The Soviet Concept of Law

Cover Page Footnote
Assistant in Foreign law, Library of Congress, Washington, D. C. The writer considers it to be his pleasant duty to express deep appreciation of the valuable guidance of Professor Walter B. Kennedy of Fordham law School in the preparation of this paper. Thanks to his generous advice and hearty cooperation the explanation of an intricate matter was brought before the American reader.

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THE SOVIET CONCEPT OF LAW

VLADIMIR GSOVSKI†

Glancing into our social, political and economic future, former Dean Pound recently warned: "One question, as men argue today, is whether that future will call for a constitution or law or laws at all.” The possibility of an approaching agitation for the ouster of law is fairly deducible from current proposals of legal reformers.

In these uncertain times, it is of vital interest to the American Bench and Bar to study the purposeful offensive in Soviet Russia directed to the “withering away of all law.” How fares this experiment to end all law? Vladimir Gsovski, relying exclusively upon soviet authorities, reviews the soviet concept of law from the Revolution to the present day.—EDITORIAL NOTE.

I

INTRODUCTION

Our jurisprudence is now in the throes of re-examination and revaluation. Many basic concepts accepted until recently as the preconceived principles of legal reasoning are challenged both in practice and in theory. A tendency to treat some of these principles as an outworn burden rather than as a valuable legacy of the past, is very much in evidence. The authority of Law and Rights as independent guiding principles is occasionally overshadowed by extra-legal considerations, social and economic. “Legal justice” is in some quarters frowned upon as an obstacle to social justice. Economics, psychology and sociology are called on to help jurisprudence.† It might, therefore, be of interest to

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The writer considers it to be his pleasant duty to express deep appreciation of the valuable guidance of Professor Walter B. Kennedy of Fordham Law School in the preparation of this paper. Thanks to his generous advice and hearty cooperation the explanation of an intricate matter was brought before the American reader.

It is believed that the reader will be assisted by an explanation of the nature of the main sources drawn upon and referred to hereafter. A list of these sources, prefixed by the abbreviated name which will be used in place of the full title, will be found in the Appendix, infra p. 43.

the inquiring mind of an American lawyer to consider the destiny of
the traditional legal concepts in a country where they have been denied
any authority whatsoever. Such is the case of Soviet Russia, because
the soviet leaders sought not only to get along without such traditional
legal institutions as property and inheritance but to get rid of law as
a guiding principle. It is the aim of this paper to discuss the problem
of whether traditional legal concepts, legal technique, and judicial proc-
cess withstood the test of social experiment in Russia.

A. General Survey of Peculiarities of Soviet Law

It is true that there is no single or unanimous concept of what we
call law which could be subject to a philosophic comparison with the
soviet theories. The numerous definitions of law to be found in tra-
ditional jurisprudence are far from being in agreement. Notwithstand-
ing all the varieties of theoretic opinions, however, there are some prag-
nematic elements of law which enjoy a common recognition. When speak-
ing of law we have in mind rules of human action enforced by the gov-
ernment; in other words, compulsory rules. Then our modern concept
of law implies also a recognition of somebody’s rights and primarily those
of the individual. For the sake of the protection of these rights the
rules of law are assumed to be binding upon the state no less than upon
the populace. In addition, law is still for us, as it was for Aristotle,
"the mean," the impartial something serving the common cause; at
least that is the purpose—the ideal—of it. Finally, the Anglo-American
concept emphasizes that the rules of law are those uniformly recognized
by the courts of justice.

Yet, the soviet idea of law is strikingly at variance in all these points.
Even the first obvious element, the coercive character of law, was ne-
eglected by the communists at the beginning, but the practical value of
it was soon realized and used. With regard to the rights of individuals
the soviet laws displayed a rather vague attitude which varied con-
siderably in different periods of the soviet regime. However, the pro-
tection of the individual was considered secondary because, using the
words of Krylenko, "in all instances the interests of the whole, the duty
to safeguard the social order are to be the decisive criteria" in the

2. ARISTOTLE, DE REPUBLICA, IV, 1: "In seeking for justice men seek for the mean or
neutral and law is the mean."
3. E.g., see: "The law may be defined as the body of principles recognized and applied
by the State in the Administration of justice . . . and acted on by courts of justices," SALMOND, JURISPRUDENCE (7th ed. 1924) §§ 15, 39. "The law of the State or of any or-
ganized body of men is composed of the rules which the courts, that is the judicial organs
of that body, lay down for the determination of legal rights and duties." GRAY, THE
NATURE AND SOURCES OF LAW (2d ed. 1927) 84.
operation of the soviet law. Again, in accordance with the Marxian doctrine of historic materialism and class struggle, the impartiality of law is denied altogether by the communists. Any law is for them in the first place the law of the ruling economic class; impartial justice is merely an illusion and law reflects actually the class concept of justice. "Your law," said Karl Marx, addressing the bourgeoisie, "is the will of your class given the authority of a statute." Similarly, Lenin taught that law is "the expression of the will of the classes which had won the victory and kept the governmental power in their hands." The Soviet law, according to Gintsburg, a soviet authority, "corresponds to the interests of the proletariat, organized into a ruling class." The communist party is supposed to be the sole representative of these interests. "Hence every problem of the soviet civil law must be treated from the point of view of the interest of the ruling class, from the point of view of the policy of the [communist] Party (the vanguard of the class) and the government; it must be presented in the Party light and get a Party decision."

Thus, the soviet courts were designed to render a specific "class justice" and be guided in that by the communist party. In the minds of the soviet leaders the soviet court is an organ of the dictatorship of the proletariat exercised by the communist party. "The duties of the court are identical in content with those of the entire governmental machinery, the court has no specific duty making it different from other organs of governmental power or constituting its 'particular nature' . . . ." The courts, like the organs of administration, are called upon to carry out the policy of the soviet government and the communist party as well as the Marx-Lenin doctrine.

6. PASHURANSKI, DOCTRINE 29.
7. "...Euer Recht nur zum Gesetz erhabene Wille eurer Klasse ist..." MARX AND ENGELS, MANIFEST DER KOMMUNISTISCHEN PARTEI (1848), 6 MARX AND ENGELS, GESELLSCHAFTSVERHÄLTNISSE (1932) Abt. 1, p. 541. The translation of this passage is by the present writer and corresponds to the Russian translation as quoted by the soviet writers. Published English translations vary and are less accurate. ESSENTIALS OF MARX (Lee's ed. 1926) 48, reads: "Your jurisprudence is but the will of your class made into a law." MARX AND ENGELS, COMMUNIST MANIFESTO (Riazanoff's ed. 1935) 47, reads: "Your 'right' is only the will of your class writ large as law."
8. LENIN, COLLECTED WORKS (Russ. 2d ed. 1929-32) 418.
9. GINTSBERG, COURSE 44. Gintsburg is one of the leaders of the Institute of Soviet Law and has been a recognized authority on civil law since 1929.
11. GINTSBERG, COURSE 121, 122, 128. "The guidance by the [communist] party of the judicial activities is expressed in that it establishes the general principle of judicial policy,
Consequently, the communists looked upon the legal concepts of the traditional jurisprudence as a manifestation of the bourgeois frame of mind. These antiquated concepts should be replaced by new ones derived from the Marxian doctrine alone, leaving aside the legacy of the legal philosophy of the past; theoretic speculation should be an interpretation or further development of Marxian principles rather than a product of free thought. However, Marx and Engels no more than hinted at the concrete problems of law in their writings, which were primarily economic and sociological. Therefore, strenuous efforts were made by the soviet theorists to find a specific Marxian theory of law and to establish their own pragmatic general concept of soviet law as a guide for the practice of courts and administrative authorities.

Although the soviet writers on these subjects sought to derive their opinions from one theoretic source—Marxism—no single soviet doctrine of law has been achieved so far. The sayings of Marx and Engels proved to be insufficient to build up a legal philosophy unanimously adopted by their soviet followers. The soviet jurists had to resort to jurisprudence in general although they mistrusted it. In this setting one cannot speak of a soviet theory of law but rather of a number of successive attempts to establish such a theory; especially so because the opinion of the soviet leaders on the role of law in soviet life varied in different periods of the soviet regime. Marxian philosophy and soviet current policy were two potent—though occasionally contradictory—factors which have influenced theoretic speculations of the soviet jurists. The history of sovietism discloses continuous efforts to uphold Marxism and to get rid of "bourgeois" legal concepts; but there is a marked difference between the theoretic "ouster" of law and the achievement of this objective in practice. Successive periods will disclose the stubbornness of traditional law, its rise and fall, ranging from complete abolition to virtual recognition; and the ultimate outcome of this ambitious program of the soviet state to outlaw all law is still in doubt. A brief outline of the starting point of the soviet writers' search for a theory of law—Marx' and Engels' teachings of law—will serve to introduce the exposition of the soviet theories.

supervises their proper fulfillment and controls the judicial personnel." Vyshinsky, Course 24. This has not been changed with the new Constitution of 1936, although § 112 provides: "Judges are independent and subject only to the law." However, this clause is interpreted by Vyshinsky, the present attorney-general, in his recent textbook on judicial procedure, as a mere independence of the judge from personal and local influences, and not from politics, politi̇k or administration. Vyshinsky, Course (1936) 21.

12. "Marxism declares a merciless war against the bourgeois legal concepts and the dogmatic method in jurisprudence." Gentsburg, Course 42; see also Stuchka, The Revolutionary Role of Law and State (Russ. ed. 1921) 3. Stuchka was the recently deceased President of the Supreme Court of the R. S. F. S. R., at one time Commissar of Justice, a prominent and prolific writer on legal subjects, and Latvian by nationality.
B. Marx and Engels on Law

The Marxian background of the communist jurists suggested undermining the importance of law as an independent factor, regarding law primarily as a by-product of economic conditions. According to Marx and Engels, the law as well as the whole of spiritual civilization is a "superstructure" erected over the material "basis" which, in their opinion, is formed by the relationships of men in the process of the production of commodities. To quote their most important statements on the subject:

"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."13

"Society is not based upon law; this is a juridical fiction. Just the reverse is the truth. Law rests upon society, it must be the expression of the general interests that spring from the material production of a given society."14

"In the social production which men carry on, they enter into definite relations that are indispensable and independent of their will; these relations of production correspond to a definite stage of development of their material productive forces. The sum or total of these relations of production constitutes the economic structure of the society—the real foundation, on which rise legal and political superstructures and to which correspond definite forms of social consciousness . . . . With the change of the economic foundation the entire immense superstructure is more or less rapidly transformed."15

Thus economic factors shape and determine the form and content of law. Everything outside of economy appears to be "the political, legal, and other ideological conceptions"16 by which men become conscious of the material forces of production and the existing or coming relations of production. According to Engels, "The jurist imagines that he is operating with a priori principles whereas they are really only economic reflexes."17

"In every historical epoch, the prevailing mode of economic production and exchange, and the social organization necessarily following from it, form the basis upon which is built up and from which alone can be explained the political and intellectual history of that epoch."18

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18. Engels, Preface to Communist Manifesto, dated January 30, 1888, in Essentials of Marx (Lee's ed. 1926) at 28. A similar idea is expressed in Engels' 1893 preface to
However, such symbols as "legal superstructure" or "economic foundation" used in the quoted passages as an explanation for the connection of law and economy, are substantially metaphorical and not explanatory. When speaking about economic, political or legal institutions we deal with certain conventional abstractions. In life they all are interwoven. For example, one cannot accurately explain the law of copyright by considering the economic factor alone; social, legal and aesthetic arguments are available to justify the protection of an author's creative writing. When we class a certain fact as pertaining to the economic sphere and not to the law, it means merely that we emphasize the economic aspect of this fact, or study it from the economic point of view rather than find it actually separated from facts which we class with law, politics, etc. Thus, economy is no less a product of human reasoning than law or philosophy and no more material or real. Marx and Engels, by elevating economics above all other social relations, have over-simplified life and its many ramifications.

After all, Marx and Engels did not define what they meant by those prime factors which they called "mode of economic production," "relations of production," "productive forces," or "material productive forces" in the passages above quoted. These terms are not at all clear by themselves, and the studies made by Marxists did not elucidate them. Indeed, Marx and Engels themselves occasionally classed with these factors phenomena which are rather remote from production. Thus, writing in a letter, Engels included in economic conditions not only "the entire technique of production and transportation" but also geographic conditions, race and the remnants of the former phases of economic development. Marx stated that "of all the productive forces the revolutionary class represents the most productive forces." Moreover, the life careers of Marx and Engels lasted for nearly a half century and their views underwent a substantial modification. From the statements quoted above, it seems that originally they assumed a more or less dominant causal connection between the "economic basis" and the legal, political and other "superstructures," the former being the cause and the latter the effect. In the letters of Engels, however, written not long before his death, he admitted that he and Marx over-

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Communist Manifesto (English translation of Riazanoff's ed., London, 1935) 261: "The method of production and the organization of social life inevitably arising therefrom, constitute in every historical epoch the foundation upon which is built the political intellectual history of that epoch."


20. "De tous les instruments de production, le plus grand pouvoir productif, c'est la classe révolutionnaire elle-même." Marx, Misère de la Philosophie (1847) c. II, 5, 6; 6 Marx and Engels, Gesamtausgabe (1932) Abt. 1, 227.
emphasized the importance of economic factors and sought to introduce
the following reservation to their teachings:

"It is not that the economic situation is the cause, and the only active one,
while everything else has a passive effect. There is, rather, mutual action
on the basis of the economic necessity, which always asserts itself ultimately."
Though the material form of existence is the *primum agens* this does not ex-
clude spheres of ideas from reacting upon it in their turn, though with a
secondary effect."22

"The economic situation is the basis, but various elements of the super-
structure are in many cases influential upon the course of historical struggle;
these elements are: the political forms of the class war and its results, the
constitutions established by the victorious class after its victory, etc., legal
forms and then even the reflexes of these actual struggles in the minds of the
participants, i.e., the political, juridical and philosophical theories, religious
ideas and their further development into systems of dogma."23

Thus the relation between the economic basis and the superstructures
of law is far from simple in the Marxian doctrine. From Engels' state-
ment, it follows that though dependent on economy as the cause, the law,
though being the effect, may in its turn become the cause. In this way
the metaphors of "economic basis" and "legal superstructure" presented
in fact new and contradictory problems yet to be solved. However, it is
pertinent to note that these basic notions of Marx and Engels played an
important part in determining the general chain of reasoning on law by
the soviet Marxists and centered their search for the key to law in the
sphere of economics and material economic conflicts. A Marxist should,
according to Professor Reisner, "ascertain the specific relation between
the law and the economic basis,"24 or according to Pashukanis, "offer a
materialistic interpretation" to the phenomenon of law.25 Let us now
turn to the first attempts by soviet jurists to translate the theories of
Marx and Engels into the philosophy of law of the proletarian republic.

II

FIRST SOVIET THEORIES OF LAW (1918-1929)

Soviet legal writers made a number of attempts to offer a constructive
soviet theory of law which would answer all these questions. The writings

21. Letter by Engles in *Marx and Engels*, op. cit. supra note 16, at 517. See also
his Letter to Mehring of July 14, 1893, id. at 511.
22. Engels, Letter to Conrad Schmidt of August 5, 1890, id. at 472.
23. Engels, Letter to J. Bloch of September 21, 1890, id. at 475; see also his Letter to
Conrad Schmidt of October 24, 1891, id. at 480, 482.
24. Reisner, *Theory of Law by Comrade Stuchka*, (1922) 1 Messenger of the Com-
munist Academy 173. See also Stuchka's reply, *Defense of Revolutionary Marxian Con-
cept of Law* (1923) 3 Messenger of the Communist Academy 159-169.
of Stuchka and Pashukanis exceeded the others in importance during this first period of the Soviet regime because the rest of the recognized Soviet writers in the field of philosophy of law either followed Stuchka, like Povolotsky;26 or followed Pashukanis, like Rezunov and Razumovsky;27 or else confined themselves to mere criticism of the "bourgeois" theories of law, like Ilyinsky.28 Professor Reisner's writings should also be mentioned though his views did not finally gain official Soviet recognition, because he was the only Russian Marxist who tried before the revolution to apply Marxism in legal philosophy.

Stuchka, one of the first commissars of justice, offered a definition of law which was included in an early piece of Soviet legislation and was as follows:

"The law is a system (order) of social relations corresponding to the interests of the ruling class and protected by the organized force of this class (the State)."29

The author of the definition himself, Stuchka, admitted that it is based upon the "revolutionary feeling rather than upon theoretic study of the problem."30 Yet he considered that it served the purpose of a practical guide. To some extent he admitted that in his definition of law the concepts of the German jurisprudence were virtually couched in Marxian terms.31

26. POVOLOTSKY, MARXIAN THEORY OF LAW (Russian 2d ed. 1925).
27. REZUNOV, MARXISM AND THE PSYCHOLOGICAL SCHOOL IN LAW (Russian ed. 1931); RAZUMOVSKY, THE PROBLEMS OF A MARXIAN THEORY OF LAW (Russian ed. 1925).
28. ILYINSKY (BRUK), INTRODUCTION TO THE STUDY OF SOVIET LAW (Russian ed. 1925); id., LAW AND MORES (Russian ed. 1925).
30. Id. at 13, n. 1; STUCHKA, THIRTEEN YEARS OF FIGHT FOR THE REVOLUTIONARY MARXIAN THEORY OF LAW (1931) 2. To be sure, Stuchka's definition is an unfortunate paraphrase of that by Rudolf von Jhering, who defined "law with reference to its content as the form of security of the conditions of social life procured by the power of the state." JHERING, LAW AS A MEANS TO AN END (Husek's translation, 1923) 330. So Jhering offered this definition not as an exhaustive answer to the question of what law is, but as a characteristic of law by its content. However, Stuchka overlooked other elements and aspects of law and state pointed out by Jhering [id. at 314, 337] and, generally speaking, made his formula more narrow and loose by introducing "the class point of view." According to Jhering, law secures "the conditions of social life" in general while according to Stuchka "law is a system of social relations" necessarily "corresponding to the interests of the ruling economic class" which is not always the case. For Jhering, law is protected by the State; for Stuchka, by the "force of the ruling class." Finally, as was pointed out by Reisner and Pashukanis, Stuchka's definition does not indicate any specific criteria of law as distinguished from other social relations. If it is true that law is "a system or order of social relations," what is its specific characteristic as a special form or kind of these relations? Without an answer to this, they argued, the whole formula sounded
THE SOVIET CONCEPT OF LAW

Among the soviet writers, Professors Reisner and Pashukanis (in his early works) gave the following criticism of Stuchka's definition:

The protection of the interests of the ruling class does not constitute, according to Professor Reisner, any specific criterion of law. On the one hand the protection of the interests of the dominant economic class is not necessarily secured by law, and on the other hand the interests of such a class are not the only interests protected by law. A given law does not cease to be the law even if it protects the interests of the oppressed classes, e.g., the labor legislation of the capitalist countries; or if it pertains to a neutral sphere, e.g., public health or traffic regulations. Thus, according to Professor Reisner, though any law is a class law in that it represents an ideology of a class or group, it is not necessarily the law of the ruling class. Nor does it operate to protect the governing class. Law is a compromise "made of odds and ends of the ideas of various classes, a multicolored tissue which is created on the basis of the legal demands of various social classes." The soviet law was, according to him, the co-existence of the bourgeois class law, the proletarian class law and the peasant class law.

With reference to the letters of Engels, Reisner emphasized that for the founders of Marxism, law was primarily an "ideological conception" and must be studied by a Marxist as such. A Marxist should find, according to Professor Reisner, "the specific criteria of law as different from other ideological superstructures," over the economic basis. His views were not shared by other communist writers; they refused to see in law merely an ideology and scorned Professor Reisner's views as an undue attempt to develop the Marxian theory of law along the lines of idealistic, bourgeois philosophy.

The writings of Pashukanis, another soviet theorist, are unsystematic; his conclusions are rather indefinite and obscure and, besides, he changed his views considerably in 1930 and in 1936. Therefore in the attempt to give a clear resumé of his views these defects could not be avoided. Pashukanis agreed with Stuchka that law is a form of protection to the ruling economic class, yet he argued that this protection constitutes the contents of law while the Marxian doctrine must "give a materialistic interpretation" to the phenomenon of law as a form of this protection.

Under the direct influence of the masters of the pre-revolutionary Russian and German legal thought, Korkunov and Petrajicki (Russians), and Jellinek and Laband (Germans), Pashukanis started with the propo-
sition that rights are the postulates of law. But he sought to give to the origin of rights an economic or materialistic interpretation in the Marxian sense.

The idea of rights and consequently of law, appears, according to Pashukanis, in the mind of the people at that stage of economic development, where the exchange of commodities and production for the market prevail over production for one's own consumption. In order to effectuate

35. PASHUKANIS, THEORY, 37, 55; see also id. at 36, 41, 51-60, 90. A few comparisons suffice to indicate the source of these ideas. The distinction between technical and legal rules is from Korkunov: "Rules of law establishing rights and duties must be distinguished from technical rules, which even when they come from the government and are compulsory, are only intended to show the best means of achievement of the object... Rules of expedience would exist even if human interests were not varied and conflicting... even if there were only one human being in the world. Technical rules might exist even then, but law would be out of question. ... Law necessarily presupposes relationship of various interests of several free persons." KORKUNOV, THE UKAS AND THE LAW (Russian ed. 1894) 236-237.

According to Laband: "Law consists in delimitation of the rights and duties of particular persons as against each other; by its nature law presupposes the existence of many persons who may run up against one another." 2 LABAND, DAS STAATSRICHT DES DEUTSCHEN REICHS (1911) 181.

Likewise, Jellinek states: "Any law is a relationship between individuals endowed with rights... a rule is law if it delimits the sphere of the free activities of persons." JELLINEK, GESETZ UND VERORDNUNG (1887) 195; see also id. at 215, 240.

The influence of Korkunov, Laband and Jellinek upon Pashukanis and other soviet legal writers is shown in a most enlightening way in Dobrin's superb study, Soviet Jurisprudence and Socialism, (1936) 52 L. Q. Rev. 402 passim. However, the Marxian aspect of Pashukanis' efforts is left somewhat out of sight by the author as well as the influence by Petrajicki.

Petrajicki was perhaps the most genuine Russian legal philosopher of the pre-war time. His principal works are: INTRODUCTION TO THE STUDY OF LAW (in Russian: 1st ed. 1905, 2d ed. 1907, 3d ed. 1908); THEORY OF LAW AND STATE IN CONNECTION WITH A THEORY OF ETHICS (2 vols., 1st ed. 1907, 2d ed. 1909-10). Petrajicki sought to establish a psychological criterion of legal rules as distinct from bare force, ethical rules and rules of social etiquette. According to Petrajicki, law arises from the feeling of right and duty and the inner compulsion attached to these feelings in the human mind. For him, the bonds of rights and duties between individuals are primarily psychological phenomena, special legal emotions of the persons obligated or authorized by law. By virtue of these emotions in every action, which we consider to be our duty by law, we attribute to somebody the right to demand its performance. A rule of law is, according to Petrajicki, different from a rule of ethics in that the latter is merely outright imperative, that is to say, is a command, while the rule of law is not only imperative but at the same time attributable, that is, it implies a real or imaginary person to whom the authority is attributed to ask the fulfillment of the command. Hence, Petrajicki defined law as an imperative attributive rule. Outer coercion is not a criterion of law, according to him, and the State is not the source of law. Petrajicki advocated the resurrection of natural law in the form of what he called the "intuitive law." Like Petrajicki, Pashukanis entered the analysis of the psychological background of the legal bonds but sought to explain them by means of economics. He also denied natural law theory of inherent rights. A splendid monograph on Petrajicki in English has just appeared; see H. W. Babb, Petzajitskii (1937) 16 B. U. L. Rev. 793.
the exchange, men must appear on the market as owners of commodities, and equally authorized to dispose of them freely. Moreover, the parties to a concrete act of exchange give and receive in their turn equivalent values. Hence, the idea of a contract as a free agreement of wills comes from the barter upon the principle of value for value, and is therefore not a manifestation of justice, but a bare economic necessity. These economic experiences produce, according to Pashukanis, in the minds of the people the idea of an abstract individual endowed with rights and of men being equal in the exercise of their rights, which ideas are postulates of law. "Legal relationship between individuals . . . is merely another side of the products of labor which became commodities" and "the genesis of the legal form is to be found in the relationship of barter." Thus, Pashukanis advanced the opinion that the period of capitalism, of a bourgeois society based upon free production of commodities for the market, is the very period of penetration of the idea of law and rights into regimentation of various fields.

"Only capitalism creates the conditions necessary to enable the juridical element to obtain its highest development in social relation. . . . When the whole economic life is based on the principle of the free agreement of wills, then every social function in some way or other obtains a legal characteristic, that is to say, becomes not a mere social function, but the right of him who exercises the function." What was then the value of law under a regime which was supposed to bring about communism? Pashukanis answered as follows:

"The withering away of the categories of bourgeois law (exactly the categories, and not of this or that particular rule) can under no circumstances mean their replacement by some new categories of proletarian law."

36. Pashukanis, Theory 9, 42, 19, 23, 29, 69 passim, 113. Pashukanis claimed to have followed here the method of inquiry applied by Marx to the analysis of economic phenomena. The following passage, though not referred to by Pashukanis, was probably responsible for his teachings:

"In order that things may enter into relation with each other as commodities, their holders must place themselves in relation to one another, as persons whose will resides in those objects, and must behave in such a way that each does not appropriate the commodity of the other, and part with his own, except by means of an act done by mutual consent. They must, therefore, mutually recognize in each other private proprietor. This juridical relation, which thus expresses itself in a contract, whether such contract be part of a developed legal system or not, is a relation between two wills, and is but the reflex of the real economical relation between the two. It is this economical relation that determines the subject matter comprised in each such juridical act. The persons exist for one another merely as representatives of, and therefore as owners of, commodities." 1 Marx, Capital (tr. by Unterman, Chicago, 1906) 96-97. The same explanation of the phenomenon of law is given by 1 Gentesburg, Course 239 passim. 37. Pashukanis, Theory 19, 57; see also id. at 7, 71.
This meant to Pashukanis:

"the withering away of law in general, that is, the gradual disappearance of the juridical element from human relations.\textsuperscript{38} . . . ethics, law and state, are the forms of a bourgeois society. If the proletariat is forced to use them it does not mean that there is a possibility of a further development of these forms by way of filling them with a socialist content. They are not apt to embrace this content and shall wither away step by step with the realization of socialism. Nevertheless, in the transitory period the proletariat must use in its own class interests these forms inherited from bourgeois society and by this exhaust them. . . . The proletariat must take a sober and critical attitude not only toward the bourgeois state and ethics but also toward its own proletarian state and ethics, i.e., must apprehend the historical necessity of their coming into being and disappearance.\textsuperscript{39}

Pashukanis was not alone among the communist writers in seeing no future for law with the achievement of communism as this idea was, to an extent, suggested by Marx himself. Marx stated that every law “is in general the law of inequality” and thought that when communism is achieved so that everyone shall contribute according to his ability and receive according to his needs “the narrow bourgeois horizon of rights [law] can be left behind.”\textsuperscript{40} The same view was expressed in the soviet decree of 1919 on criminal law. There it was stated that with the advent of communism “the proletariat shall destroy the State as an organization of violence and Law as a function of the state”.\textsuperscript{41} Then there will be no classes, no State and no law. “Communism means,” according to Stuchka, “not the victory of socialist law, but the victory of socialism over any law, since with the abolition of classes with their antagonistic interests law will disappear altogether.”\textsuperscript{42}

Goichbarg, the author of the Soviet Civil Code of 1922, went even further and condemned law as a principle. He said:

“We refuse to see in law an idea useful for the working class. . . . Religion and law are ideologies of the exploiting classes, and the latter gradually took the

\textsuperscript{38} Id. at 22.
\textsuperscript{39} Id. at 104-105.
\textsuperscript{40} MARX, CRITIQUE OF THE GOTAH PROGRAMME (Eng. tr. 1933) 31. Pashukanis believed that “Marx viewed the transition to a developed Communism not as a transition to the new forms of law but as withering away of any legal form whatsoever, as a deliverance from this legacy of the Capitalist epoch which is destined to survive the bourgeoisie itself.” PASHUKANIS, THEORY 23.
\textsuperscript{41} R. S. F. S. R. LAWS (1919) item 590, preamble.
\textsuperscript{42} 3 ENCYCLOPEDIA OF STATE AND LAW (in Russian, 1925-27) 1593. Here is another more recent presentation of the same thought by a minor writer: “The State and the Law are phenomena of a society divided into classes. Therefore abolition of classes, transition from a class society to a classless society means the final withering away of the State and the Law in the higher phase of communism.” Aleshin, Soviet Law and Building Up of Socialism, (1932) SOVIET STATE No. 5/6, 51.
place of the former. . . . At the present time we have to combat the juridical ideology even more than the religious.\textsuperscript{43}

Quite skeptical towards the value of law for the communists was Professor Reisner. He warned against overexaggeration of the necessity of legal formulas for their dictatorship, which is an actual situation.\textsuperscript{44}

Thus, it may be stated that all the leading communists share in one way or another the opinion that there is no future for law under communism. They dispute, however, the time when the disappearance of law is to begin. The question is this: Is there a place for law during the period of transition from capitalism to communism? What is the status of law in the present stage of Soviet Russia, officially termed since 1932 as socialism, the presumed first step of communism?

In this way, theoretic reasoning on the nature of law has involved a practical problem of the function, the pragmatic role of law in the soviet state. Here soviet leaders went through an evolution which has ultimately determined the present development of the soviet theoretic speculation on law in general. Let us follow this evolution from the very beginning of the soviet regime.

III

**PRAGMATIC SOVIET CONCEPT OF LAW**

\textbf{A. Period of Militant Communism (1918-1921)}

1. \textit{General Characteristics of the Period.} In view of the foregoing theories what was the actual attitude of the soviet government to the authority of laws both inherited and newly introduced? The soviet leaders have admitted that when they seized the power in 1917 they had no definite idea as to the status and operation of law under their rule.\textsuperscript{45} As a matter of fact, the first decrees of the soviet government were not intended to possess a seriously meant binding force, even in the eyes of their authors. They were, according to the definition of Trotsky, "the program of the party uttered in the language of power," and as such "rather a means of propaganda than of administration."\textsuperscript{46} In 1917, Lenin thought that:

\begin{quote}
It does not matter that many points in our decrees will never be carried out.
\end{quote}

\textsuperscript{43} Goitevburg, \textit{Economic Law} (Russian 3d ed. 1924) 19, 8.
\textsuperscript{44} "We still do not know whether we need law, and to what extent we need it, and whether it is necessary to gild the proletarian dictatorship and the class interest, for no reason at all, with enigmatic juridical symbols and formulas." Reisner, \textit{op. cit. supra} note 31, at 29 \textit{passim}, 34.
\textsuperscript{46} 2 Trotsky, \textit{My Life} (Russian ed. 1930) 65.
Their task is to teach the masses how to take practical steps... We shall not look at them as at absolute rules to be carried out under all circumstances.147

Yet, though the law is, perhaps, in some fields a product of economic conditions, it was the change in these conditions that the communists aimed at, and there was no way to accomplish this but by compulsory regulation, i.e., by means of law. It should be borne in mind that during the period of so-called militant communism, 1918-1921, an attempt was made to enforce a rigid communist order. The government tried to be the only producer and distributor of commodities. It intended to do away with all private property exceeding the bare consumptive needs. Inheritance was abolished48 as well as ownership of land and buildings in the cities with the exception of very small ones in the towns;49 banks, industry and commerce were nationalized, that is to say, converted into governmental property or monopoly.50 Stocks and bonds were “annulled”51 and savings practically confiscated52. The government claimed monopoly of all crops53 and full control of trade. These measures barred

47. 16 LENIN, COLLECTED WORKS (Russian 1st ed. 1924) 149.
50. As to banks, see decree of December 17, 1917, R. S. F. S. R. LAWS (1917-18) item 150; as to industry, the basic decrees are of June 28, 1918 (large scale industry) [id., item 559] and the decree of the Supreme Economic Council of Nov. 29, 1920 [id., (1920) item 512] which nationalized all the establishments employing over 10 workers or 5 workers using a motor; a number of decrees were issued concerning individual industries [e.g., LAWS (1917-18) item 559, 546]. Commerce by private persons was actually suppressed and besides, by the decree of April 2, 1918, the People's Commissariat for Supplies (Food) was charged with organization of the traffic in commodities. The Commissariat had “to take,” according to the decree of Nov. 21, 1918, “the place of private commerce... providing for all the products for personal consumption and household.” LAWS, (1917-18) item 879.
53. Governmental monopoly of grain trade was declared by the Provisional Government on May 25, 1917. COLLECTION OF LAWS AND ENACTMENTS OF THE Provisional Government (1917) item 487. All surpluses above the producer's own consumptive needs were to be delivered to the State at fixed prices. The standard of these needs was, however, set at a rather high level: 50 pounds of bread grain for each member of the family per month plus about 3 pounds of grits. This law, however, was not enforced. The soviet Law on Socialization of Land (February 19, 1918) R. S. F. S. R. LAWS (1917-18) item 346, confirmed in § 19 the government monopoly of grain trade. By decree of May 9, 1918 [id., item 468], the soviet government set up broader terms for the confiscation
practically any private initiative, extinguished the hitherto existing property rights, and prevented their acquisition in the future.

But the most outstanding feature of this period is that actual dispossession and confiscations were more often made by the individual soviet authorities on their own initiative and were neither based upon nor followed by a decree or any formal act.

This highly decentralized, and one might say disorganized, character of governmental activities of the time was sanctioned by the battle cry, "All power to the local authorities." It was to an extent a concession to the actual situation due to the general disintegration of governmental machinery after the revolution. Many individual provinces declared themselves independent republics and all of them were very loosely connected with the central government.54

However, the immensely diversified practice in the execution of the orders from the central government was a too obvious menace, especially in the face of the armed rebellion of the populace that was going on. An about-face with regard to law was made by Lenin in 1919 after some experience in government, when he stated that "in order to bring an end to Denikin and Kolchak it is necessary to observe strictly our revolutionary order, to observe religiously the laws and instructions of the soviet government, and to watch their observance by all."55 With the same aim, it was ordained by the decree of November 18, 1918:

"To call all the citizens of the Republic, all authorities and officers of the soviet government for a strict observance of the laws of the R. S. F. S. R. and the enactments, resolutions, statutes, and ordinances issued by the central authorities."56

Thus, to the soviet decrees was attached a binding force which, nevertheless, did not imply a supremacy of law as a principle. The same decree of November 18, 1918, contained an important exception from the proviso quoted above. There it was stated also "that the measures not complying with the laws of the R. S. F. S. R. or exceeding them are

of the grain surpluses, and special troops were organized for carrying out the monopoly. Decree of Feb. 27, 1919, R. S. F. S. R. Laws (1919) item 105. Lenin gave the following characteristics to the soviet farming policy: "Militant communism consisted in that we have actually taken away from the peasants all the surpluses and occasionally not only surpluses but also a part of the food needed for the peasants' own consumption." 26 Lenin, op. cit. supra note 8, at 330, 332. Concerning the abolition of private trade and providing for the populace, see decrees of May 27, 1918 [R. S. F. S. R. Laws (1918) item 493] and Nov. 21, 1918 [id., item 879].

55. Denikin and Kolchak were commanders of the anti-bolshevik armies.
56. 24 Lenin, op. cit. supra note 8, at 433-34.
allowed" if they are "provoked by the extraordinary circumstances of civil war and the combat of counter-revolution." But "combat of counter-revolution" is not a transitory emergency but a paramount proposition under the soviet regime. Therefore this section of the decree opened a loophole for the violation of law by the soviet administration. Thus this decree was the first manifestation of two divergent trends which constantly are evident in the soviet jurisprudence. These were the recognition of full authority of law, on the one hand, and the admittance of executive freedom, on the other. However, the soviet theorists and practitioners never defined the situation in so many words but sought to find new ideas and new terms in determining the specific role of law in the soviet state. In their endeavor to get rid of all law the soviet jurists met insurmountable difficulties and were actually lost between the two trends stated above.

Instead of outright recognition of the full authority of the soviet law a principle of "revolutionary legality" was announced (Revolutionnaya Zakennost', in Russian, translated also "revolutionary observance of law") and the decree quoted above is generally regarded as the first manifestation of this principle. However, in too many instances the so-called "revolutionary expediency" was put against the "revolutionary legality". Finally at the beginning of the soviet regime the courts were instructed to follow the dictates of a "socialist concept of law", or "revolutionary concept of law", in rendering their decisions. Thus these three unusual terms were designed to express the new, specific soviet principles in operation of law. Let us now analyze what these terms meant in the eyes of soviet jurists and in fact.

2. Revolutionary Legality Versus Revolutionary Expediency. It may be noted that the term "revolutionary legality" has given rise to well-founded objection even among the soviet jurists who were not orthodox communists. Professor Trainin stated in 1922 with reason that:

"the law may be liberal or conservative, useful or harmful but the legality, i.e., observance of law cannot be right or left, revolutionary or reactionary . . . . Legality means the attachment of a value to the law and is the same in revolution and in restoration; legality is observance of law without which no regular power can exist, be it bourgeois or proletarian."

To this it may be added that from the viewpoint of modern jurisprudence, the law binds not only the citizenry but the government; consequently such a slogan as "legality" or "observance of law" would mean for us the supremacy of law over the discretion of authorities, their "respect for law for the sake of law", in brief, the government of

58. Trainin, Revolutionary Legality (in Russian) (June 1922) 6 LAW AND LIFE 6.
59. JERING, ZWECK IM RECHT (1923) 297, 62.
law. However this was not the purpose of "revolutionary legality" which term acquired in soviet theory and practice a specific rather loose meaning which, in addition, differed in various periods of the soviet regime.\textsuperscript{60}

As is evident from Lenin's statement, the obedience of the populace and the discipline within the ranks of the government agencies were the original purposes of this slogan. It sought to check the sectionalism of local authorities. "The revolutionary legality," commented Lenin at that time, "must be single. Legality cannot be one in Kaluga province and another in Kazan province; it must be the same for the entire federation of the soviet republics."\textsuperscript{701} But the soviet government never intended to tie its own hands by the law. And it seems, that by the addition of the adjective "revolutionary" (or "socialist," as it is recently called) to the word "legality" the soviet leaders have wished to emphasize the lack of certitude and firmness of the soviet laws and their subordination to extra-legal considerations such as the interests of the revolution, or party policy. So Stuchka in his prime in 1919 stated that soviet laws are merely technical instructions, like those of agriculture, the most general passages of which possess a merely conventional force.\textsuperscript{62}

Likewise, Archippov, the soviet professor, arrived in 1924 at the conclusion that:

"Law and legality play a role in the proletarian state, but it is the role of an instrument and by no means a role of ideal or slogan."\textsuperscript{63}

According to the same writer, the soviet laws are elastic and easily revocable, so that they are rather executive than legislative acts by their nature. After all, until recently there was no formal criterion of distinction between legislative and executive acts in Soviet Russia. Five supreme organs of government were supposed to exercise under the constitution the executive power no less than the legislative.\textsuperscript{64} The entire

\begin{footnotesize}
\begin{enumerate}
\item "In different stages of the proletarian dictatorship, the contents of the revolutionary legality was subject to change depending upon the circumstances and the forms of class struggle." Shliaposhnikov, Revolutionary Legality (in Russian) (1934) 4 Soviet State 46. See also 1 Gentsburg, Course 14; also Stalin, Problems of Leninism (Russ. 10th ed. 1934) 113.
\item 27 Lenin, op. cit. supra note 9, at 298.
\item Stuchka, Proletarian Law, in October Revolution and the Dictatorship of the Proletariat (in Russian, 1919) 219; see also Stuchka, Revolutionary Role of the Soviet Law (Russian 3d ed. 1934) 103.
\item Archippov, The Concept of Law (in Russian) (1924) Soviet Law No. 2 (8), 41.
\item These were: Congress of Soviets, Central Executive Committee, its Presidium, Council of People's Commissars, Council of Labor and Defense. See Constitution of the U. S. S. R. (1923) with amendments. Although the new Soviet Constitution of 1936 reserves legislation to the jurisdiction of a single body, namely, the so-called Supreme Council, it has been pointed out that "we do not have separation of powers but the distribution and separation of functions . . . it has nothing to do with Montesquieu." Vyshinsky, Stalin's Constitution (1936) Socialist Legality No. 8, 9, 12.
\end{enumerate}
\end{footnotesize}
soviet system is in theory the dictatorship of the proletariat, the communist party being the instrument of the dictatorship which, according to Lenin, is a "power unrestrained by any law and based upon force and not law." Again, neither the organs of the communist party determining its policy nor the acknowledged leader, Joseph Stalin, have a definite legal status within soviet official governmental machinery, although party resolutions or even speeches are the primary sources of the soviet governmental policy which is supposed to be followed by the courts in particular.

Hence, the strict keeping of law by the authorities on the one hand, and the check of law from the point of the ever-changeable current policy of the communist party on the other, seem to be extremities between which soviet jurists were hesitating.

On the one hand, for example, Bukharin, at one time the leading theoretician, now branded as a "right oppositionist", stated at the beginning of the NEP period in 1923 that "Revolutionary legality means an end to any arbitrary administration, including the revolutionary." On the other hand, different opinions were also brought forward during the discussion of this problem in 1926. Soltz, a prominent prosecutor, advocated that:

"We must check the rule of a law from the viewpoint of revolutionary expediency which helps us in our work of the reconstruction of society along socialist lines. The problem of expediency should dominate over the form of the law."

65. 25 LENIN, op. cit. supra note 8, at 441, 436; see also id., supra note 47, part 1, at 124.
66. To quote the recent soviet text-book on civil law: "The sources of the soviet law are: decisions of the organs of the party, joint decisions of the party and the government, statutes, decisions of the courts and the arbitration commissions, decisions of the central organizations of the trade unions and the co-operative organizations. . . . Resolutions of the organs of soviet power or laws are the most voluminous category of the sources of soviet law. . . . The decisions and the directives of the party are the most important (although not the most voluminous) sort of sources of the soviet law, and the civil law in particular. It is true the party decisions are directly binding upon the members of the party only. However, insofar as the party directs all the toilers in the country and in the cities in their struggle for socialism and insofar as the party leadership is secured by all the soviet, professional, co-operative and other public organizations of the Soviet State without any exception, the party decision acquires a common obligatory character. . . . Marx-Lenin doctrine is not an official source of law, and yet it must be used in the most extensive way in the process of legislation (in law-making) as well as in application of the law (by the courts in particular)." 1 GINTSBERG, COURSE 121, 122, 128. The Soviet federal Supreme Court recognized frequently the official authority of the communist party. For example, it stated in its resolution of February 26, 1933, that "in accordance with the directive instruction of the party, the resolutions of the government and the Plenary Session of the Supreme Court, U. S. S. R. centered its activity on the sponsoring of the social reconstruction . . . the existing statute of the Supreme Court should be revised and made fit to the fulfillment of the directive instructions of the party and the government in the province of revolutionary legality." See DECISIONS AND INTERPRETATIONS OF THE SUPREME COURT OF THE U. S. S. R., PLENARY SESSION 40-44 (Russ. ed. 1933) 4-5.
67. Quoted from VYSHINSKY, REVOLUTIONARY LEGALITY (Russian ed. 1932) 16.
To this, others objected that such a maxim may shake the obedience of the local authorities to the central government and shatter the latter.63

3. Revolutionary Concept of Law. In any event there was, in the first months of the soviet regime, no apparatus for law enforcement, nor was there a body of laws for guidance. All the pre-soviet administrative authorities, the agencies of the central government as well as the elected organs of municipal and local self-government (zemstvo) became dissolved. The local soviets took their place.69 The Decree No. 1 on the Judiciary of December 7 (November 24, old style calendar), 1917, dissolved all the hitherto existing judicial institutions en bloc, but nevertheless the old laws retained at first their force to some extent. The newly announced People’s Courts were instructed to apply the hitherto existing laws but “only insofar as they were not abrogated by the revolution and did not contradict the revolutionary conscience and revolutionary concept of law.”70 It was evident, however, to the compilers of the decree that there was no definite concept of law in the mind of the soviet judges,71 so a note was added to this section explaining that those old laws are considered abrogated which contradict the decrees of the supreme organs of soviet power (Central Executive Committee and the Council of Peoples’ Commissars) and the “program-minimum of the Russian Social Democratic Party and Party of the Socialists Revolutionaries.”72

The next decree passed in February, 1918, omitted with reason the reference to the program of the parties73 and substituted the words “social-

68. Cf. Yachontov, Revolutionary Legality (in Russian) (1926) Soviet Law No. 1 (19), 9-10, wherefrom Soltz’s statement, which appeared in Izvestia (Nov. 24, 1925), is quoted.
69. All the administrative authorities, the agencies of the central government and the elected organs of local self-government were substituted by the local soviets. R. S. F. S. R. Laws (1917-18) item 50, § 5.
71. 1 Struchek, Course 37. Professor Reiser, who tried before the revolution to reconcile Petrajicki’s idea of “intuitive law” with Marxism, claimed to be responsible for the reference to the revolutionary concept of law in Decree No. 1 on the Judiciary. Reiser, op. cit. supra note 31, at 21. He asserts that he inspired Lunacharsky, Commissar of Education, who published contemporaneously with the decree, an article (The Revolution and the Court (1917) Pravda No. 193) in which he advocated the idea of creative power of legal conscience with reference to the non-Marxian legal writers, both Russian (Petrajicki) and German (Jellinek, Anton Menger, Knapp).
73. The so-called “programs-minimum” of the Russian Social-Democratic party, which consisted of two factions, bolsheviks and mensheviks, and of the Party of Socialist Revolutionaries, referred to in the decree of November 24, 1917, [supra notes 70, 71] were practically identical with the exception of the agrarian question. These programs (as different from “program maximum”—socialism) were designed to be carried out by those parties within the capitalism and did not go further than a declaration of principles of an advanced democracy.
ist concept of law” for the “revolutionary concept of law”, yet another decree, July 23, 1918, mentioned again the “revolutionary concept of law” as an obvious synonym to the “socialist” concept. Finally, the Statute of the Judiciary of November 30, 1918, definitely prohibited making any references to any pre-revolutionary laws in a court decision. The soviet courts were ordered to render their decisions on the ground of the soviet decrees, and in default of a provision directly bearing upon the case had to supply it from the “socialist concept of law.”

It may be stated that this part of the formula of this decree was in a way reasonable. It is after all a commonplace of jurisprudence of any country that in applying laws the judge has to interpret them and fill in the lacunae of the statutes from his notion of what the law is, i.e., to resort to his own concept of law. The adjective “socialist” used by the soviet decree does not amount to any substantial change.

Even under the Imperial regime when the Statute was the prime source of law the said authority of the judge in finding the decision was recognized. The Imperial courts were prohibited to abstain from the decision under the pretext that the statutory provisions in force be incomplete, obscure, insufficient or contradictory and were directed to lay the decision in such cases on the ground of “the general sense of law,” i.e., a concept of law.

It seems that in substituting the socialist concept of law for the general sense of law, as a subsidiary source, the soviet legislators merely

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74. Decree No. 2 on the Judiciary, R. S. F. S. R. LAWS (1917-18) item 347, §§ 8, 36.
75. R. S. F. S. R. LAWS (1917-8) item 597, § 35.
76. R. S. F. S. R. LAWS (1917-18) item 889, § 22: “When passing a decision upon a case, the Peoples’ Court shall apply the decrees of the Workers’ and Peasants’ Government, and in default of a decree directly bearing on the case, if the decree is incomplete, the Court shall be guided by the socialist conception of Law. Note: No reference can be made in the decision to the laws of the overthrown governments.”

Thus, the soviet legislation arrived at a complete break of continuity with the Imperial laws and those of the Provisional government. This principle of separation has been kept by the subsequent soviet laws, although many provisions of the old laws, especially those of civil law, survived their formal derogation (see infra notes 93, 94). It suffices to state here that since November 30, 1918, the pre-revolutionary laws ceased to be formally a guide to the soviet courts. Other governments which came into existence in post-war Europe in a revolutionary way recognized the continuity with old laws in a way somewhat similar to the American attitude toward the British law. The old laws were declared to be still in force insofar as they were not abrogated by the laws of the new government. This was the case in Czechoslovakia, Poland, Latvia, Estonia, Lithuania, and those parts of the Austro-Hungarian Empire which became incorporated into Jugoslovakia and Romania.

77. IMPERIAL RUSSIAN CODE OF CIVIL PROCEDURE (1864) §§ 9, 10; IMPERIAL RUSSIAN CODE OF CRIMINAL PROCEDURE (1864) §§ 12, 13. This rule was suggested by the § 4 of the Code Napoléon, which, however, did not definitely advise the courts as to the source from which the lacunae of the statute shall be supplied. This section reads: “A judge who refuses to decide a case on the pretext that the law is silent, obscure or insufficient, may be prosecuted as being guilty of a denial of justice.”
The Soviet concept of law took into account the obvious incompleteness of the Soviet decrees of that time. Leaving a broader space for the discretion of the judge was all that the Soviet formula practically meant. There was no intention to stimulate a development of a law of judicial precedents, of a customary socialist law. The government did not wish the country to be ruled by precedent or custom but primarily by statute as a means of introducing a new social order. The courts were not designed to be an independent power. The significance of a precedent is extremely dubious under the Soviet law, as the recent writers pass over this problem, while the older writers were afraid the doctrine of precedent would be an obstacle to that shifting of policy which is required from the Soviet judiciary.

At any rate the courts practically did not function during the period of militant communism, being under constant reorganization. Five decrees on the judiciary were issued in the course of one year changing their organization, and three of them were not even enforced. The courts tried chiefly minor criminal offenses and occasionally divorces, while the major part of criminal jurisdiction was absorbed by so-called Revolutionary Tribunals and the Cheka, both institutions proceeding unrestrained by any laws.

78. "The role of custom is reduced to a minimum within the proletarian state under revolutionary reconstruction of all the social relations," 1 Gentsburg, Course 128.

79. "The judicial precedent loses its significance being forced out by written law. The penetration of revolutionary dialectics into the consciousness of judges is important above all in order that their practice . . . should not become ossified through blind adherence to the letter of precedent . . . ." 1 Stuchen, Course 189.


81. Cheka is a coined word made out of the beginning letters of the Russian equivalent for "Extraordinary Commission" (Chresvyelaynaya Komissiya, abridged Chresvychayka). By Cheka is meant the Extraordinary Commission for Combat of Counter-Revolution, Sabotage and Breach of Duty by the Officials, which Commission, directed by Dzerzhinsky, came into being some time in December, 1917, and enjoyed a de facto unlimited power in penal prosecution. Its activities were not regulated by any law or decree but were largely a matter of fact recognized by the Soviet government. Here are characteristics of this institution given by the present Commissar of Justice, Krylenko: "The Cheka established a de facto method of deciding cases without judicial procedure . . . In a number of places the Cheka assumed not only the right of final decision but also the right of control over the Court . . . . Its activity had the character of a tremendously merciless repression and complete secrecy as to what occurred within its walls. The Cheka assumed not only the right of arrest and the right of a final decision over life and death with no appeal against it, but besides, these decisions were passed by various 'five-member' or 'three-member' collegia of the Cheka with no rule settling the jurisdiction or the procedure." Krylenko, The Judiciary of the R. S. F. S. R. (Russian ed. 1923) 322-3, 97.

Revolutionary tribunals, as differing from the so-called People's Courts, had an indefinite jurisdiction over major crimes. "In the jurisdiction of the [revolutionary] tribunals," said Krylenko, "a complete liberty of repression was advocated while shooting was a matter of everyday practice." Id. at 205. The tribunals were "not bound by anything in selection of punishment" and by no judicial procedure. Decree of Feb. 17, 1919, R. S.
Thus though at first sight the soviet appeal to the concept of law (i.e., to the conviction of the judge as a subsidiary source of law) may resemble the doctrine of the law of nature or the continental doctrine of free judicial legislation it is far from these doctrines. It was not intended to create law through court practice, nor have the courts actually produced law. Socialist concept of law meant practically the same thing as revolutionary expedience, namely, breaking of rules for the sake of the purpose of revolution. The more the central government gained power, the more it wished to be the exclusive guide of all the governmental authorities, including the courts, in the achievement of the revolutionary goal.

Consequently, when during the next period a codification of laws took place, the soviet legislator substituted, as far as the decision of civil matters was involved, the governmental policy for the socialist concept of law as a subsidiary source, and adopted with the rest the Imperial formula. The soviet civil court was instructed to decide cases in conformity with the laws and decrees of the soviet government that were in effect, as well as of the ordinances of the organs of the local authorities issued within their jurisdiction.

"In default of a law or decree directly bearing upon the case the court shall decide it, being guided by the general principles of the soviet legislation and the general policy of the Workers' and Peasants' government."  

As far as the criminal cases are concerned the reference to the socialist

F. S. R. LAWS (1919) item 130, § 4; id., item 132, § 1; id., (1920) item 115, § 1. They were to be guided "exclusively by the interests of the revolution" or "exclusively by the circumstances of the case and the revolutionary conscience." See R. S. F. S. R. LAWS (1919) item 504, §§ 1, 3; id., item 549, § 33; id., (1920) item 115, § 24; id., (1919) Item 132, § 25.

Under the more liberal policies of the NEP the Cheka was reorganized into the GPU (initial letters of Glavnoe Politicheskoe Upravlenie, or Main Political Administration). R. S. F. S. R. LAWS (1922) item 42. After the formation of the Soviet Union, a federal GPU was created, called OGPU ("O" standing for obyedinennoye, or federal, united). In 1934 the OGPU was reorganized into the federal Commissariat of the Interior. Yagoda, the former chief of the OGPU, was appointed Commissar of the Interior and all his lieutenants in the OGPU received corresponding positions in the Commissariat. See U. S. S. R. LAWS (1934) item 283; Izvestia (July 11, 1934). At the present time the Commissariat performs four functions: secret police, investigation of crime, rendering of judgments without any established procedure, and administration of all the prisons and other penal institutions.

82. The most advanced manifestation of this doctrine is to be found in the Swiss Federal Civil Code, § 1, where it is stated that the law must be applied to all those problems for which a solution is offered by the letter of law or its interpretation; if the judge cannot find such solution, he has to resort to the customary law, and in default of the latter the judge has to decide the case on the ground of such a rule which he would establish if he were a lawmaker following the established doctrine and tradition.

concept of law has been omitted altogether in the first Soviet Criminal Code of 1922 while in the later 1926 Code it was mentioned in connection with the selection of punishment only. But again, no doctrine or body of rules is attached to this term, "socialist concept of law", in the Soviet criminal justice. It may be stated, in a general way, that the terms "socialist concept of law" or "class concept of law" are used in Soviet jurisprudence in cases when a non-Soviet jurist would say volition or discretion of the court.

Coming back to the period of militant communism, it may be stated that "revolutionary expedience" overshadowed "revolutionary legality" and private rights were completely denied. Problems of law were overshadowed by those of management of the multifarious affairs taken over by the government.

Speaking of this period, another Soviet jurist said that perhaps the contract of a village with the shepherd of the community herd was the only relation regulated by private law to be found at the time. This is, of course, an exaggeration, the old law having shown much more vitality. "We only imagined that we have abolished the law," admitted Stuchka later. It is, however, characteristic of the contemporaneous point of view of the Soviet jurists, an admission of the permanency of law even in a hostile environment.

B. New Economic Policy Period (1922-1929)

1. Civil Code of 1922. The New Economic Policy (NEP), announced in 1921, implied a concession to private initiative, private property, and in this way to private rights. It was intended to give a breathing spell to the country, to let private enterprise work on the restoration of economy, while the state kept the "commanding heights" in order to check the growth of private capital as soon as it might endanger the Communist regime. Thus Section 4 of the new Civil Code emphasized that private

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86. 1 Gostevar, Economic Law (Russian ed. 1923) 3.
87. Stuchka, Class State and Civil Law (Russian ed. 1924) 9.
88. The following decrees were the first manifestation of the new policy: Decree of March 21, 1921 (changing the confiscation of grain surpluses to a tax in kind), R. S. F. S. R. Laws (1921) item 147; Decree of March 28, 1921 (on free trade of grain, bread and forage), id., item 149; Decree of May 24, 1921 (on barter), id., item 212; Decree of May 17, 1921 (permitting private small-scale industry), id., items 230, 240; finally, Decree on private property rights (May 22, 1922), id., (1922) item 423.
89. The main features of the new policy were characterized by Lenin as follows: "(a) The land is kept by the state. (b) Same is true of the commanding heights in the field of means of production (transportation, etc.) . . . (c) Free trade in the field
rights are given to citizens, yet "for the purpose of the development of productive forces" only. 60

The period of the New Economic Policy (1922-1929) was studied largely from the economic aspect. Its main importance was the limited recognition of private rights. It is significant that one of the basic decrees (May 22, 1922) which opened the new era and was the embryo of the coming Civil Code bears the title, "Concerning Fundamental Private Property Rights." 61

A partial denationalization took place; some of the properties (small houses and small industrial units) were returned to the former owners and any new confiscations were prohibited in the future. 62 An era of extensive legislation was opened: civil law and civil procedure, criminal

of small scale industries. (d) State capitalism in the sense that private capital shall be also attracted to the economic activities (concessions and mixed corporations)." 27 LENIN, op. cit. supra note 8, at 338; see also 26 id., at 340.

Stalin depicted the same period later in a very similar way, namely: "In the first period of NEP we admitted a resurrection of capitalism, the private turnover (circulation of goods), the 'activity' of the private merchants, capitalists, speculators. It was more or less free trade limited only by the regulating activity of the state. The private sector occupied an important place in the traffic of commodities." Speech by Stalin, in Pravda, January 10, 1933.

90. "The government granted rights to citizens not in the name of some abstract rights of the individual, but exclusively for its own purpose, this purpose being the development of productive forces of the country," commented Malitsky, for a time a recognized authority. See MALITSKY, CIVIL CODES OF THE SOVIET REPUBLICS (Russian ed. 1925) 7 passim; id., (3d ed. 1927) 7, is slightly different. Recognition of rights even under such reservation was found later to be too liberal because "the purpose of the soviet law is not the development of productive forces in general but their development in a definite direction only, namely, towards socialism." See 1 GINTSUG, COURSE 110.

91. R. S. F. S. R. LAWS (1922) item 423. For a similar decree for the Ukrainian Republic see COLLECTION OF THE LAWS OF THE UkRAINIAN SOVIET SOCIALIST REPUBLIC (1922) item 492.

92. The extent of the denationalization during this period raised a controversial problem of far-reaching consequences both inside of Russia and abroad with reference to the so-called Russian cases tried in foreign courts. It lost its significance within Russia only with the recurrence of enforcement of socialism in 1929. It cannot be discussed here at length but its salient point may be stated as follows: The soviet government issued a number of decrees where it was stated that with regard to some properties a confiscatory decree or order issued during the previous period is in itself insufficient title of governmental ownership unless it was followed by actual seizure of such property by governmental agencies. Thus the seizure without a decree was elevated to a title and, vice versa, properties confiscated but not seized were subject in many cases to return to their owners. See decrees concerning industrial enterprises of May 17, October 27 and December 10, 1921 [R. S. F. S. R. LAWS, (1921) items 240, 583, 684]; concerning houses, Decree of December 1, 1924 [R. S. F. S. R. LAWS, (1924) item 910]. See also ALEXANDROVSKY, COMMENTARY TO THE R. S. F. S. R. CIVIL CODE (3d ed. 1926) 177; Gintsburg, Division of the Property into That of the State and the Private (in Russian) (1929) REVOLUTION OF LAW No. 4, 33 passim; Timashev, Staats eigentum und Privateigentum in Sowjetrussland (1927) N. F. 8 ARCHIV FURZ CIVILISTISCHE PRAXIS, 3 passim; also his Nationalisierung der Banken in Sowjetrussland, (1928) id., Bd. 9, 16 passim.
law and criminal procedure, labor laws, land tenure, negotiable instruments, etc., became regulated in a short period by statutes, called Codes.\textsuperscript{93} Any continuity of the rights and of the law effective prior to the November 1917 revolution was, however, flatly denied by the new Civil Code; thus Section 6 of the law enacting the Code “prohibited the interpretation of the Civil Code on the basis of the laws of the overthrown governments and the decisions of the pre-revolutionary courts.”\textsuperscript{104} The pre-revolutionary rights were likewise cancelled by Section 2 of the same law, which reads:

“Disputes arising from the relations pertaining to the civil law that originated prior to November 21 (November 7, old style calendar), 1917, shall be thrown out of the courts or other authorities of the republic.”\textsuperscript{105}

\textsuperscript{93} The Soviet Union (U. S. S. R.) was officially formed in December 1922, and is a federation of several constituent republics, originally 5, now totalling 11. The Russian Socialist Federal Soviet Republic (R. S. F. S. R.) is the largest among them, embracing 92.8\% of the territory and 68.1\% of the population. The Civil Code and some other codes were adopted by the R. S. F. S. R. alone prior to the formation of the Union. But these and the subsequent codes of the R. S. F. S. R. served as a pattern followed by the other constituent republics almost in every detail. The original constitution of the Union as well as the new one of 1936 granted very broad powers to the federal government so as to put it in control of the legislation of the republics. It may be stated therefore that the soviet codes are uniform in basic principles, the differences, if any, between the Codes of individual republics being of secondary importance. Here the R. S. F. S. R. codes only are studied as representative pieces of soviet legislation.

\textsuperscript{94} This section repeated in a more definite form the principle announced before in the decrees of 1918 and 1920, quoted supra, note 76. This principle was not carried out, however, at that time or after the promulgation of the Civil Code; the new legislation could not fill in at once the “juridical vacuum” created by a lump abrogation of old laws. Nor could the Civil Code and subsequent legislation fill at once all the gaps. For example, the new decree on negotiable instruments was promulgated only on March 22, 1922 [R. S. F. S. R. LAWS (1922) Item 285] while the instruments were issued by the nationalized industrial units prior to that date, and the disputes were settled according to the old rules. Agency questions were not regulated by the law of the U. S. S. R. until 1925. See Koblenz, Agency Contracts According to the Civil Code (1926) Soviet Justice Weekly No. 50, at 1401. Moreover, a number of soviet laws contained provisions practically copied from the pre-revolutionary laws. For example, the proviso of the Land Code of 1922 regulating the tenure of peasant households and peasant community holdings (mir) repeated interpretations given by the supreme court of Imperial Russia, the Ruling Senate to the General Statute on Peasants [9 General Code of Laws of the Russian Empire (Supp.)].

Finally, the Civil Code did not regulate a number of individual contracts, e.g., bailment, loan for usage. The old Russian legal concepts are occasionally noticeable in interpretation of such contracts.

It is beyond doubt, however, that the soviet legislators aimed at a radical rupture with the old legal order as a whole, and that they succeeded with the time to issue enough of their own law. The Imperial laws and those of the Provisional Government are no longer a source of law in Soviet Russia, though some of the soviet laws have identical provisions.

\textsuperscript{95} Although the cancellation of all former rights was clearly stated and was seriously intended, its strict application proved to be impossible. Some of the Russian emigrant jurists asked after the code was issued: what about a claim for compensation of a worker
The cancellation of old property rights is especially underscored as follows:

"Sec. 59, Note 2: The former proprietors whose property was expropriated on the ground of revolutionary law, or otherwise has passed over to the possession of the toilers prior to May 22, 1922 [the date of the decree recognizing property rights], have no right to recover these properties."

In brief, the old private rights were not, as a rule, restored; the actual dispossession was continued, but a possibility for the acquisition of new rights had been opened. Private property later acquired was recognized and succession rights, though in a limited form, were re-established. Again, the recognition of rights was a matter of tactics and not of principle. The newly acquired rights were made precarious in their nature, for accident suffered prior to November 7, 1917, in a factory which later became nationalized?

Such cases soon came before the soviet courts. An exception to the general rule was made if the plaintiff was a toiler who suffered an injury while working prior to the revolution, insofar as he was not taken care of by social insurance or did not have any other income. In another case the plaintiffs, who were orphans, were acknowledged the right to one-third of a house on the ground that though the house was purchased in 1916 in the name of the defendant, it was paid for with joint money of the defendant and the father of the plaintiffs (orphans).

It was emphasized that the claims of injured persons should be satisfied in exceptional cases. In other words, the pre-revolutionary rights might come into consideration only by way of exception, dependent upon the volition of the court. See Zavadsky, Civil Law in 2 The Law of Soviet Russia (in Russian, Praha, 1925) 3 passim; Report on the Works of the Civil Cassation Division of the Supreme Court, R. S. F. S. R. for the Year 1925 in (1927) Soviet Justice No. 4; Nakhamson, op. cit. supra note 51, at 3; Collection of Interpretations of the Supreme Court R. S. F. S. R. (in Russian, 1932) 30-31.

96. The Civil Code as promulgated in 1922 sought to limit inheritance in the following way:

1. By setting in a fixed amount of 10,000 gold rubles the maximum of permissible net value of an estate. This limitation was however abolished in 1926. R. S. F. S. R. Laws (1926) item 63.

2. By a heavy progressive tax up to 90%, which is still in force.

3. By restricting the circle of persons to whom the estate is descended by intestate succession or by a will. Civil Code § 418. These are: the descendants of the deceased, the surviving spouse, and those disabled or propertyless relatives or strangers who were actually depending upon the deceased for not less than one year before his death. The parents and collateral heirs have not the right of succession unless they are such dependents. However, the scheme of the limitation of the freedom of the testator (ius disponendi) was broken through with regard to some properties not to be included in the estate and to be exempt from the inheritance tax, including such things as insurance premiums, several kinds of governmental loans, stocks, bonds, and the deposits with the governmental banks. The owner may dispose of these freely, not by a will, but by a written assignment addressed to the bank as to the person to whom the deposit shall be paid after the death of the depositor. U. S. R. Laws (1929) items 75, 140; id., (1935) item 43; R. S. F. S. R. Laws (1935) item 111. Thus money deposits and governmental securities may be left to any person in any amount.
were not granted but "lent," being subject to recall. A conditioned protection of rights merely was promised.97

These are the provisions designed to be, in Stuchka's wording, the "Sword of Damocles"98 over the newly created rights:

"Sec. 1: The law protects private rights with the exception of cases when they are exercised in contradiction to their social and economic destination."99

This destination was to be detected, according to the established practice, from the current policy of the soviet government. Consequently, any lawfully acquired and exercised right must have responded to the existing politik to be protected.100 A watchtower over the transactions between private persons was erected by ordaining in Section 30 of the Civil Code that transactions which are legal in themselves and have legal purposes are nevertheless null and void if "directed to the obvious detriment of the State." Whatever was delivered by one party to another in performance of such void transactions, reverted to the state (Section 147). Many kinds of contracts had to be registered to be effective.

Nevertheless, with all these and some other deviations from the bourgeois standards, the soviet Civil Code as well as some other soviet Codes offered definite opportunities for private rights. The soviet Civil Code was after all a somewhat abridged version of the draft of a Civil Code prepared under the Imperial regime, as a result of twenty years' work.101

97. The underlying idea is made clear by the following statement of Lenin:

"We do not recognize anything 'private'; for us everything pertaining to the economy is a matter of public and not private law. The only capitalism we admit is the state capitalism. . . . Hence, we have to make wider the interference of the state with the relations pertaining to the 'private law', to annihilate if necessary 'private contracts' and to apply to the 'private law relations' not the corpus juris romani but our revolutionary concept of law." 29 Lenin, op. cit. supra note 8, at 419.

98. 2 Stuchka, Course 249.

99. In this point the compilers of the soviet Code fell prey to the teachings of Leon Duguit, the modern French legal philosopher, who put forward the idea that "rights" in general and ownership in particular are social functions rather than rights.

100. See Greaves, The Social Economic Purpose of Private Rights (1934) 12 N. Y. U. L. Q. Rev. 165. A splendid study. Unfortunately the author primarily used material of the NEP period and in this way failed to be abreast of the situation in Russia. His general conclusion that § 1 of the Soviet Civil Code appeared to be, in the practice of the soviet courts, a weapon less harmful for the private rights than intended by the framers of the Code, can be accepted for a period not later than, say, 1929-1930, when a new campaign for socialism started. The soviet law as a whole presented less security for private rights in 1934 when the article appeared than may be concluded from the article.

101. This draft was presented before the State Duma in 1913, but the war postponed its deliberation. A part of this draft, containing about 1,560 sections, was reduced by the compilers of the soviet code to 435 sections and a few sections were added which were supposed to manifest the socialistic features of the soviet law.
Even in those spheres from which private ownership was excluded, as, for instance, land or large-scale industry, some semblance of private property was recognized. Thus, by way of a concession or lease a private person might have run a large-scale industrial enterprise or might have held real property under an hereditary leasehold in the cities up to sixty years for the purpose of the construction of dwellings, or in the form of the “toiling tenure” of agricultural land under the Land Code, unlimited by any period of time.\textsuperscript{102} Domestic commerce was practically free and subject only to heavy and arbitrary taxation.

There were new courts established which, in spite of numerous deviations from the Western standards, had to be guided from now on by the rules of written law, the Code of criminal and civil procedure and the other Codes. To summarize, there was a voluminous body of substantive and adjective law which had to be handled and applied in some way. But as a whole the soviet law of that time represented (using the characteristics given by Ilyinsky, a soviet writer) “a combination of elements fundamentally opposed to each other, and nevertheless co-existing by necessity.”\textsuperscript{103} These elements were socialism versus capitalism in economy, rejection of private rights versus their admission in law.

2. \textit{Doctrine}. In view of the flexible content and the mixed nature of the soviet Civil law, interpretation had to develop, either individualistic or socialistic in its elements. As the codes were promulgated after a period of almost complete denial of private rights, their individualistic possibilities were novelties. Some of the pre-revolutionary law professors and lawyers, many of them Marxists although not communists, were permitted to teach in the law schools reopened at that time, and to write books and articles in a number of legal periodicals that sprung up—one of them, \textit{Law and Life (Pravo i zhizn)}, being edited by non-communists.

They sought to introduce the traditional methods of formal, dogmatic, or analytical jurisprudence in handling the problems of soviet law. One might say a neutral, technically juridical point of view was admitted for a time in the treatment of legal problems by the writers loyal politically to the soviet regime.\textsuperscript{104} In the comments written by the old jurists, and

\textsuperscript{102} \textit{Land Code of 1922, R. S. F. S. R. Laws (1922) item 901, §§ 11, 12.}


\textsuperscript{104} Among these scholars in the field of civil and commercial law the following were active: I. Novitsky, Vinaver, Agarkov, Volf, Worms, Elyasson, Grave, Landkoff, Martynov, Volfson, Kantorovich, Gordon, Mitzlin, Shreter, Ashkenazi; and in the field of criminal law: Gernet, Trainin, Poliansky, Piontkovsky, Issev, Lublinsky, Poznyshev; in constitutional law worked Archippov, Margaziner, Diablo, Pletnev, Kotliarevsky. However, with the beginning of the Five-Year Plan, all these scholars were accused of smuggling bourgeois doctrines into soviet jurisprudence and were expelled from the universities, their writings thereafter disappearing from the public view.
in the application of the Code by the new judges who had no legal training at all, there was noticeable at first a tendency to safeguard the limited possibilities offered to private rights by the Civil Code. Stuchka himself complained that "the workers from the factories, when they were appointed as judges and came in contact with civil cases, and therefore, with civil law, became themselves prisoners of these laws, became jurists; the 'juridical logic' betakes them."\textsuperscript{105}

It may be stated that the leaders of the soviet judiciary mistrusted their own creation, the soviet law, which they had to apply; the value of law, its binding force, were extensively discussed in the press and at all kinds of conventions.\textsuperscript{106} But the controversy of revolutionary expedience versus revolutionary legality and the meaning of the latter were far from being settled during the New Economic Policy period.

C. From the First Five Year Plan to Date (1929-1937)

1. New Policy versus NEP Legislation. Radical changes in the policy of the government, which took place in the next period (First Five Year Plan, 1929-1933), brought a further complication in the soviet attitude towards law.

The industrialization of Russia was not the objective of this plan but a means to an end, its primary purpose being the enforcement of socialism. At the completion of the plan in 1933, Stalin stated clearly that the plan was framed in order "to exterminate the capitalist forms of economy and... to create such an industry as would be able to re-equip the whole of the economy on a socialist basis."\textsuperscript{107} Again, the Second Five Year Plan (from 1933 on) was designed with the aim:

"of a complete abolition of the capitalist elements and the classes in general, of bringing to a definite end the causes producing class differences and exploitation, and of overcoming the remnants of capitalism in economy and in the minds of the people..."\textsuperscript{108}

Thus the plans sought to bar private enterprise from commerce and industry and to replace with collective farming controlled by the government the independent farming of individual peasant households or their communities hitherto recognized by the Land Code. In this period the plans were directed against private rights granted by the entire legislation of the previous period. However, at first the measures destined to liqui-

\textsuperscript{105} STUCHKA, Course 10.
\textsuperscript{106} These discussions are outlined under the caption Revolutionary Legality versus Revolutionary Expediency. See supra pp. 16-19.
\textsuperscript{107} Address at the Central Committee of the Communist Party on January 7, 1933, in STALIN, PROBLEMS OF LENINISM (Russian 10th ed. 1935) 485.
date the private tradesmen (so-called *Nepmen*) and the more or less prosperous peasants (so-called *Kulaki*) were simply suggested by party authorities without being promulgated in the form of a legislative enactment.\(^\text{109}\) According to the soviet writers the soviet legislation was constantly lagging behind the policy of the government and this was viewed by them as a rather inevitable state of affairs.\(^\text{110}\) Yet step by step a number of isolated decrees appeared which vested the local administration with broad and undefined power in the pursuit of the new policy without abrogating the provisions of the Civil and the Land Codes which had secured private rights. For example, the local administrative agencies were authorized to confiscate all the properties of those peasants whom these agencies considered to be *Kulaki* and banish them with their families.\(^\text{111}\) Similarly, although Section 5 of the Civil Code, securing freedom of commerce and occupation, still remained on the statute books, the local authorities were called upon to put an end to private commerce.\(^\text{112}\)

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\(^{109}\) For example, Stalin advocated on April 6, 1929 that "Provisional extraordinary measures are permissible ... as one of the methods of breaking up the resistance of the *Kulaki* and taking away from them the maximum of their surplus food." When discussing the apparent conflict between the existing laws originating from NEP period, and the new policy, in 1930, he suggested that "consequently all such laws should be laid aside in the regions assigned for integral collectivization of agriculture. ... In order to eliminate the *Kulaki* as a class it is necessary ... to deprive them of productive sources of their existence and development (of the free use of land, of the instruments of production, of the right to rent the land, and to hire labor, etc.)." Stalin, *op. cit. supra* note 107, at 267, 320.

*Kulak* (plural *Kulaki*) means "fist" in Russian, a name applied under the Imperial regime to the "village bosses" such as saloon keepers, usurers, etc. The class of people named *Kulaki* in Soviet Russia may be discussed only in connection with the soviet agrarian policy. In a few words it means an independent small farmer who became more or less economically strong under the NEP policy and had no sympathy with socialist experimentation in agriculture; in brief, a small farmer of petty proprietor type like his colleagues in other countries.

\(^{110}\) See *Liquidation of Kulaki as a Class Viewed as the Current Task* (1930) 3 Soviet State 10; Vysinsky, Judicary 32.

\(^{111}\) By virtue of § 2 of the law of February 1, 1930 [U. S. S. R. Laws (1930) Item 105], power was granted to the provincial administration to confiscate in these regions all the property including the personal belongings of those families whom the local soviets considered to be *Kulaki* and to order their deportation. Their properties were to be turned over to the collective farms as a share of the poorest peasants joining the collective farms.

\(^{112}\) The new policy of the so-called "soviet commerce" is in Stalin's words, "a commerce without capitalists big or small". According to him the soviets "eliminated the private traders, merchants and middlemen of any kind. There may appear by virtue of laws of atavism private traders who will use the commerce of collective farms. Moreover, the collective farmers themselves don't mind speculating. But against these unsound phenomena we have a recently enacted criminal law." *Speech of January 7, 1933*, in Stalin, *op. cit. supra* note 107, at 505. This policy found its expression in a number of laws on the "commerce of the collective farms" and the "combat of speculation." Contrary to the practice of the period of "militant communism" when any selling, even by the producers, was prohibited, the collective and the individual farms are permitted now to sell
It seems that for a time the government itself did not arrive at any conclusion as to how far the drive towards socialism should be pushed and as to what extent the local administration could proceed on its own initiative in carrying out broad and indefinite instructions.\(^{113}\)

At that time Vyshinsky, the present attorney general, sarcastically rejected Bukharin's contention that "Revolutionary legality means an end to arbitrary administration,"\(^{114}\) arguing as follows:

"When we enforce revolutionary legality, we must always consider whether our laws are in accord with the interests and needs of the proletarian revolution, stressing this side of the matter rather than the formal element, the wording, or legal formula."\(^{115}\)

The same author stated in 1935:

"The formal law is subordinate to the law of the revolution. There might be collisions and discrepancies between the formal commands of law and those of the proletarian revolution . . . this collision must be solved only by subordination of the formal commands of law to those of party policy."\(^{116}\)

Revolutionary legality became, once more, loose and indefinite and subject, by principle, to qualification following the ever-changing "circumstances of the class war", that is to say, the policy of the soviet government.\(^{117}\) Pashukanis advocated the maximum elasticity of the soviet laws,\(^{118}\) and was supported in that by Krylenko, the Commissar of Just-

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\(^{113}\) Str., op. cit. supra note 107, at 325 passim.

\(^{114}\) Supra III (A) (2), p. 13.

\(^{115}\) Vösinski, Revolutionary Legality (Russian ed. 1932) 16.

\(^{116}\) 1 Vösinski, Judiciary of the U. S. S. R. (Russian 2d ed. 1935) 32. In the 1st edition (1934), at p. 24, the wording is slightly different.

\(^{117}\) See notes 60, 66 supra and authorities cited infra note 121.

\(^{118}\) "Relationship of law and politics in our country is different from that in the capitalist society. In a bourgeois society the superstructure of law must have a maximum of immobility because it represents a firm framework for a movement of economic forces represented by capitalist entrepreneurs. Therefore, creation of accomplished single legal systems is typical of the bourgeois jurists. It is different for us; we need the utmost elasticity of our legislation. We cannot tie ourselves up with any system because we are every day breaking up the economic system. Politics is law; we have a system of proletarian politics, but we do not have a system of proletarian law." Pashukanis, The Situation of the Legal Front (in Russian) (1930) Soviet State No. 11, 12, 47-48.
Gintsburg, official editor of the standard textbook on civil law, emphasized that the Communist Party decisions are the direct and the Marx-Lenin doctrine the indirect sources of the Soviet law to be used by the courts and other authorities. The same author as well as Pashukanis did not cease to repeat that Soviet law is in the first place a form of policy, or rather politik. But this very politik became endangered by arbitrary administration. Again the necessity of permanency of legal rules tormented the advocates of "no-law". Local authorities were confused rather than guided by the contradictory decrees couched in general terms and the flood of party resolutions. In their zeal for communism some of the administrators went further than proved desirable to the government, for the time being. For example, they continued the enforcement of "agricultural communes" in villages by compelling the peasant to pool in the collective farms not only the land, implements, and draught animals, but also the living quarters, poultry and personal property, while the leaders decided to abandon this form of collective farming for a looser type of the so-called "artel". Others treated indifferently or as a mere formality the instructions of the central government. Moreover many of the communist directors of governmental factories or farms and the managers of the collective farms fell under the influence of evident local needs and gave preference to the enterprises or people under their management over the governmental assignments to such enterprises. For example, they stored grain or distributed it more liberally among the members of the collective farms instead of delivering it to the government.

2. New Legislation versus Withering Away of Law. Two sets of laws sought to meet the situation. On the one hand the criminal law was put into operation to check the inefficiency of the entire economic system, but on the other hand some concession to the ever-emerging private ambition was made. To the first group of laws belongs before all else the notorious "Law on Protection of Public (Socialist) Property" of August 7, 1932, "the most important law for the strengthening of collective farming" (in the words of Yacovlev, the head of the department of agriculture). The law declared the governmental property, railroad

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120. 1 Gintsburg, Course 121-122.
121. See 1 Gintsburg, Course 113; Pashukanis, For the Marxian-Leninist Theory of Law and State (Russian ed. 1931) 17, 24.
122. Stalin, article in Pravda, March 2, 1930; see also his Speech of January 26, 1934, in Stalin, op. cit. supra note 107, at 325-327, 581 passim.
125. Izvestia, January 31, 1933. Stalin also called this law "the foundation of revolu-
cargo and properties of the collective farms "socialist" or "public" property and pronounced them to be, as such, "sacred and inviolable." Capital punishment was imposed for what was termed "graft and stealing" of these properties. It might be reduced under attenuating circumstances to not less than 10 years of imprisonment. Practice and subsequent legislation sought to punish not so much the attacks on these properties by outside individuals, but rather to prevent the disposition of these properties by their holders (governmental employees or collective farmers) in opposition to governmental interests. In the first place those individual members or managers of the collective farms were prosecuted under this law who disposed of crops or live stock on their farms instead of delivering them to the government, or otherwise used them not to the detriment of the farm but in defiance of the governmental program.120

Persons convicted under this law constituted twenty per cent of all the convicts in Soviet Russia in 1932, according to the soviet statistics.127

Other laws sought to secure by means of imprisonment (from two to five years) improvement of quality and proper quantity of the output of manufactured goods, labor discipline and proper functioning of the governmental commerce.128 The meaning of revolutionary legality was once more considered and Stalin explained, in 1933, that "the main purpose of revolutionary legality consists now in the protection of public property and in nothing else."129 The official textbook on civil law

120. (1936) SOCIALIST LEGALITY No. 8, 5; see also ESTEEN, op. cit. supra note 10, at 140.
121. Law on protection of public (socialist) property of August 7, 1932, U. S. S. R. LAWS (1932) item 360 (see supra note 125); law on responsibility of the management of the governmental factories for the quality and quantity of the output of December 8, 1933, id., (1933) item 442; law concerning fraud in use of scales and measures of July 25, 1934, id., (1934) item 325; law punishing the failure to follow the standards established for industrial production, R. S. F. S. R. LAWS (1931) item 162. See also the schedule of disciplinary punishments of December 17, 1930 § 369 for the governmental enterprises, (1930) NEWS OF THE COMMISSARIAT OF LABOR No. 36.
122. Stalin gave the following comparison of the NEP legality with the present:
"They say that the revolutionary legality of the present time does not differ from that of the first NEP period . . . this is entirely wrong. The revolutionary legality of the NEP period directed its point mainly against the extremities of the war communism, against
suggested that the discipline within governmental machinery and party ranks is still the main point of the enigma of "revolutionary legality" as follows:

"Revolutionary legality means a uniform application of the policy of the party and the government as well as the strict execution of the orders and instructions of the organs of proletarian dictatorship in the whole of the country."\(^{130}\)

This sounded like a return to the concepts of the early days of the soviet regime. There is, however, a new feature making the present period different from both the Militant Communism of 1919-1921 and the NEP period (1922-1929). Unlike the NEP policy, private enterprise is now completely banished from economic life; but unlike Militant Communism, an outlet for personal ambition is given in the system of socialist economy in order to make this system work. Whereas private vested interest and private initiative are excluded from production of commodities, inequalities in their distribution are recognized by principle and protected by law. Consequently economic inequality is fully admitted in Soviet Russia, although its reasons are different from those in other countries. Profit-making is barred in that no private independent enterprise is tolerated and the prospective earnings of the bulk of citizenry are practically limited to wages; but the governmental scale of wages, be it in money or comforts, is based upon profit-making as a motive to stimulate the efficiency of work.\(^{131}\) To this end the principles of piece work and premiums for efficiency constitute the basis of compensation for work in governmental industry and commerce\(^{132}\) and in collective farming.\(^{133}\) An elaborate scale of wages provides for additions to and deduct-

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\(^{130}\) GIINTSBURG, Course 13.

\(^{131}\) At the XVIIth Convention of the Communist Party Stalin stated "that equalization in the sphere of demands and personal life is a reactionary petty bourgeois nonsense worthy of a primitive ascetic sect and not of a socialist society organized in a Marxian way." STALIN, op. cit. supra note 107, at 583 \textit{passim}. Prior to that, in June 1931, he emphasized that the differentiation of wages is an inevitable stimulus of the socialist industry. \textit{Id.} at 451 \textit{passim}.

\(^{132}\) U. S. S. R. LAWS (1929) item 620; \textit{id.}, (1933) items 183, 242; \textit{id.}, (1934) item 109. The last named law states that if a worker does not fulfill the standard of his production he is paid according to the result without any minimum wages. If he does this systematically he may be discharged. See also U. S. S. R. LAWS (1935) items 293, 164, §§ 9-18.

\(^{133}\) The income of the collective farm is distributed, after the delivery to the government of all kind of assessed products, among the members in accordance with the efficiency
tions from the basic salary depending upon the efficiency and position of the worker and in this way offers the managing and technical staff, as well as skilled labor, remuneration in money and comforts greatly exceeding those given to the ordinary laborer.\textsuperscript{134} Although any buying for the purpose of re-selling is a crime, no matter how small and reasonable the profit may be,\textsuperscript{135} collective farms and independent farmers are permitted to sell on the open market directly to consumers the surplus of their products as soon as the quantity of these products assessed by the government for a given region is collected.\textsuperscript{136} Moreover, although the prevailing majority of the peasantry (sixty-five per cent of all the peasant households in 1933\textsuperscript{137} is organized into collective farms, each household in a collective farm is permitted to have a small plot of land (not over 2.47 acres) for its own independent "pigmy" farming and to maintain its own, although very limited, animal husbandry.\textsuperscript{138} Land assigned to each

of labor of each member measured by standards established by the government. Each collective farm is now subdivided into separate gangs (called "brigades") with more or less permanently assigned land and implements so that each gang, and especially its leader, are gratified with special premium from the income of the farm in case of efficiency; and vice versa, their share is reduced if they fail to accomplish the established standard. \textit{Standard Charter of Collective Farms, U. S. S. R. Laws} (1935) item 82, §§ 11-15.

134. In various branches of industry the laborers are divided into from 5 to 15 classes by their basic wages. In the metallurgical industry the highest wage class exceeded the lowest four times. \textit{Grishin, Soviet Labor Law} (Russian ed. 1936) 178. If a laborer occasionally gets 80 rubles a month, an engineer has 1,500 rubles a month. (1937) \textit{Soviet Justice} No. 2, 16, 17. There are in addition premiums, personal wages, possibility of holding two positions, lodgings, special restaurants for specialists, etc., and other variances of comforts. E.g., see \textit{U. S. S. R. Laws} (1929) item 620; \textit{id.}, (1935) item 277; \textit{id.}, (1933) item 110; \textit{Order of the Commissioner of Labor of March 11, 1934}, in \textit{Keesley, Collection of the Most Important Laws Concerning Labor} (Russian ed. 1936) 113.


136. Each year the federal government determines for each region the amount of cereals, milk, meat, etc., per acreage or head of cattle, to be delivered as a tax in kind. The quota of each region is then assessed among the individual farms. Beginning with the harvesting time, no private trading in crops is permitted until the quota assessed to the region is fulfilled, or until the government issues a special law that the free marketing of crops is permitted until the next harvest. See \textit{U. S. S. R. Laws} (1932) item 233, 193; \textit{id.}, (1933) item 25, § 15, and item 396.

137. Statistics presented by Stalin to the last communist party convention in 1934 claim that 65% of the present households are within the collective farms, possessing 73.9% of the total crop area. The independent farmers who constituted 35% possess 15.5% of the total crop area. The rest of the area (10.6%) is in possession of the governmental farms (State farm=Sovkhoz). \textit{Stenographic Record of Seventeenth Congress of the All-Union Communist Party} (in Russian, 1934) 20-21. Individual soviet writers assert that by April 1, 1936, the percentage of collectivized households reached 89%. See \textit{Stetsky, Liquidation of Classes in the U. S. S. R., Concerning the Draft of the Constitution} (in Russian 1936) 35. 

138. \textit{Standard Charter of the Collective Farms} §§ 2-4. The exact size depends upon the region. Except for nomadic and semi-nomadic regions of animal husbandry, no more than one cow, two calves, two hogs and ten sheep can be in the private property of a collectivist farmer. Horses as a rule cannot be such property in these regions. However, from the soviet press it is evident that these limits are frequently violated.
collective farm, though remaining governmental property, was declared as having been granted to each farm "without any limit of time, that is to say, forever."\footnote{139}

In brief, the sphere of private ownership undoubtedly was considerably curtailed as compared with the New Economic Policy Period. Private property in objects of consumption seems to be the only kind of private ownership to be "protected by law" under the new 1936 Constitution of the Soviet Union.\footnote{140} But a tendency is also in evidence to make this limited ownership appear secure. The earning, that is, the supposed fair compensation for the contribution according to one's ability may be spent, at least in theory, freely for any personal comfort one can get, but not for productive investment.

It was decided to stabilize the situation and the new 1936 Constitution sought to serve also this purpose along with others. However, the new trends have raised not only economic and political difficulties which can not be discussed here, but also generated a set of controversial problems in the operation of law and legal philosophy. The state of affairs thus developed appeared to be in discord with the prophecies hitherto accepted as the basic principle of the Marx-Lenin-Stalin theory of law. As one of the soviet writers stated it:

"The withering away of the State and the Law—these problems are put now in a concrete way, in practice. These problems are transformed from those of pure theory to those of actual immediate practical and political significance. The decisions of the Seventeenth Party Conference [in 1932] concerning the objectives of the Second Five Year Plan brought us closely to all these problems."\footnote{141}

The problem was this. Marxist-Leninism starts with the proposition that private ownership of the means of production (factories and land)

\footnotesize{139. Id. § 2. This provision was incorporated into the 1936 Constitution, § 8: "The land occupied by collective farms is secured to them for perpetual use, that is, forever." However, if an individual member leaves the farm or is expelled he loses his share without any compensation. Standard Charter § 10.

140. The new Constitution, § 10, definitely promises the "protection by law" to the "personal property of citizens" in the following objects only: "In their income from work and their savings, their dwelling house and auxiliary household economy, domestic articles and utensils as well as objects of personal use and comfort". It may be noted that the term "personal property" (lichnaia sobstvennost) does not mean in Russian an antipode to "real property" but rather to "joint property" and that the common law term "private property" or simply "property" is not used here. Professor Goichbarg ascribes to this term a special significance and contends that only "personal"—i.e., consumptive property, and not the "bourgeois" private property—is recognized by the new Constitution. Goichbarg, Personal Property Under Socialism (in Russian) (1937) 16 Soviet Justice No. 10/11, 22 passim. Cf. 24 Lenin, op. cit. supra note 8, at 365-8, 377.

is the prime cause of economic inequalities and is the fundamental reason for any other non-economic antagonism to be found in human society and in the capitalist society in particular. Political, racial, religious and other conflicts are supposed to be rooted in, and ultimately explained by, the division of society into economic classes and their struggle arising out of private ownership of the means of production. Therefore if this ownership is abolished the classes would come to an end; and with that determination all social conflicts and the law would be completely erased. Now the social order so far achieved in Russia is termed by its leader, if not communism, at least the first stage of communism; a form of socialism under which the means of production—industrial, commercial and farming enterprises—are exempt from private ownership. They must be either outright governmental or collective undertakings under control of the government. “The whole of the national economy became socialist. In this sense we have accomplished the task of the abolition of classes,” stated Molotov, one of Stalin’s chief lieutenants, in 1936. It is true private property is done away with; classes, at least in the capitalistic sense of the term, have been abolished. But economic inequalities have not disappeared nor has class antagonism vanished. Instead of a harmonious social life, the political, racial and other antagonisms, the clash of opinion and interests, are more acute in Soviet Russia than in any other place in the world; and within the communist party itself these conflicts are even sharper than among the population of the Soviet land. Resistance of the populace, of the very toilers—frequently concealed, it is true—rivals the opposition coming from within the communist ranks. The sword of soviet criminal “law” still hangs above Russia and strikes primarily the toilers in ordinary trials and the high ranking communists in political trials.

142. Aleshin, op. cit. supra note 141, at 51, 52. See notes 24, 25, 37, 38, 43, supra.
143. “The chief basis of the draft of the new Constitution [of 1936] consists in the principles of socialism, of its mainstays which have already been won and realized: socialist ownership of the land, forests, factories, plants and other implements and means of production; abolition of exploitation of the classes . . . work as an obligation and a matter of honor of every ablebodied citizen.” Stalin, Speech Presenting the Draft to the VIIIth Congress of Soviets, Moscow News. December 2, 1936. The same is stated in the Constitution, § 4.: “The socialist system of economy and the socialist ownership constitute the economic foundation of the U. S. S. R.” See also §§ 5-7.
145. It might be of interest to note that although “the class justice” protecting the toilers was the aim of the soviet courts the very toilers were the first to suffer from the prosecution beginning with the earliest days of the soviet regime. Thus, in 1922 the Supreme Tribunal complained that “the recent statistics for 1921 show that the major percentage of those convicted by the revolutionary and military tribunals belonged to the peasants and workers and that only a very small percentage of convicts belonged to the bourgeoisie” (in a broader sense). This ratio refers to all kinds of punishment, including shooting. Collection of Circulars of the Supreme Tribunal (In Russian, 1924) 6. Statistics
Thus although capitalism has been forced out of economy the above quoted communist aim to “overcome the remnants of capitalism in the mind of people”\textsuperscript{148} has proved thus far to be inachievable.

The presumed cause of this state of mind, economy, has been changed, but the presumed result, the mentality, human nature, still display all its paramount characteristics. Weakness common to mankind, imperfection of human nature was for the communists but the result of the division of society into classes; but that it is still there, after the classes ceased to exist in Soviet Russia, is admitted by the official organ of the communist Party as follows: “Egotism, indifference, laziness, cowardice will survive the abolition of classes by which they were produced. In a thousand ways they will penetrate into the mind of the child.”\textsuperscript{147} A soviet author of a study of the abolition of classes states more definitely that for the achievement of communism “our communist work must be directed towards the making of man over”.\textsuperscript{148} But insofar as the human nature has not yet been recast “class war” still goes on under socialism in Soviet Russia.

The paradox of the accomplishment of the “withering away” of the state by constantly increasing state power is thus justified by Stalin:

“Some of our comrades understood the theses about the abolishment of classes, the creation of classless society and the withering away of the State as a justification of laziness and good nature, as justification of a counter-revolutionary doctrine of extinguishing of the class war and weakening of the government powers. Is it necessary to tell that there is no place for them in the ranks of our party? . . . The abolishment of classes will be achieved not through the extinguishing of the class war but through its intensification; the State will wither away not through making the government power weak, but, through its utmost strengthening.”\textsuperscript{149}

On another occasion Stalin solved the problem as follows:

“The highest development of the government power for the purpose of preparing conditions for the withering away of the government power, this is the Marxian formula. Isn’t it ‘contradictory’? Yes, it is, but this contradiction is life, and it reflects completely the Marxian dialectics.”\textsuperscript{150}

So the withering away of the State and the law was not stricken out

\textsuperscript{146} Resolution of the XVth Conference of the Communist Party, op. cit. supra note 108.

\textsuperscript{147} Editorial, Pravda, April 7, 1936.

\textsuperscript{148} Komarov, Abolition of Classes (in Russian) (1936) Soviet State No. 3, 11.

\textsuperscript{149} Speech of January 7, 1933 in Stalin, op. cit. supra note 107, at 509 (italics supplied).

\textsuperscript{150} Speech of June 27, 1930, id. at 427.
from the program, but indefinitely postponed until the advent of pure communism and not merely socialism. With the announcement of the abolition of classes some of the writers, judges, and administrators drew the logical conclusion from the previous theoretic speculations that the reign of law was at an end and suggested closing the courts or the dismissal of village soviets—the lowest administrative organs of the state. But such ideas were severely condemned as an undue “leftist” deviation from the doctrine.\(^1\)

In other words the class point of view displayed all its vagaries.\(^2\) It has proved to be no guide in the solution of social and legal problems. In one sense classes have disappeared in Soviet Russia but in another sense class struggle has been intensified, according to the soviet leader. Not only landowners and capitalists were branded as class foes but also peasants, workers and finally the dissenting communists. In other words it is not the social standing but the frame of mind, the attitude of a given person to the current soviet policy, that determines his class characteristics in the eyes of the soviet authorities.\(^3\) If socialism is the name of the re-

\(^{151}\) For example, some of the courts entered the policy of a wholesale disregard of laws of the NEP period, but were called to discipline by the Supreme Court. *Collection of Interpretations of the R. S. F. S. R. Supreme Court* (in Russian) (1932) 31. See also Stuchka, *Revolution and Revolutionary Legality* (in Russian) (1930) *Soviet Justice* No. 3, 15-16. For problems in regard to the dissolution of the village soviet, see articles by Riachov, *Izvestia*, November 11, 1929, No. 209; Dotzenko, Labor Moscow (in Russian, 1929) 216; Novakovskv, *On the Path of Collectivization*; Rezunov, *op. cit. supra* note 27, at 9 passim.

\(^{152}\) Marx and Engels have never defined what they meant by a "class". Two attempts of Lenin at such definition are known to the writer, both vague and not germane to the concepts now in vogue in Russia, as follows:

"What is a class, generally speaking? It is that what enables one part of the society to appropriate the labor of the other. If one part of the society appropriates all the land, we have the classes of landowners and peasants. If one part has factories and plants, stocks, bonds and capital while the other part works in these factories, we have the classes of capitalists and the proletarians." 25 *Lenin, op. cit. supra* note 8, at 391.

In this sense undoubtedly classes are abolished in Soviet Russia. Another definition reads:

"We call classes the large groups of people that are distinctive: by their place in the historically established system of national production; by their relations towards the means of production (in the majority of cases fixed and shaped by laws); by their role in the national organization of labor, consequently by their method of obtaining their share of national wealth which they dispose of and by the size of their share. Classes are such groups of people of which one can appropriate the labor of the other, due to the difference in their position in a given system of national economy." 24 *Lenin, op. cit. supra* note 8, at 337 (italics supplied). If we consider the criteria given here and italicized a number of classes can be found in Soviet Russia as in any other country. Communists, technical specialists, the managing staff of the governmental factories, better and worse paid workers, collectivists and independent farmers, professionals, all these differ by their place in national economy, relations to the means of production, role in the organization of labor and especially in the size of their share in the national income if not by the methods of obtaining it.

\(^{153}\) The classes came to an end in a sense, wrote Krylenko in 1934: "Do we have a
gime in present Russia, socialism does not mean abolition of classes, be it in the soviet or in the ordinary meaning of the word. Differentiation of human society into separate groups, solidarity of their members and mutual group antagonism arise out of an abundance of interests and views which cannot be reduced to bare economic causes. The struggle for power and dominance of such groups seems to be unavoidable and will not disappear under any economic system. It is perhaps only the tension of this struggle that varies in different epochs of human history. The state as a body politic, as an organization of political power, whether moderating these antagonisms or suppressing one or another group or all of them, depending upon the ideals of the rulers, does not show any signs of withering away in any future within the reach of human foresight. Nor is the law less potent than the state as a form of social control. A tacit recognition of the permanency of state and law and an avoidance of candid admission of the failure of the Marxian point of view—these are the only conclusions one can draw from the quoted statement of Mr. Stalin.

All the leading soviet jurists now candidly recognize the theoretic fallacy of the doctrine of “the withering away of all law”, and especially its peril in practice. The idea of “withering away of law” under socialism became “opportunistic nonsense” for Pashukanis in 1936, and is now for Vyshinsky, Krylenko, Yudin and others “a subversive theory” which undermines the power of the soviet state and suggests to soviet law students a “nihilistic” attitude towards the soviet law. Soviet jurists

class of landowners? No, it is destroyed. Capitalists? They are destroyed and ruined. Businessmen? The private capitalism constitutes only .07% of our economic balance. The kulaki seem to have been destroyed too. Where are the classes then?” And yet the idea of classes being already abolished in Soviet Russia is “an error, a triple error” according to the same author, because “there are no classes, but there are still people... We did not shoot them all down and did not lock them all up, we did not destroy them physically and they remained with all their class sympathies, antipathies, traditions, points of view and concepts. We have around us living people and many of them are living in the captivity of old traditions and concepts which over-govern their conduct; therefore, we have to fight in this field also by coercion in addition to the propaganda and the rise of the cultural level.” According to him “with the progress in abolition of classes” dictatorship of the communist party is facing another task in addition to “the suppression of the resistance of the former landowners, capitalists and the bourgeoisie... This more important task is the education of the toilers who are unbalanced, shattered, hesitating and bound by the superstitions of the old regime and subject to the influence of the class enemy working among us... This task should be carried out also by compulsion.” Krylenko, The Task of the Courts, (1934) 13 SOVIET JUSTICE No. 9, 2, 4; see also supra note 145.

154. “All talks about the withering away of law under socialism are just opportunistic nonsense like the allegation that the governmental power begins to wither away the next day after the bourgeoisie is overthrown.” Pashukanis, State and Law Under Socialism (1936) SOVIET STATE No. 3, 7. Observe the turn-about-face in the above statement by Pashukanis as contrasted with the statement at p. 12, supra.

155. “They [Pashukanis and his followers] preached anti-party subversive ‘theories’ of withering away of the state and the law. To disarm the working class in front of its ene-
have now come to believe, perhaps with reason, that the neglect of statutes by the Soviet judges, their meager knowledge of Soviet law and the inferior quality of their judicial work is the result of this theory.150

Leading men in the legal profession no longer wish that the revolutionary expediency of a Soviet law be questioned by those who are called upon to enforce it.157 Nor is maximum flexibility of Soviet laws advocated.158 The Soviet leaders propose that the laws of the Soviet state now be granted full authority, that they be made firm and stable.159 On the other hand, Soviet jurists attempt to clear Soviet law of all the hitherto raised suspicions that it has ever been, even partially, bourgeois and not socialist.160 To elevate the authority of Soviet law, it is now defined in terms resembling idealistic Hegelian philosophy as "the expression of the will" of the toilers, or of the "Socialist nation".161 Moreover, the study

mies, to undermine the governmental might of socialism—that was the aim of these attempts. To the students, the growing cadres, a nihilistic attitude to the Soviet law was suggested." Vyshinsky, About the Situation on the Front of Legal Theory (1937) Socialist legality No. 5, 31. See also Antonov-Saratovsky, On Some Methods of Wrecking on the Juridical Front (May 8, 1937) Izvestia No. 107; Yudin, Against Confusion, Ridiculousness and Revisionism (Jan. 20, 1937) Pravda.

156. Manikovsky, Against the Anti-Marxian Theory in Criminal Law (1937) Socialist legality No. 5, 44.

The following figures, referring to 1935 and 1936, are characteristic of the education of the Soviet judges: only 5.8% of them are graduates of any law schools; 1.8% had a one-year course in law; and 41.7% had only a six months' course in law, so that 51.1% had no legal training at all. Moreover, 62.2% of all the judges of the higher courts had barely elementary education, while in the lower courts this percentage was as high as 84.6%. See (1936) Soviet State No. 5, 115; (1935) 15 Soviet Justice No. 35, 4-5. Illiteracy of judgments rendered, violation of law and rights of the prisoners, and similar fundamental defects in the administration of justice are continuously described in the circular letters of the Soviet supreme court and law reviews. See Interpretations and Decisions of the U. S. S. R. Supreme Court (in Russian, 1932) 19; (1934) Socialist legality No. 8, 3, 32, 34; id., No. 3, 8; (1934) 14 Soviet Justice No. 21, 5; (1935) id. No. 2; (1934) Soviet State No. 4, 50.


158. See supra notes 114, 115, 118.


160. "We can and must speak of our law as a socialist law insofar as it has always been from the very beginning an instrument of socialist reconstruction of the society and so it remains." Krylenko, Stalin's Constitution and the Task of the Soviet Judiciary (1937) 16 Soviet Justice No. 5, 8. See similar statements in Pashukanis, State and Law Under Socialism (1937) Soviet State No. 3, 10; 1 Gentsburg, Course 11, 12, 114.

161. "Law as different from an administrative ordinance represents the most abstract expression of the will and the conscience of the toilers... Law is the most general and most authoritative expression of the will of the socialist nation." Pashukanis, Stalin's...
of "socialist law" in connection with "socialist ethics" and not merely economic necessity, is part of the present program. And soviet jurists now assign a creative role to the law under socialism, no longer regarding it as a mere reflex of economy, according to Marx' original suggestion.

In brief, all the hitherto made attempts to establish a Marxist-Leninist theory of law are now condemned and the former leading writer, Pashukanis, has been declared an "enemy of the people" in 1937, despite the fact that he himself vehemently repudiated his former writings in 1936. Not only he, but his former followers and present critics as well, had arrived in 1936 at a unanimous conclusion that the search for Marxist-Leninist legal doctrine had to be started all over again.

In summarizing the evolution of soviet legal thought, it may be stated that the concepts of traditional jurisprudence which form the technique of legal reasoning are at this time reinstated in the soviet doctrine of law. Marxism, offered as a comprehensive single concept of life, a Weltanschauung, implying its own answer in any field of social sciences, has proved to be futile for jurisprudence. No longer desiring to create their own set of technical legal devices, soviet jurists are content to accept the traditional.

However, if one questions what the new shift in theory may amount to in practice, or more specifically, whether the traditional concept of law means the recognition of rights, no change is in sight. Law is still viewed primarily as an instrument of rulership, and not the guardian of rights. The very soul of law is thereby negatived. The new Constitution of the Soviet Union of 1936 is not designed to alter the primary cause of the neglect of rights in Soviet Russia, namely, the dictatorial concept of governmental power.

In the words of the present Attorney-General of the Soviet Union, Vyshinsky: "Proletarian dictatorship is the supreme law which determines the concrete contents of all the soviet laws. ... A fundamental error is

Constitution and the Socialist Legality (1936) SOVIET STATE No. 4, 24, 27. See also Concerning the Situation on the Front of Theory of Law (1937) 16 SOVIET JUSTICE No. 8, 2. There is no difference between this concept and the so-called Voluntarist doctrine of law in German idealist jurisprudence. See, for example, the following definition by Dernburg: "Law in an objective sense is that order of the relations of life which is secured by the general will." 1 DERNBURG, DAS BUEGERLICHE RECHT (3d ed. 1906) 47. Only the will of one class of the population is substituted for the general will by Krylenko and Pashukanis. 162. See (1937) 16 SOVIET JUSTICE No. 8, 6; also PASHUKANIS, op. cit. supra note 160, at 11.

163. "The law of the proletarian state is a creative force which helps the birth of the new social relations." VYSHINSKY, JUDICIARY 32. See also 1 GINSBURG, COURSE 195, 113. See I (B) supra, p. 5.

164. VYSHINSKY, Stalin's Constitution (1936) SOCIALIST LEGALITY No. 8, 17; Pashukanis, State and Law (1936) SOVIET STATE No. 8, 9.

165. VYSHINSKY, JUDICIARY 31.
made by those who think that the principle of proletarian democracy which is expressed in the new Constitution limits in any way the principle of proletarian dictatorship.\footnote{166} According to Stalin, the new Constitution "leaves unchanged the present leading position of the Communist party."\footnote{167} Thus the proletarian dictatorship is still the dictatorship of the communist Party alone.

Consequently although now the soviet jurists wish to use the traditional legal concepts, they are still in pursuit of the particular purpose of "class justice" which is not germane to these concepts, and they are not prepared to inscribe on their banner the real supremacy of law and rights. They take the body of traditional jurisprudence but repudiate its soul. In this, their recent way of reasoning does not differ substantially from their former views. Thus the victory of the traditional concepts in soviet jurisprudence over the soviet Marxian innovators is rather one-sided. The soviet statute is now the law in the eyes of the soviet jurists, but this law is devoid of the basic concept of rights.

APPENDIX

The following is a list of the main authorities used in this paper. The first name given is, in most cases, the abbreviated English title which has been used throughout.


Izvestia. Official gazette of the Soviet Union.

Pashukanis, Doctrine. Uchenie O Gosudarstvennom Prave (pod red. Pashukanisa, Leninograd, 1932) [Doctrine of the State and the Law (ed. by Pashukanis)]. A collective work published by the Institute of Law of the Communist Academy under the editorship and with the collaboration of Pashukanis.

Pashukanis, Theory. Pashukanis, Osherchaya Teorii Prava i Marxizma [General theory of Law and Marxism]. The first edition of this work was published in 1926, the second in 1926, and the third in 1927. The third edition is cited unless it is indicated otherwise.

Pravda [The Truth]. Official gazette of the Communist party.

R. S. F. S. R. Laws. Sobranie Uzakazenei i Rasporjazheni Radoshe-Krestianskogo Pravitel'Stva R. S. F. S. R. [Collection of enactments and decrees of the Workers' and Peasants' Government of the Russian Socialist Federal Soviet Republic]. Law journal of the R. S. F. S. R., which is the largest constituent of the Union, and whose organs were actually confederate organs prior to 1923. Year and item number (stat'ya) under which the act cited appeared are indicated. Acts promulgated in 1917 and 1918 have a joint consecutive numbering.


167. Stalin, op. cit. supra note 159, at 5.

Soviet Law. Sovetskoe Pravo. Legal magazine published from 1922 to 1928 by the Institute of Soviet Law in Moscow.


Vysheisky, Judiciary. Vysheisky, Sudoustroistvo S. S. S. R. [The Judiciary of the U. S. S. R.]. Consists of five separate essays published as separate volumes in the first and second editions (1934), and united in one volume in the revised third edition (1935), which edition is cited unless otherwise indicated.