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ABSTRACT
This paper examines Hans Kelsen’s Communist Theory of Law in the context of his general critique of natural law theories. Kelsen argues that since there is no such thing as objectively determined natural law, a theory that attempts to use it to establish constraints on positive law is at risk of automatically justifying the latter. Kelsen deploys this ‘Pandora’s Box Objection’ in his characterisation of the Communist theory of law as the ‘handmaiden’ of the Soviet government that conserved, rather than challenged, oppressive policies. The Objection is limited in scope. Firstly, it applies only to ‘forward-looking’ Communist theories of law that justify transitional socialist legal arrangements rather than seek to abolish the legal form as a whole. Secondly, it does not eliminate the Rule of Law constraints that are independent from natural law fetters – hence the state does not have a ‘blank cheque’ to introduce any positive law.

KEYWORDS
Kelsen; natural law; communism; rule of law

Introduction
A concept of law that separates the validity of law from its moral merit or demerit recognises imperfect, immoral, and even evil laws as, in some way, equal to more legitimate acts of lawmaking. It is, in turn, often criticised as providing insufficient ammunition for those seeking progressive change or just assessment of abuses sanctioned by evil regimes of the past like Nazi Germany or Stalinist Russia. One can, of course, note that the conceptual separation of law and morality does not prevent independent moral assessment of legal systems. However, the argument I aim to explore goes even further, seeing the conflation of validity of law with moral assessment as not only unnecessary, but also counterproductive in the pushback against wicked legal systems. In particular, this paper centres on Kelsen’s surprising notion that connecting law’s validity to its conformity with natural law opens a way for inadvertently morally justifying all kinds of legal systems regardless of their adherence to norms of morality. I will refer to this argument as the Pandora’s Box Objection.

It is in light of this Objection that I plan to examine Kelsen’s monograph The Communist Theory of Law. Published, in 1955, at the backdrop of the Cold War clash of
Kelsen’s lifelong project dedicated to the deideologization of legal theory by identifying law independently of its compliance with any moral ideal. In other words, The Communist Theory of Law can be understood as a ‘test case’ for the Pandora’s Box Objection and an argument for a pure theory of law. Kelsen’s critique of the Communist theory of law (CTL) should therefore be examined in the context of his reservations about the ‘hidden danger’ of the natural law theory (NLT).

I will first expand on Kelsen’s reconstruction of NLT and the content of the Pandora’s Box Objection. After a brief inquiry into its internal coherence, I will investigate the way CTL illustrates the Objection. For reasons of brevity, my analysis will be limited to theories of law expressed by Marx and Engels, Pashukanis, and Vyshinsky, omitting Kelsen’s discussion of other works as well as his inquiry into the Soviet conception of international law. It will be found that only one, ‘forward-looking’, CTL, which focuses on making a positive case for socialist law as well as a negative case against capitalist law, fits the NLT model.

The other two sections will address John Finnis’s criticism of Kelsen’s characterisation of natural law as based on wrong premises. Based on that, I will suggest a way out of the Pandora’s Box Objection that relies on the Rule of Law as an independent fetter on the content of positive law. However, I will note that CTL itself rejects the existence of such a fetter, making CTL vulnerable to the Objection. I shall conclude that Kelsen’s analysis of Communist theorists presents a limited – but nevertheless solid – foundation for his negative case against NLT.

Kelsen, natural law theory, and the Pandora’s Box Objection

In this section, I intend to explain the relationship between Kelsen’s criticism of CTL and his attack on NLT. I will argue that Kelsen uses the Communist example to illustrate a particular weakness of NLT: its vulnerability to being used as a justification for any set of laws, no matter how wicked or immoral.

Natural law theory according to Kelsen

According to Chiassoni, Kelsen’s reconstruction of NLT reduces it to three claims:

1. the ontological claim that natural law exists as an objective normative order, independent from positive law;
2. the epistemological claim that men can know it; and
3. the scientific claim that natural law theorists are scientific expositors of natural law as it really is.3

Here, we focus on the ontological claim and its two aspects as exposed by Kelsen: the internal features of natural law – objectivity, staticity, absolute validity, and absolute value; and its relationship with positive law that is described as one of hierarchical superiority of natural law over positive law.4

4Ibid 139.
Let us turn to internal features of natural law. Firstly, natural law is *objective* – its existence is independent from ‘any human act of law-making or law-creation’ and ‘directly flow[s] from nature, God, or reason’. Secondly, it is *static*, or ‘a permanent, unchangeable order’. Thirdly, it ‘makes its appearance as an eternal, unalterable norm’, which ‘prescrib[es] what is by itself just for every man at every time and place to do as regards to the other man’ – or, in other words, is of *absolute value*. Finally, natural law is a set of *absolutely valid* (or ’objectively valid’) norms that ought to be obeyed independently of human conduct, time, and factual circumstances. As a result, natural law is more akin to the rules of logic than to ’artificially made’ positive law since the latter is a direct result of human conduct, can be changed at will, represents only a relative value, and is not absolutely valid.

Moreover, NLT presupposes a *hierarchy* in which ‘natural law represents a *superior* normative order as regards to *inferior* positive legal orders’. Firstly, since natural law is independent from human conduct, it is also independent from positive law as a manifestation of that conduct. Secondly, positive law is in a relationship of dependence on natural law, which ‘claims supremacy’ over every other set of norms. As Kelsen outlines:

> the natural-law teachers contend … that positive law derives its entire validity from natural law; it is essentially a mere emanation of natural law; the making of statutes or decisions does not freely create, it merely reproduces the law which is already in existence, and positive law (the copy), whenever it contradicts the natural law (the model or archetype), cannot have any validity.

As a result, in the NLT model, positive law’s validity is assessed with reference to its conformity with natural law. As Raz states, Kelsen points out that this is the only criterion of validity in NLT, as it does not entertain any specific notion of legal validity separate from moral validity.

**Duality of the relationship of hierarchical superiority**

In the relationship of hierarchical superiority, natural law is not only a constraint on positive law, but also a justification of it. The constraint element is evident in the description of the relationship of hierarchical superiority – natural law precludes the validity of positive law norms that do not comply with its demands. This constraint is very robust because of the absolute character of natural law, which means that all legal systems are held to the same minimal standard provided in the content of this law.

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5ibid 138.
7ibid 397. See also Chiassoni (n 3) 139.
9Chiassoni (n 3) 138.
10ibid 138.
13Chiassoni (n 3) 139.
14Kelsen, ‘The Idea of Natural Law’ (n 8) 38.
15The word ‘copy’ would be important further on, in the section on the Finnis’s objection to Kelsen.
17Raz, ‘Kelsen’s Theory of the Basic Norm’ (n 10) 54.
The justification element is less obvious, but nevertheless key. Because of its objectivity, staticity, absolute validity, and absolute value, natural law does not require external justification. As all valid positive law is ‘founded upon [natural law’s] delegation’\textsuperscript{18} and ‘merely reproduces the [natural law] which is already in existence’,\textsuperscript{19} it does not need any additional justification beyond that provided by natural law’s self-evidence.

\textbf{‘Conservative’ natural law theory and the Pandora’s Box Objection}

One should note the important distinction that Kelsen makes between classical (conservative) NLT, which states that positive law is in conformity with natural law and hence is justified by reference to the latter, and \textit{revolutionary} NLT, which challenges the validity of, rather than justifies, the current legal order for its lack of conformity with natural law.\textsuperscript{20} According to Kelsen, while NLT is often referred to as intrinsically revolutionary, the character of NLT is more often conservative, as such theories tend, when discussing the relationship of hierarchical superiority, to focus on its justification role rather than it granting validity to positive law.\textsuperscript{21} This stands in opposition to concerns expressed by Bentham, who thought that adherence to NLT (belief in the existence of ‘natural rights’) was dangerous because of its revolutionary potential – by only recognising some laws as valid based on their moral intuitions, law’s subjects can overthrow the very fundamentals of society, leading to anarchy.\textsuperscript{22} However, it is possible to conclude that both Kelsen and Bentham were right in their assessment. Kelsen focused on the conservative potential of natural law as he saw it as more characteristic of its history, but it is plausible that his arguments equally apply when natural law is invoked to justify a revolution. Revolutionary and conservative NLT are two sides of the same coin, as a revolutionary project, while starting out as a critique of the current legal order, ends by establishing or attempting to establish a ‘replacement’ legal order (or, as Bentham pointed out, a disorderly state of anarchy), which can also be, as the Pandora’s Box Objection is concerned, less than adequate. Thus, adherence to NLT, for both revolutionary and conservative purposes, can lead to justifying morally undesirable results, brought about either by revolution or conservatism.

This argument – the Pandora’s Box Objection – would go as follows. As stated above, on NLT, because natural law is objective, static, absolutely valid, and possesses absolute value, conformity of positive law with it is sufficient for its moral justification. Kelsen rejects the existence of objective morality, arguing that there is no such thing as objective etc. natural law\textsuperscript{23} as described in NLT (or, if it exists, it cannot be known\textsuperscript{24}). As a result, conformity with what is described as ‘natural law’ is insufficient for moral justification of

\textsuperscript{18}Kelsen, \textit{General Theory of Law and State} (n 1) 416.
\textsuperscript{19}ibid.
\textsuperscript{21}Kelsen, \textit{General Theory of Law and State} (n 1) 144.
\textsuperscript{22}Jeremy Bentham, ‘Nonsense upon Stilts, or Pandora’s Box Opened’ (also known as ‘Anarchical Fallacies’) in \textit{Rights, Representation, and Reform: Nonsense Upon Stilts and Other Writings on the French Revolution} (Clarendon Press 2002) 320; also cited in HLA Hart, \textit{The Concept of Law} (3rd edn, OUP 2012) 211. Bentham was also skeptical of natural law outside the revolutionary situations, as can be seen in his scathing critique of common law and equity in ‘Truth v Ashurst’, Jeremy Bentham, \textit{The Works of Jeremy Bentham} (W Tait 1843).
\textsuperscript{23}Full summary of Kelsen’s arguments can be found in Chiassoni (n 3) 140.
\textsuperscript{24}ibid 147.
positive law unless the ‘natural law’ principles are justified on independent grounds. However, if one follows the NLT logic, one skips that step, claiming for positive law to be justified without any grounds to do so. Consequently, this opens up a possibility for positive laws that would not be justified on independent moral grounds to be justified under NLT. As a result, the NLT mode of thinking, warding positive law essentially ‘uncontested validity’,\(^{25}\) while not automatically leading to justification of immoral positive law, opens the ‘Pandora’s Box’ of justification, allowing certain legal systems to escape scrutiny. Hart, in a similar key, noted that keeping legal validity and morality of laws separate will do better to preserve ‘the sense that the certification of something as valid is not conclusive of the nature of obedience, and that … its demands might be in the end be better submitted to a moral scrutiny’.\(^{26}\)

In the Conclusion to The Communist Theory of Law, Kelsen states the following: ‘[t]he deplorable status of Soviet legal theory, degraded to a handmaid of the Soviet government, should be a grim warning to social scientists that true social science is possible only under the condition that it is independent of politics’.\(^{27}\) Kelsen believes that the original ‘revolutionary’ character of CTL as a critique of bourgeois law has diminished with time, with the same subjective premises inevitably becoming a justification for conserving the authoritarian Soviet legal order. Therefore, CTL is, to him, valuable as a ‘case study’ on the failings of NLT under the Pandora’s Box Objection.

**The trouble with the Pandora’s Box Objection**

Before addressing whether CTL is a good illustration of the Pandora’s Box Objection, I will examine an initial worry regarding the internal consistency of the Objection. While the Pandora’s Box Objection is based on Kelsen’s wholesale rejection of objective morality as an existing or discoverable ideal, highlighting the dangers of NLT seems to require accepting some form of objective morality. Claiming that accepting the NLT logic might involve legitimising ‘evil’ legal orders such as the Soviet legal order depends on there being a prior understanding as to which legal orders are ‘evil’ and hence on the presence of some moral ideal suitable for measuring legal systems against. This shows the Objection’s internal inconsistency.

To answer this, I situate the Objection in its argumentative context: Kelsen directs it to natural lawyers and intends to show them that their theory is self-defeating and can lead to endorsement of legal orders they would describe as evil. Thus, he focuses not on a particular natural law ideal, but instead on moral *indeterminacy* of positive law in spite of one’s subscription to NLT. The NLT mode of analysis, he argues, is unlikely to secure beneficial ends one would seek regardless of what these needs are, as it does not provide for an adequate fetter on the content of positive law because of its self-referential nature.

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\(^{26}\)Hart (n 22) 210. Hart’s scepticism of objective morality was shared in the Postscript: ‘[b]ut whether (?) there are objective moral facts is a controversial philosophical theory’ and thus legal validity tests should not be dependent on commitment to it. Even though I will hereinafter focus on Kelsen, this intermediate view would appeal to those who are reluctant to have a final say on whether objective morality exists and resolve problems raised in the subsequent section. ibid 253.


\(^{27}\)Kelsen, *Communist Theory of Law* (n 2) 193.
In the light of this task, the CTL example appears to be especially useful as the Soviet state was abhorrent to moral intuitions of Kelsen’s contemporaries – he was writing for an audience engaged in first phase of the Cold War. By proving that Soviet scholars engaged in NLT thinking, Kelsen aimed to show the NLT’s unreliability in securing a particular type of – Western – moral ideal.

**Communist theories of law and the Pandora’s Box Objection**

Here, I plan to unpack Kelsen’s reconstruction of CTL in the light of the Pandora’s Box Objection. My discussion will only focus on the theories advanced by Marx and Engels, Pashukanis, and Vyshinsky, omitting Kelsen’s discussion of Lenin, Stuchka, Reisner, Golunskii, and Strogovich. I see these three standpoints as sufficient for mapping the historical narrative pertinent to Kelsen’s discussion of NLT – the transition from Marx’s revolutionary criticism of the bourgeois law to Vyshinsky’s conservative justification of Soviet law.

I will begin with the summary of main features of CTL as advanced by each author, aiming to answer two questions identified by Hugh Collins. The first question that my analysis will focus on is the definition of law. The second question is whether law is necessary for human civilisation, i.e., whether it will disappear under Communism. Next, I will analyse each account through the lens provided by NLT as making epistemological, scientific, and – most importantly – ontological claims about natural law. Finally, I will identify two possible formulations of CTL, one (‘backward-looking’) falling short of the NLT model and the other (forward-looking) fitting this model and being susceptible to the Pandora’s Box Objection.

**Marx and Engels**

**Summary**

Marx and Engels, according to Kelsen, saw positive law as an ideological expression of economic reality. To unpack this understanding, we should reflect on how Marx and Engels understood law’s relationship with economic reality, its status as an ideology, its instrumental character in class oppression, and its future.

Marxism is based on the primacy of economic relations in the development of society. As stated in the famous passage from the *Preface to a Contribution to a Critique of Political Economy*, ‘men enter into definite relations that are indispensable and independent of their will, relations of production which correspond to a definite stage of development of their material productive forces’ and ‘the sum total of these relations constitutes … the real foundation on which rises a legal and political superstructure and

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29One should note, however, that even though it would be natural for Kelsen to treat law ‘as a unique phenomenon which constitutes a discrete focus of study’, Marxism-based theories would not see legal systems as possessing distinctive characteristics but rather types of a broader species of systems of power. As a result, CTL’s objects of inquiry are more correctly described as not a definition of law, but a description of characteristic functions of institutions conventionally treated as legal. ibid 11, 14.
30Ibid 15.
31Kelsen, *Communist Theory of Law* (n 2) 12.
to which correspond definite forms of social consciousness’. However, as Collins notes, this alone lacks an explanation of how exactly the base determines the superstructure.

One way would be to see superstructures as forms of ‘ideology’. Kelsen notes that Marx uses this term in a narrow and ‘decidedly deprecatory’ sense. In Marxism, he says, ideology is opposed to social reality and is seen as a false consciousness, a deception and even self-deception. Ideologies are flawed since they are constructed in response to practical experiences (‘social being determines … consciousness’), one’s perception of reality being therefore informed by their position in society, i.e., their class allegiance. Thus, laws and theories of law produced by the members of the ruling class would be inevitably concealing the reality of class relations and, at the same time, justifying them.

The other option would be to focus on what Collins terms ‘class instrumentalism’. Where the means of production are at the exclusive disposition of the minority exploiting class (as opposed to exploited class), ‘the state is the form in which the individuals of a ruling class assert their common interests’. In capitalism, that would constitute the exploitation of the proletariat by the bourgeoisie. Engels said that ‘[a society split into classes] needs the state … an organization of the exploiting class for maintaining the external conditions of its production, especially for holding down by force the exploited class’. The state exists in order to keep the conflict between the exploiters and the exploited ‘within the bounds of order’. This offers a very limited account of what would be later developed by other thinkers; however, it is clear that, under this view, state and law are not just determined by the material base, but are used instrumentally as a mechanism of sustaining those property relations.

Finally, the state ‘withers away’ under Communism when class relations are non-existent. The state is only necessary when both an exploiting and an exploited class exist, as the superstructure aims to (i) obscure economic reality, and (ii) coerce the exploited class into accepting it. Kelsen notes that it is not clear what becomes of law, partly because the connection between law and the state was viewed as self-evident by Marx and Engels and not explored further, with Marx and Engels being interested in the state more than in law. It is reasonable to presume that law would not be needed either, as its functions are identical to those of the state and other superstructures and would be exhausted in the absence of class relations. Still, Marx and Engels accept the existence of a transitional period of the dictatorship of

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33 Collins (n 28) 26.
34 Kelsen, Communist Theory of Law (n 2) 3.
35 ibid 4.
36 Karl Marx, ‘Preface to a Contribution to the Critique of Political Economy’ (n 32).
37 Collins (n 28) 28.
38 Karl Marx and Friedrich Engels, ‘The German Ideology’ in Karl Marx, Frederick Engels: Collected Works (V) (Lawrence & Wishart 1975) 90. As mentioned in Cain and Hunt (n 32) 53.
41 Kelsen, Communist Theory of Law (n 2) 33.
the proletariat and hence some presence of law ‘infected with a bourgeois character’\(^{42}\)
(in other words, class-based) before Communism is established.

**Marxist legal theory as a natural law theory**

Kelsen states that Marx and Engels, despite renouncing bourgeois legal theories including natural law theory, have produced a natural law theory of their own making.

The first possible natural law analogue in Marxist legal theory is the economic base. This base, while referring to economic relations between people, is still objective in the sense of being eternal and independent from human will and human actions, as historical materialism describes it as pre-determined historical processes that are outside the bounds of human control.\(^{43}\) There exists a relationship of hierarchical superiority between the economic base and positive law since, according to Marx, the ‘superstructure’ of law is determined by the base.\(^{44}\) Moreover, to fit the NLT model, this ‘determination’ should translate into relations of not only constraint, but also justification. But, for Marx and Engels, positive law is justified by the economic base only in the eyes of the agents tasked with making and applying such law – they are invested in maintaining the economic base, enacting laws that would serve this purpose. This instrumental ‘justification’ is hardly the one implied in an orthodox NLT account, as it only appeals to a group of power-holders rather than the community as a whole. Thus, this account is not an NLT.

Alternatively, as Kelsen says, ‘true social reality’ reflected in ideology is what forms Marxist ‘natural law’.\(^{45}\) This reality is not the existing oppressive relationship of production (the economic base) – it rather refers to its ideal destination: the state of justice, i.e., communism.\(^{46}\) Both epistemological and scientific claims are present in this account as true social reality is seen as being discoverable and correctly discovered by the virtue of Marxist methods:

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\text{[J]ust as the natural-law doctrine asserts – as a consequence of its presupposition – that it is possible to deduce from nature the just, i.e., the natural law and attributes to science, the science of law, the task of discovering this natural law somehow hidden in nature, so Marx affirms that out of social reality the justice of socialism as the social truth can be developed.}^{47}\]

In Marx and Engels’ understanding, the ‘true reality’ in question is objective: it flows directly from human nature and is constant throughout time and place. However, while positive law in NLT is justified and validated by virtue of replicating natural law, Marx and Engels take a different route. Even though they agree that true reality is independent from positive law and is a supreme standard for its assessment, this does not mean that it has any bearing on validity or justification of said positive law. Instead, Marx and Engels say that law and other superstructures are intrinsically in contradiction with true reality. Rather than proposing ‘perfect law’ that will be derived from and justified by true reality, Marx and Engels’ resolution of the conflict with true reality takes the form of revolution

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\(^{42}\)This statement is made in a letter Marx wrote on May 5, 1875, to Bracke, concerning the draft of the Gotha Programme of the German Social-Democratic Party. As cited in ibid.

\(^{43}\)Karl Marx, ‘Preface to a Contribution to the Critique of Political Economy’ (n 32).

\(^{44}\)Ibid.

\(^{45}\)Kelsen, Communist Theory of Law (n 2) 20.

\(^{46}\)Ibid 19.

\(^{47}\)Ibid 20.
establishing communism, leading to a complete withering of law and state. In Leiter’s words, according to Marx, no law prior to communism is ‘morally reasonable’.\(^{48}\) Thus, it is the abolition of law and the state of affairs that will replace it rather than law that is justified on the true reality grounds. The closest we can get to ‘perfect law’ is law of the interim period, but Marx and Engels still see it as too bourgeois for the full achievement of the natural ideal. Hence, Marx and Engels’ account can be characterised as an extreme form of revolutionary NLT, one that criticises positive law from a standpoint of a higher ‘law’: in this case, the true reality. However, it lacks the relationship of hierarchical superiority, which makes it, at the very least, a very atypical form of NLT that cannot be criticised on Pandora’s Box grounds, if an NLT at all.

Another route that I will pursue is to consider Marx and Engels’ theory not as a natural law theory on its own, but as a foundation upon which CTL rises in its final form. For CTL to be a natural law theory, it is not necessary for its influences or composite parts to be treated as such. By now, the fact that Marx and Engels reference some form of objective ‘natural law’ – as either Kelsen’s understanding of ‘true reality’ or the idea of economic base – is enough in order to continue with this strand of analysis.

**Pashukanis**

**Summary**

Pashukanis’s theory of law is interesting as he was ‘the most prominent representative of Soviet legal history during the first period of its development’.\(^ {49}\) Even though Pashukanis is building on Marxism, he develops his own idea of law as the social relationships of the goods-producing society\(^ {50}\) that is distinct from the Marxist orthodoxy. This affected his answers to the questions of law’s relationship with capitalism, what constitutes law, and law’s fate after Communism.

Pashukanis’s account is similar to Marx’s and Engels’s theories in that the economic base plays a significant role in defining law and its limits. Pashukanis is anxious about how social relations have assumed the form of legal relations, feeling that earlier Soviet theorists like Stuchka gave an inadequate answer to this question.\(^ {51}\) The relation to goods-producing (capitalist) society is, in Pashukanis’s view, what distinguishes law from other forms of social relations. He states that ‘the legal relation between subjects is simply the reverse side of the relationship between products of labour which have become commodities’.\(^ {52}\) Pashukanis sees legal relations as existing to facilitate this exchange of commodities. According to him, the emergence of commodity relations leads to isolation and opposition of interests, which should then be mediated by the legal form: it is ‘dispute’ and ‘lawsuit’ where economically active subjects first appear in their capacity as parties, i.e., legal subjects.\(^ {53}\) The relationship between ‘the base’ and ‘the superstructure’ takes on an instrumentalist character, similarly to the previously discussed Marxian thesis of law as a tool of class oppression. However, as Arthur notes,


\(^{49}\)Kelsen, Communist Theory of Law (n 2) 89.

\(^{50}\)Ibid 91.


\(^{52}\)Ibid 86.

\(^{53}\)Ibid 93.
Pashukanis thinks that the view of law as an external regulation imposed by command of authority does not bring out the specific character of legal regulation.\textsuperscript{54} Even though law, on his view, exists to maintain the capitalist economic relations by preventing social conflict caused by these relations through coercive means, the judge in Pashukanis’ account acts as an ‘umpire’\textsuperscript{55} in a lawsuit rather than a top-down authority. In my view, this vision unpacks the complicity of property-holders (members of the ruling class) in maintaining the hierarchical structure as not just legal officials but also ordinary participants in the legal system.

Therefore, Pashukanis defines law’s domain much more narrowly than expected. According to Kelsen, since law exists to mediate goods-producing or commodity-producing relations, only private law can be considered ‘law’ in its true sense. What we understand as public law is taken as a ‘meta-legal phenomenon inconceivable as a subject of law’.\textsuperscript{56} While Pashukanis said that, in capitalist systems, public interests protected by public ‘law’ can be recast as private interests,\textsuperscript{57} it does not mean that public ‘law’ is, by itself, ‘law’ since it can only assume legal form under certain economic conditions. In addition, Pashukanis tries to accommodate criminal law (which is neither private nor public by an ordinary definition) into his classification by recasting it in the form of commodity relations. He says:

\begin{quote}
Crime may be regarded as a special variety of turnover in which the exchange – that is to say, the contractual relationship – is established \textit{ex post facto}: that is to say, after the wilful action of one of the parties. The ratio between the crime and the requital is nothing more than the same exchange ratio.\textsuperscript{58}
\end{quote}

Thus, private law is seen as the paradigmatic legal form, with other ‘law’ in the standard sense being only capable of assuming legal character when it can be presented in the same model of commodity-exchange relationship.

Since positive law is defined as characteristic of one form of economic production (capitalism), Pashukanis says that following the transition to Communism, there will be no commodity-exchange relationships and thus no conflicts, so legal form will become obsolete and ‘wither away’. In other words:

\begin{quote}
The withering away of certain categories … of bourgeois law in no way implies their replacement by new categories of proletarian law … The withering away of the categories of bourgeois law will, under these conditions, signify the withering away of law altogether, that is to say the disappearance of the juridical factor from human relations.\textsuperscript{59}
\end{quote}

However, one should note that this applies to what Pashukanis terms law proper, i.e., private law or other ‘law’ only insofar it can be expressed in a private law form. Kelsen notes, for instance, that he admits the existence of coercive rules that will be merely ‘technical’ and serving a unity of purpose rather than mediating conflicting interests,\textsuperscript{60} which

\textsuperscript{54}CJ Arthur, ‘Towards a Materialist Theory of Law’ (1977) 7 Critique 31, 42.
\textsuperscript{55}ibid.
\textsuperscript{56}Kelsen, \textit{Communist Theory of Law} (n 2) 93.
\textsuperscript{57}Pashukanis (n 51) 104.
\textsuperscript{59}Pashukanis (n 51) 61.
\textsuperscript{60}Kelsen, \textit{Communist Theory of Law} (n 2) 104.
would potentially encompass law that does not take the required legal form, i.e., public or criminal law.

Pashukanis’s theory of law as natural law theory
Kelsen did not address the natural law elements in Pashukanis’ theory; however, one can still attempt to map it in accordance with the Pandora’s Box Objection model. Hunt was rightly critical of Pashukanis for over-simplifying Marxist theory, saying that ‘while he correctly identified law as a social relation, he blocked that insight by reducing law to a single and inappropriate relation, the commodity relation’.

In other words, Pashukanis reduced law’s foundation to the economic base, and a specific one as such – goods-producing relations associated with capitalism. As these relations are taken to ‘exist’ in fact rather than ‘the heads and the theories of learned jurists’, they are easily discoverable by the sociological method, and easily satisfy the epistemological and scientific claims of NLT.

While commodity exchange is eventually replaced by socialist economic mechanisms, Pashukanis, following Marx and Engels, sees it as an inevitable attribute of the bourgeois mode of production. Specifically, Pashukanis admitted that ‘this property appears to be an intrinsic natural property of object themselves, according to some sort of natural law which operates behind people’s back, quite independently of their will’. Even though the realisation of the value of the commodity is a result of the conscious act of will of its owner, commodity ‘acquires its value independently of the producing subject’. Therefore, it fits the role of objective natural law in NLT.

On the other hand, there is a relationship of hierarchical superiority between the commodity exchange and the legal form. In particular, defending the independence of the former from the latter, Pashukanis denies the positivist objection that in order to engage in goods-producing relations one should operate within the existing legal categories such contract, rendering commodity exchange secondary – as deriving from the legal form and not vice versa. He says:

One cannot assert that the relation between creditor and debtor is generated by the system of compulsory debt collection operating in the state in question. The objective existence of this system certainly guarantees and safeguards the relation, but in no way creates it.

Moreover, as shown above, the legal superstructure, on Pashukanis’s view, exists only by virtue of commodity exchange. Further, norms that are not found on this relationship are not construed as legal ones, unless they can be drawn out in a commodity-exchange form. A social relation only becomes law by the virtue of its grounding in the natural law of capitalist economic relations.

However, this relationship of hierarchical superiority differs from the NLT model. As already discussed in relation to Marx and Engels’ theories, construing the economic base as natural law is somewhat deficient as while it presupposes the existence of positive law, it does not ground its validity as it cannot operate as its justification: commodity-producing

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62 Pashukanis (n 51) 68.
63 Ibid 112.
64 Ibid.
65 Ibid 89.
society cannot be justified as it needs to be overthrown and replaced with communism. In other words, Pashukanis would, following Marx and Engels on this interpretation, see legal form as illegitimate and unjust *per se*. Even though he allows some quasi-legal rules like ‘technical’ rules of governance to remain, this is only by virtue of them not belonging to the paradigmatic commodity exchange-based legal form. This makes Pashukanis’ account an ill fit for the NLT model.

**Vyshinsky**

**Summary**

Vyshinsky’s theory marks the ‘second period’ in the development of Soviet legal theory. While claiming to devise the concept of law consistent with the main premises of the Marxist doctrine, he rejects the work of previous jurists such as Pashukanis. Vyshinsky’s aim was to provide theoretical support for the ‘refetishisation’ of law – reassessment of the role of law as a necessity for the functioning of the Soviet state in order to provide grounding for its instrumental use by Stalin in his consolidation and preservation of power. Pashukanis’s theory that denied the very existence of law in a socialist society apart from its station as a remnant of the bourgeois commodity relations was unsuitable for such purposes. Thus, Vyshinsky had to go further and make room for a new, socialist form of law. Vyshinsky first stated:

> Law is the totality (a) of the rules of conduct, expressing the will of the dominant class and established in legal order, and (b) of customs and rules of community life sanctioned by state authority their application being guaranteed by the compulsive force of the state in order to guard, secure, and develop social relationships and social orders advantageous and agreeable to the dominant class.\(^{67}\)

This definition, while applicable to the previously discussed Marxist vision of law as an instrument of class oppression used by the bourgeoisie, does not, on its surface, fit the notion – proclaimed by Stalin – that Soviet society no longer contained a class divide. However, to Vyshinsky, Soviet law is an expression of the will of the class that was dominant in the Soviet society – the toilers (proletariat). As this was the only class constitutive of Soviet citizenry, the will of the working class ‘merged’ with the will of everyone.\(^{68}\) In other words, ‘Soviet law is the aggregate of the rules of conduct established in the form of legislation by the authority of the toilers and expressive of their will’.\(^{69}\) According to Vyshinsky, Soviet law was superior to bourgeois law as it, unlike the latter, was truly dedicated to legality and fairness instead of being used as a mechanism for subjugation of the oppressed class.

Even though Vyshinsky defended the existence of Soviet law at the moment when he was writing, he still retained the Marxist thesis that it would remain only a transitional category: ‘law – like the state – will wither away … in the highest phase of communism’.\(^{70}\) However, Vyshinsky treated the Soviet law not just as an inevitable remnant of the old

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\(^{66}\)Kelsen, *Communist Theory of Law* (n 2) 116.


\(^{69}\)Vyshinsky (n 67) 50.

\(^{70}\)ibid 52.
production and class relations on the ‘halfway’ to communism, but as a functional necessity in this transition. In other words, the Soviet law was taken to exist ‘in order to defend, to secure, and to develop relationships and arrangements advantageous and agreeable to the toilers, and completely and finally to annihilate capitalism and its remnants in the economic system, the way of life, and human consciousness in order to build a communist society’. According to Vyshinsky, Soviet law, through coercion, would shape public consciousness in order to accustom the citizenry to observing the fundamental rules of the communist society until they no longer needed said coercion to follow them.

Vyshinsky’s theory of law as natural law theory

Vyshinsky’s concept of law, in its normativity and reliance on institutional authority, can be easily mistaken for a positivist concept of law. However, Kelsen states that Vyshinsky’s theory resembles a ‘bourgeois’ natural law doctrine. This can be attributed to the fact that, on Vyshinsky’s concept, positive law is only secured by state coercion and is grounded not in its sanctioning by the state (even though that remains one of its defining features), but in the will and interests of the dominant class. Vyshinsky, aiming to fit legal machinery in the socialist order, was particularly interested in foundational principles necessary for securing the interest of the toilers. He said: ‘the principles of legal theory must be worked out from the beginning – and they can be worked out, not from law (even though it be positive law), but from life’. Therefore, following the Marxist theory of law, he sought to trace positive law back to ‘the principles of the organization of social relationships which are explained in the final analysis by production relationships’. Thus, on his theory, toilers’ needs and the needs of the socialist society can be determined objectively by reference to empirical facts about the nature of man, and the epistemological and scientific conditions of NLT are justified alongside the ontological claim’s objectivity thesis. In a similar key, Fuller observes that Vyshinsky characterised Soviet law as superior to bourgeois law ‘in terms of the premises underlying bourgeois law; it really does the things bourgeois law pretends to do’. In other words, Vyshinsky has rediscovered already existing and despised ‘bourgeois virtues’ like justice, fairness, and legality, i.e., has adopted the natural law doctrine.

Moreover, as these ‘principles of legal theory’, on Vyshinsky’s claim, cannot be worked out from positive law, they are independent from the positive law. In addition, positive law, unlike in prior discussion, is not just derived from them, but is dependent on them in a full sense. Vyshinsky justifies Soviet law by connecting it to the proletarian interest in structuring society according to socialist principles and coercing its members into accepting and following this structure. Therefore, Vyshinsky’s theory contains an NLT-like relationship of hierarchical superiority between natural and positive law. This framework, as a result, escapes the incompleteness of Marx, Engels’ and Pashukanis’ theories from the NLT perspective by suggesting that there is a kind of law distinct from bourgeois law that can be justified under socialist principles, even though it is bound to play only a

71ibid 50.
72ibid 52.
73Kelsen, Communist Theory of Law (n 2) 120.
74Vyshinsky (n 68) 324.
75ibid.
77ibid 1165.
transitional role. Therefore, Vyshinsky’s ambition of finding a place for legal form in the Soviet society had allowed his concept of law to play, in Kelsen’s terminology, not only a ‘revolutionary’, but also a ‘conservative’ role.

**Two communist theories of law**

One could conclude that Marx’s and Engels’s theory acts as a foundational step for Pashukanis’s and Vyshinsky’s: one takes for ‘natural law’ the existing relationships of production while the other takes the society’s ideal destination.

I shall call one of these frameworks the *backward-looking CTL*. It takes positive law as grounded on relations of production that are independent of the human will and are a product of historical processes pre-determined by the nature of man. However, these relations of production are fundamentally unjust and are to be replaced by communism. Communism, a desirable destination of society, is a relationship of production of a new type and therefore does not require the legal form. Hence, the legal form becomes obsolete once this stage is reached. This argument is not an NLT\(^ {78}\) as, while it refers to some objective foundation of law, it does not accommodate the relationship of hierarchical superiority as relations of production do not justify the legal form, as the legal form is taken as something that, while remaining a reality, is intrinsically unjust. This is Pashukanis’s account, which was characteristic of the early phase of Soviet legal thought.

Another theory is what I term the *forward-looking CTL*. It describes positive law as being in the genuine relationship of hierarchical superiority with the principles of socialism. They are taken as a scientifically deducible objective truth about the ideal future of society. These principles are compatible with one legal form – the Soviet legal form or socialist law, the latter justified by the former as necessary but temporary instrument for creating a new set of rules governing societal relations. With the advance of communism, these rules are transformed into habitual rules and the legal form is no longer needed. This theory, fully developed by Vyshinsky, fits the NLT model.

**Vyshinsky’s theory of law and the Pandora’s Box Objection**

As only forward-looking CTL is NLT proper, backward-looking CTL cannot be repudiated using the Pandora’s Box Objection. Since backward-looking CTL says that legal form cannot be justified, there is no problem of post factum legitimisation of positive law as such, as the perfect social order demands the absence of law. However, since Pashukanis’ theory does not exclude the existence of ‘technical’ rules under communism, these rules are justified by virtue of their compatibility with socialist ideal and are potentially subject to the Pandora’s Box Objection. If they are treated as *de facto* legal rules as, in my view, they should be, then backward-looking CTL will assume the form of forward-looking CTL.

Forward-looking CLT, as an NLT, is vulnerable to the Pandora’s Box Objection. As Kelsen denies that natural law can be objectively determined, the forward-looking CTL’s grounding principles can assume any form. Kelsen even denies the uniqueness of forward-looking CTL and sees it as a NLT where natural law is construed in a certain way:

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\(^{78}\)Leiter convincingly argues that this Orthodox Marxist theory is better accounted for by legal positivism: Leiter (n 48).
If the representatives of the bourgeois natural-law doctrine work out from the social relationships of a capitalist society the ideal norms of capitalist law, their knowledge of law is as ‘correct and scientific’ as the knowledge of law of Soviet writers who from the social relationships of a socialist society work out the ideal norms of socialist law.79

Thus, rather than constraining the legal form, principles of socialism can, in practice, be secondary to it and apply to it retroactively in order to legitimise the existing rules. This, in the popular imagination, was what Vyshinsky was trying to achieve: he attempted to justify the oppressive, coercive use of law by Stalin by referencing its supposed necessity for achieving a communist ideal. His course of action, to Kelsen, would be a perfect example of the state’s use of NLT logic to justify positive law at all costs.

One can say that law plays a temporary role in forward-looking CLT and therefore the Pandora’s Box Objection only applies to this narrow time window before the legal order is replaced with a habitual order of a kind Vyshinsky describes under Communism. However, I do not see it as a substantial limitation on the Objection’s reach. Firstly, Vyshinsky set no definite time frame for the transition to Communism, and socialist law could possibly stay in place for an indefinite period of time. In fact, Communism was never achieved and Soviet citizens had to live under supposedly temporary rules for 70 years. Secondly, under Communism, the content of habitual rules would replicate the content of socialist law, and the only part that would disappear would be state sanctions. While this new order would not be deemed as law proper by Kelsen (who saw law as an intrinsically coercive order80), on Raz’s concept it would still be law, akin to rules in the ‘society of angels’.81 While removing coercion would take away some risk of oppression, some of it might still be preserved in the content of the rules as such, and hence, with our modified definition of law, the Pandora’s Box Objection would still be applicable after Communism.

**Natural law revisited: from determination to the rule of law**

Kelsen’s examination of CLT is useful because it demonstrates NLT’s vulnerability to the Pandora’s Box Objection. However, this assumes that the reconstruction of NLT by Kelsen is accurate. Here, I will consider Finnis’s reply to Kelsen, which characterises the latter’s reconstruction of NLT as a misinterpretation. I will argue that, while it (i) can be questioned; and (ii) does not change natural law’s constraining and justificatory force and its connection with the Pandora’s Box Problem in itself; it (iii) introduces a new type of constraint which differs from natural law in NLT and is immune to charges levelled at natural law by the Objection – principles of effective lawmaking, such as the Rule of Law. Hence, legal systems do not remain at the free rein of the state apparatus, but are constrained by something intrinsic to law as such.

79Kelsen, *Communist Theory of Law* (n 2) 120.
81Raz’s ‘society of angels’ thought experiment aimed to demonstrate the need for law in a society where all participants behave morally. Such ‘angels’ would still need law to coordinate their conduct as they pursue different aspirations, interpret the existing rules, and compensate for accidental damage. Joseph Raz, *Practical Reason and Norms* (OUP 1999) 100; also noted by Leiter (n 48) 1182. Note that Raz has likely borrowed this thought from Aquinas. Thomas Aquinas, *Summa Theologica* I, Q96, A4 (Fathers of the English Dominican Province tr, Complete English ed, Christian Classics 1981).
Replication versus determination?

As we have seen, NLT asserts that positive law is in a relationship of hierarchical superiority. However, Finnis claims that this aspect of NLT as exposed by Kelsen is a misrepresentation of true NLT. St Thomas Aquinas, he points out, highlights that positive law is not a mere ‘copy’ of natural law, unlike what Kelsen argues. According to Aquinas, there are two types of positive law distinguished by their relations to natural law: (i) the sort of law which is derived from natural law by a process analogous to deduction of demonstrative conclusions from general principles (such as the norm prohibiting killing); and (ii) rules which are ‘derived from natural law like implementations [determinationes] of general directives’ (these also correspond to Hooker’s two categories of laws ‘mixedly human’ (i) and ‘merely human laws’ (ii)). While developing the second category of law, the legislator is allowed to go beyond what the natural law maxims say and enjoys ‘the creative freedom of an architect’ in specifying what is required by natural maxims. It can be illustrated, as per Finnis, as follows: by making a door you are guided by the general idea of what a ‘door’ is, but the size, colour, and placement of this door is informed not only by this general idea, but also by other considerations. As a result, ‘the making of the artefact is controlled but not fully determined by the basic idea’. Hence, as per Aquinas, positive law does not just repeat natural law, and positive law adds new rules to those that are already in existence.

However, one can argue that this claim about Kelsen’s account of natural law stands on a weak footing. While Kelsen does not use the word ‘determination’ (or determinatio), his idea does not seem that different from Aquinas’s. While, as quoted above, he indeed refers to the positive law as ‘a copy’ of natural law, his other arguments might suggest that this statement should not be interpreted literally. For example, he says that, on NLT, positive law is an ‘unfolding of [the] basic institutions’ originating in natural law, such as the magistracy, private property, slavery, and marriage. This reminds one of Aquinas’s ‘architect’ account presented above. Moreover, Kelsen scrutinises the possibility of ‘delegation’ accorded by natural law to positive law (‘for instance, public authority has been instituted by God’), which suggests a more complicated relationship than mere replication of positive law by natural law. Thus, it is not clear whether Kelsen in fact misinterpreted Aquinas on this point.

83 Kelsen, General Theory of Law and State (n 1) 416.
84 Finnis, Natural Law and Natural Rights (n 82) 284.
85 ibid 284.
86 ibid.
87 Kelsen, General Theory of Law and State (n 1) 416.
88 ibid.
89 ibid. Kelsen, however, seems to understand this ‘delegation’ as ‘a norm whereby a supreme authority is empowered to make positive law’, and not a norm giving this authority any directions on how to proceed, which shows an incomplete grasp of Aquinas’s argument.
90 ibid 412.
Moreover, even if Finnis’s objection were true, it would have little immediate consequence for the Pandora’s Box Objection. It is correct that, on his version, the constraint provided by natural law is in fact weaker as it allows for the existence of many possible and equally valid realizations of natural law in the form of more concrete positive laws. But even on this account, natural law still puts limits on valid positive law – even if positive law can go beyond what natural law says directly, it should still be in conformity with it. Aquinas, for instance, said that ‘every law laid down by men has the character of law just in so far as it is derived from natural law’. Finnis argues that unjust law is not law in the focal sense but still has intrasystemic legal validity – and he interprets Aquinas as supporting this view. Nonetheless, natural law still acts as a moral constraint and, more importantly, justification of positive law. Therefore, the duality of constraint and justification that marks NLT still exists in what Finnis sees to be an ‘authentic’ natural law doctrine. Hence, if we agree with Kelsen’s rejection of natural law’s existence, the Pandora’s Box Objection still stands. Even though natural law no longer determines positive law to the full extent, it still fetters and justifies its content. Therefore, the possibility of automatically justifying positive law by supposing it has a natural law foundation, which Kelsen described in the Pandora’s Box Objection, is a danger that may persist even in NLT as defined by Finnis.

**Coordination problems – a way out**

Thus, it seems like, on its surface, the appeal to Aquinas does not change the viability of the Pandora’s Box Objection. However, while Finnis’s objection might be weak, it forces us to consider another side to the Pandora’s Box Objection. In doing so, we should turn to the reasons Aquinas provided for expanding positive law beyond mere deduction from natural law. Kelsen asks: ‘why should a human-arbitrary order be needed for the regulation of human conduct, if just regulation can be founded in an order “natural”, evident to all and in harmony with what all men of good will would propose?’ Aquinas (as restated by Finnis) answers that: (i) the natural law on its own does not provide solutions to most or all coordination problems; and (ii) selfish people who do not desire to act in according to natural law need compulsion which is only provided via positive law mechanisms. The discussion of coordination problems and the guiding force of law – since coercion is meaningless without law being able to guide people into making certain choices – is of much interest, as positive law’s function of resolving said problems provides an additional constraint on the content of positive law independent of natural law principles. The argument goes as follows. As per Aquinas, the legislator enjoys freedom in building the positive law within the bounds set by natural law. However, not all legislative choices that are determinationes of natural law would be equally desirable and

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91 Chiassoni argues that it does not impact Kelsen’s argument against natural law’s objectivity either. Chiassoni (n 3) 158–62.
92 Finnis, *Natural Law and Natural Rights* (n 82) 285.
93 Ibid 363–64. Conversely, Finnis can also be seen saying that ‘unjust laws are not laws’, although this might merely mean that they are not the central case of law – see John Finnis, ‘Law and What I Truly Should Decide’ (2003) 48 The American Journal of Jurisprudence 107, 114.
95 Finnis, *Natural Law and Natural Rights* (n 82) 28.
valuable. Finnis notes that even in case of an agreement on the common good and commitment to its realisation, individuals will have multiple diverse ways of approaching the common good that will need to be reconciled with each other to prevent chaos and achieve the common good in a systematic way. In other words, there is a coordination problem. Legal authority is presented as being needed for resolving coordination problems by providing uniform instructions so members of a community can coordinate these actions. In addition, in order for law to be able to coerce selfish agents into doing something, it should be able to make clear, uniform instructions in the same way because arbitrary force would be unable to provide the desired result of getting the subjects to conform to law. Hence, determinatio is further fettered by the need to choose an implementation of a general principle that will resolve coordination problems.

**The content of controls on determinatio**

The next step is to determine what these fetters are and what is their effect on the content of law, whether they are different from natural law principles, and, most importantly, if they can be objectively deduced in the way, according to Kelsen, most natural law principles cannot. I will consider the ‘thin’ or ‘formalistic’ conception of the Rule of Law. It can be expressed, for instance, by the eight desiderata referred to by Fuller: rules of law shall be general, publicly promulgated, prospective, clear, free of contradictions, stable, possible to obey, and administered in a way that does not diverge from their apparent meaning. As the Rule of Law requirements guarantee clearer and more certain instructions levelled at law’s subject that makes it easier for them to conform to law, they secure greater conformity with legal rules and thus greater effectiveness of the legal system as a project serving certain ends. Coordination problems expose it further: clearer and more stable authoritative directives are operationally better in securing prompt and uniform responses to conundrums caused by the multitude of possible choices. Hence, one can conclude that following the Rule of Law desiderata is essential for establishing a stable regime. Not only that, but some minimal adherence to the Rule of Law is required for law to exist as law. Fuller makes this point by imagining failure to make law when his eight desiderata are not complied with to any degree. Raz follows by saying that ‘[a] knife is not a knife unless it has some ability to cut … [the] law to be law must be capable of guiding behaviour, however inefficiently’. Therefore, the Rule of Law requirements determine what law is effective, and what is capable of being law.

Adherence to the Rule of Law thus has some bearing on law’s effectiveness and validity. However, one can ask a further question about whether the Rule of Law morally improves its content. Fuller implies that it does when he notes that, as a matter of historical fact, you cannot find a tyranny that follows the Rule of Law requirement. However, this is

97Finnis, *Natural Law and Natural Rights* (n 82) 231.
98ibid 232.
99Fuller (n 76) 33.
100Joseph Raz, ‘The Rule of Law and Its Virtue’ in *The Authority of Law: Essays on Law and Morality* (Clarendon Press; OUP 1979), 225. I note revisions of the original rule of law concept made in *The Law’s Own Virtue* (2018), and in this paper I refer solely to Raz’s view of the rule of law prior to these revisions.
101Fuller (n 76) 33.
102Raz, ‘The Rule of Law and Its Virtue’ (n 100) 226.
103As noted in Finnis, *Natural Law and Natural Rights* (n 82) 273.
controversial and has since been challenged. Hart, for example, points out that effectiveness obtained by virtue of compliance with the Rule of Law can be used not only for good, but for wicked purposes.  

104 Similarly, Raz compares the Rule of Law to the sharpness of a knife – it merely determines law’s ability to rule as something that can be used for both morally good and bad ends, similarly to how a sharp knife can be used for both craft and murder.  

105 Still, there is a balance between the views expressed by Fuller and his opponents. Firstly, the Rule of Law, according to Raz, enhances individual autonomy no matter the content of laws in question, as it allows law’s subjects to plan their lives with more certainty.  

106 Secondly, as Finnis points out, the Rule of Law tends to mitigate the tyrannical potential of law as it restricts the tyrant’s freedom of manoeuvre by imposing restrictions on form in which his power can be deployed.  

107 Therefore, the Rule of Law is more than a functional necessity – in two ways discussed above it can improve moral outcomes even if the Rule of Law ideal is employed for immoral ends.

**Pandora’s Box revisited**

To conclude, according to NLT, the making of positive law is determined not only by the natural law rules, but, in addition, principles binding legislation and application of rules in case of *determinatio* such as the maxims of the Rule of Law that affect positive law’s effectiveness and to some extent its moral content. These demands are ultimately derived from scientific facts about human nature (namely that one is more likely to follow instructions which are, for example, clearly formulated) and thus are discoverable by reason. Thus, unlike natural law restrictions, they are acknowledged by Kelsen: even though he does not directly address the Rule of Law question, he accepts some of the Rule of Law demands, such as that judge-made law is conditioned on a ‘a general norm of adjective law by which the judicial power is delegated to courts’, or it would be impossible to recognise judicial decisions as law.  

108 This weakens the Pandora’s Box Objection since it suggests that there are some immutable rules affecting the content of positive law even if there is no such thing as objective natural law. While the content of Soviet law could be variable according to whatever justification the public authorities put forward as ‘natural law’, it is still dependent on other fetters that relate to minimal effectiveness, and thus minimal existence, of the legal system.

**Communist theory of law and determinatio fetters**

Naturally, the next step in our inquiry is to ask whether or not CTL allows for the existence of fetters on the content of law that are determined by the need of law to perform its function of guiding behaviour and resolving coordination problems. Firstly, CTL sees the function of law as being different and much more narrow. Secondly, accordingly, CTL has no

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105 Raz, ‘The Rule of Law and Its Virtue’ (n 100) 226.
106 ibid 210. A similar argument was made by Finnis who referred to the Rule of Law as embodying our ‘dignity’ as ‘responsible agents’: Finnis, *Natural Law and Natural Rights* (n 82) 272.
107 Finnis, *Natural Law and Natural Rights* (n 82) 273–74.
place for law under Communism. Thirdly, and consequently, forward-looking CTL does not see the Rule of Law desiderata as necessary. As a result, CTL is inconsistent with the Pandora’s Box Objection.

**Function of law**

First of all, the rule of law argument as described above is based on a presumption that the role or the function of legal system is to regulate interpersonal conduct and provide guidance in case of coordination problems. The CTL, however, perceived this function differently. Marx and Engels viewed law’s superstructure as a tool of class oppression: law appeared to promote the interests of dominant class by both coercing the exploited class through sanctions and covering the upper class’s demands in the cloak of an ideology of legality. Thus, the role of law was formulated much more narrowly and less neutrally than in the account considered above. Pashukanis’s description of what law existed to be was equally narrow – he saw it as mediating the commodity exchange under the capitalist regime. Once again, law was seen as serving a narrow role peculiar to a certain economic arrangement. Vyshinsky, in his appeal to an independent concept of socialist law and develop a forward-looking rather than a backward-looking CTL, still formulated its role narrowly as shaping public consciousness in the way consistent with the Communist ideal for a limited period of time until the public becomes accustomed to the new way of life. It is clear that neither Marx and Engels nor Pashukanis and Vyshinsky shared the NLT’s perception of law as existing to guide conduct irrespective of societal conditions.

**Withering away**

The aforementioned is also reflected in all theorists’ agreement that law and state would wither away under Communism: because it would not separate the citizenry into dominant and dominated classes (Marx and Engels), because it would exclude capitalist exchange of goods (Pashukanis), or because law’s subjects would become accustomed to Communist ideals so law would no longer be needed (Vyshinsky). In all theories, Communism is akin to Raz’s ‘society of angels’ – a society in which some functions of legal orders (in Raz’s formulation, coercing citizens into obeying certain rules even if they do not want to do so) become redundant. However, unlike Raz who still saw the need for law as a solution for coordination problems in such a society, Communist theorists excluded this function. Even if they contemplated the need for the existence of certain rules regulating behaviour even in Communist societies, they located those rules outside law. For instance, Pashukanis talks about ‘technical’ rules that are different from legal rules. Are these quasi-legal rules just merely legal rules named otherwise? This interpretation is possible but not conclusive since law is not the only way of regulating conduct – these ‘technical rules’ can be akin to moral rules, customs, or religious rules and be totally devoid of their legal character.

109 Rab, *Practical Reason and Norms* (n 81) 159.
110A similar observation was made by Leiter (n 48) 1182.
111 Raz, *Practical Reason and Norms* (n 81) 159.
The rule of law disappears

Hence, if the function of law is reduced to something narrow and temporary, the need for the Rule of Law fetters as stemming from the wider regulatory function disappears. While, in the backward-looking CTL, the Rule of Law may play a role in making law more serviceable to the ruling class by being a more effective guiding tool, the whole institution of law, including the Rule of Law, needs to be dismantled. Hence, since law needs weakening and not strengthening, the opposite of the Rule of Law may be required to achieve the Communist ideal. However, Vyshinsky’s forward-looking theory remains an exception – since the withering of the state is based on the effectiveness of socialist law controls that is needed to create customary rules and base habitual obedience of them, the Rule of Law, as a condition of such effectiveness, is needed in order to reach the ultimate goal of the legal system. Still, there are two caveats that make Vyshinsky’s theory different from, say, Raz’s or Fuller’s. Firstly, the Rule of Law is required not in any legal system, but in a system of socialist law on the road to Communism – in ‘bourgeois’ societies, it still needs to be dismantled. This is why Vyshinsky does not talk about the Rule of Law itself, but refers to ‘socialist legality’, or the rule of socialist law: ‘Soviet state activity is carried into effect on the basis of socialist legality, its most important principle’. On the one hand, ‘socialist legality’ rejects reduction of law to politics characteristic of previous Soviet legal thought, rejects ‘arbitrary perversity and lawlessness’ pertaining to bourgeois states, and recognises that ‘all administrative acts must be in conformity with law’. On the other hand, however, it differs from the standard Rule of Law requirements by being valuable only by virtue of advancing socialist policy. Thus, Vyshinsky’s theory is more in line with the Hartian objection to the universal moral virtue of the Rule of Law, as it only sees the value in the Rule of Law when law serves goals that are socially desirable, rather than valuing it regardless of the aims that it serves. Secondly, the Rule of Law’s virtue is temporary and its demands are obsolete when Communism is reached, while Raz and Fuller saw the Rule of Law to be a more prolonged ideal necessary at all stages of society.

The Pandora’s Box Objection remains

Therefore, under the forward-looking CTL, there are no external fetters on the content of law apart from ‘socialist legality’, which was different from the classic Rule of Law demands. Even though ‘socialist legality’ places constraints on the content of law for a limited period, it is not independent from one’s vision of an objective moral ideal. ‘Socialist legality’ is the rule of a specific kind of law which is determined to be morally superior to capitalist law based on the pre-existing notion of objective morality. Therefore, forward-looking CTL does not include any fetters independent of ‘natural law’ and is thus subject to a full-fledged Pandora’s Box Objection.

Conclusion

This article has placed The Communist Theory of Law in the context of Kelsen’s argument that NLT, despite claiming to impose moral checks on the content of positive law, was

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112Vyshinsky (n 67) 369.
113Kelsen, Communist Theory of Law (n 2) 122.
114Vyshinsky (n 67) 369.
115ibid.
capable of empowering evil laws and regimes. Analysing how the Tsarist rule, overthrown as unjust, was replaced by an equally dictatorial Soviet regime, seems to illustrate it perfectly. In writing this paper, I did not plan to challenge Kelsen’s skepticism of objective morality or his presumption of the immorality of Soviet legal system. Instead, I followed the internal logic of the Pandora’s Box Objection and considered a potential external challenge raised by Finnis’s exploration of the issue. I have come to the following conclusions:

Firstly, while the Objection appears to be based on presuming a certain objective standard by which legal systems can be characterised as ‘good’ or ‘evil’, Kelsen’s skepticism of objective morality is not an obstacle to its success. Instead of criticising Soviet law and other cases of ‘NLT gone wrong’ based on a specific moral ideal, Kelsen emphasises how the NLT fails to prevent moral indeterminacy of positive law.

Secondly, Finnis’s version of NLT proper, if different from Kelsen’s model, is still vulnerable to the Pandora’s Box Objection, since it still refers to objective natural law and a relationship of hierarchical superiority, in which natural law determines and justifies the content of positive law. However, Finnis’s appeal to St. Thomas Aquinas can give rise to an external challenge to the Pandora’s Box Objection. Aquinas’s focus on resolution of coordination problems as the function of law can lead us to other ‘natural’ fetters that are constant regardless of one’s subjective morality, such as the minimal Rule of Law requirements. These fetters, drawn from the practical needs of law, protect positive law from arbitrariness to some extent and weaken the Pandora’s Box Objection.

Thirdly and most importantly, the Pandora’s Box Objection applies only to forward-looking (Vyshinsky’s) CTL, rendering the initial challenge less powerful. Still, forward-looking CTL survives the Finnisian challenge, as it accommodates neither the coordination function of law nor the Rule of Law ideal.

What implications does it have for wider debates surrounding the nature of law? Even though the Pandora’s Box Objection only applies to CTL in part, this limited relevance still shows that Kelsen’s argument should be taken seriously as a challenge to criticisms of separation between law and morality. The Communist Theory of Law is not only valuable as a historical artefact documenting the development of CTL and its contemporary critiques, but can be a useful aid in examining the equally revolutionary and conservative potential of natural law, the danger of ‘automatic justification’ of positive law, the relationship between law and morality, and the importance of the Rule of Law.

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