by non-legal means, legal history offers many examples of a gradual and peaceful liberation of oppressed groups, or the humanization of their status, through the agency of the law. Especially the history of ancient Roman law is a valuable source of information on this problem.

Although it is true that the law, due to its inertial elements and its tendency to consolidate and stabilize existing social relationships, is by no means always an embodiment of prevailing notions of justice, its forward movements and creative phases are generally inspired by strong sentiments and convictions on what is just and equitable. Even tyrants usually attempt to depict and rationalize their political decisions as acts of justice—a fact which shows how deeply rooted the sense of justice is in the psychological structure of the human soul.<sup>74</sup>

Justice, moreover, often plays a part not only in large-scale legislative or constitutional reforms, but also in those small-scale legal improvements accomplished through judicial or administrative adjudication. Where statute, ordinance, or precedent give no guidance to those entrusted with the administration of the law, the proper solution must be found by reference to contemporary ideas of fair-dealing, decency, and equity. In these "interstitial" improvements of the law, no legal system worthy of its salt can ignore the moral climate and notions of justice of the time.

Soviet legal theory, because of its Marxian cast, neglects to consider these elements in the life of the law. Its overtones are cynical and largely negative. The accent in its description of the nature of law rests on force and class advantage, although attempts to mitigate the rigor and one-sidedness of the Marxian approach have recently been made. There is little hope that these attempts will lead to a gradual return to healthier views regarding the law. The Soviet state cannot discard Marxism as a basis for its totalitarian philosophy without endangering the intellectual bastion of its rule. It would seem safe to predict, therefore, that a fundamental change capable of solving the present impasse in Russian legal philosophy will be brought about by incisive political developments on the domestic or international scene rather than by a rational revision of present dogma.

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<sup>74</sup> See in this connection CAHN, *THE SENSE OF INJUSTICE* (1949); COING, *GRUNDZUEGE DER RECHTSPHILOSOPHIE* 100 (1950).