Marxism, revolution and law: the experience of early Soviet Russia

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PLEASE NOTE

The greatest amount of care has been taken while scanning this thesis,

and the best possible result has been obtained.
NOTE TO THE EXAMINERS

I am indebted to the examiners for their incisive and constructive comments, which have strengthened the thesis. While not necessarily agreeing with every issue raised, I have substantially revised the thesis to respond to the criticisms and suggestions. In some instances, I have made additional changes, going beyond the requested revisions, in order to clarify aspects of my analysis.

The end result has been to add 20 pages (approximately 10 percent) to the thesis. The principal changes and additions are as follows:

Summary: rewritten to replace the claim of a new paradigm with reference to seven criteria guiding an alternative approach.

Introduction: substantially rewritten along the same lines, accompanied by the addition of more specific and modulated references to the earlier studies that are the subject of my critique.

Chapter One: addition of a more systemic discussion of Trotsky's views on the state and law (pp. 27-32). Deletion of the reference to usury.

Chapter Two: strengthened by references to, and discussion of, material and analysis in Berman, Justice in the USSR. (It must be noted, however, that this Chapter is not meant to be a major focus of the thesis).

Chapter Three: Treatment of the quote from Pipes deleted.

Chapter Four: Additional material and discussion on the impact of changes to property relations (p. 63), development of analysis of Carr quote (pp. 71-72), revised treatment of Berman quote (pp. 73-74). Section on 'case studies' recast as 'examples' of Bolshevik law, with additional references to, and discussion of, Herman and others on family law and crime, and Beirne's volume on the 1922 SRs trial.

Chapter Five: strengthened by references to, and discussion of, material and analysis in the two chapters by Hunt and Beirne in Beirne (ed) Revolution in Law. Two sections added, on Lenin and bureaucratism, and, was Lenin responsible for Stalinist authoritarianism?

Chapter Eight: strengthened by references to, and discussion of, material and analysis in Fuller, 'Pashukanis and Vyshinsky'. New section on 'commodity exchange' core of Pashukanis. Additional material on state and coercion. Additional references made to other authors whose work does not, in my opinion, warrant extensive treatment for this thesis.

Chapter Nine: Restructured and expanded to make clearer the examination of the impact of the Left Opposition.

Bibliography: restructured with the structure of the thesis, with added references to additional works cited.
Preface

My thanks go to my supervisors, Professor Razeen Sappideen and Dr Scott Mann, and other colleagues at the University of Western Sydney and Osgoode Hall Law School, York University, for many fruitful discussions and suggestions.

Thanks also go to the examiners for their incisive comments, which have strengthened the thesis.

My greatest debt is to Mary, Tom, Daniel and Kathleen, whose love and support have sustained my efforts.

This thesis, while referring to the writings of others, is entirely an original contribution. Wherever the work of others has been used, it is acknowledged in the footnotes.


No parts of this thesis have been submitted for any other degree.

Footnote style

For ease of reading, after initial citation, commonly cited sources are referred to by a short title. Full titles are listed in the Bibliography.
Summary

The 1917 Soviet Revolution in Russia was an attempt to fundamentally reorganise economic, social and legal life along anti-capitalist, participatory and egalitarian lines. This thesis suggests seven criteria for assessing the early Soviet legal debates:

1. Broad-ranging legal debates. There were vibrant debates and conflicts over the role of the law in the early days of the Russian Revolution, debates that extended far beyond the best-known protagonists, Eugene Pashukanis and Peter Stuchka.

2. The social and historical context. These debates can only be understood in the light of the historical and material circumstances facing the young workers’ state.

3. The legal record of Soviet Russia. Attention must also be paid to the actual legal record of the Soviet government, its comparison to the pre-revolutionary Russian legal system, and its subsequent trajectory under Stalin.

4. The socialist opposition. It is impossible to assess the early Soviet legal experiences without reference to the formidable socialist opposition to the post-1923 Stalinist regime, an opposition that Stalin sought to extinguish through repeated repression.

5. Classical Marxist legal theory. The starting point for any analysis is classical Marxist theory, which shed considerable light on the problems confronting the Soviet state.

6. The axis of the early debates. It is necessary to identify the underlying axis of the conflicts over legal theory between 1917 and 1927. They revolved around the key inter-related issues of (1) the class character of the Soviet state, (2) the withering away of the state under communism, and (3) the role of law under socialism.

7. The contrast with Stalinism. It is essential to examine the antithesis between the classical Marxist thesis that the state and the law will become redundant with the successful development of communism, a view that prevailed in the early Soviet legal debates, and the program of ‘socialist legality’ imposed by the Stalinist dictatorship in the 1930s.

An Introduction explains the parameters of the thesis. Chapter 1 examines the classical Marxist theory of law and the state. Chapters 2 and 3 review the revolution’s context: the pre-1917 legal record and the political physiognomy and dynamics of the 1917 revolution. Chapters 4 and 5 probe the legal record of early Soviet Russia, and Lenin’s views on law. Chapter 6 reviews the legal debates, while Chapters 7 and 8 focus on the particular contributions of Stuchka and Pashukanis. Chapter 9 examines the impact of the socialist opposition, most notably the Left Opposition formed by Leon Trotsky at the end of 1923. Chapter 10 draws some tentative conclusions.

Appendix One presents biographical sketches of the main contributors to the legal debates; Appendix Two provides a time line and list of factions within the Bolshevik Party; and Appendix Three lists the known early Soviet legal treatises.
INTRODUCTION

The challenge of Soviet law

The Soviet Revolution in Russia marked the first attempt internationally (apart from the short-lived and localised 1871 Paris Commune) to fundamentally reorganise economic, social and legal life along anti-capitalist, participatory and egalitarian lines. The subsequent degeneration of the Soviet Union at the hands of Stalin’s bureaucrats after 1923 has been taken by many as proof that these aspirations were utopian. In order to assess these claims, it is necessary to examine both the achievements and problems of the early years of the Russian Revolution.

In relation to legal theory and practice, the October 1917 revolution launched the boldest and most sweeping experiment of the 20th century. The Soviet government led by Vladimir Lenin dispensed with the previous courts, legal system and legal profession and sought to fashion a radically new approach to the state, law and legal theory, with some striking results in many fields, including criminal and family law. Moreover, it attempted to create the conditions for the fading away (‘withering away’) of law and the state.

Never before had a mass revolution placed in power an administration whose avowed intent was to dissolve itself into a classless, stateless society. This program of state disappearance was enshrined as a constitutional principle. In the words of the first Constitution of the Russian Republic, adopted in 1918:

> The basic task of the Constitution ... at the present transitional moment is the establishment of the dictatorship of the city and village proletariat and the poorest peasantry in the form of a powerful All-Russian state authority for the purpose of complete suppression of the bourgeois, the destruction of exploitation of man by man, and the installation of socialism, under which there will be neither division into classes nor state authority.¹

The early years of the Soviet Revolution and its social and legal reforms presented a fundamental challenge to Western capitalism and law.

* Where Western law asserted the sanctity of private property, freedom of contract and the ‘rule of law’ itself, as supposed guarantors of liberty and formal equality, the Bolsheviks argued that these doctrines inherently produced economic and social inequality.

* While Western law enforced the stability of the nuclear family as an economic unit, the Soviet government called for genuine freedom of choice in undertaking and leaving marriage, and gender equality in family and social relations.

* Whereas Western law declared miscreants punishable because of their alleged personality defects, Soviet law treated ‘crime’ primarily as a product of social inequity and, accordingly, sought to replace ‘punishment’ with social improvement, education and other remedial measures.

* Western jurists insisted that law was an organic and indispensable method of governing society, essential to combat or curb the alleged deficiencies and aggressive tendencies of human nature. Soviet jurisprudence regarded humanity as capable of rising to a higher social and moral level,

given the right conditions. It viewed the state and law as legacies of exploitative, class society and sought to create the social conditions for them to be supplanted by more participatory and democratic forms of administration.

Informed by this approach, Soviet law struck out in new directions, often setting benchmarks that Western governments later felt compelled to emulate. This was especially so concerning gender equality, domestic relations, labour protection and social welfare.\(^2\)

Soviet law was the first in the world to give women equal rights in marriage, divorce and economic status. The 1918 Russian Socialist Federated Soviet Republic (RSFSR) family code instituted divorce on demand, without a separation period, and gave wives equal legal authority with husbands in decisions affecting their children. In Britain, by contrast, divorce was only available on the ground of adultery and while a husband need only prove adultery, a wife had to prove cruelty or desertion in addition to adultery. According to the French Code-Civil, a wife owed ‘obedience to her husband’ and was obliged ‘to live with her husband and to follow him wherever he chooses to reside’.\(^3\)

In 1919, Lenin could boast with some justification that:

In the course of two years of Soviet power in one of the most backward countries of Europe, more has been done to emancipate women, to make her the equal of the ‘strong’ sex, than has been done during the past 130 years by all the advanced, enlightened, ‘democratic’ republics of the world taken together.\(^4\)

There were similar groundbreaking achievements in labour protection (e.g. the eight-hour day), social welfare (e.g. social insurance) and housing (e.g. rent controls and rent-free public housing).\(^5\) Overall, the Soviet government sought to make a fundamental shift from private property and individual rights to social ownership and collective rights and responsibilities, underpinned by the nationalisation of land and key enterprises.

The first Criminal Code of 1919 made criminal law hinge on ‘social danger’ and ‘measures of social defence,’ replacing the notions of ‘crime’ and ‘punishment’.\(^6\) Soviet leaders drew the conclusion that the latter terms, together with ‘guilt,’ functioned to obscure the social causes of crime.\(^7\) The Communist Party program of the same year looked ahead to when ‘the entire working population will participate in administering justice and punishment will be replaced once and for all by educational measures.’\(^8\) Despite the primitive and difficult social and economic conditions that the Soviet government confronted, its programmatic and legal instruments looked forward to more humane possibilities.

But what is the relevance of this today? As this thesis will suggest and explore, many of these early initiatives were reversed or abandoned under the Stalinist regime that took hold after the end of the 1923. Moreover, it may be objected, does this not mean that communism proved to be a

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\(^3\) Ibid., pp. 135-9.

\(^4\) Ibid, p. 140.

\(^5\) Ibid, pp. 141-51.

\(^6\) K. Herman, *Justice in the USSR*, p. 35.


hopelessly utopian failure? Only a decade ago, certain writers asserted that the demise of the Soviet Union and the Eastern European Stalinist regimes signalled the irrevocable triumph of the market over socialism and even the "end of history," to use Francis Fukuyama’s phrase.9

With the dawning of a new century, however, it is apparent that many of the issues bound up with the Russian Revolution and which continued to plague humanity during the last century -- war, social inequality, economic exploitation, national oppression, financial instability and colonialism -- have not been resolved but instead revived. Economic globalisation, technological transformation and the widening gap between rich and poor are combining to undermine the old political and legal certainties. Perhaps it is time to examine the possible lessons of the Soviet experiment more closely, with a view to assessing the quality of the early (pre-Stalinist) Soviet legal debates and experiences, and identifying any worthwhile features of this period. In the light of Stalinism’s ignominious collapse, it may be instructive also to examine the contrast between the initial Soviet legal experiments and their subsequent degeneration.

There were lively and wide-ranging debates on the future of the Soviet state and law throughout the early years of the Russian Revolution. This thesis attempts to capture and comment on this phase of Soviet legal history, in which the best-known protagonists were the Soviet jurists Peter Stuchka and Evgeny Pashukanis. Much has been written in the West on their contributions, particularly that of Pashukanis. This thesis will suggest that to unduly focus upon these two figures may distort an understanding of the wider significance of this period.

This thesis proposes an alternative approach, based on seven criteria for making an assessment of the early Soviet legal debates:

1. Broad-ranging legal debates

There were passionate conflicts over the role of the law in the early days of the Russian Revolution; debates that included, among others, Pashukanis and Stuchka. Few Western scholars have examined the full scope and richness of these debates, the extent of which is still emerging in the wake of the collapse of the Soviet Union.10 There were exceptions, including several well-known scholars, notably Kelsen, Hazard, Berman, Schlesinger and Fuller.11

After 1956, Khrushchev’s attempts to distance the Kremlin bureaucracy from the most grotesque features of Stalinism led to renewed interest in the writings of Pashukanis and, to a lesser extent, Stuchka12. These studies, however, often paid insufficient attention to the wider jurisprudential

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discussion that flourished between 1917 and 1927, until they were extinguished by the Stalinist regime. Considering the austere and tense circumstances of the Soviet state, which had barely managed to survive the so-called civil war of 1918-21, these debates were remarkably open and spirited.

2. The social and historical context

With some exceptions, the existing Western academic works on this phase of the Russian Soviet state are often flawed by insufficient attention to the concrete historical and material circumstances facing the young workers' state after 400 years of suffocating and repressive authoritarianism and feudalism.

The Russian Revolution occurred in one of the least developed countries of Europe, with an overwhelmingly peasant population, only formally freed from serfdom 50 years earlier. The leaders of the revolution, notably Lenin and Trotsky, stated that socialism could not be built under such conditions, and that the survival and future of the Soviet state had to depend on the extension of the international revolution across Western Europe.

Instead, as it happened, the revolutionary upsurges in Germany, Italy and other European countries were suppressed. During the so-called civil war of 1918-22, Japan, Britain, the United States and other Western powers intervened behind the military opponents of the revolution, sending in more than half a million troops in an unsuccessful bid to overturn the revolution. Although the hastily-assembled Red Army finally defeated the White armies, the victory came with huge human, social and economic costs. Many of the most active socialists were killed in the fighting, much of the country was devastated and production fell far below pre-World War I levels.

This was followed by the post-1921 New Economic Policy (NEP), under which Lenin's leadership, facing prolonged economic and political isolation in a capitalist world, felt compelled to restore private property rights and market relations to a certain degree in an attempt to revive domestic economic life. All of these developments had a marked impact on legal practice and theory.

3. The legal record of Soviet Russia


For example, Fuller in 'Pashukanis and Vyshinsky' at p. 1165 states that the causes that produced the shift in doctrine from Pashukanis to Vyshinsky, Stalin's principal legal spokesman in the late 1930s, "are not, I think, obscure": Rather than examine the economic and political conditions behind the circumstances, Fuller asserts, with little discussion, that the Soviet leaders rediscovered some "ancient truths" about "the very nature of the human animal": This view undoubtedly flows from the assumptions and arguments underlying Fuller's entire procedural naturalist approach to the minimal requirements for a legal order (see L. Fuller, The Morality of Law, Yale University Press, 1964) but Fuller did not substantiate his analysis in this context.
It is not possible to properly assess the role of Pashukanis and Stuchka, and the wider legal debates, without placing them in the context of the actual legal record of the young Soviet government. It will be argued, for example, that Pashukanis’ best-known contribution, his so-called ‘commodity exchange theory of law’ was bound up with the contradictions thrust forward by the NEP, which necessitated a sweeping codification of law in order to protect revived economic property rights. Pashukanis’ theory enabled him, for a period, to reconcile the Marxist theory of the ‘withering away’ of the state and law with the greater recourse to legal sanctions. Yet, some authors have suggested that Pashukanis’ thesis should be considered without reference to the requirements presented by the NEP.15 This abstract approach, it will be argued, has contributed to some romanticisation of Pashukanis.

4. The socialist opposition

Much of what has been written in the West makes no reference to the formidable socialist opposition to the post-1923 Stalinist regime, an opposition that Stalin sought to extinguish through repeated repression, from the 1927 expulsion of Leon Trotsky from the party leadership through to the great purges of 1936-39. It is of particular significance that both Pashukanis and Stuchka lined up with Stalin’s faction, and that the publication of Pashukanis’ initial volume, The General Theory of Law and Marxism in 1924 coincided with the opening of the battle against the Left Opposition and with Stalin’s proclamation of the quest to build ‘socialism in one country’.

Some scholars, including the historian E. H. Carr, examine the impact of the suppression of the Left Opposition led by Trotsky on the early Soviet legal developments. Others, however, make little or no mention of the Opposition.16 But it is impossible to assess the writings of Stuchka and Pashukanis, or the evolution of the legal discussion as a whole, outside the context of the Kremlin’s struggle against the Opposition. Starting with the New Course, one of the first documents issued by the Left Opposition in late 1923, the Opposition consistently demanded a return to the Marxist course: a democratic and participatory administration, designed to begin dissolving the state apparatus.

5. Classical Marxist legal theory

It is essential to analyse and measure the early Soviet legal debates by reference to classical Marxist theory on the relationship between economic development and law, the class role of law and the ultimate withering away of the state and law in a truly communist society. As will be explored in Chapter One, the early Soviet legal theorists had a considerable Marxist heritage upon which to draw, including substantial writings on law and the state.

Some Western theorists display a limited or distorted understanding of Marxist theory, presenting it as mechanical economic determinism or class instrumentalism.17 Others tend to dismiss its

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16 For example, none of the contributors to P. Beine (ed.), Revolution in Law. Contributions to the Development of Soviet Legal Theory, 1917-1938, M.E. Sharpe, Armonk, New York, 1990, refer to the Left Opposition. Fuller, in his article, cited above, on Pashukanis and Vyshinsky makes no mention of the Left Opposition. Berman, in Justice in the USSR, refers to, or cites, Trotsky several times, and also mentions the Russian nationalism content of Stalin’s measures, but does not explore the significance of the defeat of the Left Opposition.
17 Thus, Fuller, ‘Pashukanis and Vyshinsky’ at p. 1164 states: ‘The orthodox communist conception regards law as the expression of the will of the ruling class.’
relevance or assert that it had little to say on the practical issues facing the Bolsheviks. Some go further, depicting existing Marxist theory as a serious barrier to the Bolsheviks developing a coherent view. This thesis will argue, on the contrary, that Marxist theory had much to say on these issues, but was abandoned under Stalin. It will begin by examining, in outline form, the essential Marxist principles that existed to provide a guide for the approaches taken by the Soviet theorists and authorities.

6. The axis of the early debates

It is necessary to identify the essential axis of the conflicts over legal theory between 1917 and 1927. One chronicler of the debates, Jaworskyj, has discerned the existence of at least four 'Marxist' schools: (a) sociological, (b) psychological, (c) social function and (d) normativist. According to this classification, which is based on the categories adopted by some of the protagonists themselves, the so-called commodity-exchange theories of Stuchka and Pashukanis formed part of the predominant sociological school.

While these classifications are sometimes helpful, they can obscure underlying differences of program and perspective. This thesis attempts to analyse the tendencies differently — primarily from the standpoint of their stances on the key inter-related issues of (1) the class character of the Soviet state, (2) the withering away of the state under communism, and (3) the role of law under socialism.

This approach focusses on the fundamental questions of the function and nature of the state and law in the transition from capitalism to communism. Was the Soviet state apparatus socialist in character, or did it constitute a bourgeois hangover, or did it contain competing features of both? How, and at what pace, would the state wither away, and what factors would determine the outcome? What role would or should law play in the transition, and what would replace it as an instrument of social policy and regulation under genuine communism? Herein lay the nub of the jurisprudential and practical problems, from which flowed other issues.

The participants in the debates sought to elaborate a Marxist perspective by adapting, and criticising, various well-known schools of legal theory, including the leading Western bourgeois writers. They were doing so, however, in the context of grappling with the contradictory requirements of the legal order posed by the successive phases of early Soviet Russia — the consolidation of political power, October 1917 to mid-1918, 'War Communism', mid-1918 to early 1921; the New Economic Policy, from 1921; and the emergence of Stalin's dominance after Lenin's death in early 1924. In particular, the NEP, with its concessions to market economic forces, necessitated the revival of discarded legal forms. From 1924, the ideological and practical needs of the Stalinist regime increasingly shaped and distorted the debates.

18 Fuller, ibid, at p. 1165 states: 'That doctrine [Marxism] give no explicit guidance in conducting the transition from revolutionary terror to stability and legality, and such implicit guidance as can be deduced from it is fantastically wrong.' Likewise, Jaworskyj, Soviet Political Thought at p. 50 contends that Russian legal theorists found few answers in Marxist theory.

19 In his Introduction to Beirne, Revolution in Law, at p. ix, Beirne states: '[T]he Bolsheviks found themselves altogether lacking in theoretical direction for the role of law during the transitional period between capitalism and communism. For Bolshevik theorists of state and law the several strands of existing legal theory presented, in concert, a formidable obstacle to the development of a Marxist theory of law.'


21 See Chapter Six.
7. The contrast with Stalinism

This thesis examines on the contrast between the classical Marxist thesis that the state and the law will become redundant with the successful development of communism, and the program of 'socialist legality' imposed by the Stalinist dictatorship in the 1930s. Numbers of Western scholars have contended that the roots of, and the responsibility for, Stalinism lay in Marxist theory, or at least the unresolved problems of Marxist theory. On one view, Stalinism arose directly out of Marxism-Leninism, with disdain for the rule of law leading inexorably to Stalinist repression. On another view, the fragmentary character of Marxist writings about the nature of legal relations in the period of socialist transition between capitalism and communism created a theoretical vacuum that contributed to the intensification of authoritarian centralism during the late 1920s.

This thesis will suggest a different analysis. It will point to the antithesis between classical Marxism and Stalinist practice. It will further argue that the above-mentioned views underestimate two factors: the unfavourable material circumstances confronting the Soviet state, both internally and internationally, and the degree to which Stalinist authoritarianism arose in direct response to the challenge of the Left Opposition, which fought for the continuation of a Marxist approach.

The evolution of the early debates

This thesis reviews aspects of the post-1917 legal changes and jurisprudential debates, including on family and criminal law, political trials and the legal profession, and examines them in the light of Marxist theory, the objective problems confronting the new state, the Soviet government's practical record, and the emergence of the Stalinist regime.

The pre-Stalinist period between 1917 and 1923 saw free-ranging and scholarly discussion on legal theory. It began to emerge in the earliest days following the October Revolution, and continued during the difficult days of the civil war, but was largely-provoked by the complex issues raised by the NEP. The debates were not extinguished until after the final defeat of the Joint Opposition, led by Trotsky, Zinoviev and Kamenev, in 1927.

The ferment was part of a wider flowering of intellectual, artistic and cultural life generated by the 1917 revolution. Many leading Bolsheviks, including Lenin and Trotsky, wrote on questions of religion, morality, philosophy, psychology, education, law, art and literature. Those seeking to dictate or suppress differences on such profound and intellectually-rich issues were vigorously combated. To take the example of art and literature, intense debates arose in which Trotsky, Aleksandr Voronsky and other Left Oppositionists campaigned against the stifling doctrines of 'proletarian culture' and 'socialist realism'.

After 1923, the consolidation of the Stalinist regime increasingly meant an end to the open discussion of law and legal theory. From genuine debate, by the 1930s the dialogue became reduced to diatribes and denunciations. In essence, the regime's nationalist and bureaucratic

program, formalised by the adoption of Stalin's thesis of 'socialism in one country' in 1924 -- after Lenin's death -- collided with the basic Marxist understanding of the international basis of socialism, with terrible consequences for the role of the Soviet state. The basic perspective that had informed the October Revolution -- that the fate of the Russian Revolution hinged on the international overthrow of capitalism, without which genuine communism was inconceivable -- was replaced by a program based on building an authoritarian fortress state in the Soviet Union, with the prospect of communism delayed indefinitely.

These implications became more apparent over time. They can be seen most poignantly in the fate of Pashukanis, the best-known early Soviet jurist. One of the questions that this thesis seeks to answer is the apparent enigma of Pashukanis: how did the Kremlin’s favourite legal theorist of the second half of the 1920s become officially reviled as a counter-revolutionary within a decade?

As will be reviewed in Chapters 6 and 8, Pashukanis’ 1924 commodity theory of law initially became part of the regime’s official doctrine. It helped reconcile the needs of the NEP, including the legal protection of private property rights, with the Marxist understanding of the withering away of the state. Despite various dismissive critiques in the West, however, his theory provided some profound insights into the nature of law under capitalism.

By the late 1920s, Pashukanis was under attack within the Soviet Union because he maintained, in keeping with authentic Marxism, that the law and indeed the state apparatus of the Soviet Union would ultimately disappear with the construction of a genuinely communist society. He initially resisted the Stalinist notion that the law and the state itself had become organically 'socialist' and therefore occupied a permanent place in social organisation. By 1936, his views were incompatible with the Kremlin line, which was based on the wholly self-contradictory claim that socialism had been built; yet the 'dictatorship of the proletariat' had been simultaneously strengthened.

Pashukanis made several efforts to 'correct' his 'errors', and joined the increasingly ritual denunciations of the 'Trotskyites' and then the 'Bukharinites' from the mid-1920s. His revisions became more grotesque by the mid-1930s, culminating in the almost complete repudiation of his basic theory in 1936, but this failed to save him. After a decade of opposing the Left Opposition, he ended up being denounced and executed as a 'Trotskyite' saboteur in 1937, the year of Stalin's great terror.

His fate was bound up with that of his entire generation. Almost all those with any association with the 1917 revolution, Marxist scholarship or creative intellectual or cultural development were put to death in 1936-37. It is one of history's ironies that the country in which Marxism achieved its highest and widest influence, became the venue for the most ferocious assault on genuine Marxism -- in the name of defending Marxism.

Such was the depth of the socialist opposition to his regime that Stalin undertook the Moscow show trials of 1934-37, the execution of Old Bolshevik leaders and mass purges of the 1930s in

26 Pashukanis' main treatise, Law and Marxism, A General Theory, was originally published in the Soviet Union in 1924. It was published in a new English translation in 1978 (Links Links, London), which is the edition cited in this thesis.
order to secure the survival of his rule. Stalin's extermination of his opponents was a political genocide, unparalleled in history. By framing-up and executing hundreds of thousands of socialist-minded workers and intellectuals, Stalin's regime sought to extinguish the Marxist heritage of the 1917 revolution. Not only were the cream of the entire generation that led the revolution slandered in the most pernicious manner as 'saboteurs,' 'counter-revolutionaries' and 'Nazi collaborators,' they were forced to make ludicrous confessions and then put to death. Trotsky and other leaders of the Left Opposition within the Soviet Union and worldwide were assassinated.

The extent of the repression was, however, also a measure of the power and grandeur of the ideas that the regime sought to silence. Although short-lived, the early pre-Stalinist period of Soviet Russia was living proof of the capacity of downtrodden people, informed by a progressive political perspective, to radically restructure economic, social and political life. This thesis explores the possibility that some features of early Soviet legal thought and experience provide signposts for a future transition to a truly democratic and egalitarian society.

Structure of this thesis

Flowing from the points made in this Introduction, Chapter 1 will examine the classical Marxist theory of law and the state. Chapters 2 and 3 review the revolution's context: the pre-1917 legal record and the political physiognomy and dynamics of the 1917 revolution. Chapters 4 and 5 probe the legal record of early Soviet Russia, and Lenin's views on law. With the scene having been set for an analysis of the legal debates themselves, Chapter 6 reviews the debates, while Chapters 7 and 8 focus on the particular contributions of Stuchka and Pashukanis. Chapter 9 examines the impact of the socialist opposition, most notably the Left Opposition formed by Trotsky at the end of 1923. Chapter 10 draws some tentative conclusions.

Appendix One presents biographical sketches of the main contributors to the legal debates; Appendix Two provides a time line and list of factions within the Bolshevik Party; and Appendix Three lists the known early Soviet legal treatises, providing another measure of the depth of the early jurisprudential work.

CHAPTER ONE

THE MARXIST VIEW OF LAW: SOCIALISM, DEMOCRACY AND THE WITHERING AWAY OF THE STATE

Introduction: the neglected Marxist heritage

The Soviet experiments and experience with law can be understood only in the light of the Marxist view of law. This thesis cannot attempt a full analysis of the Marxist concept of the state and law but it is necessary to address two issues. The first is to consider the notion that there was no coherent Marxist heritage to guide the Soviet administration. The second is to examine, if only in outline form, the relevant propositions that could be considered part of that legacy.

Jaworskyj and other commentators assert that Russian legal theorists found themselves confronting uncharted waters for which Marxist theory had no answers. It is certainly true that unprecedented challenges were posed in the years after 1917 that earlier Marxists could not have fully anticipated. None of the leading Marxists – Marx, Engels, Plekhanov, Lenin, Trotsky – attempted to set out a comprehensive model of society under socialism. They regarded such ventures as overly prescriptive, as well as premature and utopian. For them, socialism consisted of human self-emancipation and would be shaped by the actions and ideas of millions of working people, tempered by the concrete historical and international circumstances that prevailed. The classical Marxists were even less inclined to provide a detailed blueprint for the role of law and the state machinery in the transition from the overthrow of capitalism to socialism and then communism. They regarded law’s role as being fundamentally bound up with and, in the final analysis, dependent upon the development of humanity’s economic capacities and social well-being.

Karl Marx and his close collaborator, Frederick Engels wrote considerably on the role of law in contemporary society, albeit usually tangentially to their broader examinations of class structure and dynamics. Only in several short letters did they address the issue of law as a subject in itself. They wrote less on the post-revolutionary withering away of the state and law in the transition to genuine communism, but enough to provide a policy orientation. What they did not attempt, flowing from their analysis of law as ultimately deriving from economic interests and the conquest of state power, was a general theory of law. Marx twice wrote of his intention to develop a theory of state and law, but this project was set aside to concentrate on his study of political economy, presented in the three volumes of Capital.

Nevertheless, a Marxist heritage provided guiding principles. While Marx and Engels did not write systematic expositions on legal theory, many of their works examined the role of law in society. They provided a definite framework of analysis and orientation, as well as basic

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1 Jaworskyj, Soviet Political Thought, p. 30.
2 See, for example, Marx’s 23 November 1871 letter to F. Bolte in Marx and Engels, Selected Correspondence, Moscow, Progress Publishers, 1975, p. 328.
principles, which initially guided the early Soviet leadership but were later betrayed under Stalinism.

It is worth noting that in the months preceding the October Revolution, while in hiding from the police of the Provisional Government, Lenin wrote his major work on the nature of the state, *The State and Revolution*. He regarded it as so critical for the future of the revolution that in July 1917 he sent a note to Kamenev, asking him to publish his notes if he were assassinated. In his August 1917 Preface to the First Edition, Lenin insisted that the much-mystified questions of the state and law were of acute importance for the looming revolution and needed clarification in the minds of ordinary people. He also recognised that the state and legality and their legitimacy in the eyes of the population could help determine the success and viability of the revolution. He wrote:

> The question of the relation of the socialist proletarian revolution to the state is acquiring not only a practical political importance, but also the significance of a most urgent problem of the day, the problem of explaining to the masses what they will have to do before long to free themselves from capitalist tyranny. ⁶

### Fundamental Conceptions

The two fundamental, underlying Marxist conceptions were (1) that, in general, all forms of law and the state were in the end derived from the development of the productive and hence cultural level of human society and (2) that law and the state would wither away in the process of arriving at a genuinely communist society. That is, the need for formal, bureaucratic and repressive instruments of rule would disappear with the creation of a bountiful, egalitarian and democratic world.

While all the major Marxist theoreticians named above wrote on the role of law and the state, none wrote a full treatise on the subject. For them, these social institutions were derivative and secondary, not primary, in the economic, social and political structure. Nevertheless, as the passage from Lenin just quoted illustrates, Marxists have not ignored the fact that law can play a critical part in shaping social development and consciousness under certain circumstances.

The starting point for understanding this historical materialist view is Marx’s 1859 Preface to *A Contribution to the Critique of Political Economy*, where he tentatively described the following propositions, derived from years of research and experience, as ‘a guiding thread for my studies’:

> In the social production of their life, men enter into definite relations that are indispensable and independent of their will, relations of production which correspond to a definite stage of development of their material productive forces. The sum total of these relations of production constitutes the economic structure of society, the real foundation, on which rises a legal and political superstructure and to which correspond definite forms of social consciousness. The mode of production of material life conditions the social, political and intellectual life process in general. It is not the consciousness of men that determines their being, but, on the contrary, their social being that determines their social consciousness.

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At a certain stage of their development, the material productive forces of society come in conflict with the existing relations of production, or — what is but a legal expression for the same thing — with the property relations within which they have been at work hitherto. From forms of development of the productive forces these relations turn into their letters. Then begins an epoch of social revolution. With the change of the economic foundation, the entire immense superstructure is more or less rapidly transformed.

In considering such transformations, a distinction should always be made between the material transformation of the economic conditions of production, which can be determined with the precision of natural science, and the legal, political, religious, aesthetic or philosophical — in short, ideological forms in which men become conscious of this conflict and fight it out. 7

Three themes can be discerned in this seminal passage. The first is that law, like other aspects of the political superstructure, arises from definite relations of production and the forms of social consciousness forged by those relations. The second is that those relations are not static but are inevitably shattered by the further development of technology and production itself, ultimately leading to social revolution. The third is that law is one of the ideological forms in which humanity becomes conscious of the underlying conflicts and ‘fight them out’. Each of these three observations were reflected in the early Soviet debates and are also important in assessing the contents of the debates.

This is not the place to enter into the disputes over the alleged dichotomy between the ‘young’ and ‘mature’ Marx and Engels and the supposed differences between Marx and Engels. Certain scholars have claimed to detect a contrast between the more ‘humane’ and less deterministic views of the young Marx and his later writings. 8 Other authors have argued that Engels was more mechanical, humanist and superficial in his views on law than Marx. 9 Some have argued that both Marx and Engels became amenable to the possibility of reforming, rather than removing, the legal and state apparatus of capitalism. 10 While this writer does not subscribe to any of these contentions, the existence of such debates underscores the fact that Marx and Engels left a body of writing on law that is capable of informing the struggle for socialism, even if different interpretations have been made of the legacy.

As a young man, Marx studied law but soon rejected the ‘metaphysics of law,’ which he saw as divorced from social reality. He turned initially to a study of the philosophy of law and then to the class and economic driving forces of social development. In his 1843 Critique of Hegel’s Philosophy of Law, he criticised the ‘speculative philosophy of law’ for its disregard of real man’. 11 This notion was further developed in his 1859 A Contribution to the Critique of Political Economy:

Neither legal relations nor political forms can be comprehended whether by themselves or on the basis of a so-called general development of the human mind, but that on the contrary they originate in the material conditions of life, the totality of which Hegel, following the example of English and French thinkers of the eighteenth century,

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8 For example, L. Althusser, For Marx, Harmondsworth, Penguin, 1969, pp. 221-47.
9 Cann and Hunt, above n 4, p. 2.
11 Extracted in Cann and Hunt, above n 4, p. 19.
embraces within the term 'civil society'; that the anatomy of this civil society, however, has to be sought in political economy.12

This conception formed the kernel of his analysis of the role of law throughout his life, although his view was enriched by an exhaustive study of political economy. In Capital, his final work, he remarked upon Hodgskin's 1832 complaint that 'The power of the capitalist over all the wealth of the country is a complete change in the right of property, and by what law, or series of laws, was it effected?'13 Marx commented: 'The author should have remembered that revolutions are not made by laws.'14 In other words, it was not abstract legality that determined property rights, but the taking of economic and political power by a definite social class, in this instance the capitalist class.

At the same time, the class role of law under capitalism was camouflaged in the language of formal equality and 'justice'. It also expressed productive and social relations in a necessarily mystified form. In The German Ideology, Marx and Engels examined the 'cult of concepts' that pervades jurisprudence:

All relations can be expressed in language only in the form of concepts. That these general ideas and concepts are looked upon as mysterious forces is the necessary result of the fact that the real relations, of which they are the expression, have acquired independent existence. Besides this meaning in everyday consciousness, these general ideas are further elaborated and given a special significance by politicians and lawyers, who, as a result of the division of labour, are dependent on the cult of these concepts, and who see in them, and not in the relations of production, the true basis of all real property relations.15

These observations are bound up with what Marx and Engels termed commodity fetishism, which is examined later in this Chapter.

Essential propositions

Properly understood, the Marxist view of law includes a number of pivotal propositions. First, that socialism means democracy and the withering away of the state, not the bureaucratic 'command economy' that subsequently emerged under Stalin.

Secondly, that socialism cannot be achieved by seeking to reform the state machine of the old order. It requires a thoroughgoing popular revolution to establish a new kind of state, a genuinely democratic state (the dictatorship of the proletariat), as a transitional regime to create the ultimate conditions for a classless, stateless communist society.

Third, that law is not inherent or organic to society; rather it arises out of conflicting interests in society and primarily reflects the interests of the ruling layers. Therefore, in a classless society, the legal form of social regulation will become redundant. This withering away of the state and law can and must begin as soon as the socialist revolution has successfully wrested power from the old ruling class.

Fourth, that the relationship between law and socio-economic power is dialectical. Against crude materialism and class reductionism, Marxists explain that legal definitions and measures can, in some circumstances, exert a sharp influence on economic and social developments. In part, this arises from the mystified, ideological form in which law and legal theory present themselves.

Finally, the Marxist view of law rejects the notion that capitalism, based on private ownership of the means of production, is somehow natural while socialism is alien to human nature. Under capitalism, law also plays an ideological role in disguising social inequality, dulling consciousness of class divisions and reinforcing 'commodity fetishism'.

Each of these propositions is essential for interpreting the Soviet legal debates.

**Socialism, democracy and the state**

Marx insisted that the development of a socialist society will not take place according to a series of prescriptions and rules laid down by an individual, a political party or a governmental authority. Rather, it will develop on the basis of the activity of the members of society who, for the first time in history, consciously regulate and control their own social organisation as part of their daily lives, free from the domination and prescriptions of either the 'free market' or a bureaucratic authority standing over them.

In one of his earliest writings Marx stated:

> Only when man has recognised and organised his own powers as social forces, and consequently no longer separates social power from himself in the shape of political power, only then will human emancipation have been accomplished.\(^\text{16}\)

This perspective guided him throughout his life. In one of his later writings, he explained that the significance of the Paris Commune of 1871 was that it involved

> the reabsorption of state power by society as one of its own living forces instead of as forces controlling and subduing it, by the popular masses themselves, forming their own force instead of the organised force of their own supression—the political form of their social emancipation, instead of the artificial force appropriated by their oppressors.\(^\text{17}\)

In Marx's view, the precondition for such a society is the development of the social productivity of labour to such a point that the vast bulk of humanity does not have to spend the greater portion of the day merely trying to obtain the resources to live. The overture of capitalist rule would not see the overnight abolition of the market. The price mechanism would still be needed for a period as a guide in the provision of information regarding the relative costs of alternative production methods. But increasingly it would be made subordinate to and eventually replaced by the conscious regulation of the economy according to a plan, decided on, checked and altered to meet changing circumstances through the involvement of workers and the population as a whole in process of economic decision-making.


The emergence of the Stalinist bureaucracy in the early 1920s, and its complete usurpation, by 1927, of political power meant that genuine socialism, that is democratic, planning, could never be carried out in the Soviet Union. Such democratic input would have immediately threatened the privileged social position of the bureaucracy and its monopoly of political power. Against the Stalinist bureaucracy, Trotsky argued that the demand for Soviet democracy was an economic necessity, not an abstract policy, much less the expression of a pure moral ideal. The establishment of a planned economy, he wrote, was by its very nature insoluble without the daily experience of millions, without their critical review of their own collective experience, without their expression of their needs and demands and could not be carried out within the confines of the official sanctums. 18

That is, bureaucratic planning would inevitably lead to terrible mismatches, dislocations, inefficiencies; crises and eventual economic collapse. Democratic participation was an essential pre-requisite and ongoing requirement for the harmonious development of a genuinely socialist economy and the all-round growth of productive output, as well as social emancipation. This imperative has enormous implications for law, being a central component of the need to delegalise social life as far as possible and facilitate the withering away of the state.

The transition to communism

The dictatorship of the proletariat, in the writings of Marx and Engels, means the temporary and emergency political rule of the working class, as the first stage in the transition to a classless, stateless society. This political rule must include the control by the associated producers—the working class which constitutes the overwhelming majority of society—of the productive forces they themselves have created. In other words, the dictatorship of the proletariat means from the outset the establishment of genuine democracy, with the majority of the population exercising economic power.

The term 'dictatorship of the proletariat' as used by Marx and Engels does not mean tyranny or absolutism or rule by a single individual, a minority or even a single party but political rule exercised by the majority of the population. This is clear from their analysis of the Paris Commune of 1871, which ruled Paris for a period of 72 days before being militarily crushed. In his 1891 introduction to the re-issue of Marx's analysis of the Commune in The Civil War in France, Engels explained that the Commune, which was the first attempt at establishing the dictatorship of the proletariat, began with the 'shattering of the former state power and its replacement by a new and truly democratic one.' 19

In The Civil War in France, Marx underscored its democratic character. The Commune abolished the 'whole sham of state mysteries and state pretensions' and made public functions the activities of working people instead of 'the hidden attributes of a trained caste.' Its tendency of development, Marx emphasised, was 'a government of the people by the people.' Marx declared the Commune to be a harbinger for a future communist society.

When the Paris Commune took the management of the revolution in its own hands; when plain ordinary working men for the first time dared to infringe upon the governmental privilege of their 'natural superiors,' and, under circumstances of unexampled difficulty, performed their work modestly, conscientiously, and efficiently - performed it at salaries

the highest of which barely amounted to one-fifth of what, according to high scientific authority, is the minimum required for a secretary to a certain metropolitan school board — the old world writhed in convulsions.20

Lenin and Trotsky, like Marx before them, warned that in the transition to communism — which could be protracted — it would be impossible for the workers’ government to immediately achieve the egalitarianism goal: ‘from each according to his ability, to each according to his need’. Initially, the new order would have to fall back on incentives such as wage payments to spur production, giving rise to inequality that would continue to be enforced by the state.

In the Critique of the Gotha Program, Marx distinguished between the two stages of socialism. In the first, it would be impossible, given the economic, intellectual and moral birthmarks of the old capitalist order from whose womb socialist society emerged, to go beyond the ‘narrow horizon of bourgeois right’ — by which he meant the formal legal equality that invariably masks social inequality. ‘Law can never stand higher than the economic order and the cultural development of society conditioned by it,’ Marx wrote.21 That is, the law would inherently reflect the fact that society could not provide a plentiful and satisfying life for all. Only after individuals were no longer enslaved by others, labour had become a meaningful and enjoyable pursuit rather than a burden, and the productive forces had increased abundantly would the communist ideal be realised.

Trotsky defended this underlying conception in The Revolution Betrayed, his analysis of the degeneration of the Soviet Union:

The material premise of communism should be so high a development of the productive forces that productive labor, having ceased to be a burden, will not require any goad, and the distribution of life’s goods, existing in continual abundance, will not demand — as it does not now in any well-off family or ‘decent’ boardinghouse — any control except that of education, habit and social opinion.22

Central to this view, as first expounded by Marx and Engels in the Communist Manifesto and later by Lenin in The State and Revolution, was that the state and law must begin to fade away as soon as the dictatorship of the proletariat was established. That is, inherent in the seizure of political power and the establishment of a workers' state was the creation of a unique kind of government that would immediately begin to transfer society's administration into the hands of the population at large.

In the Communist Manifesto, Marx and Engels put it this way:

When, in the course of evolution, the class differences have disappeared and all production has been concentrated in the hands of the associated individuals, the public power will lose its political character. Political power, properly so called, is merely the organised power of one class for oppressing another. If the proletariat during its contest with the bourgeoisie is compelled, by the force of circumstances, to organise itself as a class, if, by means of a revolution, it makes itself the ruling class, and, as such, sweeps

20 Ibid, p. 58.
away by force the old conditions of production, then it will, along with these conditions, have swept away the conditions for the existence of class antagonisms generally, and will thereby have abolished its own supremacy as a class. In the place of the old bourgeois society, with its classes and class antagonisms, we shall have an association, in which the free development of each is the condition for the free development of all.\textsuperscript{21}

Thus, after the socialist revolution, the state becomes an anachronism, retained only for the purpose of suppressing the former propertied classes, and immediately begins to fade away, to be replaced by a free association.

In Anti-Duhning, Engels described an evolving withering away process. 'The interference of the state power in social relations becomes superfluous in one sphere after another and then becomes dormant of itself.'\textsuperscript{24} He elaborated on this point in a letter to August Bebel in 1875, insisting that the dictatorship of the proletariat would be a state, but at the same time not a state, or, at least, a self-dissolving state. Engels criticised the German Social-Democratic Party for advocating the formation of a 'free people's state':

It would be well to throw overboard all this chatter about the state, especially after the Commune, which was no longer a state in the proper sense of the word. The anarchists have too long thrown this 'people's state' into our teeth, although already in Marx's work against Proudhon, and then in the Communist Manifesto, it was definitely stated that, with the introduction of the socialist order of society, the state will dissolve of itself and disappear. As the state is only a transitional phenomenon which must be made use of in struggle, in the revolution, in order to forcibly crush our antagonists, it is pure absurdity to speak of a 'people's free state'. As long as the proletariat still needs the state, it needs it, not in the interests of freedom, but for the purpose of crushing its antagonists; and as soon as it becomes possible to speak of freedom, then the state, as such, ceases to exist. We would, therefore, suggest that everywhere the word 'state' be replaced by 'community' (\textit{Gemeinwesen}), a fine old German word, which corresponds to the French word 'commune' (emphasis in original).\textsuperscript{25}

Engels returned to this theme in his 1891 Introduction to Marx's \textit{The Civil War in France}, which described the formation and suppression of the Paris Commune. Engels contrasted the Commune to all previous revolutions, which had replaced one oppressive state by another.

From the very outset, the Commune was compelled to recognise that the working class, once come to power, could not go on managing the with the old state machine; that in order not to lose again its only just conquered supremacy, this working class must, on the one hand, do away with all the old repressive machinery previously used against itself, and, on the other, safeguard itself against its own deputies and officials, by declaring them all, without exception, subject to recall at any time.\textsuperscript{26}

Apart from the right of recall, Engels reviewed three other measures taken to prevent 'careerism': (1) election to all posts, administrative, judicial and educational; (2) restriction of the wages of all officials, high and low, to those paid to workers; and (3) binding mandates for delegates to representative bodies.

\textsuperscript{24} F. Engels, \textit{Anti-Duhning}, Moscow, Progress Publishers, p. 301.
\textsuperscript{25} Marx and Engels, \textit{Selected Correspondence}, p. 336.
\textsuperscript{26} Engels, Preface to Marx, \textit{The Civil War in France}, p. 16.
Engels scorned the reverence for the state as a font of eternal justice, cultivated under capitalism, and advocated reducing the role of the state as quickly as possible after a socialist revolution.

In reality, however, the state is nothing but a machine for the oppression of one class by another, and indeed in the democratic republic no less than in the monarchy; and at best an evil inherited by the proletariat after its victorious struggle for class supremacy, whose worst sides the victorious proletariat, just like the Commune, cannot avoid having to lop off at once as much as possible until such time as a generation reared in new, free social conditions is able to throw the entire lumber of the state on the scrap heap. ²⁷

In other words, the state was an ‘evil’ remnant of class society, which had to be dispensed with in order to pave the way for the achievement of communism itself. In case this is thought to be a late and heretic opinion of Engels, Marx expressed the same idea in an 1875 letter to Bracke, criticising the draft Gotha Program of the German Social-Democratic Party. Law would continue to exist in the transition from socialism to communism and, in spite of its progressive character as compared to bourgeois law, it would still be ‘infected with a bourgeois barrier’. ²⁸

As will be explored in Chapter Five, Lenin based himself on these principles. In The State and Revolution, he described the proletarian state as a ‘semi-state,’ being the ‘transitional form of its disappearance (the transition from the political state to no state)’. Law and even the state itself remained ‘bourgeois’ in that they were capitalist legacies that could not be abolished immediately amid residual inequality. But the state must be so constituted that it began to wither away immediately and could not but wither away. Its coercive power must be exercised only against the bourgeois, not the working people:

During the transition from capitalism to communism, suppression is still necessary; but it is the suppression of the minority of exploiters by the majority of exploited. A special apparatus, special machinery for suppression, the ‘state’ is still necessary, but this is now a transitional state, no longer a state in the usual sense. ²⁹

Dialectical interrelationship between law and social structure

In some Western academic writings, Marx and Engels are presented as mechanical economic determinists. This somewhat simplifies their analysis. They were determinists in the following sense. For them, the driving forces of all economic, political and social life are the contradictions in material and economic life. Essentially, these contradictions arise from the conflict between the social forces of production and the relations of production – the class and property relations of society – within which those productive forces have hitherto developed.

More specifically, the development of capitalist economic relations shaped the content and structure of law in many ways. The most fundamental relate to the core concepts of private property and contract. Both required an essential break with feudal relations, based on communal and feudal property, fixed status and personal allegiance. Capitalism, as an expansionary economic system, demanded the unfettered accumulation of capital based on the private ownership of the means of production.

²⁷ Ibid, p. 18.
Past societies had developed concepts of property. What was new with capitalism was the development of exclusive private property. This involved a sharp shift from the previous conception that land and the fruits of the earth were originally given to mankind in common. Writing in the second half of the 17th century, the British political theorist John Locke for the first time nominated 'property' as an inalienable right of man and sought to provide a justification for its accumulation.30

Previous societies, including the Roman Empire, had also known commodity exchange. With capitalism, however, this became the predominant form of economy. Labour power itself was transformed into a commodity to be bought and sold on the market. The idea of contract, the supposed free and equal exchange of commodities, rose to dominance.31 The notion of contract became central to the extraction of surplus value via the purchase and consumption of labour power. The process was cloaked ideologically in the doctrine of freely given offers and acceptances giving rise to mutual agreements.

Of course, historical traditions and peculiarities played a part in shaping the particular forms taken by the law in different countries, but the essential form and content of bourgeois law was similar everywhere.

In Ludwig Feuerbach and the End of German Classical Philosophy, written in 1886, Frederick Engels commented on the universal content of law in Britain, France and Germany, notwithstanding certain notable variations. Comparing the French Civil Code with English and Prussian law, he contrasted the gradualist and pragmatic groping of the English common law—which substantially attempted to mould old feudal forms, particularly in the field of real estate—with French legal theory, which was radically overhauled in the wake of the 1789 Revolution:

If the state and public law are determined by economic relations, so, too, is private law, which indeed in essence only sanctions the existing economic relations between individuals which are normal in the given circumstances. The form in which this happens can, however, vary considerably. It is possible, as happened in England, in harmony with the whole national development, to retain in the main the forms of the old feudal laws while giving them a bourgeois content; in fact, directly reading a bourgeois meaning into the feudal name. But, also, as happened in Western continental Europe, Roman Law, the first world law of a commodity-producing society, with its unsurpassably fine elaboration of all the essential legal relations of simple commodity owners (of buyers and sellers, debtors and creditors, contracts, obligations, etc.), can be taken as the foundation.

Engels observed that the law could be developed through judicial practice (common law) or codified, sometimes badly, as in the case of the Prussian Landrecht.

However, after a great revolution it was also possible for such a classic law code of bourgeois society as the French Code Civil to be worked out on the basis of Roman Law. If, therefore, bourgeois legal rules merely express the economic life conditions of society in legal form, then they do so well or ill according to circumstances.32

In an 1884 letter to Karl Kautsky, Engels explained the recourse of the French and other European governments to Roman Law as the foundation for their legal codes.

Roman law was the consummate law of simple, i.e. pre-capitalist, commodity production, which however included most of the relations of the capitalist period. Hence precisely what our city burghers needed at the time of their rise and did not find in the local law of custom [italics in original].

Marx and Engels concluded that the ultimate driving forces of all economic, political and social life are the contradictions in material and economic life. This analysis is far from passive, lifeless and mechanical. While the decisive factors shaping law are economic relations, the legal system remains one of the arenas within which the class struggle is fought out. As Engels pointed out in his 1890 letter to Conrad Schmidt. Marx’s section on the working day in Capital shows that legislation can have a ‘drastic effect’ on social conditions and the class struggle.

This conflict is not automatically reflected in legal doctrines but refracted through the need to elaborate legal principles that have the appearance of internal coherence and universality and to continually adjust these doctrines to meet changing economic circumstances. On law, as other social phenomena, Marx and Engels demonstrated the dialectical interaction between the economic base of society and the ideological superstructure.

In a letter to J. Bloch, Engels emphasised that the economic situation is the ‘ultimately determining factor in history’ but:

the various elements of the superstructure – political forms of the class struggle and its results, such as constitutions established by the victorious class after a successful battle, etc., juridical forms, and especially the reflections of all these real struggles in the brains of the participants, political, legal, philosophical theories, religious views and their further development into systems of dogmas – also exercise their influence upon the course of the historical struggles and in many cases determine their form in particular [italics in original].

This analysis was also dynamic in relation to the continual contradictions produced by the further development of the productive forces and new forms of property rights. Further contradictions arose constantly from the ideological role of law – from the need of any modern ruling class in the epoch of mass politics to present its political order as just and impartial. In his letter to Conrad Schmidt, Engels stated:

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

33 Engels, Letter to K. Kautsky, 26 June 1884, Marx and Engels, Selected Correspondence, pp. 451-2.
34 Engels, Letter to Conrad Schmidt, 27 October 1890, Marx and Engels, Selected Correspondence, p. 402.
35 For a general presentation of Marx and Engels’ writings on this dialectical relationship, see Cui and Hunt, Marx and Engels on Law, chapter six, ‘Law and politics’.
36 Engels, Letter to J. Bloch, 21 September 1890, Marx and Engels, Selected Correspondence, pp. 394-5.
In particular, Marx and Engels recognised the decisive role that could be played by control over the state apparatus, including the legal system, at critical junctures in history, most notably during revolutionary struggles. He concluded his letter to Schmidt by posing the question: ‘Why do we fight for the political dictatorship of the proletariat if political power is economically impotent? Force (that is, state power) is also an economic power!’

This active materialist conception provided the Russian Marxists with some understanding of the role that law could play in the transition to a future communist society. Soviet law could not rise higher than Soviet Russia’s, initially primitive, economic development but it could assist in clarifying the political and economic tasks at hand. Moreover, in a society that was conscious of law’s ideological role, the transitional legal system could perform educational and normative functions.

**Law and ideology**

While Marx and Engels recognised that under capitalism ideological factors could determine the form of legal development, the resulting process produced a mystification, by presenting economic interests as philosophical principles. In his 1890 letter to Schmidt, Engels wrote:

> Economic, political and other reflections are just like those in the human eye. They pass though a condensing lens and therefore appear upside down, standing on their heads. Only the nervous system, which would put them on their feet again for representation, is lacking... The reflection of economic relations as legal principles is necessarily also a topsy turvy one: it happens without the person who is acting being conscious of it; the jurist imagines that he is operation from *a priori* principles, whereas they are really only economic reflexes; so everything is upside down. And it seems to me obvious that this inversion, which , so long as it remains unrecognised, forms what we call ideological conception, reacts in its turn upon the economic basis and may, within certain limits, modify it.¹⁹

Precisely because law was a distorted reflection of economic reality, the distortion could, to the extent that the deformation went unrecognised, impact on the underlying economic relations. This view has a number of implications. In the first place, the mystified distortion served to legitimise exploitation. By reproducing in legal form the commodification of all relations, law presented these relations in an ‘inverted’ way, camouflaging their real content. This was not simply a conspiracy or confidence trick perpetrated by the ruling class, aided by legal theorists and lawyers. Because law was shaped by the objective requirements of the capitalist mode of production, it was organically shrouded in a distorted view of social relations. Bourgeois legal theorists were themselves trapped in an ideological inversion, mistakenly regarding their ideas as the source of jurisprudential development.

While much of their work concentrated on tracing the impact of productive and class relations on political life, Marx and Engels recognised the influence of ideology in shaping the forms in which this impact made itself known. This was particularly evident in both their early and late writings. In one of their early works, *The German Ideology*, Marx and Engels stated:

¹⁹ Ibid, p. 482.
Almost all ideology can be reduced either to a distorted understanding ... of history or to a complete abstraction from history... The fact that conscious expression of the real relationships of these individuals is illusory, that in their representations they place reality on its head, is a result of their limited material mode of activity... Only with the introduction of the division of material and spiritual labour, can consciousness really imagine itself as nothing but the consciousness of the existing practice... Jurists, politicians, moralists, etc are involved in an objectivisation of their occupation, because of the division of labour.\textsuperscript{40}

Marx later traced the ultimate source of this distortion of reality to commodity fetishism, a concept that he fully developed in Chapter One of Capital, Volume One.\textsuperscript{41} At the heart of production and exchange under capitalism was a perverted appearance of social relations.

It is a characteristic feature of labour which posits exchange-value that it causes the social relations of individuals to appear in the perverted form of a social relation between things. The labour of different persons is equated and treated as universal labour only by bringing one use-value into relation with another in the guise of exchange-value. Although it is correct to say that exchange-value is a relation between persons, it is however necessary to add that it is a relation hidden by a material veil... All the illusions of the monetary system arise from the failure to perceive that money, though a physical object with distinct properties, represents a social relation of production.\textsuperscript{42}

(One contemporary writer who provided a useful, if somewhat pretentious, summation of the concept of commodity fetishism and its relation to law is Balbus. He explained commodity fetishism in the following manner:

[T]he masking of the link between commodities and their human origins gives rise to the appearance, the ideological inversion, that commodities have living, human powers. Products appear to take on a life of their own, dominating the very human subjects who in fact bring them into existence but who no longer 'know' this. Commodity fetishism thus entails a profound reversal of the real causal relationship between humans and their products: humans, the subjects who create or cause the objects, become the object, i.e., are 'caused' by the very objects which they have created and to which they now attribute subjectivity or causal power.\textsuperscript{43}

According to Balbus, this process led to life being dominated by the passion to possess the power of the one commodity, money, that made possible the accumulation of all other commodities. Ultimately, 'money is transformed from a means of exchange into the very end or goal of human life itself'.\textsuperscript{44} Likewise, legal fetishism, which parallels commodity fetishism, regards the legal form as independent or autonomous from the power or will of the human subjects who originally set law in motion.\textsuperscript{45})

\textsuperscript{41} Marx, Capital, Moscow, Progress Publishers, 1956, Vol 1, pp. 76-87.
\textsuperscript{42} Marx, A Contribution to the Critique of Political Economy, pp.34-35.
\textsuperscript{44} Ibid.
\textsuperscript{45} Ibid, p. 584.
Engels elaborated on the role of ideological factors in several of the letters written in the final years of his life. In an 1893 letter to Franz Mehring, Engels sought to correct a ‘mistake’ that he and Marx may have made in focussing mainly on the basic economic facts while neglecting the ideological forms through which the economic factors were expressed.

Ideology is a process accomplished by the so-called thinker consciously, indeed, but with a false consciousness. The real motives impelling him remain unknown to him; otherwise it would not be an ideological process at all. Hence, he imagines false or apparent motives. Because it is a process of thought, he derives both its form and its content from pure thought, either his own or that of his predecessors. He works with mere thought material which he accepts without examination as the product of thought; he does not investigate further for a more remote process independent of thought; indeed, its origin seems obvious to him, because, as all action is produced through the medium of thought, it also appears to him to be ultimately based upon thought.46

As we shall see in Chapter Six, these issues became frequent points of contention during the early Soviet debates. Broadly speaking, Pashukanis opposed those writers who depicted law as a mere ideological construct. He emphasised the inner connection between the legal form and commodity production. His protagonists expressed two tendencies. One, the ‘social function’ school, personified by Goikhbarg, saw law as a form of deception that could be dispensed with under socialism. Others in the ‘psychological’ school, such as Reisner, stressed that, to be effective, law had to correspond to a public sense of justice. Later in the debates, figures such as Naumov decried these views as evincing a disregard for Soviet legality.

LAW AND ‘HUMAN NATURE’

The proponents of the free market and capitalist ownership of the means of production argue that socialism is unnatural and therefore doomed to failure because it violates the inherent drive in every human being towards the exclusive ownership of property. This conception is filled with unstated assumptions.

In the first chapter of Capital, in his analysis of commodity fetishism, Marx explained that one of the great difficulties in coming to an understanding of society is that it has already undergone a considerable development:

Man’s reflections on the forms of social life and consequently, also, his scientific analysis of these forms, take a course directly opposite to that of their actual historical development. He begins, post festum, with the results of the process of development ready to hand before him.47

In other words, analysis begins with categories and forms of thought already at hand under conditions where the historical processes that gave rise to these forms is obscured from view. Hence these forms of thought are not understood as the product of historical processes, but seem to spring from the ‘inner nature’ of man himself. In capitalist society, the extraction of surplus labour does not take place through political means, but economically. That is, while there were a myriad of laws in feudal society, which spelt out the obligations of the peasant, there are no such laws under capitalism. There is no statute that compels the worker to sell his or her labour power to the owner of capital. He or she is forced to do so by the pressure of economic necessity. And

46 Engels, Letter to Mehring, Selected Correspondence, July 14, 1893.
that compulsion arises from the fact that, unlike the peasant or small producer in feudal society, the worker in capitalist society has been separated from the ownership of the means of production.

Therefore, the crucial question to be examined in the transition from feudalism to capitalism is how this transformation took place. That is, how it was that a class of free wage labourers emerged—free both from feudal obligations and from the means of production—with nothing to sell but their labour power. History shows that this transformation did not result from some innate human nature, but was the outcome of new forms of social organisation based on the market. Those who maintain that the emergence of capitalism is the result of some inherent drive to own private property can never answer the question as to why the transition to capitalism took place between the 16th and 18th centuries, rather than earlier. Capitalism could only emerge once society's technology and productive capacity—for example, steam power—had developed to the point where large-scale manufacturing could arise.

One of the most important battles in the development of capitalism was the establishment of exclusive property rights, above all in land, over the common property rights that had played such a central role in the lives of the peasantry under feudalism. Far from expressing some inherent human characteristic, manifesting itself at a young age, this new form of property had to establish itself against the conception that land should be held in common and its fruits available to all. Locke, in particular, had to argue strenuously for the right to individual property, against the conception of common property and custodianship. Locke identified certain inalienable rights—the right to life, liberty and property. According to Locke, every man was the sole proprietor of his own person and capacities. His right to property derived from his right to enjoy the fruits of his own labour.

C.B. Macpherson has pointed out that the political concepts developed by Locke were intimately bound up with the rise of the free market and individual property rights. Locke provided the ideological basis for exclusive private property, so essential to the development of the new mode of production.

[1] If the new kind of property required by the capitalist market society, i.e. property as exclusive, alienable right to all kinds of material things including land and capital, was to be thought to be justified, the right would have to be based on something more universal than the old feudal or customary class differentials in supposed needs and capacities. The universal basis was found in 'labour'. Every man had a property in his own labour. And from the postulate that a man's labour was peculiarly, exclusively his own, all that was needed followed. The postulate reinforced the concept of property as exclusion. As his labour was his own, so was the land with which he had mixed his labour, and the capital that he had accumulated by means of applying his labour. This was the principle that Locke made central to the liberal concept of property.

Later, Macpherson observed:

Locke begins by accepting, as the dictate both of natural reason and of Scripture, that the earth and its fruits were originally given to mankind in common. This was of course the traditional view, found alike in Medieval and in seventeenth-century Puritan theory. But Locke accepts this position only to refute the conclusions previously drawn from it, which had made property something less than a natural individual right. ‘But this [that

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the earth was given to mankind in common] being supposed,’ Locke wrote, ‘it seems to some a very great difficulty, how any one should ever come to have a Property in any thing ... I shall endeavour to shew, how Men might come to have property in several parts of that which God gave to Mankind in common, and that without any express Compact of the Commoners.’

In other words, the forms of property, based on exclusion, which are considered as emanating from human nature today, were once regarded as so unnatural that they had to be argued for.

In considering these issues of property and human nature, it is also important to recognise that socialism does not mean the abolition of personal property. Marx wrote in the *Communist Manifesto*, ‘The distinguishing feature of Communism is not the abolition of property generally, but the abolition of bourgeois property.’ By that, Marx meant the abolition of the private ownership of the means of production, not all individual private property. He stated, ‘Capital is a collective product, and only by the united action of many members, nay, in the last resort, only by the united action of all members of society, can it be set in motion.’

The theory that identifies freedom with private ownership is based on the claim that each individual has the natural right to the fruits of their own labour and that private property is the means through which this right is secured. But concentration of ownership and the separation of the mass of the population from the means of production with nothing to sell but their labour power to the owners of capital means that private property itself has long ago undergone a transformation. No longer is it a social mechanism through which individuals secure the fruits of their own labour, it is rather the mechanism through which capital secures the fruits of other people’s labour in the form of profit.

**George Plekhanov’s contribution**

George Plekhanov, regarded as the father of Marxism in Russia, contributed some important insights in the course of his works on Marxist philosophy and historical analysis. As will be reviewed in Chapter Three, Plekhanov ended up opposing the October 1917 Revolution, in part because he held to a mechanical conception that the Russian revolution first had to proceed through a protracted capitalist stage. Nonetheless, his earlier writings contained much of value and were sometimes referred to during the early Soviet legal debates, notably by Pashukanis.

Plekhanov elaborated the basic thesis that law cannot rise higher than the socio-economic order, whether it is feudal, capitalist or socialist. This remains crucial for understanding the contradictions of Soviet Russia. He summed up the Marxist view as follows: ‘In the opinion of the economic materialists, legal concepts develop, not of themselves but under the influence of the mutual relationships entered into by producers under the impact of economic necessity.’ Only one of two things was possible: ‘either the legal institutions of a given country are in accord with its economic needs, or they are not in accord.’ Plekhanov pointed out that a legal system may lag behind technological and other rapid changes in production, but this gave rise to a striving to overcome the discrepancies.

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51 For example, Pashukanis, *Law & Marxism*, p. 54.
Plekhanov explained that new stages in society's economic development must be translated into political and legal concepts, highlighting the deep interaction between the economy – the primary historical driving force – and the political and legal superstructure. Referring to different stages of economic development, Plekhanov stated:

Mankind’s advance from point A to point B, from point B to point C and so on, right up to point S, *never takes places on the plane of the economy alone...The road from one turning point to another always lies through the ‘superstructure’... What do a country's political institutions hinge on? We already know that they are an expression of economic relations. For that practical expression, however, these economically prompted institutions must first pass through the minds of people in the shape of certain concepts.*

Later, Plekhanov distinguished between legal form and content.

*At various stages of social development, any given ideology experiences in a highly unequal degree the influence of other ideologies. Thus, in ancient Egypt and partly in Rome, law was subordinate to religion; in recent history, law has developed (in the formal aspect - we would underscore that and ask for due note to be taken) under the strong influence of philosophy.*

Plekhanov emphasised the point made by Engels in his letters of 1890 and 1895, refuting the caricatured view of mechanical economic determinism attributed by some critics to Marx: ‘Political development rests on the economic development but at the same time reacts on the economic base.’ In particular, Plekhanov noted an important passage in Marx’s critique of Hegel’s philosophy of law, in which Marx remarked upon the ideological and political need for any ruling class to gain legitimacy in the eyes of the rest of society:

No class ... can play this role without arousing a moment of enthusiasm in itself and in the masses, a moment in which its demands and rights are truly the rights and demands of society itself; a moment in which it is truly the social head and the social heart.

Plekhanov, like Marx and Engels, noted that while law was fundamentally determined by economic factors, law and legal ideology could have a critical impact on social consciousness.

The legal and political relations engendered by a given economic structure exert a decisive influence on social man’s entire mentality. ‘Upon the different forms of property, upon the social conditions of existence,’ says Marx, ‘rises an entire superstructure of distinct and peculiarly formed sentiments, illusions, modes of thought and views of life.’

Plekhanov, following Marx and Engels, also emphasised that historical materialism provided a method of analysis, not a ‘key to all riddles’. That is, Marxism provided a method of approach to

the role of law in society, not a recipe for predicting every legal twist and turn under capitalism, nor for detailed law-making in the transition to socialism. This observation is helpful in assessing the later Soviet experience.

Leon Trotsky’s observations

No discussion of the Marxist conception of law is complete without introducing the writings of Trotsky, one of the foremost leaders of the October 1917 Revolution and of the fight against Stalin’s bureaucratisation of Soviet society. This thesis will examine the impact of Trotsky and the Left Opposition in several places but Trotsky’s views are also significant in elucidating the classical Marxist view of the state and law.

Like other central figures in the Marxist movement, Trotsky did not attempt to present a systematic analysis of the role of law in society. Moreover, Trotsky had no formal training in law. His most complete exposition of the relationship between law and the state was written as part of his analysis of the degeneration of the Soviet Union, in The Revolution Betrayed. Chapter 3 of that work, entitled 'Socialism and the State,' contrasts the evolution of the Soviet state into an ever more totalitarian regime under Stalin with the classical Marxist conception of the withering away of the state.

While basing himself on the writings of Marx, Engels and Lenin on law and the state (quoting several of the passages quoted above in this Chapter) Trotsky developed their conceptions by examining them in the context of both the acute contradictions of the Russian Revolution and the increasingly integrated character of world economic life. Trotsky first set out to explain the unavoidable necessity for a socialist revolution to pass through a transitional regime in the 'the lowest stage of communism' before the material and political conditions arose for genuine communism, in which, according the famous maxim, everyone could work 'according to his abilities' and receive 'according to his needs.' In doing so, Trotsky pointed to the tension at the heart of early Soviet Russia.

Capitalism prepared the conditions and forces for a social revolution: technique, science and the proletariat. The communist structure cannot, however, immediately replace the bourgeois society. The material and cultural inheritance from the past is wholly inadequate for that. In its first steps the workers' state cannot yet permit everyone to work 'according to his abilities' – that is, as much as he can and wishes to – nor can it reward everyone 'according to his needs,' regardless of the work he does. In order to increase the productive forces, it is necessary to resort to the customary norms of wage payment – that is, to the distribution of life's goods in proportion to the quantity and quality of individual labor.\footnote{The slogan was elaborated by Marx in Critique of the Gotha Program}

This would be the case, Trotsky argued, even in an American socialist state, based on the most advanced capitalism. Even under those favourable circumstances, it would not be possible to immediately provide everyone with as much as he needed, and therefore everyone would initially have to be spurred or encouraged to produce as much as possible. Moreover, Trotsky noted that Marx had expected the social revolution to commence in the most economically advanced capitalist countries, such as Germany and Britain. Instead, Russia, one of the least developed countries, had been thrust into the lead. By itself, Russia could not even reach socialism, that is, 'the lowest stage of communism,' because it was still trying to catch up to the capitalist powers.\footnote{Trotsky, The Revolution Betrayed, p. 46.}
From this, Trotsky drew the conclusion that Soviet Russia could not be classified as a socialist regime, but a preparatory regime transitional from capitalism to socialism:

If Marx called that society which was to be formed upon the basis of a socialisation of the productive forces of the most advanced capitalism of its epoch, the lowest stage of communism, then this designation obviously does not apply to the Soviet Union, which is still today considerably poorer in technique, culture and the good things of life than the capitalist countries.61

Trotsky insisted that an essential task of the transitional proletarian dictatorship was to prepare for its own dissolution. Success in this 'fundamental mission' was bound up with overcoming both class distinctions and material contradictions.62 In Anti-Dühring, Engels had written that in order for the state to fade away, 'class domination and the struggle for individual existence' must disappear. But these two pre-conditions would not necessarily be achieved simultaneously. As the Russian experience demonstrated, the socialisation of the means of production did not automatically remove the struggle for individual existence. In order to stimulate production, the state had been obliged to resort to the methods of labour payment worked out by capitalism. Hence the relevance of Marx's warning that 'bourgeois law' was inevitable in the first socialist phase, and Lenin's added warning that even a bourgeois state would persist, albeit without a bourgeoisie.

We have thus taken the first step toward understanding the fundamental contradiction between Bolshevik program and Soviet reality. If the state does not die away, but grows more and more despotic, if the plenipotentiaries of the working class become bureaucratised, and the bureaucracy rises above the new society, this is not for some secondary reason like the psychological relics of the past, etc. but is a result of the iron necessity to give birth to and support a privileged minority so long as it is impossible to guarantee genuine equality.63

Trotsky conceded that the first attempts to create a state cleansed of bureaucracy had suffered from the 'unfamiliarity of the masses with self-government' and the lack of qualified workers devoted to socialism but pointed to more profound difficulties that soon emerged.

That reduction of the state to functions of 'accounting and control,' with a continual narrowing of the function of compulsion, demanded by the party program, assumed at least a relative condition of general contentment. Just this necessary condition was lacking. No help came from the West. The power of the democratic Soviets proved cramping, even unendurable, when the task of the day was to accommodate those privileged groups whose existence was necessary for defence, for industry, for technique and science. In this decidedly not 'socialistic' operation, taking from ten and giving to one, there crystallised out and developed a powerful caste of specialists in distribution.64

This clearly had immense implications for the legal system, whose function became, in large measure, the enforcement of these social disparities. Trotsky related that the Left Opposition had warned in the early 1930s against accepting the predictions of the Soviet bureaucracy that within five years, "the last relics of capitalist elements in our economy will be liquidated".

61 Ibid, p. 47.
63 Ibid, p. 55.
64 Ibid, p. 59.
You must not limit yourself to the socio-juridical form of relations which are unripe, contradictory, in agriculture still very unstable, abstracting from the fundamental criterion: level of the productive forces. Juridical forms themselves have an essentially different social content in dependence upon the height of the technical level. 'Law can never be higher than the economic structure and the cultural level conditioned by it' (Marx). 65

This passage encapsulates Trotsky’s adherence to the Marxist analysis of law as conditioned and shaped by the level of economic development. In the course of seeking to apply this analysis to the degeneration and betrayal of the Russian Revolution, he arguably enhanced the analysis. He suggested that legal forms themselves, while retaining their formal outer appearance, would have varying social content, depending on the economic, technical and cultural level of society.

In earlier writings, Trotsky consistently defended the October 1917 Revolution and the initial actions of the Bolsheviks, including the seizure of power, the dissolution of the Constituent Assembly, the banning of parties that took up arms against the revolution and other measures taken during the civil war of 1919-21. In *Terrorism and Communism — A reply to Karl Kautsky*, Trotsky responded to Kautsky, previously a major figure in the Marxist movement, who accused the Bolsheviks of proceeding undemocratically. 66 Members of the Austro-Marxism school, who, in some instances, claimed to be Marxist legal theorists, joined Kautsky’s denunciation of the revolution. They included Karl Renner, Otto Bauer, Max Adler, Rudolf Hilferding and Friedrich Adler. 67

Trotsky insisted that the Soviet revolution was far more democratic than the parliamentary apparatus defended by Kautsky. He pointed to the innate fraud of capitalist democracy, which leaves the economic power and control over the state apparatus in the grip of a ruling elite, arguing that it gives the working masses no other way but revolution to take charge of society:

Violent revolution has become a necessity precisely because the imminent requirements of history are helpless to find a road through the apparatus of parliamentary democracy. The capitalist bourgeois calculates: ‘while I have in my hands lands, factories, workshops, banks; while I possess newspaper, universities, schools; while – and this is most important of all – I retain control of the army; the apparatus of democracy, however you reconstruct it, will remain obedient to my will. I subordinate to my interests spiritually the stupid, conservative, characterless lower middle class, just as it is subjected to me materially… To this the revolutionary proletarian replies: ’Consequently, the first condition of salvation is to tear the weapons of domination out of the hands of the bourgeoisie. It is hopeless to think of a peaceful arrival to power while the bourgeoisie retains in its hands all the apparatus of power. Three times hopeless is the idea of coming to power by the path which the bourgeoisie indicates and, at the same time, barricades – the path of parliamentary democracy. There is only one way: to seize power, taking away from the bourgeoisie the material apparatus of government. Independently of the superficial balance of forces in parliament, I shall take over for social administration the chief forces and resources of production.’ 68

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68 Ibid, p. 58.
Trotsky also examined democracy from a theoretical and historical standpoint. He pointed to the degeneration of the democratic conception in the hands of the capitalist class and its jurisprudential theorists.

As a battle cry against feudalism, the demand for democracy had a progressive character. As time went on, however, the metaphysics of natural law (the theory of formal democracy) began to show its reactionary side – the establishment of an ideal standard to control the real demands of the labouring masses and the revolutionary parties… Natural law, which developed into the theory of democracy, said to the worker: 'all men are equal before the law, independently of their origin, their property, and their position; every man has an equal right in determining the fate of the people.' This ideal criterion revolutionised the consciousness of the masses in so far as it was a condemnation of absolutism, aristocratic privilege, and the property qualification. But the longer it went on, the more it sent the consciousness to sleep, legalising poverty, slavery and degradation: for how could one revolt against slavery when every man has an equal right in determining the fate of the nation?… In the real conditions of life, in the economic process, in social relations, in their way of life, people became more and more unequal; dazzling luxury was accumulated at one pole, poverty and hopelessness at the other. But in the sphere of the legal edifice of the state, these glaring contradictions disappeared, and there penetrated only unsubstantial legal shadows.\(^{69}\)

In the course of his reply, as well as defending the record of the Bolsheviks in detail, Trotsky made several illuminating remarks about the Marxist view of law and the state. These comments shed light not just on the particular problems confronting the Russian Revolution but also on the degree to which Trotsky and other Bolshevik leaders were acquainted with the debates over previous decades surrounding the Marxist analysis of law.

Trotsky accused Kautsky and the Austro-Marxism school of taking a mechanical view of the development of social relations. In essence, they argued that socialism could only arise gradually with the ripening of humanity's technological and productive capabilities and that socialists would have to wait for a democratic vote before assuming political power. In assessing the historical impact of their views, Trotsky drew upon a very different approach to Marx's base-superstructure analogy than that propagated by those who accuse Marxism of economic determinism. He identified a multiplying effect of legal and political factors on the economic base.

If, beginning with the productive bases of society, we ascend the stages of the superstructure - classes, the state, laws, parties, and so on - it may be established that the weight of each additional part of the superstructure is not simply to be added to, but in many cases to be multiplied by, the weight of all the preceding stages. As a result, the political consciousness of groups that long imagined themselves to be among the most advanced, displays itself, at a moment of change, as a colossal obstacle in the path of historical development. Today it is quite beyond doubt that the parties of the Second International, standing at the head of the proletariat, which dared not, could not, and would not take power into their hands at the most critical moment of human history, and which led the proletariat along the road of mutual destruction in the interests of imperialism, proved a decisive factor of the counter-revolution. The great forces of production - that shock factor in historical development - were choked in those obsolete

\(^{69}\) Ibid, pp. 60-61.
institutions of the superstructure (private property and the national state) in which they
found themselves locked by all preceding development (Trotzky's italics).90

Trotzky's argument was specifically directed against the leaders of the Second International,
including Kautsky and the Austro-Marxism school, who had taken the side of their national
governments in World War I, supporting the dispatch of millions of working people to kill each
other in the trenches. His assessment incorporated his previously elaborated analysis that the war
between the major colonial powers - Britain, France and Germany - over territories and world
markets had expressed, in a fundamental sense, the irreconcilable conflict between the globalised
development of economy and the nation-state system.71

Yet, his approach has wider implications for the role assigned to superstructural factors, including
law, in social change. Far from a determinist conception that economic changes would be
automatically registered in politics and law, or even give them a new content, it is clear from
Trotzky's view that questions of ideology, particularly political consciousness, could assume
decisive importance at critical moments. This would follow, albeit perhaps to a lesser extent, for
law (law being a lower 'stage' of the superstructure). Law, like other superstructural factors,
could have a multiplied impact, either accelerating or retarding historical development. Thus,
while law was shaped by economics, legal policies and problems could be critical under certain
circumstances.

Trotzky related the need for the dictatorship of the proletariat in the transition to communism, to
the political and economic tasks involved in overthrowing capitalism. He argued that genuine
socialism and communism were impossible to achieve without the free and creative involvement
of all people. The bureaucratic police state erected by Stalin was not only an affront to socialist
democracy but also a suffocating barrier to the development of the productive and cultural
capacities of society.

The socialistic economy must be directed to ensuring the satisfaction of every possible
human need. Such a problem it is impossible to solve by way of commands only. The
greater the scale of the productive forces, the more involved the technique; the more
complex the needs, then the more indispensable is a wide and free creative initiative of
the organised producers and consumers. The socialist culture implies the utmost
development of the human personality. Progress along this path is made possible not
through a standardised cringing before irresponsible 'leaders', but only through a fully
conscious and critical participation by all in a socialistic creative activity. The youthful
generations stand in need of independence, which is wholly consistent with a firm
leadership but rules out any police regimentation. Thus the bureaucratic system in
crushing the Soviets and the party is coming ever more clearly into opposition with the
basic needs of economic and cultural development.72

In line with Marx and Engels, Trotzky's emphasis was on the self-liberation of the entire
population. This was the essence of communism. Therefore, the task of the Soviet state was to
encourage, not to stifle, the maximum degree of conscious, well-informed and independent
participation in political and administrative affairs.

70 ibid., p. 41.
See also Trotzky, The History of the Russian Revolution.
72 Trotzky, Terrorism and Communism, p. 9.
CHAPTER TWO

PRE-REVOLUTIONARY RUSSIAN LAW

Introduction

The legal debates, achievements and problems of the Soviet Russia must be placed in the context of the administrations that preceded it – the 400-year-old Tsarist autocracy and the short-lived Provisional Government from February to October 1917. Both failed to provide even formal legal equality, let alone basic democratic rights. Their records reveal aspects of the authoritarian heritage and political difficulties that the Bolsheviks sought to overcome. They also highlight the historical impasse that led to the Russian Revolution.

The Tsarist regime remained dictatorial, arbitrary and ruthless until it was overthrown.¹ It was an absolute monarchy, administered by an all-powerful bureaucracy. This suffocating regime was directly reflected in its legal system. Its characteristic features were explicit inequality of treatment according to social status and class, arbitrariness and corruption, secret trials and the absence of professional legal representation. One scholar of Russian law summarised the legal conditions as follows:

The Russian judicial system of the mid-nineteenth century lives up to the worst possible expectations. It was organised on a class basis, with separate courts and different punishments for the nobility, the clergy, the urban population, and the remnants of the free peasantry. The intellectual and moral level of the judges was notoriously low; bribery was almost universal. The courts were in the control of centrally appointed provincial governors. Procedure was still entirely written, the evidence being presented in the form of documents prepared by the police. Trial was secret, with judges appearing in public only to pass sentence or to hand down a judgment. There was a confusion of jurisdictions and instances, with unlimited delays. In 1831, for example, in the province of Petersburg there were discovered on investigation to be 120,000 undecided cases in the courts. There was no professional bar. Legal education was poor... As with the legal position of the peasantry and the emperor, as with the whole system of public administration, so with the judicial order, too, reform was far behind the revolutionary demands which had been fermenting among the intelligentsia for two generations.²

The Tsarist court recognised, especially after the defeat in the Crimean War 1854-6, that economic modernisation was necessary if it were to retain Great Power status, and this was the reason for the legal and other reforms of Alexander II. However, following his assassination in 1881, his successors attempted to continue industrial expansion and modernisation, while maintaining the existing social and political order, creating extreme social tensions. Another study summed up pre-revolutionary Russia as follows:

In fact the very notion of freedom seemed incompatible with Tsarism. None of the political liberties that had long since been written into Western law existed in Russia before the 1905 Revolution. No opposition of any form was tolerated ... Despite all its hollow pretences, autocratic and obsolete Tsarism continued to crush every

² Derman, Justice in the USSR, pp. 211-212.
striving for freedom. It not only suppressed all attempts to liberalise political and social life, it also stifled all cultural stirrings.

The Tsarist autocracy and its law

Together with the abolition of serfdom in 1861, Alexander II introduced legal reforms in 1864, creating an independent judiciary, jury trials and a Bar (advokatura). As scholars have noted, Alexander II’s concern was to effect reforms from above in order to head off revolution from below. Far from representing any genuine liberal modifications, his 1864 court reform edict sought to shore up his autocracy by creating public respect for law, that is, by rehabilitating the reputation of the widely-detested legal apparatus. The Tsar stated his desire to establish in Russia fast, just and merciful courts, equal for all our subjects, to increase judicial power, to give it the necessary independence and, in general, to strengthen in our people the respect for law without which public prosperity is impossible, and which must serve as a permanent guide for the actions of all and everybody, from the person of the highest rank to that of the lowest rank.

To that end, the 1864 measures introduced some basic features of a Western-style legal order, such as defence lawyers, a professional bar, jury trials and independent judges. The provisions included judicial tenure; the elimination of class courts, except for peasants; the establishment of English-style elected justices of the peace; public hearings; trial by jury; and a system of appellate courts. At the same time, these measures retained at least four key features of Tsarist rule. Firstly, peasants—three-quarters of the population—remained subject to special courts. Secondly, the Minister of Justice was also Prosecutor General and controlled the Procuracy, the main recruiting ground for judges. Thirdly, the Minister could also transfer or block the promotion of dissenting judges. Fourthly, defendants had no right to counsel during the important pre-trial investigation, leaving them in the hands of investigating magistrates.

Despite their formal emancipation from serfdom in 1861, peasants remained bound by debts and taxes to their local communes, something akin to the South African apartheid regime’s bantustans. The 1864 measures left them segregated into a separate estate, bound by customary law. Under the soslovie system, the Russian Empire classified all people into legal estates according to their social position. The first estate was the nobility, followed by the clergy, town dwellers, peasants and others. The latter category, called raznochintstvi (people of various origins who no longer belonged to a traditional group), included workers, professionals and the intelligentsia. In this semi-feudal hierarchy, each estate had its own legally defined rights and obligations.

The 1860s are commonly referred to as the decade of the Great Reforms, with Alexander II’s initiatives regarded as a thoroughgoing reformation. Nevertheless, the government

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4 For example, Berman, *Justice in the USSR*, p. 212.
10 For example, Berman, *Justice in the USSR*, p. 212.
intervened whenever it felt threatened by the independence of judges and juries. Alexander III (1881-94) further reduced judicial independence and made a mockery of the 1864 measures. The 1878 acquittal of Vera Zasulich, who shot the governor of St Petersburg for ordering the flogging of a student revolutionary, was followed by the withdrawal of the right to jury trials for crimes against the state and other political offences. In 1885, the independence of judges was severely limited and in 1887, the staging of secret trials was restored, with the government able to conduct proceedings behind closed doors whenever it considered that a public trial would endanger public morality, religion, the state or public order.

This was particularly so in dealing with political opposition. During the trials of the People’s Will dissidents in the 1880s, 42 of the 73 cases were heard by military courts and 7 by special Senate session. Only the least significant were heard in public jury trials. By 1906, about 1,000 political prisoners had been executed during field courts-martial. While the death penalty was inapplicable in civilian courts, except for peasants, military courts ‘handed out death sentences to civilians right and left,’ especially from 1906 to 1914—from the putting down of the 1905 Revolution to World War I.

Like the rest of the legal system, the pre-revolutionary legal profession was in a sorry state. Tsars from Peter the Great to Nicholas I vehemently opposed the introduction of a Western-style legal profession. As a result, minor state officials supplied most legal services, working privately after hours for the wealthy few who could afford their fees. Feeble attempts to modernise the Russian state along Western capitalist lines in the second half of the nineteenth century failed. The Judicial Reform Act of 1864 laid the legislative basis for an estate of lawyers but the Tsarist authorities largely thwarted it.

Following the acquittal of Zasulich in 1878, the autocratic regime invested itself with the power to remove undesirable advocates from trials, political trials were shifted to military courts without juries and new restrictions were placed on court reporting. Reactionary measures were introduced to clamp down on the legal profession, including a quota on the intake of Jews. Most accused, overwhelmingly poor peasants and workers, had no representation—of the extraordinary number of 2.5 million criminal cases per year, just 120,000, or 5 percent, were heard by general courts, where there was a right to representation, but even there most defendants went unrepresented.

As will be discussed in Chapter Three, mass opposition to Tsarism first erupted in full force during the 1905 Revolution. Confronted by a general strike, the Tsar granted civil liberties and a popularly elected representative assembly (Duma). However, these concessions were largely reversed after the putting down of the St Petersburg soviet and the December 1905 Moscow workers’ insurrection. A draft Western-style Criminal Code, introduced in 1903,

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12 Juvelier, Revolutionary Law and Order, p. 7.
15 Juvelier, Revolutionary Law and Order, p. 8.
16 Kucherov, Courts, Lawyers and Trials, pp. 113-6.
18 Ibid, p. 23.
19 Ibid, pp. 24-25.
remained only partially adopted, while a draft Civil Code was produced in 1910-13. As one scholar noted, 'the law reform movement of the first years of the century was to some extent frustrated by recurrent waves of reaction and was finally ended by the outbreak of the World War in 1914'.

Opponents of the autocracy, notably Social Revolutionaries and Marxists, bore the full brunt of Tsarist repression. They faced constant police surveillance, raids, arrests, imprisonment, forced exile and execution. In the final years of Tsarism, in the wake of the 1905 Revolution, Nicholas II personally authorised many acts of terror perpetrated by his administration against political opponents and political prisoners, including summary executions. Berman estimates that 'from 1906 to 1917 military courts condemned thousands of revolutionaries and semi-revolutionaries to death for various illegal activities'.

In his autobiography, My Life, Leon Trotsky records the punishment imposed on himself and other members of the St Petersburg Soviet of Workers' Delegates following their arrest in December 1905. After Trotsky used his defence statement at the trial as a political platform to explain the historical content and mass character of the Russian Revolution, the court would not allow the defendants to call a government Senator who had opened a printing press in the Police Department to disseminate reactionary pogromist literature. The defendants refused to proceed, whereupon the judges shut down the trial and convicted the accused behind closed doors in their absence. Trotsky was sentenced to indefinite 'enforced settlement' in Arctic Siberia.

We were deprived of all civic rights and sentenced to enforced settlement in exile. This was a comparatively mild punishment. We were expecting hard labour... The enforced settlement was for an indefinite period, and every attempt at escape carried the additional punishment of three years at hard labour. The forty-five strokes with the lash which used to go with this had been abolished several years before.

It is little wonder that not just Tsarism but its legal system was widely resented and discredited. Alexander Herzen observed:

Complete inequality before the law has killed any trace of respect for legality in the Russian people. The Russian, whatever his station, breaks the law wherever he can do so with impunity: the government acts in the same way.

In the tradition of Russian anarchist leaders such as Mikhail Bakunin and Peter Kropotkin, Leo Tolstoy concluded that law was an instrument of class oppression, wielded by the state on behalf of those in power. He wrote, in answering a student, addressing the question, what is law?:

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21 Berman, Justice in the USSR, p. 216.
23 Berman, Justice in the USSR, p. 218.
26 Trotsky, My Life, p. 197. Trotsky (Lev Davidovich Bronstein) escaped from Siberia in early 1907 after taking the name of one of his jailers. Trotsky, ibid, p. 199-207.
If we are thinking not in accordance with ‘science’ ... but in accordance with universal common sense, then the answer to this question is very simple and clear: for those in power, law means the authorisation, which they have given themselves, to do everything which is advantageous to themselves, while for those subject to them, law means permission to do whatever is not forbidden to them. Civil law is the right of some to own land, even tens of thousands of desiatinas, as well as other means of production, while for those who are deprived of land and other means of production, it is the right to sell (upon threat of dying of poverty and hunger) their labour and their lives to the owners of the land and capital. Criminal law is the right of some to send others into penal servitude, ... while for those who are subject to penal servitude, imprisonment or execution, it is only their right to avoid these things until those who are in power decide otherwise.\(^{31}\)

Some scholars have pointed to the development of a class of distinguished, reform-minded, jurists in the universities, courts and the bar in the second half of the 19th century.\(^{32}\) Nevertheless, taken as a whole, the liberal tradition in Russia was weak and politically spineless. Its subservience to Tsarism was epitomised by the docility of the extremely circumscribed Dumas, or legislative assemblies that Nicholas II established and dissolved at will in the years following the 1905 Revolution.\(^{33}\) From the 1860s, the liberal gentry and so-called moderates had begun belatedly to advocate gradual change to a constitutional or ‘rule of law’ state, based on private property and individual rights, to replace the autocratic rule of the Tsar. Their perspective, like that of Alexander II, was to head off a movement from below. In some cases, their views were openly anti-democratic and anti-socialist. Boris Chicherin, a prolific writer on legal theory, argued for a Rechtstaat of the German Bismarck-Junker variety, founded on legality but not parliamentary or popular sovereignty. He considered socialism, with its opposition to the private ownership of the means of production, to be a threat to civil rights and freedom.\(^{34}\)

Other liberal theorists based themselves on popular sovereignty, but equally opposed revolutionary change. In this period, Murontsev, Petrozhitsky, Novgorodtsev and Kistiakovskovsky sought to find sociological, psychological and philosophical foundations for a legal order based on individual citizens, rather than estates or classes.\(^{34}\) Kistiakovskovsky, a Ukrainian nationalist who was once associated with the Marxist movement, argued for socialist constitutionalism. For him, a socialist state could only reach its fullest form if it were governed by a constitutional, or ‘rule of law’, government, and a constitutional government could only be completely developed if it existed within a socialist system. He suggested that once private ownership of production and gross economic inequalities were abolished, the individual could participate fully in government, take more initiative in economic life and contribute to the cultural life of society.\(^{35}\) During World War I, however, the Tsarist regime shut down his publications.

Heuman concludes that ‘The liberal democratic roots of legal culture expressed in the work of Kistiakovskovsky and others were severed at the time of the 1917 revolution.’\(^{36}\) This implies that the fault lies with Lenin and the Bolsheviks, for cutting across the development of a liberal

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\(^{31}\) For example, Berman, *Justice in the USSR*, p. 216.


\(^{34}\) See Heuman, ‘Perspectives on Legal Culture’, pp. 8-14.


democracy. Yet, when the Russian liberals came to power in the February Revolution that toppled Tsarism, their record was far from democratic and libertarian.

**Liberal democracy in practice: the Provisional Government**

In the dying years of Tsarism, the legal profession became polarised between supporters and opponents of the dictatorship, with some joining the 1905 general strike. Those who opposed the autocracy, however, did so primarily from the standpoint of staying off social revolution. The greatest concentration of politically active lawyers was in the Kadet party, which advocated a constitutional monarchy. Following the mass uprising that overthrew the Tsar in February 1917, the Bar rallied around the Provisional Government and many took government posts, including Alexander Kerensky, a leading figure in the profession’s left-wing, who ultimately became Prime Minister.

In the Provisional Government formed after the February Revolution, Kerensky, who professed to be a socialist, initially took the post of Justice Minister. Despite initial decrees of amnesty for political prisoners (by which time already ‘the doors of the prisons had been opened by the people throughout the whole country’ and the adoption of a resolution to introduce representatives of workers and soldiers as members of the courts, the judges and prosecutors of the Tsarist regime were retained.

In general, the Provisional Government made limited reforms, along the lines of the 1864 measures and abolished capital punishment. In the words of Berman, ‘the new government completed – on paper, at least – the transformation of Russia into a liberal democratic Western state.’ How much these reforms remained merely ‘on paper’ can be seen from the fact that Kerensky’s administration restored the death penalty in July 1917, after the collapse of its second offensive against Germany. Having failed to call a Constituent Assembly or take any steps toward democratic elections and having continued to send troops to fight and die on the battlefields of World War I, the Provisional Government faced an upsurge of mass strikes and insurrectionary challenges from workers and soldiers. In response, it resorted to measures that were little different to the Tsarist regime -- military repression, mass arrests and the closure of Pravda, the Bolshevik daily newspaper. The government declared that it had assumed ‘unlimited powers’ and sought to arrest Lenin, Zinoviev and Kamenev, together with Trotsky and Lunacharsky, who were arrested on July 24.

In the lead-up to the October Revolution, leaders of the Bar publicly denounced the Bolsheviks, even though a number of prominent Bolsheviks had practised as advocates under the old regime, including P. Krasikov, N. Krestinsky and D. Kursky, as well as Stuchka and Lenin himself.

In criminal law, the Provisional Government rejected the views of those, beside the Bolsheviks, who advocated less punitive measures that sought to ameliorate the social causes of crime. Professor M. N. Gernet, a non-Marxist scholar, envisaged the day when gallows, prisons and corporal punishment would ‘withaway along with the old unjust social

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38 Ibid., pp. 30-31.  
40 Ibid., p. 220.  
41 Berman, *Justice in the USSR*, p. 216.  
44 Ibid., p. 561.  
46 Ibid., p. 636.  
relations. With the advent of a new, just socialist order, compulsory rehabilitation with the utmost humanity and respect for the inmates would replace punishment.\textsuperscript{48}

By October 1917, the government, then headed by Kerensky, who had been vested with unconditional powers, rested on Tsarist generals who attempted, unsuccessfully, to suppress the rising tide of opposition with military force.\textsuperscript{49} The promises of popular sovereignty and democracy made by liberal politicians such as Kerensky and their coalition partners, including prominent Mensheviks Dan and Gotz and Social Revolutionary Tchaikovsky, proved illusory. Increasingly, they turned to the same methods of police repression used by the Tsarist regime.\textsuperscript{50} In order to achieve political control, more and more Russian workers, soldiers and peasants drew the conclusion that they had no choice but to overthrow the Provisional Government. The Bolsheviks did not terminate what could have been an experiment in liberal democracy or socialist constitutional rule. Rather the socio-economic and political dynamics of the Russian Revolution left only two courses open: a military-led counter-revolution or a Bolshevik-led social revolution.

\textsuperscript{48} Juviler, \textit{Revolutionary Law and Order}, pp. 9-10.
\textsuperscript{49} Trotsky, \textit{History of the Russian Revolution}, pp. 914-1146.
\textsuperscript{50} Liebman, \textit{The Russian Revolution}, pp. 218-230.
CHAPTER THREE

THE DYNAMICS OF THE RUSSIAN REVOLUTION

Introduction

The legal debates and practices of Bolshevik-led Russia need to be assessed in the light of the nature of the 1917 revolution itself. This has four important aspects. The first is the mass character and class composition of the Russian revolution. The second is the revolution’s strategic conception and precise historic character. The third concerns the roots of the degeneration under Stalin, and the fourth is the emergence of the Left Opposition from the end of 1923.

The mass character of the Russian Revolution

Trotsky stated in his *The History of the Russian Revolution*, ‘the most indubitable feature of a revolution is the direct interference of the masses in historic events'.¹ This intervention manifested itself, in the first instance, in the participation of masses of people in the stormy events of February 1917. The size of the crowds that gathered on the streets of Petrograd exceeded anything that had previously been seen, at least since the 1789 French Revolution.

Naturally, when millions of ordinary people participate in a great social revolution, they do not do so with a prepared plan. To take one important example, the basic unit of the Russian Revolution, the soviets or workers councils, pre-dated 1917 and were not established by the Bolsheviks. They initially emerged during the 1905 Revolution, semi-spontaneously, although they were similar to the communes envisaged by Marx in writing on the Paris Commune.² From April 1917, the Bolsheviks called for all power to the soviets, but it was not until late 1917 that the Bolsheviks won a majority in many of the soviets.

One recent work depicts the Russian Revolution as an underground conspiracy organised by power-crazed intellectuals who lacked any substantial support among the masses.³ In reality, the revolution was deeply-rooted and arose from protracted political experiences. For the present purposes, a relevant starting point is the Russian Revolution of 1905, although it was preceded by a rising tide of strikes, peasant disturbances and student unrest from the 1890s.⁴ The 1905 Revolution began in St. Petersburg in January that year when Tsarist troops fired on a crowd of workers, who, led by a priest, were marching to the Winter Palace to petition Nicholas II. This ‘bloody Sunday’ was followed in succeeding months by a series of strikes, riots, assassinations, naval mutinies, and peasant outbreaks. These disorders, coupled with the disaster of the Russo-Japanese (1904-5), which revealed the corruption and incompetence of the Tsarist regime, forced the government to promise the establishment of a consultative duma, or assembly, elected by limited franchise. Nonetheless, unsatisfied popular demands provoked a general strike, and in a manifesto issued in October the Tsar granted civil liberties and a representative duma to be elected democratically.

The manifesto split the groups that collectively had brought about the revolution. Those who were satisfied with the manifesto formed the Octobrist party. The liberals who wanted more power for the duma consolidated in the Constitutional Democratic party. The Social Democrats,

¹ Trotsky, *The History of the Russian Revolution*, p. 17
who had organised a soviet, or workers’ council, at St. Petersburg, attempted to continue the strike movement and compel social reforms. The government arrested the soviet, then led by Trotsky, and put down a December 1905 workers’ insurrection in Moscow.

When order was restored, the Tsar promulgated the Fundamental Laws, under which the power of the duma was limited. The Tsar’s Prime Minister, Stolypin, made some attempt at economic reform but his efforts failed. The defeat of the 1905 revolution resulted in a sharp decline in the numerical strength and political influence of the revolutionary organisations. In the years of revolutionary upsurge, between 1905 and 1907, both the Bolsheviks and Mensheviks, the two antagonistic factions of the Russian Social Democratic Labor Party (RSDLP), had grown by tens of thousands. After June 1907, their mass membership faded away and the impact of defeat produced widespread demoralisation. By 1910, according to Trotsky, Lenin’s loyal and active contacts within Russia numbered about 10 people.

Lenin and Trotsky, despite considerable disagreements, were both analysing the events of 1905 and drawing far-reaching conclusions. For Trotsky, the 1905 revolution demonstrated that only the working class could lead the democratic revolution in Russia against the Tsarist autocracy, and that under that leadership the democratic revolution would assume an increasingly socialistic direction. This insight into the socio-political dynamics of the Russian Revolution laid the basis for the elaboration of Trotsky’s theory of permanent revolution.

For Lenin, the experiences of 1905 led to a deepening of his analysis of the differences between Bolshevism and Menshevism. The tactics employed by the Mensheviks throughout the 1905 revolution confirmed Lenin’s belief that Menshevism represented an opportunist current that reflected the influence of the liberal bourgeoisie on the working class. He insisted that the development of a revolutionary movement required the persistent deepening of the struggle to expose before the working class this essential political characteristic of Menshevism.

Under Stolypin, the Tsarist regime enjoyed, after the close call of 1905, a revival of its political fortunes. However the assassination of Stolypin in 1911, which was the outcome of a plot organised by the secret police, removed the Tsar’s most capable minister just as the workers movement entered into a new phase of radical activity. The outbreak of mass strikes in 1912 brought about a new political climate, which saw a rapid growth in Bolshevik influence.

Throughout 1913 and 1914, the Bolsheviks won the leadership of major trade unions from the Mensheviks⁴. Another indication of the growth of the Bolsheviks’ support at the expense of the Mensheviks comes from the respective sizes of their press circulation. The Menshevik newspaper, Luch, had a press run of about 16,000 per issue. But Pravda, the Bolshevik daily, had a press run of 40,000.

The 1917 Russian Revolution is commonly attributed to the acute social tensions produced by the Tsarist regime’s disastrous engagement in World War I. But the actual course of development was different. By July 1914, on the eve of the war, the class struggle in the major industrial centres of Russia had already assumed revolutionary dimensions. Incidents of street fighting between workers and police were reported in St. Petersburg. For the Tsarist regime, the war came at an opportune moment. While the pressure of war led, over a period of three years, to an enormous intensification of social conflict, its initial impact was to douse the workers movement

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with nationalist fervour. The Bolsheviks, who had been operating under conditions of borderline legality, were again driven underground.

In the months and years that followed the outbreak of war in August 1914, Europe descended into barbarism. Millions of young men lived in muddy trenches, with rats, mice and lice as their constant companions, and devoted their energies to killing each other by the hundreds of thousands. On the first day of the ill-fated Somme offensive, 60,000 British soldiers lost their lives. The battle of Verdun cost one million casualties. One in three French soldiers was killed or wounded. By the time the war was over, the French people had lost 20 percent of their men of military age. A half million British youth under the age of 30 lost their lives. The Germans lost about a million. Russia, between the outbreak of the war and the outbreak of revolution in 1917, lost nearly 2 million.

Trotsky was to write later that had it not been for the war, the eruption of revolution in late 1914 or 1915 would have meant a mass proletarian movement unfolding, from the beginning, under the leadership of the Bolsheviks. Instead, the revolution began in February 1917 under conditions that were far less favourable to the Bolsheviks than they had been in July 1914. First, their organisation was barely functioning in Russia. A great number of their working class factory members had been drafted into the army and were dispersed along a wide front. The factories were now populated by far less politically experienced workers. Finally, the mass mobilisation of the peasantry inside the army meant that when the revolution erupted, the proletarian character of the social movement, at least in its beginning stages, was far less pronounced than it had been in 1914. That is why the Socialist-Revolutionary Party, based largely on the peasantry, emerged out of the first weeks of the February revolution as the largest political party.

However, despite their initial weakness, the Bolsheviks influenced the revolutionary events that brought about the collapse of the Tsarist regime in February-March 1917. As Trotsky explained in *The History of the Russian Revolution*, the uprising of February 1917 was not purely ‘spontaneous,’ without any trace of political leadership. Years of political agitation and education by the Social Democrats had left a Marxist residue on the consciousness of St. Petersburg workers.

Thus, the eruption of February 1917 led to the creation of soviets (workers councils) and assumed the form of a conscious political struggle against Tsarism, rather than of apolitical rioting and looting. The war had not entirely destroyed the underground organisation of the Bolsheviks, who were still in a position to impart a more militant consciousness to the mass uprising of February 1917. Contemporary historical research substantiates Trotsky's assertion that the February Revolution was led by 'conscious and tempered workers educated for the most part by the party of Lenin'.

According to *The Blackwell Encyclopaedia of the Russian Revolution*, there were approximately 3.5 million workers in the factories and mines of Russia and another million and a quarter workers in transport and construction. The actual number of people who might be classified as wage workers comprised 10 percent of the population, or about 18.5 million. Both St Petersburg and Moscow were great industrial centres and there were also concentrations of industrial workers in the Urals, the Ukraine, the Baltic region, Transcaucasia and Siberia. Relative to the size of the entire population, the working class was numerically small. However, it was highly concentrated. Over 70 percent of the workers in Petrograd were employed in enterprises

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2 Ibid. p. 171.
consisting of more than 1,000 workers. In Ukraine and the Urals, two-thirds of workers were in enterprises that employed more than 500.  

Scholars have unearthed considerable material about the scope and power of the mass working class movement upon which the Bolshevik bid for power was based. One study has argued that Lenin’s ‘April Theses,’ in which Lenin reversed the policy of the Bolshevik party, in order to call for the establishment of a government based on the soviets, had a direct impact on the consciousness of the most advanced sections of the Petrograd working class. For example, general assemblies of workers at the Puzyrëv and Ekvål factories passed the following resolution during the ‘April Days,’ which saw the first large demonstrations against the Provisional Government, which assumed power after the February 1917 revolution.  

The government cannot and does not want to represent the wishes of the whole toiling people, and so we demand its immediate abolition and the arrest of its members, in order to neutralise their assault on liberty. We recognize that power must belong only to the people itself, i.e., to the Soviet of Workers’ and Soldiers’ Deputies as the sole institution of authority enjoying the confidence of the people.  

If anything, the Bolshevik Party spent much of the year trying to keep pace with a mass movement that possessed a dynamic momentum whose equal had not been seen since the 1789 French Revolution. At several key points, the Bolsheviks unsuccessfully attempted to hold back the movement from premature confrontations with the Tsarist regime.  

After the events of February, a form of dual power emerged, with working class bodies challenging the Provisional Government and employers for control over economic and political decision-making.  

Legality was often cast aside. Factory committees evolved quickly into complex structures involved in virtually every aspect of daily life, reorganising society on anti-capitalist lines. They formed subcommittees that were responsible for the security of their factories, food supply, culture, health and safety, the improvement of working conditions, and the maintenance of labour discipline through the discouragement of drunkenness.  

Soviet historian, Z. V. Stepanov, ‘counted 4,266 acts by 124 factory committees in Petrograd between 1 March and 25 October and calculates that 1,141 acts related to workers control of production and distribution; 882 concerned organization questions; 347 concerned political questions; 299 concerned wages; 241 concerned hiring and firing and the monitoring of conscription’. By the late summer and autumn of 1917, the factory committees began to demand that the employers provide them with access to order books and financial accounts. By October, some form of workers control was in effect in 573 factories and mines, with a combined work force of 1.4 million workers.

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12 On dual power, see ibid, pp. 223-32.

Thus, well before the October Revolution, millions of workers were already challenging employer prerogatives, capitalist property rights in general and the legal power of the Provisional Government.

Throughout 1917, the Bolsheviks developed strength within the factory committees. Weeks before the Bolsheviks obtained a majority inside the Petrograd Soviet, they were in the leadership of the most important factory committees. A study of the resolutions passed by local assemblies shows that there was a broad-based response to the slogans and principal demands of the Bolshevik Party. In Moscow, which was less developed politically than Petrograd, the month of October 1917 saw more than 50,000 workers pass resolutions in support of the Bolshevik demand for the transfer of power to the soviets; and there is considerable evidence that the Bolshevik seizure of power was welcomed by a large majority of the working class.\(^4\)

Between April and October, the Bolshevik Party experienced rapid growth. In April 1917 the Petrograd organization of the Bolsheviks consisted of about 16,000 workers. By October its membership had risen to 43,000, of whom two-thirds were workers. In June 1917 the elections to the First All-Russian Congress of Soviets produced 283 Socialist-Revolutionary delegates, 248 Menshevik delegates and only 105 Bolshevik delegates. The elections to the Second All-Russian Congress, which assembled on the eve of the October Revolution four months later, produced a transformation: the Bolsheviks’ share of the delegates rose to 390, the Socialist-Revolutionaries’ share fell to 160 and the Mensheviks, to 72.

Workers generally moved to the left, as they became increasingly disgusted with the Provisional Government and the refusal of the moderate socialist parties to break with it. In the words of one historian:

> Economic crisis, the continuation of war, the acceleration of class conflict, and the Komilov putsch transformed the vast majority of politically active workers into enemies of the Provisional Government in its various incarnations.... They came to see no essential distinction between the new government and the old Tsarist regime, except that the Provisional Government was now more clearly a ‘bourgeois dictatorship’.\(^5\)

Another historian summed up the results of his research into the causes of the Bolshevik victory as follows:

> [T]he Bolsheviks themselves did not create popular discontent or revolutionary feeling. This grew out of the masses’ own experiences of complex economic and social upheavals and political events. The contribution of the Bolsheviks was rather to shape workers’ understanding of the social dynamic of the revolution and to foster an awareness of how the urgent problems of daily life related to the broader social and political order. The Bolsheviks won support because their analysis and proposed solutions seemed to make sense.\(^6\)

When the Bolsheviks ultimately seized power in October 1917, official resistance was short-lived. The Bolsheviks were not imposing a new political and economic structure from above. Rather, they were sitting astride a mass upheaval, which continued through the early years of the

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new order. As we shall see, this had definite implications for their approach to the old legal system, which was widely detested, discredited and paralysed.

The physiognomy of the Russian Revolution: Permanent Revolution

Equally important to an understanding of the legal experiences of the Russian Revolution are the historic dynamics, scope and character of the revolution. According to Trotsky, the 1905 Revolution became

not only 'the dress rehearsal of 1917' but also the laboratory from which emerged all the basic groupings of Russian political thought and where all the tendencies and shadings within Russian Marxism took shape or were outlined. The centre of the disputes and differences was naturally occupied by the question of the historical character of the Russian revolution and its future paths of development.¹⁷

Russian socialist thought advanced three possible and conflicting variants. Plekhanov conceived of Russian social development in terms of a formal logical progression, in which a given level of economic development determined historical stages of development. As feudalism was replaced by capitalism, the latter would, in turn, give way to socialism when all the required conditions of economic development had been attained. This theoretical model assumed that Russian development would follow the historical pattern of Western Europe's bourgeois-democratic evolution. There existed no possibility that Russia might move in a socialist direction before the more advanced countries to its west. Russia, at the turn of the 20th century, Plekhanov maintained, still had before it the task of achieving its bourgeois democratic revolution—by which he meant the overthrow of the Tsarist regime and the creation of the political and economic preconditions for a future, distant, social revolution. In all probability, Russia had before it many decades of bourgeois parliamentary development before its economic and social structure could sustain a socialist transformation. This organic conception of Russia's development constituted the accepted wisdom that prevailed among broad layers of the Russian social-democratic movement during the first years of the 20th century. Plekhanov wrote in 1905:

Marxists are absolutely convinced of the bourgeois character of the Russian revolution. What does this mean? This means that those democratic transformations which have become indispensable for Russia do not, in and of themselves, signify the undermining of capitalism, the undermining of bourgeois rule, but on the contrary they clear the soil, for the first time and in a real way, for a broad and swift, for a European and not an Asiatic development of capitalism. They will make possible for the first time the rule of the bourgeoisie as a class ... We cannot leap over the bourgeois democratic framework of the Russian revolution but we can extend this framework to a colossal degree.¹⁸

The eruption of the first Russian Revolution in 1905 generated serious questions about the viability of Plekhanov's theorem. The most significant aspect of the Russian Revolution was the dominant political role played by the proletariat in the struggle against Tsarism. Against the background of general strikes and insurrection, the manoeuvres of the political leaders of the Russian bourgeoisie appeared petty and treacherous.

Lenin's analysis went further. He accepted that the Russian Revolution was of a bourgeois-democratic character. But such a formal definition did not exhaust the problem of the relation of class forces and balance of power in the revolution. Lenin insisted that the task of the working

18 Ibid, p. 245.
class was to strive, through its independent organisation and efforts, for the most expansive and radical development of the bourgeois democratic revolution, that is, for an uncompromising struggle to demolish all economic, political and social vestiges of Tsarist feudalism; and thereby create the most favourable conditions for the establishment of a genuinely progressive constitutional-democratic framework for the flowering of the Russian workers' movement. For Lenin, at the heart of this democratic revolution was the resolution of the 'agrarian question,' by which he meant the destruction of all the economic and juridical remnants of feudalism. The vast landholdings of the nobility constituted an immense barrier to the democratisation of Russian life, as well as to the development of a modern capitalist economy.

Recognising the immense social tasks implicit in Russia's impending democratic revolution, Lenin insisted that their achievement was not possible under the political leadership of the Russian bourgeoisie. The triumph of the bourgeois democratic revolution in Russia was possible only if the working class waged the struggle for democracy independently of and, in fact, in opposition to the bourgeoisie. But due to its numerical weakness, the working class alone could not provide the mass basis of the democratic revolution class. The Russian proletariat, by advancing an uncompromisingly radical democratic resolution of the agrarian issues, had to mobilise behind it the multi-millioned Russian peasantry.

The victory of the revolution, he wrote, required:

[A] dictatorship because the accomplishment of transformations immediately and urgently needed by the proletariat and the peasantry will evoke the desperate resistance of the landlords, the big bourgeoisie and Czarism. Without the dictatorship it will be impossible to break the resistance, and repel the counter-revolutionary attempts. But this will of course be not a socialist but a democratic dictatorship. It will not be able to touch (without a whole series of transitional stages of revolutionary development) the foundations of capitalism. It will be able, in the best case, to realise a radical redivision of landed property in favour of the peasantry, introduce a consistent and full democratism up to instituting the republic, root out all Asiatic and feudal features not only from the day-to-day life of the village but also of the factory, put a beginning to a serious improvement of workers' conditions and raise their living standards and, last but not least, carry over the revolutionary conflagration to Europe. 16

Lenin proposed that the new regime would be a 'democratic dictatorship of the proletariat and peasantry.' In effect, the two classes would share state power and jointly preside over the fullest possible realisation of the democratic revolution. Lenin offered no specifics as to the precise nature of the power-sharing arrangements that would prevail in such a regime, nor did he define or describe the state forms through which this two-class dictatorship would be exercised.

Trotzky's position differed profoundly from that of the Mensheviks and Lenin. Notwithstanding their different conclusions, both Plekhanov and Lenin based their perspectives on an estimate of the given level of Russian economic development and the existing relations of social forces within the country. But Trotsky's real point of departure was not the existing economic level of Russia or its internal relation of class forces, but rather the 'world-historical foundations' of Russia's belated democratic revolution 17. Trotsky traced the historical trajectory of the bourgeois revolution, from its classical and youthful manifestation in the French Revolution of 1789 to its retreats in the 1848 European revolutions to the modern context of 1905. He explained how the profound changes in historical conditions, especially the development of world economy and the

16 Ibid, p.247.
emergence of the international working class, had fundamentally altered the social and political dynamics of the bourgeois democratic revolution.

Trotsky regarded Lenin's formula as politically unrealistic: it did not solve the problem of state power but evaded it. Trotsky did not accept that the Russian proletariat would be able to limit itself to measures of a formally democratic character. The reality of class relations would compel the working class to exercise its political dictatorship against the economic interests of the bourgeois. In other words, the struggle of the working class would, of necessity, assume a socialist character. But given the backwardness of Russia, which was clearly not ready for socialism, the fate of the revolution would depend on its extension internationally. Trotsky noted that:

[Capitalism has converted the whole world into a single economic and political organism... This immediately gives the events now unfolding an international character, and opens up a wide horizon. The political emancipation of Russia led by the working class will raise that class to a height as yet unknown in history, will transfer to it colossal power and resources, and make it the initiator of the liquidation of world capitalism, for which history has created all the objective conditions.]

Trotsky's theory of permanent revolution shifted the paradigm from which revolutionary processes were viewed. Prior to 1905, the development of revolutions was seen as a progression of national events, whose outcome was determined by the logic of internal socio-economic structure and relations. Trotsky proposed another approach: to understand revolution, in the modern epoch, as essentially a world-historic process of social transition from class society, rooted politically in nation-states, to a classless society developing on the basis of a globally-integrated economy and internationally-unified mankind.

Trotsky outlined the theory from his cell while awaiting trial for his participation in the Petersburg Soviet of 1905. The expression 'permanent revolution' was borrowed from Marx' and Engels' 1850 'Address of the General Council to the Communist League'. Trotsky wrote:

The permanent revolution, in the sense which Marx attached to this concept, means a revolution which makes no compromise with any single form of class rule, which does not stop at the democratic stage, which goes over to socialist measures and to war against reaction from without; that is, a revolution whose every successive stage is rooted in the preceding one and which can end only in complete liquidation.

Some 24 years later, The Permanent Revolution (1929) was written in response to an attack on the theory by Karl Radek, a former Left Opposition member who advocated Stalin's theory of 'socialism in one country'. Trotsky sought to clarify the relationship between his and Lenin's perspectives on class relationships and objectives of the Russian revolution and the subsequent Stalinist degeneration of the USSR. He summed up his theory thus:

The perspective of permanent revolution may be summarised in the following way: the complete victory of the democratic revolution in Russia is conceivable only in the form of the dictatorship of the proletariat, leaning on the peasantry. The dictatorship of the proletariat, which would inevitably place on the order of the day not only democratic but socialist tasks as well, would at the same time give a powerful impetus to the international socialist revolution. Only the victory of the proletariat in the West could

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21 Trotsky, Permanent Revolution, p. 240.
22 Ibid.
protect Russia from bourgeois restoration and assure it the possibility of completing the establishment of socialism."\textsuperscript{33}

Trotsky had, as early as 1909, warned of the potential anti-revolutionary character of Lenin's formulation of the 'democratic dictatorship of the proletariat and peasantry,' because it required the working class to limit itself to bourgeois tasks:

The snag is that the Bolsheviks visualise the class struggle of the proletariat only until the moment of the revolution and its triumph, after which they see it temporarily dissolved in the democratic coalition, reappearing in its pure form, this time as a direct struggle for socialism only after the definitive establishment of a republican system. Whereas the Mensheviks, proceeding from the abstract notion that our revolution is a bourgeois revolution, arrive at the idea that the proletariat must adapt all its tactics to the behaviour of the liberal bourgeoisie, in order to ensure the transfer of state power to the bourgeoisie, the Bolsheviks proceed from an equally abstract notion, democratic dictatorship not socialist dictatorship and arrive at the idea of a proletariat in possession of state power imposing a bourgeois democratic limitation upon itself. It is true that the difference between them in this matter is very considerable. While the anti-revolutionary aspects of Menshevism have already become apparent, those of the Bolsheviks are likely to become a serious threat only in the event of victory.\textsuperscript{34}

This passage proved prescient in relation to the subsequent degeneration of the Soviet revolution. Trotsky warned that if the working class were held back from achieving socialist objectives by a 'proletariat in possession of state power,' the result would be anti-revolutionary. This is what in fact happened after 1924, when Stalin's policy of 'socialism in one country' effectively renounced the objective of world socialism.

Lenin himself re-evaluated his political perspective during World War I and announced a new orientation on his return to Russia in April 1917. No doubt his study of world economy under the impact of the First World War gave him a deeper insight into the international dynamics of the world and Russian Revolution and led him to adopt, in essence, the perspective that had been associated with Trotsky for so many years. Lenin's Imperialism, written during the war, suggests such a process of reconsideration and can be read as a theoretical prologue to his April Theses.\textsuperscript{35}

Before Lenin's return to Russia in April 1917, the Bolshevik Party leadership in the capital had adopted a policy of giving conditional support to the bourgeois Provisional Government, including its continuation of the war against Germany and Austria-Hungary, on the grounds that the revolution could not leap over the bourgeois democratic stage of its development. Lenin opposed this policy, while he was still in Switzerland and unable to intervene directly in the deliberations of the party leadership. The editorial board of Pravda, which was led by Stalin, refused to publish statements by Lenin. Not until he returned was he able, in the course of several weeks of bitter factional struggle, to overcome the initial policy. Lenin was fighting to change a programmatic position that he himself had developed and then defended for many years. To the Old Bolsheviks whom he now attacked, Lenin's new line -- calling for the preparation of the overthrow of the Provisional Government and the assumption of power by the working class -- seemed a heretical capitulation to the theory of permanent revolution that had been propounded by Leon Trotsky, in opposition to the Bolsheviks, for a decade.

\textsuperscript{33} Ibid.


\textsuperscript{35} Lenin, Imperialism, the Highest Stage of Capitalism, Moscow, Progress Publishers.
Lenin had come, by his own route, to the perspective with which Leon Trotsky had been so prominently identified. The experience of the World War, refracted through his own study of modern imperialism, had led Lenin to conclude that the Russian Revolution was the beginning of a world socialist revolution; that the international crisis of capitalism, interacting with the weakness of the Russian bourgeoisie and its subordination to international capital, left open no possibility of a progressive bourgeois democratic stage of Russian development; and that the only class capable of breaking Russia's subordination to imperialism and carrying through the essential democratic tasks of the revolution was the proletariat. On this basis Lenin presented in the 'April Theses' the call for the transfer of state power to the workers' soviets.

Central to both Trotsky's perspective of permanent revolution and the programmatic change introduced by Lenin in April 1917 was the link between the struggles of the Russian working class and the international, especially the European, proletariat. Neither Lenin nor Trotsky conceived of the October Revolution in primarily national terms. They understood and justified the overthrow of the Provisional Government as the beginning of an international resolution of the global capitalist contradictions that were exemplified by the First World War.

As Lenin told the Third Congress of the Communist International in July 1921:

> It was clear to us that without aid from the international world revolution, a victory of the proletarian revolution is impossible. Even prior to the revolution, as well as after it, we thought that the revolution would also occur either immediately or at least very soon in other backward countries and in the more highly developed countries, otherwise we would perish. Notwithstanding this conviction, we did our utmost to preserve the Soviet system under any circumstances and at all costs, because we know that we are working not only for ourselves, but also for the international revolution.²⁶

This perspective had nothing in common with the goal of establishing a self-sufficient socialist system within the boundaries of an economically backward Russia. It was not until the autumn of 1924, several months after Lenin's death, that Bukharin and Stalin introduced the idea that socialism could be established on a national basis, in one country. Before that time it was accepted as a basic premise of Marxism that the survival of the Bolshevik government, let alone the development of a socialist economy, depended upon the victory of socialist revolutions in Western Europe. It was believed that the conquest of power by the working class in the advanced capitalist countries would provide Soviet Russia with the political, financial, industrial and technological resources vital for its survival.

The roots of the degeneration

Understanding the strategic dimensions and contradictions of the Russian Revolution makes it possible to grasp the pressures on the Soviet government and the underlying factors in the betrayal of the revolution. The defeats suffered by the European working class in the aftermath of World War I, above all in Germany, were the primary cause of the political degeneration of the Soviet regime.

The isolation of Soviet Russia altered drastically the relation of class forces that had made possible the Bolshevik conquest of power. The principal social base of the October Revolution was a small but strategically positioned working class. The crisis of Bolshevism cannot be

understood apart from the impact on the working class of the civil war of 1918-22, in which Japan, Britain, the US and other Western powers intervened behind the military opponents of the revolution, sending in more than half a million troops in an unsuccessful bid to overturn the revolution. Among them were some 10,000 US troops, who suffered considerable losses in Vladivostok and Siberia.\textsuperscript{27}

In his writings on the objective causes of the degeneration of the Bolshevik Party, Trotsky referred to the physical and spiritual exhaustion of the working class by the end of the Civil War. Studies by a number of historians shed further light on the scale of the social catastrophe that confronted the Soviet government.

One study cites statistical data on the shrinkage of the industrial working class in the course of the war.\textsuperscript{28} At the time of the revolution, there were 3.5 million workers in factories employing more than 16 workers. That figure dropped to 2 million in 1918 and to 1.5 million by the end of 1920. The worst losses were in the big industrial centres of Petrograd, Moscow, the Donbass and the Urals, and the decline of the proletariat was part of a general process of urban depopulation. From a population of 2.5 million in 1917, only 722,000 people were left in Petrograd by 1920, the same number as had lived in the city in 1870. Moscow's population fell between February 1917 and late 1920 from 2 million to just over 1 million, somewhat less than the number recorded in the census of 1897. Kiev lost more than a quarter of its population between 1917 and 1920.

There were many factors contributing to this disastrous process, of which disease and acute shortages of food and fuel were among the most important. Tens of thousands of people, already weakened by hunger, died during epidemics of cholera, influenza, typhus and diphtheria. The Moscow death rate rose from 23.7 per thousand in 1917 to 45.4 in 1919. Another major factor was the need of the Red Army for troops to fight the White armies. Mobilisations by the Red Army removed well over 600,000 workers from the factories between 1918 and 1920.

The impact was felt not only economically, but also politically. The Red Army depended for its successes, to a great extent, on the devotion and initiative of the most class-conscious sections of the working class. The depletion of the industrial proletariat involved the loss of those workers who had played important roles in the revolutionary struggles of 1917, in factory committees or in other party-led organizations. A statistically-significant section of workers who had, at the very least, voted for the Bolsheviks in elections to the soviets and then to the Constituent Assembly were drawn away from the industrial locations by the demands of the civil war or by assignment to emerging soviet, party and trade union administrations.

It has been estimated that 200,000 out of 500,000 Communists who served in the Red Army were killed during the civil war.\textsuperscript{29} The political implications of such mortality rates can be better appreciated by drawing attention to the influx of new members into the Communist Party, particularly after the military position of the Soviet government improved as a result of major victories in the autumn of 1919. Between August 1919 and March 1920, the membership of the party grew from 150,000 to 600,000.\textsuperscript{30} But the calibre of this new intake was, in general, much

\textsuperscript{27} W. Graves, \textit{America's Siberian Adventure, 1918-1920}, New York, Jonathan Cape & Harrison Smith, 1931; C. Dobson & J. Miller, \textit{The Day They Almost Bombed Moscow: The Allied War In Russia, 1918-1920}, New York, Athenaeum, 1986.


\textsuperscript{29} Ibid., p. 29.

\textsuperscript{30} Ibid., p. 22.
lower than that of those who had been lost. The proportion of workers fell steadily, from 57 percent at the beginning of 1918, to 44 percent in 1920. The proportion of peasants, particularly young men who had entered the Red Army, and white-collar workers (the Western term for what the sources refer to ‘employees’) rose. By January 1921, the party membership numbered 240,000 workers (41 percent), 165,300 peasants (28.2 percent), 138,800 ‘employees’ (23.7 percent) and 41,500 whose social origins were unknown (7.1 percent). Although precise statistics are not available, it is likely that a significant proportion of the white-collar ‘employees’ would be former Tsarist functionaries, given the limited access to education under the old regime.

Thus, by the end of the civil war, the social and political base of both the Soviet government and the ruling party had been profoundly reduced and altered. The percentage of Bolshevik Party members who described their social origin as white collar, as opposed to proletarian, had increased significantly. Within the administration of the soviets, the proportion was even higher. By 1920, 57 percent of members of provincial executive committees were of white-collar background. Siegelbaum draws attention to the growing importance of this ‘lower middle strata’ in the affairs of the party and state organisations:

The lower middle strata thus successfully grafted themselves onto the workers’ and peasants’ revolution. The result was that the social composition of the revolutionary state was more heterogeneous and less proletarian than generally has been acknowledged. What impact these ‘alien elements’ had on the day-to-day functioning of the state, whether they possessed a specific psychology that was itself alien to the original revolutionary project, is not entirely clear.

The character of the Bolshevik Party was changed not only by the loss of seasoned working class cadres and the influx of tens of thousands of inexperienced and politically-questionable recruits. Among the older cadres that had survived the years of revolution and civil war, the ‘professional demands of power’ took an unforeseen but serious political toll. In a backward country where a vast portion of the population was illiterate and technical skills were in limited supply, party members were invariably dragged into management and administrative positions. The innumerable and ever-expanding state agencies and party organisations vied with each other to obtain the services of cadres who possessed some sort of managerial skills. In this way a significant section of the party cadre was swept up in a process of bureaucratisation. At the same time, under conditions of economic chaos and desperate poverty, positions within the organisations and agencies of the state and party provided some small measure of personal security. Under the conditions that prevailed at the end of the civil war, the possibility of obtaining at least one passable meal a day at the workplace canteen constituted a not insignificant privilege. In all sorts of small but important ways, a bureaucratic caste, with specific social interests, gradually took shape.

Trotsky summed up the social conditions for the victory of Stalin’s bureaucratic caste as follows:

The revolutionary vanguard of the proletariat was in part devoured by the administrative apparatus and gradually demoralised, in part annihilated in the civil war, and in part thrown out and crushed. The tired and disappointed masses were indifferent to what was happening on the summits. \(^{11}\)

\(^{11}\) Ibid., pp. 22-23.

\(^{12}\) Ibid., p. 62.

\(^{13}\) Ibid., pp. 62-63.

Another factor in the unfavourable economic conditions confronting the revolution was that the Soviet government was forced by the circumstances of the civil war, notably the armed resistance of business owners, to nationalise far wider sections of industry than had been intended originally. Given the low level of development of the Russian economy, the Bolshevik leadership initially planned to nationalise only the ‘commanding heights’ in the economic sphere, allowing private entrepreneurs to own or lease smaller and less essential undertakings. The first decrees on nationalisation were confined to large industrial and financial enterprises. But the needs of the civil war compelled nationalisations of entire industries, even of small producers, which only led to widespread economic breakdown.

One of the political indicators of the strains upon the Soviet economy and administration was the Kronstadt rebellion, which broke out in March 1921, soon after the eventual defeat of the White armies in the civil war. The sailors of the naval base near Petrograd (later Leningrad and now St. Petersburg) mutinied against the Soviet regime, opposing many of the measures necessitated by the civil war. The Kronstadt sailors had been among the most reliable supporters of the October 1917 Revolution, but in the intervening years many of the experienced revolutionary leaders and fighters had either perished or had been withdrawn from the armed forces to staff posts in the government, the economy and the party. Their place had been taken by newer recruits, drawn from the peasantry, which had suffered greatly from the war and the tremendous economic disruptions and sacrifices it brought with it. Their demands for privileged food rations did not attract the support of workers throughout Petrograd, who were facing forced labour and other deprivations as the revolution fought for survival during the civil war. This meant that the rebellion remained internally isolated, although it attracted prominent backing externally among opponents of the Russian Revolution.

Trotsky, who ordered the Red Army to put down the rebellion, always maintained that this response was a tragic necessity. The alternative was, he maintained, surrender of the October Revolution because, he put it, ‘a few dubious Anarchists and SRs [the peasant-based Social Revolutionaries] were sponsoring a handful of reactionary peasants and soldiers in rebellion,’ under conditions where foreign military intervention remained a threatening possibility. He characterised the uprising as ‘nothing but an armed reaction of the petty bourgeoisie against the hardships of social revolution and the severity of the proletarian dictatorship’. To the extent that the sailors’ grievances were justified and understandable, the blame for their conditions lay in the fact that the country had been bled dry by the Civil War and foreign intervention. The enemies of the revolution were aiming to use the disillusionment reflected at Kronstadt to restore capitalist rule in Russia, bringing with it the most bloody reprisals against the working class.

Nevertheless, the Soviet leaders drew immediate lessons from this painful episode. They recognised in the rebellion a sign of growing and explosive contradictions within the revolution, principally between the working class and the far more numerous peasantry. The New Economic Policy, adopted during this period, was an effort to repair relations with the peasantry. The period of ‘War Communism’, in which economic life was completely subordinated to the needs of the civil war, gave way to the partial reintroduction of the market, which inevitably brought with it new problems of its own. Under these conditions, some of the Bolsheviks’ other measures in the

58 Ibid, p. 104.
wake of Kronstadt, such as the banning of party factions in March 1921, a step that Trotsky also defended as a temporary necessity, contained within them serious dangers for party democracy. As the political and economic isolation of the Soviet state continued, the emerging bureaucracy under Stalin made use of the ban on factions to consolidate its grip on the party. It is possible that a different tactical course could have avoided the bloody confrontation at Kronstadt, and that the ban on factions, temporary at first, increased the dangers to the revolution by strengthening bureaucratic tendencies. The fact remains, however, that the Soviet government faced tremendous odds as it fought to hold out against world reaction.

The NEP and the emergence of the Stalinist layer

It is not possible in this thesis to review the debates that attended the adoption of the New Economic Policy (NEP) or to review in detail its operation. Briefly, it was an attempt by the Soviet regime, born of necessity and desperation, to tolerate the revival of a capitalist market so as to restore the foundations of organized economic activity in Russia.

By 1921, it was obvious that the post-war revolutionary tide had abated. The impoverished Soviet state faced a period of economic and political isolation. Moreover, although the civil war was largely won, its economic, social and human costs were immense, adding to the devastation of the world war. In 1920 the area of Russia under crops was 23 percent less than in 1913. Agricultural production had fallen further: grain by 50 percent, livestock by 40 percent, flax by 35 percent, sugar beet by 70 percent. Droughts across the southern parts of the country worsened the situation; by the end of 1921, starvation had caused 23,227 deaths, according to official estimates. By other accounts, 3 to 4 million people perished.

Facing economic collapse and a delay in the European revolution, Lenin and his co-thinkers were forced to make an economic retreat in the form of the New Economic Policy. To use Lenin's words, they sought to provide a 'stimulus, a jolt and a motivation' to production by offering material incentives to peasants, cooperatives and manufacturers. In a concession to market forces, the wartime requisition of crops was replaced by taxation, and peasants were permitted to sell their surpluses for private gain. Nationalised industrial property was leased out to cooperatives or private owners and foreign capitalists were allowed to acquire mining and other interests.

Lenin frankly acknowledged the NEP as a manoeuvre with far-reaching implications and possibly unforeseen consequences. Addressing the Moscow Soviet in November 1922, he warned: 'Where and how we must now restructure ourselves, reorganise ourselves, so that after the retreat we may begin a stubborn move forward, we still do not know.'

Lenin advanced a revised notion of 'state capitalism,' which would seek to reestablish the link (smychka) between town and country on the basis of market relations. Capitalist production and

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41 Siegelbaum, *Soviet State and Society*, p. 89.


exchange would be permitted under state regulation. Small-scale manufacturing would be turned over to cooperatives and private investors, while foreign investors would be invited to help restore the fuel industries. No set blueprint was possible; instead, other measures to revive the economy would be worked out in practice.\textsuperscript{43}

While the NEP may have been an unavoidable response to the ruinous economic situation confronting the isolated Soviet state, it accelerated the process of political degeneration within the ruling party. Under conditions in which the proletarian base of both the state and party had been drastically weakened, the impetus given by the NEP to the growth of capitalist tendencies within Soviet Russia was bound to have dangerous political consequences.

A number of disturbing political and social tendencies became increasingly pronounced between 1921 and 1923. The NEP breathed new life into social elements who had opposed the Bolshevik Revolution. Businessmen and traders re-emerged, and by 1922 a stock exchange was once again functioning in Moscow.

The NEP strengthen small proprietorship in the form of some 20 million household plots, while permitting the re-reformation of the better-off land-holding kulak class in the countryside and a private entrepreneurial class, known as the nepmen, in both the villages and the towns. Initially, it was hoped that commercial transactions could be limited to bartering or direct exchange of goods between peasants and city dwellers, with consumer cooperatives serving as conduits. By the spring of 1921, however, with the state possessing only a ‘tiny supply of desirable consumer goods,’ and in the absence of controls over transport, ‘a wave of private buying and selling had rolled into the void’.\textsuperscript{44} As successive decrees loosened controls on prices and exchange, tens of thousands of private traders emerged. In many rural areas, the nepmen were the only sellers of manufactured goods. Even the state-owned industries relied on them to obtain raw materials and sell their products, despite the official policy favouring cooperatives. Across the country, private businessmen handled over 75 percent of all retail trade in 1922-3; in Moscow, they controlled over 80 percent of retail, 50 percent of mixed retail-wholesale and 14 percent of wholesale trade. In more outlying areas, the proportions were higher still.\textsuperscript{45}

Alongside, this growth of privileged layers came a dramatic rise in unemployment among workers and peasants. According to the official and trade union labor exchanges, the jobless numbers rose from 160,000 on 1 January 1922 to 1,344,300 by 1 July 1924, or 18 percent of all hired labour. Unemployed trade union members numbered 427,600 on 1 July 1923 and 676,000 on 1 July 1924, or 13.8 percent of all union members.\textsuperscript{46} The 1922-23 demobilisation of the army and the renewal of urban migration contributed to the soaring joblessness but it was also related to the rise of private employers and, in turn, increased the degree of social polarisation.

The social climate became more tolerant of inequality, and moods that reflected a certain moral and political decline found expression within the party membership, particularly those who were active in the upper echelons of the bureaucracy.

\textsuperscript{43} On Lenin’s revival and revision of the concept of ‘state capitalism,’ see C. Bettelheim, Class Struggles in the USSR, First Period: 1917-1923, New York and London 1976, pp. 464-76.
\textsuperscript{44} A. Ball, Russia’s Last Capitalists. The Nepmen, 1921-1929, Berkeley and Los Angeles, 1987, p. 17; also Carr, Bolshevik Revolution, vol. 2, pp. 330-4.
\textsuperscript{46} Siegelbaum, Soviet State and Society, p. 104.
There were also signs that with the NEP came a revival of nationalist sentiments. There were elements within the party -- especially the new recruits from the lower middle strata for whom the revolution had opened immense opportunities -- who might be inclined to interpret the October Revolution as the beginning of a great national revival. Against the background of defeats of the European working class, the practical tasks of building the national Soviet economy appeared to these forces far more realistic than the vision of world socialist revolution.

No less important was a sharp reduction in the mass literacy and education campaigns in the villages and the Red Army, under Trotsky's leadership, during the civil war. The decline in state revenue that accompanied the revival of private trade meant a slashing of funds for cultural and educational institutions. By January 1923, only 3.8 percent of the literary bases, 16.1 percent of the reading rooms and 47.7 percent of the libraries of two years earlier remained. The proportion of children aged 8-11 who attended school in the RSFSR shrank from 74.3 percent in 1920-21 to 46.0 percent in 1922-23. Lenin's wife Nadezhda Krupskaya, head of Glavpolitprosvet (Main Administration for Political Education) complained that the NEP had "brought it to the countryside an upsurge of darkness".\(^{47}\)

In political terms, what occurred in 1922 and 1923 was the beginning of the political reaction against the October Revolution and the resurgence of Russian nationalism within the Bolshevik Party. The social tendencies that began to predominate in 1922-23 were very different from those upon which the growth of Bolshevism was based in 1917. The growth of Bolshevism in the revolutionary year was based on an explosive radicalisation of the working class in the major urban centres. The social forces which underlay the growth of the party in 1922 and 1923, and which were the source of great concern to Lenin, were specifically from the lower middle classes in the urban areas for whom the revolution had opened up innumerable career opportunities, not to mention remnants of the old Tsarist bureaucracy. Lenin began to warn of this, and the emergence of a type of national Bolshevism, as early as 1922, and he became increasingly strident in his warnings about the growth of chauvinistic tendencies. In late 1922 and early 1923, those warnings were directed specifically against Stalin, whom he referred to in his final writings as the individual who expressed the re-emergence of the Great Russian chauvinist bully.

Another important aspect of the crisis of Bolshevism was the deterioration in the quality of inner-party political life. From 1920 on there were innumerable expressions by leading Bolsheviks of despatch over the bureaucratization of the state apparatus. Lenin referred to Soviet Russia as a 'workers state with a bureaucratic twist'. But despite the concerns, the process of bureaucratization was nourished by deep-rooted objective tendencies related to the backwardness of Russia, and the party itself could not remain immune from the intrusion of bureaucracy into all spheres of social life. In the absence of a politically active working class, the methods of bureaucratic management and administration migrated rapidly into the affairs of the party. The most pronounced expression of this process was the growing influence of Stalin, whose principal responsibility as general secretary consisted of selecting the personnel required for the staffing of critical party and state positions. More and more, the power of appointment, exercised ruthlessly by Stalin, invalidated and replaced the traditional forms of party democracy.

By the time that the Twelfth Congress convened in April 1923, Stalin, who became general secretary a year earlier, had assigned some 10,000 party members to various party and official positions and made another thousand or so senior appointments, including 42 guknom secretaries. Supporters of Trotsky, together with the Workers Opposition and the Democratic Centralists,

\(^{47}\) Ibid, p. 93.
were dispersed and isolated. Within a few months, the Orgburo announced the regularisation of these procedures, marking the birth of the nomenklatura system of appointment.\textsuperscript{46}

In March 1922, at the Eleventh Party Congress, Lenin warned that the party was in danger of being overwhelmed by the bureaucracy that administered the state. Shortly afterwards he was incapacitated by a stroke that removed him from political activity for several months. When he returned to work in the autumn of 1922, Lenin was stunned by the degree to which the situation within the party had deteriorated. He rapidly identified Stalin as the personification of the process of bureaucratic degeneration that threatened the party with destruction. It is clear from the notes and documents prepared by Lenin during the last months of his politically-active life that he was preparing for a decisive confrontation with Stalin at the Twelfth Party Congress scheduled for April 1923. The testament written by Lenin calling for Stalin's removal from the post of general secretary, as well as the letter Lenin sent to Stalin threatening to break all personal relations with him, were part of a political dossier that Lenin intended to present to the party congress. The massive stroke suffered by Lenin in March 1923 saved Stalin's political career.

The Left Opposition

In the months that followed Lenin's final incapacitation, opposition grew to bureaucratic methods employed by the 'triumvirate' of Stalin, Zinoviev and Kamenev. The political tensions were exacerbated by deepening anxiety over the consequences of the NEP, expressed particularly, as Trotsky explained in the spring of 1923, in the worsening disparity between industrial and agricultural prices and the continuing deterioration in the conditions of the working class.

As it grew increasingly clear that Lenin would not recover and return to political activity, Trotsky came under mounting pressure from many of the most politically distinguished members of the Bolshevik Party to speak out against the party bureaucracy and fight for a far-reaching review and change in economic policy. On October 8, Trotsky addressed a letter to the Central Committee that called attention to serious weaknesses in economic policy and also criticised the bureaucratisation of party life. One week later, his criticisms were endorsed in a 'Platform' signed by 46 prominent party members, including Preobrazhensky, Antonov-Ovseenko, Piatakov, Sazonov and Osinsky. It indicted the 'progressive division of the party, no longer concealed by hardly anyone, into the secretarial hierarchy and the 'laymen,' into the professional party functionaries, selected from above, and the simple party masses, who do not participate in its group life.'\textsuperscript{47}

These events marked the beginning of the political struggle of the Left Opposition. The Platform of the 46 warned that unless there was a radical change in the policies and methods of the leadership:

\textit{[T]he economic crisis in Soviet Russia and the crisis of the factional dictatorship in the party will deal heavy blows at the workers' dictatorship in Russia and the Russian Communist Party. With such a load on its shoulders, the dictatorship of the proletariat in Russia and its leader the RCP cannot enter the phase of impending new worldwide}

\textsuperscript{46} Ibid, p. 130.

disturbances except with the prospect of defeats on the whole front of the proletarian struggle.\footnote{30}

At first, the criticisms of Trotsky and the Platform of the 46 threw the triumvirate into disarray, and it offered a few insincere political concessions. But then it recovered its nerve, counterattacked, and appealed to the social forces that, within the framework of NEP, had become the new constituency of the Soviet regime.

In order to counter the Left Opposition’s charges of bureaucratism, while swamping the party with obedient recruits, the Politburo launched a mass enrolment campaign in December 1923 to admit 100,000 workers into the party. In the name of ‘reproletarianising’ the party, two recruitment drives were conducted in 1924 and 1925, which boosted the membership from 446,089 on 1 January 1924 to slightly over one million by 1 January 1926. This dramatic influx was orchestrated under the banner of the Lenin Levy, one of the earliest examples of Stalin invoking the name of the dead leader to strengthen his grip over the party.\footnote{31}

Stalin’s unveiling in late 1924 of the theory of ‘socialism in one country’ appealed especially to the growing bureaucratic strata, which were tending with increasing consciousness to identify their own material interests with the development of the ‘national’ Soviet economy. Within broad layers of the working class a general political exhaustion expressed itself in a retreat from the internationalist aspirations of the October Revolution. Especially after the debacle suffered by the German Communist Party in October 1923, the promise of a national solution to the crisis of Soviet society seemed to offer a new lifeline for the besieged revolution. Stalin suggested that the theory of ‘socialism in one country’ served the valuable function of offering the Soviet masses a reason to believe that the October Revolution had not been made in vain, and that those who denied the possibility of building socialism in Russia, regardless of the fate of the international revolutionary movement, were dampening the faith and enthusiasm of the working class. It was necessary to assure the workers that they were, through their own efforts, achieving socialism. To arguments of this sort Trotsky replied in 1928:

The theory of socialism in one country inexorably leads to an underestimation of the difficulties which must be overcome and to an exaggeration of the achievements gained. One could not find a more anti-socialist and anti-revolutionary assertion than Stalin’s statement to the effect that ‘socialism has already been 90 percent realized in the USSR.’... Harsh truth and not sugary falsehood is needed to fortify the worker, the agricultural laborer, and the poor peasant, who see in the eleventh year of the revolution, poverty, misery, unemployment, bread lines, illiteracy, homeless children, drunkenness, and prostitution have not abated around them. Instead of telling them fibs about having realized 90 percent socialism, we must say to them that our economic level, our social and cultural conditions, approximate today much closer to capitalism, and a backward and uncultured capitalism at that, than to socialism. We must tell them that we will enter on the path of real socialist construction only when the proletariat of the most advanced countries will have captured power; that it is necessary to work unremittingly for this, using both levers—the short lever of our internal economic efforts and the long lever of the international proletariat struggle.\footnote{32}

\footnote{30} Trotsky, \textit{The Challenge of the Left Opposition}, p. 400. 
Trotsky's insistence on the dependence of the Soviet Union upon the development of world socialist revolution and, conversely, the impossibility of constructing socialism in a single country, constituted the theoretical and political foundation of the struggle that he and the Left Opposition waged against the Stalinist bureaucracy. The central elements of the program of the Left Opposition -- such as the reestablishment of party democracy, the development of planning, the strengthening of industry -- flowed from this conception.

The 'triumvirate' accused the Left Opposition of violating the party's 1921 ban on factions. Trotsky retained strong support among educated youth and within the army, but refused to appeal to the military to move against the emerging Stalinist regime, insisting that such an intervention, far from overcoming the deep-seated political, economic and cultural roots of the bureaucratization, would endanger the very social and political base of the workers' state itself. Historians, including those sympathetic to Trotsky\(^3\), are inclined to see in his commitment to world revolution the weakest element of his overall program. This criticism underestimates the revolutionary potential that existed in the international workers' movement of the 1920s and 1930s, and fails to appreciate the impact of Stalinism on the development of world revolution. The political destruction of the Comintern by the Stalinists -- that is, its transformation into an appendage of the Soviet bureaucracy -- was the major cause of the calamitous defeats suffered by the working class, above all in Germany in 1923, Britain in 1926, China in 1926-27, Germany again in 1933 and Spain in 1936-37. These defeats, in turn, profoundly affected the course of developments within the Soviet Union. Trotsky noted that two dates were especially significant in this historic process.

In the second half of 1923, the attention of the Soviet workers was passionately fixed upon Germany, where the proletariat, it seemed, had stretched out its hand to power. The panicky retreat of the German Communist Party was the heaviest possible disappointment to the working masses of the Soviet Union. The Soviet bureaucracy straightaway opened a campaign against the theory of 'permanent revolution' and dealt the Left Opposition its first cruel blow. During the years 1926 and 1927 the population of the Soviet Union experienced a new tide of hope. All eyes were now directed to the East where the drama of the Chinese revolution was unfolding. The Left Opposition had recovered from the previous blows and was recruiting a phalanx of new adherents. At the end of 1927 the Chinese revolution was massacred by the hangman, Chiang-kai-shek, into whose hands the Communist International had literally betrayed the Chinese workers and peasants. A cold wave of disappointment swept over the masses of the Soviet Union. After an unbridled baiting in the press and at meetings, the bureaucracy finally, in 1928, ventured upon mass arrests among the Left Opposition.\(^4\)

If the revolution had spread to the advanced countries of Western Europe, starting with the German revolutionary upsurges of 1918-23, and the many-milloned countries of the East, beginning with the Chinese revolution of 1926-27, the history of the USSR and the world would almost certainly have been very different.

The Soviet bureaucracy's consolidation of power was accompanied by the discrediting, criminalisation and physical destruction of its political opponents. Trotsky himself was forcibly expelled in 1928, expelled from the Soviet Union in 1929 and assassinated by a GPU agent in

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\(^4\) Trotsky, The Revolution Betrayed, p. 91.
Mexico in 1940. The process of physical destruction was supplemented by a campaign of historical falsification that sought to obliterate from the consciousness of the Soviet and international working class all traces of the Marxist alternative to Stalinism advanced by Trotsky and other leaders of the Left Opposition, such as Rakovsky, Preobrazhensky, Piatakov, Joffe, Sosnovsky, Eltsin, Ter-Vaganian, Boguslavsky, Vilensky and Voronsky. But in many fields, including law, these figures contributed to the immense political and intellectual life of the early years of the Russian Revolution.
CHAPTER 4

BOLSHEVIK ‘LAW’: THE RECORD

Introduction

In its initial phases, the Russian Revolution saw far-reaching efforts to end the old legal order based on private property, de-legalise all aspects of family and social life and pave the way for a self-governing society without a separate legal apparatus of lawyers, judges, police and prisons. These were unprecedented endeavours at the time, and remain unparalleled to this day. They had particular implications in five areas – family relations, criminal law, the treatment of the mentally-ill, trials of political opponents and the legal profession – each of which forms a case study in this chapter. It is essential to examine these policies and experiences in order to understand the context of the intense legal debates throughout the first decade of Soviet Russia, from 1917 to 1927.

Lagging behind events

In examining early Bolshevik legal policy, one factor must not be overlooked, flowing from the mass character of the October 1917 revolution. Well before the Soviet government was formed and decreed the abolition of the Tsarist courts, in key areas the working people themselves had already swept aside the authority of the old police agencies and courts. Immediately after the February Revolution, in Kronstadt and the Vyborg side of Petrograd, for example, the workers had ignored the Tsarist courts and begun to set up their own revolutionary courts. Trotsky records that on March 1, the Provisional Government had issued an order for the arrest of all police officials, public, secret and political, but the gesture was ‘purely platonic in character, for the police were already being arrested and the jails were their only refuge from massacre’. By April 1917, Trotsky records, under the pressure of the masses, ‘the soviets were becoming organs of administration,’ interfering in all aspects of government, ‘even in the courts of justice’. In Tiflis, for example, the local soviet ‘confiscated a private printing establishment for its own uses, made arrests, took charge of investigations and trials for political offences, established a bread ration, and fixed the prices of food and the necessaries of life’.

After seizing power in October 1917, the Bolsheviks initially lagged someway behind the events concerning the courts. Judges continued to act in the name of the overthrown Provisional Government. Writing in Pravda in November 1917, Stuchka, the first Soviet Commissar of Justice, stated: ‘We must concede that the Russian Revolution acts very slowly with respect to the old apparatus of power; except for the commanding heights, all the old apparatus is intact.’ Under the headline ‘A Class Court or a Democratic Court?’ he complained that judges were continuing to preside over cases, even though they were not yet subjected to democratic election and recall. As an interim measure, Stuchka proposed to transfer the following cases from the courts: agrarian cases (to land committees), apartment disputes (to apartment house mediation committees) and all other civil cases (to special workers’ institutions). He observed that the overall volume of cases would also diminish significantly with the removal of such obsolete institutions as tribal property and predetermined inheritance, the abolition of political and religious crimes and the simplification of the penal system.

4 P.I. Stuchka: Selected Writings, p. 7.
Stuchka proposed the election of all judges, the equalisation of all judicial salaries and the earliest possible replacement of the old legal institutions with revolutionary courts. But there were heated discussions among the Bolsheviks about how to proceed. One faction urged the retention of the pre-revolutionary courts during the period of socialist transition. Another faction insisted that all existing legal institutions and law should be abolished because they were incompatible with socialism. Lenin effected a compromise with the enactment of Decree No. 1 on the courts on November 24, 1917. First, it abolished most of the old legal system, including the district courts, military and naval courts, commercial courts, court chambers, the departments of the Ruling Senate, the Procuracy and justices of the peace. Second, it declared that all laws were invalid if they contradicted the decrees of the Central Executive Committee or the minimum programs of the two parties in the ruling coalition – the Russian Social Democrats (Bolsheviks) and the Left Social Revolutionaries. Third, it instituted a system of local (later people’s) courts and revolutionary tribunals. The former were to hear civil cases and minor criminal trials; the latter were to consider offences of a counter-revolutionary character. Both were to be democratically elected, and their members were to be guided by revolutionary consciousness.

According to Stuchka, Lenin warmly supported Stuchka’s first draft of the decree and worked on it personally, adding a note to Article 5. The original draft stated:

Local workers and peasants revolutionary courts are approved, guided in their decisions and sentences not by the written laws of the overthrown governments, but by the decrees of the Council of People’s Commissars, revolutionary conscience and revolutionary legal consciousness.

Concerned that insufficient decrees existed and that the terms ‘revolutionary conscience’ and ‘revolutionary legal consciousness’ were too abstract and vague, and facing opposition from the Social Revolutionaries and among the Bolsheviks to the sweeping nature of the proposal, Lenin added a note specifying more specifically that all laws would be regarded as repealed that contradicted the Soviet government’s decrees or the minimum programs of the coalition partners. Lenin also delayed the measure by two days and asked Lunacharsky to write a Pravda article in support of the decree. Thus from the first days of the revolution, there were lively and considered debates over legal policy.

**Educative decrees**

Another, related, factor must be considered. Many of the early decrees and declarations were intended to be educative and normative, setting out the aspirations of the new government, lifting the expectations of the working and peasant masses and indicating the standards by which the new order wished to be judged by citizens. As will be discussed in the chapter on Lenin and Law, he and other Bolshevik leaders did not primarily conceive of their proclamations, such as the January 1918 ‘Declaration of Rights of the Working and Exploited People’ as legal codes; rather as statements of intent and exhortation.

Soviet labour legislation afforded the right to labour to ‘all able-bodied citizens,’ regardless of gender, and protected women from discriminatory dismissal, rights that were unheard of.

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1. Ibid, p. 4.
2. Ibid, p. 4.
elsewhere.9 There were similar proclamations in labour protection (e.g. the eight-hour day), social welfare (e.g. social insurance) and housing (e.g. rent controls and rent-free public housing).10 A leading Soviet jurist of the time, A. G. Gorkharg, stated that the labour code was more of a hope than a reality in 1918, given widespread unemployment and economic crisis.11 Nevertheless, the vast array of declarations issued by the Soviet government in the early ‘honeymoon’ period of the revolution, that is before the invasion of the White armies and the onset of the civil war, were important statements of principle.

According to one study, the two formal organs of the Soviet government -- the All-Russia Central Executive Committee of the Soviets and the Council of People’s Commissars -- issued no less than 950 decrees and other enactments in the first nine months after October 1917. The measures were by no means confined to declarations of law; they were sweeping in their character, covering every aspect of economic, social and political life.12 The study’s author noted that the Soviet leaders ‘made the principles of their policy known to millions of ordinary workers and peasants by mass publication of all decrees and decisions’.13 Within two days of their adoption, decrees had to be published in the central government newspapers -- Izvestia and Gazeta Vremennogo Rabochego i Krestyanskogo -- and in the ‘Collection of Laws and Ordinances of the Workers and Peasants Government’. From January 1918, the Council of People’s Commissars required the official newspapers to also publish reports of the Council’s proceedings.14

Another scholar divided the early decrees into four main categories. The first had no legal meaning at all. They were political proclamations or directives, such as the Decree on Peace of 8 November 1917, renouncing the war against Germany and appealing for peace negotiations. The second group contained legal provisions but could not be implemented due to the circumstances of civil war and ‘War Communism’ or were not intended to be implemented. They were also issued mainly for propaganda purposes, including the November 1917 Decree on Workers Control. A third category ‘legalised arbitrariness and terror,’ notably the establishment of the Cheka. The fourth group consisted of ‘normative acts which were aimed at a gradual building up of a new system of law in the ordinary sense of the term,’ such as decrees dealing with the judiciary, crime, family, property and labour relations.15

This classification has merit in drawing attention to the wider, consciousness-raising role of many early Soviet measures, as well as the variety of aims and purposes behind the decrees generally. The latter two categories are highly contentious, however. As is discussed below, the provisions establishing the revolutionary tribunals and Cheka contained definite measures to constrain their jurisdiction and powers. The notion of ‘building up a new system of law’ contradicts the central thrust of early Soviet jurisprudence, which was to begin to de-legislate social relations. Only after the adoption of the NEP in 1921 could it be said that ‘a new system of law’ was erected. In any case, the veracity of the suggested categorisation can best be gauged by reviewing the early Soviet legislation in relation to the challenging and shifting circumstances that confronted the Soviet government.

Six periods for analysis

13 Ibid. p. 17.
The post-1917 debates about law need to be seen in the light of the actual changes made in the legal system. Six periods stand out in the approach to law between 1917 and World War II:

1. The establishment of Soviet power (October 1917 – mid-1918)
2. The civil war and intervention by foreign armies – ‘War Communism’ (1918-21)
3. The New Economic Policy (1921-26)
4. The defeat of the Left Opposition (1927-29)
5. Stalin’s ‘Third Period’ and forced collectivisation (1929-35)
6. The Popular Front and the great purges (1935-39)

This thesis can only briefly review – and contrast – the first three periods, but these, especially the third, were crucial for what was to follow.

**The establishment of Soviet power**

Neither the first months of the 1917 revolution nor the civil war period allowed for a great deal of theoretical elaboration. As Goikhberg, noted in 1923, (by which time the NEP had dramatically changed the legal outlook): ‘Prior to the revolution, no one had thought of drawing up (whether in detail or in a general form) the legal relations to be established and adjusted during the transition from the proletarian revolution to the consolidation of socialism and communism... At present, therefore, research in this area is like plowing virgin soil...’

Nevertheless the assumption underpinning the actions of the new government remained, as the historian E. H. Carr concluded, ‘that law was a temporary expedient, borrowed for specific purposes from the defunct bourgeois order of society, and destined to die away as soon as socialism became a reality.’

In accord with the notion that the state would immediately begin to wither away, the Bolshevik leaders urged the working class masses to take all decision-making power, and even the power of arrest, into their own hands. A few days after the October revolution, Lenin drafted his appeal ‘To the Populace’:

> Comrade workers! Remember that you yourselves now administer the state. Nobody will help you if you yourselves do not unite and fail to take all the affairs of the state into your own hands. Your Soviets are henceforth the organs of state power, plenipotentiary organs of decision-making... Arrest and bring before revolutionary tribunals anybody who dares to harm the people’s cause, whether such harm take the form of sabotage (spoiling, wrecking, injuring), or concealment of supplies of grain or other foodstuffs, or interference with the operations of the railroad, postal, telegraph and telephone systems, or any kind of opposition to the great cause of peace, the task of transferring the land to

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the peasants, and the task of securing the workers’ control over the production and distribution of goods.\footnote{Zile, Ideas and Forces, p.12.}

This was not an invitation to mob rule but an appeal for the ordinary people to actively involve themselves, through the Soviets and revolutionary tribunals, in fully wresting economic and political power out of privileged hands. As discussed in Chapter Three, the Soviets, or workers’ councils, had pre-dated the Bolshevik revolution of October 1917. They first emerged as a mass phenomenon during the February 1917 revolution, which overthrew the Tsarist dictatorship.

By the end of 1917, the Soviets had become official forms of government. There were 30 provincial, 121 city, 286 county and 6,088 township Soviets. If district and regional soviets were added, there were 7,550 bodies of local administration with more than 100,000 working people participating in their operation.\footnote{‘Forty Years of Soviet Law 1917-57’ in Zile p. 12.} Between their periodically convened congresses, elected executive committees ran the Soviets. One year after the October Revolution, 6,550 such committees existed – 6,111 at the volost level, 286 uezd, 121 city, 30 provincial and two regional.\footnote{Siegelbaum, Soviet State and Society, p. 16.} All over the age of 18 could vote in Soviet elections, regardless of sex, creed, nationality or residential qualifications, except for those who ‘employ others for profit’.\footnote{‘Constitution (Fundamental Law) of the Russian Socialist Federative Republic (1918)’ in Zile p. 13.}

Among the earliest decrees of the new central government were those abolishing ownership of land and inheritance without any compensation, subject to the protection of individual homes, the sustenance of the poor and the right of those who tilled the land to use it.\footnote{See Zile pp. 14-15.} Thus, the revolution set out to replace private ownership of the means of production, including land, with social ownership. It also sought to eliminate, or at least greatly restrict, employment for wages and market relations based on exchange of commodities. These fundamental changes to the economy and the very conception of property had vast implications for the role of law, not just radically altering economic and social relationships, but recasting core concepts such as property and employment. They also laid the basis for beginning to de-legalise society, to the extent that much law, both civil and criminal, is either directly or indirectly predicated upon the protection of private property interests, or arises from the socio-economic and personal conflicts generated by private ownership and social inequality.\footnote{Zile pp. 35-37.}

The Bolsheviks sought to abolish the traditional apparatus of legal and state power and set in motion processes leading to a self-regulating society. The initial judicial decree of November 1917\footnote{This proposition has been much contested. Fuller, in ‘Pashukanis and Vyshinsky’, for example, as previously noted in the Introduction, asserts that human nature makes legality essential. Berman, in his Justice in the USSR, at pp. 48-65, concludes that the Bolshevik efforts to delegalise life ultimately foundered on lack of popular support for Marxist-Leninist internationalism, and the restoration of strong bonds of traditional Russian family life — legal, economic and spiritual — together with the ‘age-old’ questions of personal claims and interests.} set up local Peoples’ Courts, elected or nominated by Soviets, with two rotating lay assessors to sit with each judge. Not only were the previous courts dissolved, but the legal profession lost its monopoly on representation, enabling any citizen of good character to appear as a prosecutor or defence counsel. The practice of law was opened to ‘all who enjoy civil rights’.
Later, a body of salaried legal representatives was established, appointed by the local soviets, with any clients’ fees to be collected by the state treasury.\textsuperscript{25}

Distrust of judges, dating from the days of the Tsarist dictatorship, influenced the introduction of one of the unique features of Soviet justice, the people’s assessors. Their creation by Article 2 of the decree recognised a form of justice that had already arisen semi-spontaneously in the immediate aftermath of the October revolution. In various centres, local revolutionary authorities had established new courts in order to replace the hated judiciary and the complex, slothful judicial procedures, which were still based on treating citizens unequally according to their legal status. Local justices of the peace functioned as chairmen of the courts, accompanied by elected assessors representing different sections of the community. Based on this experience, article 2 provided for the assessors to be provisionally nominated by the local Soviets, with the prospect of eventual democratic elections.\textsuperscript{26}

The November 1917 decree also established elected revolutionary tribunals with rotating assessors to deal with counter-revolutionary activity, as well as pillaging, plundering and sabotage, including that conducted by officials. This marked the beginning of a separate system to deal with those seeking to overturn the revolution.\textsuperscript{27} Nevertheless, the first regulation governing the tribunals contained certain democratic safeguards, including public hearings, the right to defence counsel and the restriction of punishments to imprisonment and banishment.\textsuperscript{28}

Before the revolution, Lenin had envisaged a non-professional people’s militia, as referred to in The State and Revolution (which was published and made widely available as soon as possible after the revolution). As an interim measure, the existing professional militia of the Provisional Government became the basis of the Workers and Peasants Militia, under the control of the Peoples Commissariat of Internal Affairs (NKVD). A Statute on the Workers and Peasants Militia was later adopted on 10 June 1920.\textsuperscript{29}

As another interim measure, an Extraordinary Commission for Combatting Counterrevolution and Sabotage, which came to be known as the Cheka, was established in December 1917. It controlled the border troops and an elite corps of security troops, as well as a network of secret agents operating at home and abroad. Western accounts have depicted the Cheka as a lawless agency of terror, conducting arbitrary arrests, executions and torture. There seems little doubt that the Cheka took pre-emptive action to combat efforts to overturn the revolution, efforts that reached their peak during the Civil War. Nonetheless, even as they sought to meet the White Terror with Red Terror, the party leaders took steps to contain the Cheka’s powers. In June 1918, Cheka lost the power to impose the death penalty. Its punitive powers were restricted to cases of armed activity, except in areas under martial law or where a state of war had been declared.\textsuperscript{30}

Subsequent decrees modified the new judicial order in certain respects. A February 1918 decree ‘On the Judiciary’ established elected circuit courts, provided for a right to representation in criminal cases and created a ‘college of advocates’ to appear in them. In order to stabilise and legitimise the emerging legal system, the decree was adopted as the Statute on the Courts,

\textsuperscript{25} Berman, \textit{Justice in the USSR}, p. 31.
\textsuperscript{26} Schlesinger, \textit{Soviet Legal Theory}, pp. 62-63.
\textsuperscript{27} Carr, vol. 5, p. 68.
\textsuperscript{28} Zile, pp. 42-48.
\textsuperscript{29} Juvelier, \textit{Revolutionary Law and Order}, p. 24.
\textsuperscript{30} Zile, pp. 42-48.
although it was commonly referred to as the ‘second decree’. It preserved the civil and criminal procedures of the Tsarist 1864 Judicial Code, insofar as they were not abrogated by the revolution and contradicted ‘socialist conceptions of justice’. In civil cases, considerations of ‘justice, not formal law’ should prevail over rules of limitations and other formal objections.

Article 29 of the February statute strengthened the role of the people’s assessors in acting as a check on the court presidents, who were likely to be lawyers. The assessors could remove the president from his post at any stage of the proceedings and reduce any sentence as much as they thought just, even to acquittal. On the other hand, there were guarantees against ‘revolutionary’ arbitrariness. Under article 8, a court, if deviating from existing procedure as ‘obsolete and bourgeois’ had to state its reasons for so doing, so that its decision could be reviewed on appeal. Article 6 established a Supreme Judicial Control, comprising delegates from the local courts elected for no more than a year, unless their electors or local Soviet recalled them previously. Article 6 provided for the Supreme Judicial Control to set down guiding decisions for local courts and to propose legislative amendments. Interestingly, the scheme incorporated a certain separation of powers, by insisting that only the legislative organ -- the national Soviet assembly -- not the Council of People’s Commissars, could overturn Supreme Judicial Control rulings:

If observing distortions of the law or contradictions in the interpretation of the law by various Courts of Appeal, the Supreme Judicial Control has to carry a principal decision which serves the courts as a rule... If the Supreme Judicial Control should be confronted by an insurmountable contradiction between the existing law and the revolutionary sense of justice, it will suggest to the legislative organ the necessity of amending the law. Only the legislative organ is allowed to overrule decisions of the Supreme Judicial Control.

One factor must be mentioned here. From December 1917 until March 1918, the Bolsheviks were in coalition with the Left Social Revolutionaries, from whose leadership I. N. Shchetinin was appointed Commissar of Justice. The Left SRs opposed the complete abolition of the old judicial system, backed the reintroduction of circuit courts and proposed basing criminal law on a reformed Tsarist code. After the Left SRs quit the government over the signing of the Brest-Litovsk treaty with Germany, Shchetinin was replaced by Stuchka, who introduced decrees of July and September 1918 to return to the single level of people’s courts. But the underlying conception of supervising the local courts through a combination of assessors, judicial self-government and an elected appellate body was preserved in the Law of Procedure of War Communism, the Statute on the People’s Courts of November 1918, which is outlined below.

As quoted earlier, the first Constitution of the Russian Republic, adopted in 1918, stated that its task was to help create the conditions for ‘socialism, under which there will be neither division into classes nor state authority’. Thus, the purpose of, and need for, the proletarian dictatorship was clearly defined: it was to overcome the violent physical and economic opposition of the propertied elites, so as to pave the way for ending economic exploitation, the prerequisite for the state to begin to wither away. This conception envisaged an initial strengthening of the state, but for temporary and definite purposes. In 1920, Trotsky outlined the prospective ‘withering away of
the state’ as follows: ‘The whole population of the country will be drawn into the general Soviet system of economic arrangements and self-government. The Soviets themselves, at present the organs of government, will gradually melt into purely economic organisations.’\(^{38}\) As Trotsky was to later explain in *The Revolution Betrayed*, the Bolsheviks hoped for an early victory of the socialist revolution in Western Europe, which would make possible a relatively short transition to genuine communism.

‘War Communism’

These hopes and initiatives were overtaken by the invasion of Soviet Russia by foreign armies and the onset of the civil war. In June 1918, under conditions of armed resistance to the revolution, Stuchka, newly appointed as People’s Commissar of Justice, allowed the revolutionary tribunals to impose the death penalty. At the same time, the tribunals were given the sole power to pass death sentences, displacing the Cheka.

In November 1918, after months of fighting against the white armies backed by military contingents dispatched by the various Western powers and Japan, the Sixth All-Russian Extraordinary Congress of Soviets adopted a decree ‘On the Strict Observance of Laws’\(^{39}\). It frankly and explicitly sought to legitimise, but also limit, emergency measures taken ‘because of the continued extraordinary plots and the war which was forced on the peasants and workers of Russia by the imperialists’. The decree stated that measures that deviated from or exceeded the limits of the law had to be justified by ‘extraordinary circumstances of the civil war’ and reported to the Council of People’s Commissars. Over the same months, Trotsky, as People’s Commissar for Military and Naval Affairs, forged the Red Army that ultimately, after four years of severe fighting, prevailed in the civil war.\(^{40}\)

A further decree of November 1918 established a central People’s Court within the Russian Socialist Federated Soviet Republic (RSFSR) and another decree of October 1920 specified qualifications for people’s judges and defence counsel. As well as being entitled to vote, a judge was required to either have experience in the political work of the party, trade unions, cooperatives, factory committees or soviets, or have theoretical or practical preparation for the duties of a judge.\(^{41}\)

Under Article 1 of the November decree, the People’s Courts held three kinds of sessions. The president sitting alone could make non-controversial decisions, such as granting a divorce or ordering an arrest. The president with two people’s assessors could hear the bulk of civil and criminal cases. Accompanied by six assessors, the president could judge crimes against life, grave bodily injury, rape, forgery, bribery or speculation in goods contrary to a state monopoly. Under Articles 15, 17 and 18, the assessors were chosen by lot from lists prepared by local Soviets. Like juries in other countries, the assessors were obliged to perform this civic duty, except that they participated in six consecutive sessions of the court, not just a single hearing.\(^{42}\)

Another characteristic feature of early Soviet criminal justice was a strict separation between investigation, preliminary inquiry and final verdict in a public trial. An Investigating Commission

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\(^{39}\) Zile p. 51.


\(^{41}\) Zile pp. 38-41.

\(^{42}\) Schlesinger, *Soviet Legal Theory*, pp. 67-68.
of six judges had to conduct a preliminary investigation in order to decide if sufficient grounds existed for a public trial. Defence was organised by a College of Advocates, chosen by the executive committee of the local Soviet. Defence counsel was obligatory in the serious cases to be heard by the president and six assessors, and in all other cases where prosecuting counsel was admitted.\textsuperscript{45}

The November decree contained clauses that reflected and perhaps influenced the early legal debates over the role of 'law' in the transition to communism. Article 22 specified that the only written laws to be applied were decrees of the Soviet government. If no relevant decree existed, 'the Socialist consciousness of Justice' had to be applied. A footnote to this article prohibited reference, in giving judgment, to laws or judicial decisions of the pre-revolutionary regime. Stuchka later concluded from this that law was formally lacking from 1917 to 1922.\textsuperscript{46}

While these courts dispensed justice according to 'revolutionary conscience,' the statistics suggest that they approached cases leniently and with an open mind. A 1919 analysis prepared by Kursky, then the Justice Commissar, reported that of 61,128 criminal cases, 43 percent resulted in acquittal, 35 percent in imprisonment (four fifths with probation), 8 percent in socially necessary work, 4 percent in fines and 10 percent in other determinations, usually admonitions. Even the Supreme Revolutionary Council, which dealt only with cases of treason or with former leading agents of the Tsarist Ochrana secret police, passed less sentences of death than of imprisonment, and then commuted most of the death sentences by way of amnesty.\textsuperscript{47}

During 1920, the people's courts tried 881,933 people, of whom nearly 300,000 were exonerated. Among those convicted, 34 percent were sentenced to confinement, 30 percent were fined and 23 percent had to perform compulsory labour. Revolutionary tribunals, which heard more serious cases and consisted of six assessors and a judge, handled far fewer cases - 26,738 - but had a higher conviction rate (85 percent, compared to 66 percent) and imposed heavier penalties. Among those convicted, 16,107 (70.7 percent) were sentenced to confinement and 766 (3.4 percent) were shot.\textsuperscript{48}

There was official resistance to local Soviet interference in people's court decisions. A Moscow general meeting of people's court judges on 30 March 1918 adopted a resolution moved by Pashukanis, then a people's court judge, demanding complete autonomy for the courts, after a borough soviet set aside a people's court decision.\textsuperscript{49} A 1921 decree gave the People's Commissariat of Justice the responsibility to supervise and train the judicial bodies and also to invalidate their decisions, albeit in defined circumstances. These were enumerated as: (a) a clear violation of the laws of the Soviet government; (b) acting outside jurisdiction; and (c) a clear conflict with the guiding principles of Soviet legislation and general government policies.\textsuperscript{50}

Stuchka was the author of the first attempt by the Soviet authorities to define law in general and Soviet law in particular. The 'Guiding Principle of Criminal Law of the RSFSR' (1919)\textsuperscript{51} defined law as: 'A system (order) of social relations which corresponds to the interests of the ruling class and which protects the ruling class by means of its organised force, in other words, state.' This

\textsuperscript{45} Ibid, p. 68.
\textsuperscript{46} Ibid, pp. 68, 79.
\textsuperscript{47} Ibid, p. 72.
\textsuperscript{49} Juviler, Revolutionary Law and Order, pp. 21-22.
\textsuperscript{50} Zickefoose, p. 41.
\textsuperscript{51} Ibid, p. 50.
definition, Stuchka argued, sought to apply the Marxist understanding of law as essentially an instrument of class rule, enforced by a coercive state apparatus. (The merits of this definition and its criticism by Pashukanis are discussed in Chapters Seven and Eight).

Thus in the first period of ‘war communism’ the Bolshevik leaders were preoccupied with physically defending the revolution while providing basic democratic guarantees. Their approach to law was characterised by efforts to encourage mass participation in decision-making, explain the ideological basis for law and hasten the demise of purely legal measures.

By 1921, the direct military threats to Soviet Russia had been repelled, but expectations of victorious social revolutions elsewhere in Eastern and Western Europe were dashed. In the wake of the world war, convulsive struggles had erupted in Germany, Bulgaria, Estonia, Poland, Britain and China. A successful overthrow of capitalism in several of these countries, particularly in the industrial powerhouse of Germany, may have provided the material conditions for socialism, which did not exist in backward Russia on its own.

The New Economic Policy

Designed to buy time for the isolated Soviet state, the adoption of the NEP in 1921 led to a marked shift in the role assigned to law. Exchange on the market was only possible if the buyers and sellers were assured of legally protected property rights. Lenin, in particular, was acutely aware of the dangers of creating a new economic elite and warned of difficult and inevitable political and legal problems. He told the Bolshevik party’s 10th Congress:

Freedom of market is freedom of trade, and freedom of trade means a return to capitalism. Freedom of market and freedom of trade mean the exchange of commodities between small individual operators. All of us who have studied the ABC of Marxism realise that such [freedom of] market and freedom of trade inevitably cause the producers to break into two elements: the owners of capital and the owners of two toiling hands, that is, into the capitalists and the hired laborers. This is the revival of the capitalist slavery of hire.\footnote{Ibid, p. 51.}

In a resolution, the party congress declared that ‘the exchange of commodities is recognised as the basic moving force of the New Economic Policy’ and ‘enterprise and local initiative must be given manifold support and developed at all cost’.\footnote{Ibid, p. 65.}

The next congress, just seven months later in December 1921, adopted a resolution ‘On the Current Tasks of the Party in Connection with Restoration of the Economy’ that drew the following conclusion in relation to law: ‘the immediate task is to introduce strict principles of revolutionary legality into all areas of life’\footnote{Ibid, p. 66.}. This notion of ‘revolutionary legality’ was, however, a far cry from the ‘socialist legality’ later proclaimed by Stalin to be inherently associated with the achievement of socialism. For Lenin it was an unavoidable concession made to private property relations in order to revive the economy. The 11th Congress resolution stated:

The new types of relations established both during the course of the revolution and as a result of the government’s economic policy must now find their expression in the law and must be protected by the courts. Firm rules of civil law must be laid down for the
resolution of all kinds of conflicts in the area of property relations. Citizens and corporations entering into contractual relations with state organs should receive an assurance that their rights will be protected. The judicial institutions of the Soviet republic should be elevated to appropriate heights.53

The Soviet government was conscious of the fact that investors demanded certainty before parting with their capital. 'To end doubts as regards the sincerity of the new course of economic policies.' a 1921 decree specified that only courts were permitted to annul contracts and that, in the future, nationalisation of any enterprise was allowed only by special enactment.54 With the restoration of the market under the NEP came the acknowledged necessity of restoring bourgeois law. The Bolsheviks therefore instructed jurists to study the pre-revolutionary Russian codes, as well as the German, Swiss and French codes, and adapt them to the new Soviet conditions. In 1922 and 1923 there appeared a Judiciary Act, a Civil Code, Code of Civil Procedure, Criminal Code, Code of Criminal Procedure, Land Code and Labor Code. The Judiciary Act established a traditional hierarchy of courts, with a system of appeals, but retained some innovative features. Among them were people's assessors, chosen from the general population for periods of 10 days. Two assessors sat alongside each judge.

The Civil Code dealt in traditional terms with legal capacity, persons, corporations, legal transactions, a statute of limitations, property, mortgages, landlord and tenant relations, contract and tort, unjust enrichment and inheritance. At the same time, the codes contained provisions to protect the economically weak and uphold the public interest. Under the Civil Code, any transaction 'directed to the obvious prejudice of the state' was invalid and any profits accrued from such a transaction were to be forfeited to the state as 'unjust enrichment'.55 [Article 1] Thus, the absolute character of private rights was tempered by public policy, giving rise to what Berman describes as 'the dualism of private rights and public policy'.56

With regard to civil liability for personal injury, as in criminal law, the concept of fault was minimised, if not eliminated. 'Our code does not view the fault of the person causing the injury as essential for the imposition of liability,' stated Gorshkevich, the principal author of the Civil Code. 'Compensation for injury is, generally speaking, an institution beneficial to the workers' and therefore 'it is necessary to give extensive interpretation to the liability of the person causing the injury (except where the liability of the state is involved) and a narrow construction to rules permitting the defendant to escape liability'.57

Similar considerations underpinned the code provision that 'where a person, under the pressure of distress, concludes a transaction clearly unprofitable to him, the court, on the petition of the damaged party, or on the petition of a proper government agency or social organisation, may either declare the transaction invalid or preclude its operation in the future'.58 In both tort and contract law, the focus was upon preventing financial distress and redressing social injustice, rather than assigning individual fault.

Likewise, the 1922 Civil Code afforded legal protection to private commercial transactions and associated individual liberties, subject to regulatory decrees. Article 5 included the following:

51 Ibid. p. 51.
54 Schlesinger, Soviet Legal Theory, p. 87.
56 Berman, Justice in the USSR, pp. 35-6.
56 Ibid. p. 36.
51 Ibid.
57 Ibid. p. 37. See also V. Gsovski, Soviet Civil Law, Ann Arbor, 1948, Vol 1, pp. 415 ff, 485 ff.
Every citizen of the RSFSR and the union soviet republics has the right to more about freely and to settle down within the territory of the RSFSR, to choose any occupation and profession not prohibited by law, to acquire and alienate property within the limitations established by law, to enter into legal transactions and to incur obligations, and to organise industrial and commercial enterprises in compliance with all decrees regulating industrial and commercial activities and protecting hired labor.

Article 6 stated: 'No one may be deprived of civil-law rights or limited in rights except in the cases and in the manner prescribed by the law.'

Much discussion in Soviet legal circles centred on Article 1, which sought to clarify the relationship between the recognition of civil-law rights and the needs of socialism. It subordinated these rights to the requirements of production: 'Civil-law rights shall be protected by law, except in those instances when they are exercised in contradiction to their socio-economic purpose.'

While these provisions established a prima facie protection of individual and commercial rights, they allowed these rights to be overridden where they were utilised in a socially harmful or wasteful way. Writing on Article 1 in the *Weekly of Soviet Justice*, Asknazil said these rights were secured not so much to satisfy personal interests as to achieve certain economic ends. He gave the example of an idle enterprise being taken temporarily from its owner and transferred to other operators so that the enterprise could serve its productive function. The owner would be compensated according to the normal profitability of such an enterprise. Asknazil argued that the public interest should always prevail over private interests, but that it was also in the public interest for individual property rights to be assured in order to promote the growth of commodity trade. The author argued for this purpose to be more clearly defined in the Civil Code, to prevent Article 1 being excessively invoked against owners.

The Land Code adopted in 1922 formally declared all land the property of the state and prohibited its sale or purchase but permitted households to hold, cultivate and under certain circumstances, lease land. These arrangements arguably codified nineteenth century peasant legal custom, developed under serfdom, which maintained that land belonged "to nobody." Important decisions, including on the extent to which peasant holdings could be partitioned, were left largely in the hands of communal assemblies.

Lenin and his co-thinkers advocated definite administrative and political measures to guard against the growth of a privileged bureaucracy within the state. They were acutely aware that the NEP brought with it definite economic and political dangers associated with the enrichment of a layer of peasants and party careerists via the market and the accumulation of private profit. The rise of the NEPmen, as they became known, threatened to become the social and material basis for an emerging party and state bureaucracy. Lenin's campaign against bureaucracy assumed immense importance for him in the last three years of his life. This was translated into measures to try to prevent state power from being usurped by apparatchiks, in line with the party program of 1919;

69 Zile, p. 69.
60 Ibid, p. 84.
61 Ibid, pp. 87-89.
Conducting the most resolute struggle against bureaucratism, the Russian Communist Party advocates for the complete overcoming of this evil the following measures:

(1) an obligatory call on every member of the Soviet for the fulfillment of a definite task in the administration of the state;
(2) a systematic variation in these tasks in order that they may gradually cover all branches of the administration;
(3) a gradual drawing of the whole working population into work in the administration of the state.

The full and universal application of all these measures, which represents a further step on the road trodden by the Paris commune, and the simplification of the functions of administration accompanied by a rise in the cultural level of the workers will lead to the abolition of state power. 63

With Lenin largely incapacitated by illness, however, from the time of his first stroke in 1923, the NEPmen and bureaucrats found a champion in Stalin. By autumn 1924, less than a year after the defeat of the October 1923 German revolution and eight months after Lenin's death, Stalin had unveiled the new doctrine of 'socialism in one country'. This new nationalist program appealed to a mood of exhaustion in the country, abandoning the struggle for international socialism and instead concentrating on constructing a strong national state. It became the ideological and material underpinning of the bureaucrats who assumed the role of presiding over terrible scarcity and inequality, all the while declaring these social conditions to be necessary for the forging of socialism.

According to the historian E.H. Carr, the consolidation of a corresponding legal regime was one of the signs of the emergence of the elite layer and its nationalist doctrine:

The reversal of the initial hostility of the revolution towards law was one of the most striking symptoms of the change in the climate of opinion which paved the way for the doctrine of socialism in one country. 64

This suggestion provides a crucial key for analysing the early Soviet debates about law. The reversal of earlier aspirations of a short transition to classless, stateless society, led to the consolidation of state authority, which in turn was bound up with the emergence of nationalist outlook. Contained in this were the seeds of the later reversals of the early legal experiments and accomplishments.

Over the ensuing decade, Stalin's nationalist doctrine became intertwined with the development of a totalitarian order and the reversal of the early legal initiatives. It reversed the Marxist conception that the transition to communism required overcoming scarcity, instead holding out the prospect of gradually building socialism, even on an impoverished basis. For this, Stalin and his supporters, who initially included Bukharin, insisted that the state apparatus had to be strengthened and stabilised, rather than reduced. Trotsky explained:

64 Carr, vol. 5, p. 88.
The 'theory' of socialism in one country -- a 'theory' never expounded, by the way, or given any foundation, by Stalin himself -- comes down to the sufficiently sterile and unhistoric notion that, thanks to the natural riches of the country, a socialist society can be built within the geographic confines of the Soviet Union. With the same success you might affirm that socialism could triumph if the population of the earth were a twelfth of what it is. In reality, however, the purpose of this new theory was to introduce into the social consciousness a far more concrete system of ideas, namely: the revolution is wholly completed; social contradictions will steadily soften; the kulak will gradually grow into socialism; the development as a whole, regardless of events in the external world, will preserve a peaceful and planned character. Bukharin, in attempting to give some foundation to the theory, declared it unshakably proven that 'we shall not perish owing to class differences within our country and our technical backwardness, that we can build socialism even on this pauper technical basis, that this growth of socialism will be many times slower, that we will crawl with a tortoise tempo, and that nevertheless we are building this socialism, and we will build it.'

We remark the formula: 'Build socialism even on a pauper technical basis,' and we recall once more the genial intuition of the young Marx: with a low technical basis 'only want will be generalized, and with want the struggle for necessities begins again, and all the old crap must revive'... The juridical and political standards set up by the revolution exercised a progressive action upon the backward economy, but upon the other hand they themselves felt the lowering influence of that backwardness. The longer the Soviet Union remains in a capitalist environment, the deeper runs the degeneration of the social fabric.65

Stalinist 'legality'

The overall subsequent degeneration of Soviet legal discussion and policy is discussed in detail in Chapter Six. From enlightened legislation and vibrant legal debates, the climate shifted dramatically to repressive laws and mindless diatribes. One of the central features of that reversal, which is further explored in Chapter Six, was the adoption of what the regime called 'socialist legality'. Ironically, as the regime became increasingly lawless in practice -- seen, for example, in the show trials of 1934-37, which are reviewed in one of the case studies later in this chapter -- it proclaimed the erection of a new permanent legal system, overturning the previous emphasis on moving toward the disappearance of the state and law.

By 1936, the Stalinist regime had not only trampled over, but formally repudiated the basic Marxist conception of the withering away of the state. While claiming to have created socialism and dissolved antagonistic social classes, the regime denied that the legal institutions and state apparatus would disappear, even in the final stage of communism. This abandonment of Marxist precepts flowed organically from the doctrine of 'socialism in one country' adopted by Stalin in 1924. The formal reason given for the new policy of 'socialist legality' was the existence of socialism in one country, encircled by capitalist powers, making it essential to strengthen the state power.

In the midst of the Great Purges of 1936-37, directed against all socialist opposition, Stalin emphasised the need for stability, orthodoxy and legality to consolidate power. 'We need stability of laws now more than ever,' he said in his Report on the Draft Constitution in 1936.66 Over the

66 Berman, Justice in the USSR, p. 53.
following two years, every surviving feature of Bolshevik jurisprudence was overturned. ‘Crime’ and ‘punishment’ were restored, as were the sanctity of marriage and contracts, individual fault as chief criterion of personal injury liability and ‘judicial authority’. Correspondingly, Soviet legal theory became reduced to self-serving and platitudinous gibberish. In a series of articles and a book on Soviet public law published in 1938, Procurator-General Vyshinsky denounced Pashukanis and Stuchka and their insistence that genuine socialism would mean the end of law.

History demonstrates that under socialism, on the contrary, law is raised to the highest level of development... Our laws are the expression of the will of our people as it directs and creates history under the leadership of the working class. The will of the people with us is fused with the will of the whole people.68

As Western legal observers have readily concluded, these banalities cannot compare to the theoretical work of Pashukanis, let alone provide a coherent conception of law. ‘Such generalities hardly constitute a theory of law,’ comments Berman.69 Berman also points to the relationship between the lawless despotism of the Stalinist regime, its annihilation of the Bolshevik party and its increasing need for the political prop of ‘socialist legality’:

Stalin deintellectualised the Party; he purged it of the men who were in love with revolutionary ideas. The revolutionary ideas themselves became liturgical rather than rational in Soviet Russia. Marxism was chanted. Not reason as such but loyalty, patriotism, discipline, responsibility, were now stressed. It was in this context that law was restored, not only as legality but also as a system of justice. Without a legal system and a legal order – without Law with a capital L – the Stalinist regime could neither control the social relations of the people nor keep the economy going nor command the political forces in the country as a whole.70

While Marxism was chanted, however, the Stalinist doctrine was the antithesis of Marxism. As Trotsky observed in The Revolution Betrayed, the evolution of the Soviet state into an ever more totalitarian regime under Stalin could not be reconciled with the classical Marxist conception of the withering away of the state. Referring to the 1918 program adopted by the Bolshevik party, he wrote:

The state as a bureaucratic apparatus begins to die away the first day of the proletarian dictatorship. Such is the voice of the party program – not voided to this day. Strange: it sounds like a spectral voice from the mausoleum. However you may interpret the nature of the present Soviet state, one thing is indubitable: at the end of its second decade of existence, it has not only not died away, but not begun to 'wither away'. Worse than that, it has grown into a hitherto unheard of apparatus of compulsion... While continuing to publish the works of Lenin (to be sure, with excerpts and distortions by the censor), the present leaders of the Soviet Union and their ideological representatives do not even raise the question of the causes of such a crying divergence between program and reality.71

‘Stalinist legality’ it is argued, was a terrible negative demonstration of the truth of the Marxist analysis of law as a defender and facilitator of privilege, inequality and private property interests.

67 Ibid, p. 57.
69 Ibid, p. 55.
70 Ibid, p. 64.
71 Trotsky, The Revolution Betrayed, pp. 51-52.
This can be illustrated by five examples contrasting the early Soviet experiments with the later Stalinist degeneration.

Five examples of Bolshevik law

1. Family law

One of the most revealing and emblematic areas of Bolshevik legal theory and practice was family law. In general, the Bolsheviks sought to free women from domestic drudgery. They gave women equal political and legal rights with men, liberalised divorce rules and legalised abortion. More fundamentally, they sought to transform the material conditions of family life. They set about providing universal social care and accommodation: maternity houses, nursery schools, kindergartens, schools, social dining rooms, social laundries, first-aid stations and hospitals.

In this sphere, as in others, the Bolsheviks were guided by the critique and analysis conducted by the Marxist movement. Most notable, in this field, was Engels’ contribution in The Origin of the Family, Private Property and the State.

Drawing upon the research of Lewis Morgan, Engels traced the origins of patriarchal society and its associated conception of the family as a monogamous economic unit to the emergence of surplus value, private property and the state. To summarise his conclusions somewhat simplistically, the accumulation of private property gave rise to the need for a father to pass his estate on to his own children. On the basis of a certain historical level of development of productive capacity, society became divided into classes, as an essential stage in human civilisation. Through the different phases of class society – slavery, feudalism and capitalism – the family evolved in line with the requirements of production and the interests of the ruling strata. In the classless society of the future, the economic basis and dictates of the nuclear family would fade away and with it the supremacy of men and the legal enforcement of marriage, together with the consequent problems of infidelity, prostitution and the degradation of divorce and custody battles. Bound only by love, affection and mutual respect, personal relations, including true monogamous partnerships, would be truly free and enjoyable.

Engels poured scorn on the notion that by beginning to provide formal legal equality to women, Western capitalist governments were “removing all cause for complaint on the part of the woman”. He pointed out that the legislative reforms, in so far as they modified marriages into voluntary agreements with equal rights and obligations on both sides, essentially brought family law into line with the transformation of commercial law from status, under feudalism, to contract.22 Marriage arrangements remained tied up with private property rights:

As far as marriage is concerned, even the most progressive law is fully satisfied as soon as the parties formally register their voluntary desire to get married. What happens behind the legal curtains, where real life is enacted, how this voluntary agreement is arrived at – is no concern of the law and the jurist. And yet the simplest comparison of laws should serve to show the jurist what this voluntary agreement really amounts to. In countries where the children are legally assured of an obligatory share of their parents’ property and thus cannot be disinherited - in Germany, in the countries under French law, etc. - the children must obtain their parents’ consent in the question of marriage. In countries

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under English law, where parental consent to marriage is not legally requisite, the parents have full testatory freedom over their property and can, if they so desire, cut their children off with a shilling.73

Whether or not formal property and inheritance rights were still enforced, Engels insisted, the formally equal and free appearance of marriage would remain a charade as long as personal relations were dominated by economic considerations. Although he was writing of the conditions of the late 19th century, his observations were certainly applicable to early 20th century Russia and remain substantially valid.

Today, in the great majority of cases, the man has to be the earner, the breadwinner of the family, at least among the propertied classes, and this gives him a dominant position which requires no special legal privileges. In the family, he is the bourgeoisie; the wife represents the proletariat.24

Only under a socialist society would the underlying source of oppression of both women and men be removed.

With the passage of the means of production into common property, the individual family ceases to be the economic unit of society. Private housekeeping is transformed into a social industry. The care and education of the children becomes a public matter. Society takes care of all children equally, irrespective of whether they are born in wedlock or not. Thus, the anxiety about the "consequences," which is today the most important social factor – both moral and economic – that hinders a girl from giving herself freely to the man she loves, disappears.25

Engels emphasised that these processes by no means dictated the end of monogamous partnerships; instead they would create the conditions for genuine, loving relationships for the first time in human history. Marriages would be freed from the hypocrisy of 'extra-marital affairs' and the recourse by men to the services of prostitutes. Partnerships would be amicably entered into and would last as long as the love which sustained the marriage continued: "A definite cessation of affection, or its displacement by a new passionate love, makes separation a blessing for both parties as well as for society. People will only be spared the experience of wading through the useless mire of divorce proceedings."26 At the same time, Engels refused to attempt to predict or prescribe the future evolution of human and sexual relations under socialism.

That will be settled after a new generation has grown up: a generation of men who never in all their lives have had occasion to purchase a woman’s surrender either with money or with any other means of social power, and of women who have never been obliged to surrender to any man out of consideration other than that of real love, or to refrain from giving themselves to their beloved for fear of the economic consequences. Once such people appear, they will not care a rap about what we today think they should do. They will establish their own practice and their own public opinion, conformable therewith, on the practice of each individual – and that’s the end of it.27

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73 Engels, *The Origin of the Family, Private Property and the State*, p. 73.
74 Ibid., p. 74.
75 Ibid., p. 76.
76 Ibid., p. 82.
77 Ibid., pp. 82-83.
In Tsarist Russia, up until 1917, the family was considered by law to be founded on a religious or sacramental conception. A religious marriage ceremony was required. Marriage between members of the Eastern Orthodox or Roman Catholic churches and non-Christians was prohibited, as was marriage between Protestants and pagans. The prevailing doctrine, as stated at a synod of 1744, was that ‘marriage is established by God for the increase of the human race’. Women, therefore, were under a duty to bear children. Grounds for divorce varied according to religious faiths and suits for divorce were heard only in ecclesiastical courts.  

Among their first initiatives, the Bolsheviks secularised marriage, liberalised divorce and permitted abortions, as initial steps toward liberating women and children (and men) from the confines of semi-feudal and capitalist family relations. For the first time in Russian history, the Family Code introduced in 1918 recognised civil (non-religious) marriages, granted the absolute right of divorce and abolished illegitimacy as a legal category.  

Some historians have acknowledged the progressive character of the 1918 Code, and attributed its enlightened content to the Marxist tradition of the party. Both Quigley and Goldman describe it as an intensely revolutionary document that reflected the ‘socialist-libertarian heritage of the Bolsheviks’. Others have judged it to be ‘no more than modern and Western,’ rather than ‘socialist’. But there is no doubt that the Bolsheviks themselves saw the emancipation of women, the equality of the sexes, freedom of human and sexual relations and the removal, as far as possible, of economic pressures and ties from family and social life as an integral aspect of creating the conditions for a genuinely socialist society. In Trotsky’s view:

The October revolution honestly fulfilled its obligation in relation to woman. The young government not only gave her all political and legal rights in equality with man, but, what is more important, did all that it could, and in any case incomparably more than any other government ever did, actually to secure her access to all forms of economic and cultural work... The revolution made a heroic effort to destroy the so-called ‘family hearth’ – that archaic, stuffy and stagnant institution in which the woman of the toiling masses performs galling labour from childhood to death. The place of the family as a shut-in petty enterprise was to be occupied, according to the plans, by a finished system of social care and accommodation: maternity houses, creches, kindergartens, schools, social dining rooms, social laundries, first-aid stations, hospitals, sanatoria, athletic organisations, moving-picture theatres, etc. The complete absorption of the housekeeping functions of the family by institutions of the socialist society, uniting all generations in solidarity and mutual aid, was to bring to woman, and thereby to the loving couple, a real liberation from the thousand-year-old fetters.  

Liberating human relations from the economic burdens, as well as legal restrictions, associated with capitalist private property was essential to the socialist project, Trotsky insisted.

Socialism, if it is worthy of the name, means human relations without greed, friendship without envy and intrigue, love without base calculation... The genuinely socialist family, from which society will remove the daily vexation of unbearable and humiliating cares, will have no need of any regimentation.\textsuperscript{83}

As materialists, the Bolsheviks recognised that the nuclear family and its exploitative character were rooted in deep economic and social pressures produced by money and class relations. Marriage vows and family ties could not be simply abolished. Rather, the 1918 Code sought to end the church’s control over marriage and end the legal and social bondage of women. Goikhberg, responsible for the committee that drafted the Code on Marriage, the Family and Guardianship, summarised this position:

Our [state institutions of guardianship] ... must show parents that social care of children gives far better results than the private, individual, inexpert and irrational care by individual parents who are ‘loving,’ but in the matter of bringing up children, ignorant.\textsuperscript{84}

Given the extraordinary financial, economic and cultural difficulties confronting the new order, the Code did not attempt to provide for public maintenance of children – parents remained responsible for the upbringing of children, with the assistance of state facilities.\textsuperscript{85} In 1920, a further step was taken to free women (and men) from economic and social pressure -- abortion was legalised for the first time. Trotsky insisted that under conditions of poverty and family distress, abortion was one of women’s ‘most important civil, political and cultural rights’.\textsuperscript{86}

According to the available evidence, these unprecedented reforms began to have a significant impact on social and family life. They contributed to a rise in registered marriages, a decline in church weddings in urban areas, higher ages of marriage, smaller families and a ‘soaring’ divorce rate.\textsuperscript{87} However, the privations and shortages of the civil war, followed by drastic cuts in childcare and other social services under the NEP, produced increased pressures on working class women and children. War, unemployment and food and housing shortages added to family breakups and a growth in the number of orphaned children.

Two diverging responses emerged. Some party leaders, such as Bukharin, blamed lax sexual morals and excessive consumption of alcohol, an early warning of a tendency to turn back to family authority as a means of social control. At a Komsomol congress in 1922, Bukharin attacked ‘anarchy in the realm of conduct’.\textsuperscript{88} By contrast, Trotsky stressed the need for expanding and improving the stock of housing, public dining facilities, organised leisure activities and other services to alleviate the burdens of working class and peasant women, together with higher levels of literacy, education and cultural development. In 1923, he sought to address anxieties about the disintegration of traditional family authority. He wrote: ‘There is no denying ... that family relations, those of the proletarian class included, are shattered’ and gave examples of many ‘domestic tragedies’. He argued that this crisis was symptomatic of the death of the old family

\textsuperscript{83}Ibid, pp. 155-57.
\textsuperscript{84}Zile, p. 36
\textsuperscript{86}Trotsky, The Revolution Betrayed, p. 149.
\textsuperscript{88}Siegelbaum, Soviet state and society between revolutions, p. 151.
and the birth pangs of the new, while urging party members to work for 'the development of the individual ... raising the standard of his requirements and inner discipline'.

Against this background, the RSFSR Commissariat of Justice prepared a draft of a new Family Code, which became the subject of a wide and democratic discussion, notwithstanding the intense factional war that had been waged by Stalin, Zinoviev and Kamenev against Trotsky since late 1923. The draft was canvassed in the media and debated in regional and district executive committees before it was submitted to the TsIK of the RSFSR in October 1925. The draft went significantly beyond the 1918 Code in several respects. It recognised de facto marriage as legally equivalent to registered marriage, extending property and alimony rights to de facto wives, making the Soviet Union the first country to do so. Second, it established joint ownership of property acquired during a marriage and its equal division in case of divorce. Third, it simplified divorce proceedings, entrusting them to the ZAGS instead of the courts and allowing for notification of divorce via mail.

An extensive debate ensued in the 434-member TsIK, ranging over a broad range of issues, including the legal criteria for marriage, childrearing and the role of law in the transition to a socialist society. It cut across factional lines, with Left Oppositionists and supporters of the party majority among the proponents and critics of the draft. Rather than impose any position, the TsIK postponed a decision until after local soviets had considered the draft. More than 6,000 village meetings were held. Peasant representatives and working class women expressed considerable opposition to the liberalisation of divorce and recognition of de facto marriages, reflecting concerns about the insecurity of their economic circumstances.

Before the TsIK resumed its consideration of the draft in November 1926, Aleksandra Kollontai, a leading Bolshevik who briefly returned from her diplomatic post in Norway, argued that it was demeaning to women and a negation of socialist principles to oblige them to plead before the courts for support from their former husbands. She also pointed to the plight of women who had borne children outside any form of marriage, who were not covered by the Code. Kollontai proposed a General Insurance Fund, based on contributions from the working population. This proposal ignited a lively debate in the press, winning support from young activists and several leading figures. Trotsky among them, but encountered strong criticism, including from female factory workers, for fostering irresponsibility among men. The draft was adopted with only minor revisions in November 1926 and went into effect in January 1927.

The RSFSR was the only Soviet republic to fully recognise de facto marriages, suggesting both a sensitivity to peasant sentiment and a tendency to compromise with traditional elites in the less economically developed republics. However, from 1926 to 1929 an official campaign was waged in the Central Asian republics against the veiling of women, which included legal and administrative measures to break the resistance of mullahs and village and clan elders.

90 Schlesinger, ed., Changing Attitudes, pp. 107-120.
92 Farnsworth, 'Bolshevik Alternatives' in Atkinson, et al, eds., Women in Russia, pp. 149-52.
93 Siegelbaum, Soviet state and society between revolutions, pp. 155-6.
Significantly, the open and lively discussion on the 1926 Code on Marriage, Family and Guardianship was one of the last to occur before the 1927-28 repression of the Left Opposition. Within a decade, the egalitarian and liberating features of the 1926 Code were among the first social gains reversed by Stalin’s regime. Given the continuing relative backwardness of Soviet society, the gains for peasant and working women and their families had been limited in any case. As Trotsky noted, by 1935 there were only 1,181,000 children in kindergarten, a ‘drop in the ocean’ of more than 40 million Soviet families, especially given that the lion’s share would undoubtedly go to the families of party and administrative bureaucrats.94

But the Stalinists systematically demolished the gains of Bolshevik family law, re-criminalising non-therapeutic abortions in 1936, followed by new laws, adapted from the capitalist West, to restrict divorce and reinforce the sanctity of marriage.95 Berman suggests that these reversals were intended to lift the birth rate and halt the disintegration of the family, which was ‘endangering the stability of Soviet social relations’.96 He points to ‘alarming’ rates of juvenile delinquency, soaring abortion rates and an ‘extraordinarily high’ number of registered and de facto divorces. By comparison, Trotsky argued that the changes not only expressed the material interests of the new privileged caste, which revived nepotism and other family favouritism, but also the political calculations of the ruling stratum. ‘The most compelling motive of the present cult of the family is undoubtedly the need of the bureaucracy for a stable hierarchy of relations, and for the disciplining of youth by means of 40,000,000 points of support for authority and power.’97

Indeed, the Stalinist doctrine of the ‘sacredness’ of the Soviet family contained definite echoes of the Tsarist sacramental conception of marriage. ‘Soviet marriage reveal the spiritual side of marriage, its moral beauty, inaccessible to capitalist society,’ the official newspaper Pravda declared in 1936, during the debates on the law restricting abortion. Another official commentary insisted that:

Assertions that socialism brings the withering away of the family are profoundly erroneous and harmful... The family under socialism does not wither away, but is strengthened. Comrade Stalin, the Party, and the government are giving much attention to questions of strengthening the Soviet family.98

Again in 1944, welcoming the restoration of judicial control over divorce, Pravda emphasised the ‘spiritual side’ of family law, stating: ‘A mother who has not yet known the joy of motherhood has not yet realised all the greatness of her calling.’99 The 1944 decree subjected divorce to rigorous judicial procedure and high fees. De facto marriages ceased to be recognised as legal. The right of illegitimate children to inheritance from their father was ended.100

These shifts matched a new stress on personal ownership of one’s home, of one’s savings and government bonds. Greater freedom of inheritance was introduced in 1945, permitting Soviet citizens to not only become wealthy but to pass their wealth on to their heirs with a maximum inheritance tax of 10 percent.101 Stalin’s denunciation of ‘equality-mongering’ and exultation of

94 Trotsky, The Revolution Betrayed, p. 147.
95 Ibid, pp. 151-3.
96 Berman, Justice in the USSR, p. 49.
99 Berman, Justice in the USSR, pp. 332-3.
100 Daniels, Trotsky, Stalin and Socialism, p. 155.
101 Berman, Justice in the USSR, p. 51; Daniels, Trotsky, Stalin and Socialism, p. 155.
personal rewards sanctified the abandonment of any goal of social equality and the emergence of a new privileged caste, whose interests were anchored in both testament and marriage arrangements. Already by 1934, Stalin had repudiated Marxist egalitarianism, declaring ‘equality in the sphere of requirements and individual life’ to be ‘a piece of reactionary petty-bourgeois absurdity worthy of a primitive sect of ascetics, but not of a socialist society organized on Marxian lines’. While these transformations were carried out in the name of Marxism-Leninism, they were an ironic, negative, confirmation of Engels’ analysis of the relationship between private property and the nuclear family.

2. ‘Crime’ and ‘punishment’

On crime and punishment too, Marx and Engels had sketched, at least in outline form, a communist approach. In essence, they drew out that so-called criminal conduct was the product of several factors. In part, it expressed an elemental protest by the poor and working people at the rampant inequality and oppression of capitalist society. In so far as it consisted of anti-social behaviour, its roots substantially lay also in social conditions. At the same time, ‘crime’ was socially and legally defined by the ruling class of any society in order to protect its property interests. In addition, different punishments were meted out to the rich and poor. For all these reasons, Marx and Engels vehemently opposed the ‘police-manic’ response of harsh and revengeful punishment, particularly the death penalty.

Drawing on the English crime statistics of his day, Engels noted the rapid growth of crime under capitalism (‘the British nation has become the most criminal in the world’) and the extraordinarily high proportions of prisoners who had poor education levels, an indication of poverty, while only 0.22 percent had enjoyed a higher education. While stressing that impoverishment and want drove some ordinary people to theft, Engels noted that crime also contained an element of social protest. In tracing the emerging revolt of the British working class, which later took the form of industrial strikes and the Chartist movement for voting rights, Engels wrote:

The earliest, crudest, and least fruitful form of this rebellion was that of crime. The working-man lived in poverty and want, and saw that others were better off than he. It was not clear to his mind why he, who did more for society than the rich idler, should be the one to suffer under these conditions. Want conquered his inherited respect for the sacredness of property, and he stole. We have seen how crime increased with the extension of manufacture; how the yearly number of arrests bore a constant relation to the number of bales of cotton annually consumed.

Elsewhere, Engels observed that criminality was also rooted in capitalism’s increasing transformation of human relations into cash relations. Paraphrasing Carlyle, he noted that cash payment became more and more ‘the sole nexus between man and man’. In the realm of business, cut-throat competition, cheating, corruption and adulterous marriages of commercial convenience prevailed, but of course, these practices were not classified as crime.

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102 Daniels, Trotsky, Stalin and Socialism, p. 158.
Engels observed that, when it came to conviction, sentencing and imprisonment, the poor in England invariably fared worse than the rich, despite the pretence of formal legal equality. In a passage that — with allowances for wit and popularity of style — is indicative of his underlying analysis of law, as well as his observations of its application, he wrote:

Laws are only necessary because there are persons in existence who own nothing; and although this is directly expressed in but few laws, as, for instance, those against vagabonds and tramps, in which the proletariat as such is outlawed, yet enmity to the proletariat is so emphatically the basis of the law that the judges, and especially the Justices of the Peace, who are bourgeois themselves, and with whom the proletariat comes most in contact, find this meaning in the laws without further consideration. If a rich man is brought up, or rather summoned, to appear before the court, the judge regrets that he is obliged to impose so much trouble, treats the matter as favourably as possible, and, if he is forced to condemn the accused, does so with extreme regret, etc., etc., and the end of it all is a miserable fine, which the bourgeois throws upon the table with contempt and then departs. But if a poor devil gets into such a position as involves appearing before the Justice of the Peace — he has almost always spent the night in the station-house with a crowd of his peers — he is regarded from the beginning as guilty; his defence is set aside with a contemptuous 'Oh! We know the excuse', and a fine imposed which he cannot pay and must work out with several months on the treadmill.\[107\]

From their earliest writings, Marx and Engels denounced the punitive outlook of the prevailing regimes as cruel, vindictive and counter-productive. In *The Holy Family*, they related the official attitude to the theology of the Church, with its insistence on purging humanity's 'original sin'. They wrote that 'vengeance on the criminal' was linked with 'penance and consciousness of sin in the criminal, corporal punishment with spiritual punishment, sensuous torture with the non-sensuous torture of remorse'.\[108\] Marx declared that history and statistics had proven that punishment had neither deterred crime nor ameliorated its social causes and strongly condemned capital punishment. He asked rhetorically: 'Is there not a necessity for deeply reflecting upon an alteration of the system that breeds these crimes, instead of glorifying the hangman who executes a lot of criminals only to make room for the supply of new ones?'\[109\]

Marx and Engels predicted that communist society would mean an immense reduction, if not eventual elimination, of crime and, along with it, the need for a vast police, judicial and penal system. In one speech, Engels outlined their argument as follows:

Present-day society, which breeds hostility between the individual man and everyone else, thus produces a social war of all against all which inevitably in individual cases, notably among uneducated people, assumes a brutal, barbarously violent form — that of crime... In communist society... we eliminate the contradiction between the individual man and all others, we counterpose social peace to social war, we put the axe to the root of crime — and thereby render the greatest, by far the greatest, part of the present activity of the administrative and judicial bodies superfluous. Even now, crimes of passion are becoming fewer and fewer in comparison with calculated crimes. Crimes of interest — crimes against persons are declining, crimes against property are on the increase. Advancing civilization moderates violent outbreaks of passion even in our present-day

society, which is on a war footing: how much more will this be the case in communist, peaceful society! Crimes against property cease of their own accord where everyone receives what he needs to satisfy his natural and spiritual urges, where social gradations and distinctions cease to exist. Justice concerned with criminal cases ceases of itself, that dealing with civil cases, which are almost all rooted in the property relations or at least in such relations as arise from the situation of social war, likewise disappears; conflicts can then be only rare exceptions, whereas they are now the natural result of general hostility, and will be easily settled by arbitrators [italics in original].

As far as possible, the Bolsheviks sought to implement this approach. One of the earliest legal debates concerned the pace at which the new government could abolish criminal punishment, under extraordinarily difficult conditions. Given the deprivations faced by millions of people after years of war, the levels of robbery and murder rose sharply both before and after the October Revolution. By 1918, the levels in Moscow were said to be 10 to 15 times the pre-war levels.

Despite this social strife, the first Criminal Code made criminal law hinge on ‘social danger’ and ‘measures of social defence,’ rejecting the notions of ‘crime’ and ‘punishment.’ Soviet leaders drew the conclusion that these terms, together with ‘guilt,’ functioned to obscure the social causes of crime.

Drafted by Stuchka, the ‘Guiding Principle of Criminal Law of the RSFSR’ (1919) defined criminal law as being ‘made up of rules of law and other legal measures by which the system of social relations of a particular “class society” is protected against infringement (crime) through the application of repressive measures (punishment).’ Notably, the terms crime and punishment were placed in brackets. These traditional notions were rejected for socialist society. As Stuchka also explained, this flowed from the conception that the state’s role was social protection, not the assignment of individual guilt and retribution.

The Guiding Principle described penalties as compulsory measures by which the government protects a certain order of social relations against future infringements by the offender or by others. In a class-divided society, crime originated from the social structure, not individual ‘guilt.’ Therefore, penalties ought not to ‘redeem the guilt’ but be restricted to the demands of expediency, without inflicting injurious and needless sufferings. Penalties ought to re-educate, not just deter. The range of penalties included compulsory attendance at evening classes. In sentencing, courts should consider the class position and personality of the offender, as well as the degree of danger to society.

The criminal law’s operation was stated as transitional: ‘Soviet criminal law has the task of protecting the system of social relations which correspond to the interests of the working masses who are being organised into the ruling class under the dictatorship of the proletariat during the period of transition from capitalism to communism.’ Thus, the criminal law’s acknowledged purpose was to help attain definite economic and social purposes, rather than to punish individuals. The Communist Party program of the same year looked ahead to when ‘the entire

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111 Juridical Revolution, Law and Order, pp. 18-19.
112 Berman, Justice in the USSR, p. 35.
114 Zizek p. 50.
115 Schlesinger, Soviet Legal Theory, pp. 74-75.
working population will participate in administering justice and punishment will be replaced once and for all by educational measures'.

These efforts were, however, cut short by the civil war, in which the policy of Red Terror was advanced to counter the sabotage, summary executions and reprisals of the White Armies and their allies. One of the worst examples of the White Terror was the British military-organised execution of 26 Bolsheviks in Baku. These conditions led to a wider adjustment of the early emphasis on avoiding criminal punishments. When an official in the Revolutionary Tribunal system argued that ‘the socialist criminal code must not know punishment as a means of influence on the criminal,’ representatives of the Commissariat of Justice rebuked him. Kozlovsky derided ‘sentimental notions of re-education,’ saying that during the time it would take to create socialism, and until ‘remnants of the past, crime and the need for punishments disappear,’ the government would need decisive measures of terror and isolation. Savransov, head of the Commissariat’s Penal Department, agreed that the Bolsheviks could not ‘soften’ the regimen in places of confinement. Lenin made similar statements during this period:

In order to stem increases in crime, hooliganism, bribery, speculation, outrages of all kinds ... we need time and we need an iron hand... We would be laughable utopians if we imagined that such a task can be accomplished the day after the fall of the bourgeois regime, that is, in the first stage of the transition from capitalism to socialism, or that it can be accomplished without repression.

These statements, however, need to be placed in the context of the civil war, in which the Revolutionary Tribunals were established to deal with serious counter-revolutionary activities. Even so, their jurisdiction was strictly confined to counter-revolution, pogroms, corruption, forgery and espionage. No tribunal judgment could be carried out before the defendant or any other interested citizen could appeal to a special Court of Cassation.

During the early revolutionary period, the debates over criminal law occurred at several levels. For example, from 1917 to 1927 a number of disputes arose over the right of necessary defence (usually referred to as self-defence in Western jurisprudence). Butler records that the primary issue was the extension of the right to the defence of collective and societal, rather than individual, interests. Article 19 of the 1922 RSFSR Criminal Code permitted defence against infringements of both the person and the rights of the defender or of other persons. Piontkovsky, a legal theorist, criticised it for following ‘bourgeois law, bourgeois codes’ whose provisions were ‘usually intended merely to protect individual interests’. The Code was silent ‘about protecting the interests of the collective’. Later, in 1926-27, a ‘lively’ debate occurred before the words ‘revolutionary legal order’ were deleted from the necessary defence clauses of the Soviet codes because they were excessively broad and vague as criteria for justifying defensive conduct.

The initial strivings toward an enlightened criminal law were repudiated under Stalin. His 1936 Constitution restored the words ‘crime’ and ‘punishment’. The ‘formal-juridical’ element was emphasised as having equal importance to the ‘material’ element of social danger and social

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116 Juvelier, Revolutionary Law and Order, p. 25.
118 Juvelier, Revolutionary Law and Order, p. 19.
119 Schlesinger, Soviet Legal Theory, p. 77.
121 Ibid, pp. 104-105.
defence. While Berman suggests that this reversal, like that in family law, was in response to a social crisis, including high crime rates, Huskey argues that the restoration of ‘bourgeois’ conceptions of punishment by Vyshinsky was related to the consolidation of political and social power in the hands of the nascent Stalinist bureaucracy. For his part, Trotsky drew attention to the mounting inequality and social antagonisms that produced discontent and police repression.

3. Mental ill-health

The early Soviet approach to criminal law extended to the removal of questions of mental health from courts altogether. Article 14 of the ‘Leading Principles of Criminal Law’ of 1919 stated: ‘A person shall not be subject to trial and to punishment for a deed which was committed in a condition of mental illness... To such persons shall be applied only medical measures and measures of precaution.’ In effect, all accused who pleaded mental illness were immediately under the jurisdiction of the medical administration.

This was in line with the Marxist understanding that the roots of anti-social behaviour lay primarily in the socio-economic conditions of society and, in some instances, the complex interaction of these conditions with mental illnesses. Again, the emphasis was not ‘individual’ culpability and punishment but treatment and, where necessary, confinement, to address the underlying mental problem and protect society. The First All-Union Conference on Psychiatry and Neurology in 1925 adopted a resolution ‘On Legislation and the Criminal Question’ that opposed the notion of ‘imputability’ – that is, mental capacity to incur criminal guilt – and advocated its replacement by the ideas of ‘social dangerousness and socially dangerous conditions’ and attention to the ‘neuropsychiatric deprivations of the criminal’.

The concept of legal insanity was reintroduced in the criminal codes of 1923 and 1926 but until the mid-1930s, the question of criminal insanity was still decided by a psychiatric expert. Article 10 of the 1926 Criminal Code provided that ‘measures of social defence of a judicial-correctional character’ may be applied to persons who have committed ‘socially dangerous acts’ only where they acted intentionally, that is, foresaw the socially dangerous nature of their acts, or acted negligently, that is, should have foreseen the socially dangerous consequences of their acts. Article 11 stated that judicial-correctional measures may not be applied to persons who have acted while in a condition of chronic mental illness, or temporary derangement, or other diseased condition, if they could not realise the nature of their acts or control them, and also to persons who, although they acted in a condition of mental balance, had become mentally ill at the time of sentencing. ‘To such persons may be applied only measures of social defence of a medical character.’ A note to this article states that it does not apply to persons who were intoxicated.

Until the mid-1930s, as provided by the Code of Criminal Procedure, a psychiatric expert was summoned whenever the issue of mental health was raised, whether at a pre-trial hearing or during the trial itself. Courts rarely rejected the psychiatrist’s conclusions. Thus, although the

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122 Berman, Justice in the USSR, p. 56.
123 Ibid., p. 49.
126 Ibid., p. 315.
128 Berman, Justice in the USSR, p. 315.
129 Ibid., pp. 315-6.
Criminal Code provided for tests of mental health in terms of will and intellect, the tests actually applied were medical-psychiatric tests of mental illness.

But from 1935, there was a sharp shift, corresponding to the overall shift to 'stability of laws' demanded by Stalin. Soviet psychiatrists, like jurists and members of every other intellectual discipline, became victims of Stalin's purges to the extent that they clung to any residue of a genuinely Marxist approach. They were denounced as 'wreckers,' bracketing them with the 'Trotskyites' and the disgraced former Justice Commissar Krylenko. In 1938, the Director of the Serbskii Institute of Forensic Psychiatry, the leading agency involved in the psychiatric examination of accused persons, was denounced for 'failing to draw any conclusions for himself from the break in the legal front of wrecking'. According to the authorities: 'The treatment of the problems of imputability and non-imputability by the Institute of Forensic Psychiatry coincided in fact with the wrecking tendencies of Krylenko. 130

This turn corresponded with the reversal of Soviet criminology, to attribute 'crime' to evil individuals and substantially deny the impact of both social conditions and mental impairment. Taking a quote from Engels on 'free will' entirely out of context, the official 1948 textbook on criminal law declared that Marxism placed 'freedom of the human will' at 'the basis of criminal responsibility'. The reversal was starkly felt in practice. In 1922, 46.5 percent of all psychopaths examined by the Serbskii Institute were declared non-imputable and 29.3 percent 'partly imputable'. By 1945, only 12 percent were judged non-imputable and the category 'partly imputable' had long been abolished.131

4. A show trial under Lenin?

The treatment of political dissent is an important test of any society, as well as a key indicator of its approach to law. Extraordinary but justifiable measures of 'Red Terror' were taken during the civil war against those who took up arms against the Soviet Republic or who gave support to such activities.167 As reviewed in Chapter Three, the Bolsheviks were fighting an international cabal, in which all the major capitalist powers, including the United States, Britain, France, Germany and Japan, were determined to use any means to strangle the revolution at birth.

Arguably, however, a better test of the regime's peacetime approach came soon after the end of the civil war. It was the 1922 trial of leaders of the Socialist Revolutionary Party (SRs), a party that opposed the October 1917 revolution. It became the most prominent public trial of dissidents conducted in the pre-Stalinist period. Given that the SRs, who professed to be socialists, were significant rivals of the Bolshevik party, the trial can provide a measure of the Soviet administration's political and legal responses to organised political opposition. The importance of the case is underscored by the international attention that it attracted and by subsequent claims that the trial was a direct precursor to the Stalinist show trials of the 1930s. According to one study of the trial, it revealed 'a number of elements which determined the character of the Stalinist trials' and demonstrated that the degeneration of the Bolshevik regime was 'already fairly far advanced in 1922'.133

133 See earlier in this chapter and also Chapter Five.
A review of the evidence, however, and the historical and political context of the trial, suggests the opposite: that the trial was very different to those staged by Stalin's regime during the great purges of the late 1930s. The hearing was conducted publicly, the accused were represented by both international and domestic advocates, and there were no contrived confessions. Some of the accused were acquitted, others were pardoned and where death penalties were imposed, they were commuted to terms of imprisonment. That is not to say that no criticisms can be made of the proceedings. But the trial must be assessed in the light of the situation confronting the Soviet state in 1922, the assassination attempts and other serious offenses actually committed by the SRs between 1917 and 1922 and the Marxist view of law. Neither the Bolsheviks nor the SRs and their international allies approached the trial as a purely legal exercise. On the contrary, both the prosecution and the defence, in keeping with a long tradition developed in the struggle against the Tsarist authorities and judiciary, saw the hearing as primarily a political contest and regarded the courtroom essentially as a political platform. On the part of the Bolsheviks, this attitude was informed by the Marxist conviction that law and the state are not purely independent or neutral social phenomena but fundamentally instruments of political and class rule. In that sense, the trial provides a picture of the Marxist theory of law in practice.

Jansen asserts that Lenin orchestrated the entire affair, despite his grave illness. Others, however, have suggested that Lenin, who was recovering from a stroke throughout the trial, played no role in it at all, and that it was organised by Stalin, the party general secretary, and Dzerzhinsky, the leader of the Cheka. Lenin certainly expressed disagreements with the agreement struck with the two Socialist Internationals to allow international observers at the trial and to not apply the death penalty to any of the defendants. But he did not persist with his objections, concluding that the Bolshevik party should abide by the agreement. Later, after regaining his health, Lenin complained that the trial had lasted too long.

To assess the validity and fairness of the 1922 trial, it is necessary to examine:

1. The context, including the efforts of the Social Revolutionaries to overthrow the Soviet government.
2. The degree to which both sides—the Soviet government and the Social Revolutionaries—treated the trial as a political one.
3. The access given to legal counsel and observers.
4. Whether the trial and the verdicts were based on accurate or plausible evidence, rather than concocted testimony or contrived confessions.
5. Whether the sentences imposed and the pardons subsequently granted were proportionate and appropriate to the offenses.
6. How the trial compared to the Stalinist show trials and purges of the 1930s.

The context

Soviet Russia had barely survived three years in which anti-revolutionary forces, including leading Social Revolutionaries, had sought to militarily overturn the government, in cooperation

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138 Lenin, "We Have Paid Too Much", *Collected Works*, vol. 33, p. 330.
with Washington, London, Paris, Berlin and Tokyo. The Japanese military had attacked Siberia and occupied Vladivostok. The Germans had occupied all of the Ukraine, the Crimea, and the coasts of the Black and Azov Seas. The British, French and Americans had landed at Murmansk. There was no doubt that SRs had been actively involved in violent attempts to overthrow the Soviet government from the earliest days of the revolution. Jansen states:

In the days that immediately followed the October Revolution, the major Social Revolutionary Party, the PSR, took part in efforts to form a counter-government and even supported an attempt at a counter-uprising, all without result.  

Despite this, for a period, the Soviet government, which at the time consisted of a coalition between the Bolsheviks and the Left SRs, permitted the SRs to continue to publish newspapers, hold meetings and convene a party congress in November-December 1917.

After the Soviet government signed the Brest-Litovsk peace treaty with Germany in March 1918, the Left SRs split from the government in protest and unsuccessfully mounted a coup d'état with the intention of re-launching the war with Germany. The PSR planned and called for armed resistance at that point. In June 1918, the party threw itself behind an anti-Soviet revolt by Czech soldiers along the Trans-Siberian railway, initiating the three-year Western-backed civil war against the Soviet government. Over the ensuing months, the PSR formally declared war on Soviet Russia, established a militia and set up a rival government. Party leaders backed assassination attempts against leading Bolsheviks, including Lenin, and formed various alliances with the Allied powers and former Tsarist generals, notably Admiral Kolchak and General Denikin.

Even as the Red Army prevailed in the civil war, leading SRs declared the inevitability of renewing armed struggle against the Bolsheviks and, at their last party council in August 1921, called for the revolutionary overthrow of the government. Numerous rifts and splits emerged among the SRs, with a succession of prominent former party leaders issuing public calls for unity with the government. Nevertheless, leading SRs, including their most authoritative member, Viktor Chernov, continued to work with foreign powers for the government's overthrow. It was in this context that the decision was made in December 1921 to organise a trial of the PSR central committee.

A political contest

From the outset, both sides regarded the trial as a political battleground. The Bolsheviks saw the trial as a device for forcing the remaining SRs to relinquish their efforts to oust the government, an educative vehicle for exposing the machinations of the SRs and their external backers and, to some extent, as a means of improving relations with other governments and political tendencies internationally. The SRs, acting in a long tradition of conducting political defences against the Tsarist autocracy, intended to use the trial to broadcast their own platform. Jansen notes:

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144 Ibid, pp. 16-17.
146 Ibid, p. 23.
The Socialist Revolutionaries did not accept that the Bolsheviks had any right to try them, and they therefore intended during the trial to attack rather than to defend, i.e. themselves to become accusers. They saw the trial as a means in their political struggle against the Bolsheviks, a platform on which, in the eyes of workers in the whole world, to unmask the anti-socialist and counter-revolutionary character of Bolshevism. Like the Bolsheviks, therefore, the Socialist Revolutionaries regarded their trial as a political affair. Just as the Bolsheviks wanted to use it to make propaganda against them, so they wanted to use it to make propaganda against the Bolsheviks.  

Access to counsel

Albeit partly for diplomatic reasons, the Soviet government took care to meticulously prepare the cases against the accused and extended them the right to both internal and external counsel. The preliminary investigations were entrusted to Krylenko, then chairman of the Supreme Revolutionary Tribunal, who also acted as public prosecutor, joined by Lunacharsky and Pokrovsky (all three were participants in the legal debates, as we shall see in Chapter Six). The court was presided over by Piatakov, a leading Bolshevik and Trotsky supporter.  

Ten foreign defenders nominated by Friedrich Adler on behalf of international socialist groups were permitted to participate in the trial, although some dropped out before the proceedings began. In the end, the four who attended were former Belgian prime minister Emile Vandervelde and his social democratic party associate Arthur Wauters, and two members of the left-wing German USPD, Kurt Rosenfeld and Theodor Liebknecht (brother of the slain German communist Karl Liebknecht), representing the centrist Vienna Union. They collaborated with a team of a dozen Russian defenders, some of whom, particularly NK Muravev, AS Tager and VA Zhdanov, had won fame as radical lawyers before 1917 and were experienced in political trials. A group of the accused who disassociated themselves from the SRS and cooperated with the prosecution were represented by another group of defenders, who included Bukharin and Tomsky, both central leaders of the Bolshevik Party.  

The evidence

Given the political seniority of the figures involved in the trial and the highly charged nature of the proceedings, lack of complete legal impartiality was only to be expected. Nevertheless, the accused were convicted on the basis of evidence, not trumped-up confessions. Jansen demonstrates that the trial was dominated by political accusation and counter-accusation on both sides and that there were shortcomings in confining the evidence to proof of specific offences. Yet, he concedes that many of the most serious charges against the accused were based on irrefutable and well-recorded facts. Indeed, because of the thoroughness with which the evidence was considered, the trial itself lasted eight weeks. It went so long, in fact, that when Lenin, recovering from a stroke, at the end of June or early July learned that the trial still continued, complained that it was occupying the time of many people who had urgent work to do elsewhere.

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147 Ibid., p. 57.
148 Ibid., pp. 47, 60, 61.
149 Ibid., pp. 55-58.
150 Ibid., p. 60.
151 Ibid., pp. 83-104.
152 Ibid., p. 194.
The principal charges upheld against 22 of the accused arose under Article 60 of the recently adopted 1922 Penal Code, which punished membership of any organisation whose activities were oriented toward perpetration of the crimes listed in Articles 57, 58 and 59. These articles defined as counter-revolutionary all activities directed toward overthrowing the Soviet regime and outlawed the maintaining of contacts with foreign powers for the purpose of supporting them in armed conflict with the Soviet Republic or for the purpose of persuading them to take up arms against the Soviet Republic. The court found the PSR to be a criminal organisation within the meaning of Article 60. Some of the 12 accused of the second group were convicted under other articles for terrorist actions but the court recommended that they be pardoned because they had acknowledged their crimes and broken from the PSR.

The sentences

The sentences imposed and the pardons subsequently granted were proportionate and appropriate to the offences, even though they were clearly and explicitly politically motivated at securing an end to violent Social Revolutionary activity. Of the 22 found guilty, 12 were sentenced to death and the others were to be imprisoned variously for ten, five, three or two years. The Presidium of the Central Executive Committee (TsIK) immediately pardoned the 12 from the second group and proposed to suspend the enforcement of the penalties against the 22, as long as the PSR ceased all underground activities directed toward espionage and revolt.153 In January 1924, some 18 months later, the TsIK Presidium announced that it had converted the death sentences to jail terms of five years and halved the other prison sentences, to be followed by three-year terms of internal exile under GPU supervision. The Presidium noted that the Social Revolutionaries had not, as demanded, discontinued their activities against the Soviet Republic but, given the strengthening of the Soviet regime, these activities were no longer considered a threat.154

Comparison to the 1930s show trials

The Moscow trials of 1934-1937155 were qualitatively different from the 1922 trial. As Trotsky pointed out, the 1934-1937 trials were transparent frame-ups, with two fundamental features—the absence of evidence and the epidemic character of the confessions of the accused.156 One detailed study of the trials of 1936-1937 summed up the 1936 ‘Trial of the Sixteen’, otherwise known as the case of the ‘United Trotsky-Zinoviev Centre’, as follows:

Not one document, not one piece of material evidence was introduced at the Trial of the Sixteen. All the convictions were constructed exclusively on the slander and self-slander of the accused and the witnesses.157

The proceedings were truly surreal. Unlike the SRs, who were avowed combatants against the Soviet government, all the defendants had been leading figures in the October 1917 revolution and in the Soviet administration for many years. Suddenly, they confessed to having been counter-revolutionary agents of fascism, and were executed on the basis of their own improbable confessions. Trotsky, who was, in effect, the chief defendant in absentia in the trials of 1936-

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152 Ibid., p. 131.
153 Ibid., p. 170.
154 There were seven major Moscow Trials, from the Kirov assassination trial of December 28-29, 1934 to the Pyatakov-Radek trial of January 23-30, 1937. See Trotsky, ‘Stalin’s frame-up system and the Moscow Trials’ in Moscow Trials Anthology, London, New Park Publications, 1967, p. 79.
155 Ibid., pp. 77-78.
1937, meticulously exposed the fraudulent character of the trials from every angle. Even from the standpoint of formal jurisprudence, leaving aside the decisive factors outside the courtroom, the trials were 'a pure and simple mockery of justice':

Defence is waived, and the procedure is deprived of any vestige of controversy. The material proofs are not presented to the court; they are talked about, but they do not exist. The witnesses mentioned by the prosecutor or by the defendants are not questioned. A whole series of accused who form a part of the judicial inquiry are absent from the defendants' bench, for reasons unknown. Two of the principal accused who happen to be abroad [Trotsky and his son Leon Sedov, a young leader of the Left Opposition -- MH] are not even appraised of the trial, and, like those witnesses who are outside Russia, are deprived of the possibility of taking any steps whatsoever to bring out the truth. The judicial dialogue is wholly constructed of a pre-arranged game of question-and-answer.  

These characteristics divulged the *form* of the frame-up, but not its *essence*, which was to be found in the prevailing circumstances beyond the courtroom. Trotsky insisted that it was impossible for jurists to divorce themselves from the political conditions out of which the trials arose and in which the preparations for them were conducted. Trotsky summed up these conditions as follows:

> Under an uncontrolled and despotic regime which concentrates in the same hands all the means of economic, physical and moral coercion, a juridical trial ceases to be a juridical trial. It is a juridical trial, with the roles prepared in advance. The defendants appear on the scene only after a series of rehearsals which will not overstep the limits of their roles.  

Trotsky refuted in detail every charge against him, conclusively proving that several key accusations were contradicted by known facts. He was also declared innocent by an independent Commission of Inquiry of 10 internationally renowned intellectuals, political activists and journalists, headed by the American liberal philosopher and educator John Dewey.

The Commission declared the confessions of the other accused to contain such 'inherent improbabilities' as to demonstrate their falsity and found the Moscow trials to be 'frame-ups'. By contrast, no such independent exposure or refutation of the facts was attempted in relation to the 1922 trial, nor does Jansen's book provide one.

5. The debates over the legal profession

Among the most hotly contested features of the early Soviet legal debates were a series of conflicts over the future of the legal profession. From the first days of the October 1917 revolution until the consolidation of Stalinist repression in the mid-1930s, there were differences within the Bolshevik party, the Soviet administration and the legal profession itself about how to proceed. Representatives of the Commissariat of Justice, the Academy, judges, advocates and, occasionally, senior members of the Soviet government engaged in vigorous debates, which sometimes remained unresolved for months. The issues raised included the maintenance of an independent legal profession, the provision of legal aid, the right to legal representation, salaried

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Footnotes:

158 Trotsky, n 9, p. 71.
159 Ibid, p. 71.
legal services versus fee-based private practice and the functions of lawyers in a socialist society. Thus, the relatively open and democratic discussion that surrounded legal policy in the pre-Stalinist period extended to practical as well as theoretical issues.

Not surprisingly, the trajectory of the discussions mirrored those relating to the role of law and the legal system as a whole. In the initial months of the October Revolution, prior to the foreign military interventions during the so-called civil war, the Soviet leadership proposed to abolish the monopoly over legal services held by the private profession and give all citizens of good standing the right to appear as advocates in court, in line with the policy of de-legalising life as quickly as possible. During ‘war communism’ from mid-1918 to 1921, as legal rights were curtailed, only advocates approved by local soviets were permitted and measures were taken to discourage private legal practice.

The ‘retreat’ to the New Economic Policy after 1921, and the consequent restoration of private property and market relations, international trade and foreign investment, necessitated the revival of a private legal profession, alongside public advocates. Lawyers became indispensable for the layer of ‘NEPmen’ who provided Stalin’s social base in the 1924-27 struggle against the Left Opposition and thereafter. From 1928, Stalin’s ‘left’ turn to forced collectivisation and industrialisation saw the suppression of the private profession, followed after 1934 by the creation of a new ‘Soviet’ legal profession subservient to the Stalinist bureaucracy’s needs. As with legal policy overall, the approach to lawyers went full circle from 1917 to 1936, from seeking to displace legal professionals as part of the withering away of law, to entrenching a new privileged profession as an essential component of Stalin’s ‘socialist legality’.

It is beyond the scope of this thesis to examine these twists and turns in detail, but an overview is possible, drawing upon previous research, particularly that summarised by Hussey in his volume, Russian Lawyers and the Soviet State. This review sheds important light on both the thrust of, and the key protagonists in, the wider debates on early Soviet legal policy.

As reviewed in Chapter Two, there was a history of hostility by the legal profession toward the Bolsheviks. In the lead-up to the October Revolution, leaders of the Bar joined the Provisional Government’s repressions against the Bolshevik leaders. Moreover, they abandoned the mask of professional neutrality to publicly denounce the Bolsheviks, even though some prominent Bolsheviks had practised as advocates under the old regime, including P. Krasikov, N. Krestinsky, and D. Kursky, as well as Stuchka and Lenin himself. After the revolution, the Bar vehemently condemned it, refused to recognise its authority and fomented a judicial strike against the Soviet government.

When Stuchka, the first Peoples Commissar of Justice, published his Pravda article of 10 November 1917 calling for the abolition of the existing Procuracy and Bar, together with the courts, and the formation of an elected public institution of advocates and defenders, his comments sent shock waves through the profession. Decree No. 1 on the courts of November 24

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164 Hussey, Russian Lawyers and the Soviet State, pp. 33-37.

formally abolished the Procuracy and the Bar, but did not establish any organised profession to replace them. Instead, it permitted any citizen of good standing who enjoyed civil rights to represent persons in court. Possibly for the first time in history, legal practice was effectively opened up to almost the entire adult population, as well as the lawyers of the old regime. Bar Association offices were closed down, although the associations remained free to meet in private premises. Huskey suggests that uncertainties and differences among the Bolsheviks over the future of the legal profession in the transition to socialism delayed further measures until December 1917.\textsuperscript{166}

On December 19, the Justice Commissariat directed local soviets to create colleges of accusers and defenders to serve the revolutionary tribunals. Entrance to the colleges was to be made on the basis of recommendations by the local soviets. This system was extended to the people’s courts by legislation in early 1918. The original draft from the Justice Commissariat, then under the leadership of the Left Social Revolutionary, Shteinberg, provided for supervision of the colleges by the courts. With Stuchka’s support, Lenin introduced amendments in the Council of People’s Commissars (Sovnarkom) to insist upon local soviet supervision and selection, and to allow only college members to charge legal fees. The revised draft was adopted as part of Decree No. 2 on the court in March 1918.\textsuperscript{167} Thus, from the outset, the Bolshevik leadership was concerned to establish democratic control over the provision of legal services.

Nevertheless, debates and differences continued within the Bolshevik party. Delays in implementing the decrees reflected some ambivalence and also dissatisfaction at local levels. When the First All-Russian Congress of Regional Justice Commissars met in Moscow in April 1918, most of the local delegates favoured a more radical approach. The congress called for the abolition of fee-for-service and for legal representatives to be placed on state salaries, thereby removing the link between legal representation and wealth and capacity to pay. The dispute continued at a second congress in July 1918, where Krestinsky, the justice commissar of Petrograd and a member of the Bolshevik central committee, led an attack on a Justice Commissariat proposal, presumably reflecting Stuchka’s views, to permit advocates to negotiate fees with individual clients. It seems that the lack of state funds to pay salaried lawyers influenced the Commissariat plan, but the Commissariat’s committee also argued that positive features of the pre-Revolutionary legal profession should not be discarded. Krestinsky and his supporters successfully contended that the profit motive should not hold sway in the Soviet justice system, winning a strong majority vote for their position. The shortage of government funds, however, prevented the formation of a salaried service.\textsuperscript{168}

In the spring of 1918, groups of advocates in several cities sought to reach a modus vivendi with the government by forming unions of advocates as a new form of professional organisation. Although the initiative was rebuffed by at least one city justice commissar, Stuchka, then the All-Russian justice commissar, gave the proposers a more sympathetic hearing. Encouraged by this, the Moscow Union of Advocates adopted a charter that included providing free representation to indigents appearing before revolutionary tribunals. Stuchka’s position contradicted the spirit of Decree No. 2 on the court, which called for a monopoly of legal practice for those in the soviet-supervised local colleges. Huskey argues that the development revealed divisions between ‘moderates’ in the Justice Commissariat, such as Stuchka and Kozlovsky, and ‘hardliners’ represented by Lenin and most local justice commissars.\textsuperscript{169} He does not cite any evidence of

\textsuperscript{166} Ibid, pp. 41-44.
\textsuperscript{167} Ibid, pp. 44-46.
\textsuperscript{168} Ibid, pp. 47-49.
\textsuperscript{169} Ibid, pp. 49-51.
Lenin’s stance, however, and the Bolshevik leadership, which included Stuchka, may have regarded the formation of such unions as a helpful chink in the ongoing hostility and boycott maintained by the old Bar associations. Certainly, the issue of how to proceed with the profession was not resolved during the first half of 1918. Variations developed, with local soviets left to decide how legal services should be provided. Old methods of legal practice largely continued, although lawyers’ numbers declined markedly. Notions of due process introduced by the 1864 reforms were substantially honoured—tribunals had jury trials and judges permitted vigorous and political defence arguments.170

After mid-1918, foreign military intervention and the onset of the ‘Civil War’ brought about a sharp shift in Soviet government policy. The dispatch of foreign troops to Russia’s outlying regions was accompanied by armed resistance internally, an abortive uprising by the Left Social Revolutionaries, the assassination of Volodarsky and Uritsky, both leading Bolsheviks, and a near successful attempt on Lenin’s life on 30 August 1918. The Soviet government responded with a declaration of Red Terror, directed against all those seeking to overturn the revolution. Criminal cases were substantially shifted to extraordinary legal institutions, such as the Cheka and the revolutionary tribunals, which could invoke the death penalty and order administrative detention. Tribunal members were far more likely to be party members — 99 percent were members compared to 29 percent of people’s court judges. The Bar associations and advocates’ unions were closed and private lawyers were banned from courts.171

Initially, debates and differences continued over new forms of legal practice and organisation. The Petrograd soviet moved to require advocates to perform salaried services but this was displaced by a national decree to proceed with advocates’ colleges. Divergences remained between the Moscow and Petrograd soviets, with the former permitting advocates’ fees and a degree of self-regulation. In November 1918 a decree on the People’s Courts settled upon the employment of salaried advocates, limited the right to representation and abolished many jury trials. It defined a defender’s role as being to ‘aid the court in the most complete illumination’ of a defendant’s circumstances. Kursky, who had replaced Stuchka as Justice Commissar, introduced the law but it appears that Krylenko was the prime mover of the new policy.172

A further policy shift was foreshadowed at the height of the civil war in May 1920 with the drafting of a decree to introduce compulsory legal service, akin to that required of workers and other professionals. Vigorous debate ensued at the Third All-Russian Congress of Justice Workers, where there was vocal opposition to Justice Commissariat proposals to replace the colleges of accusers and defenders with a system that periodically assigned jurists working in private or government institutions to cases on the basis of obligatory labour service. Cherliunchakevich, who moved the Commissariat plan, characterised the colleges as ‘an institution of advocates of the bourgeois order,’ echoing Lenin’s complaint in Left-Wing Communism: An Infantine Disorder that the ‘old bourgeois Bar’ was reappearing despite its earlier abolition. Nevertheless, eight of the 12 delegates who spoke favoured the retention of institutions of legal defenders. In the end, the Congress passed the official resolution and the colleges were dismantled during the summer of 1920.173

In practice, labour service was not pursued. Instead, local justice departments began to employ full-time consultants to provide basic legal aid services to the public. At the same time, jury trials

170 Ibid. pp. 52-56.
were abolished, with serious cases being hard by three-person benches of one judge and two lay assessors. The private legal profession dwindled from some 13,000 in 1917 to around 650 by 1921.174

As with other aspects of the legal system, the restoration of market relations in the NEP produced a reversal of policies on the legal profession. The revival of private property interests, the quest for foreign investment and the encouragement of foreign trade meant that lawyers were needed to service commercial requirements. The underground practice of law by semi-qualified individuals, a legacy of Tsarist life, particularly in the countryside, began to re-surface. Justice Commissar Kursky observed: ‘Either we create a profession of advocates under our control, or a private profession will take over.’175

Mixed with these economic imperatives, another political strand with far-reaching implications began to emerge – that of restoring popular respect for a legal system as a means of securing political legitimacy. One Justice Commissariat official, Brandenburgsky, stated: ‘We introduced court defence in order to arouse in the worker-peasant masses undivided loyalty to the courts and to guarantee complete respect towards them.’176

However, despite a Sovnarkom decision to reestablish an institution of defenders and allow private fee-for-service there was strong opposition to these reversals at the Fourth All-Russian Congress of Justice Workers in January 1922. Concerns were expressed that lawyers would become the servants of a resurgent capitalist class. One delegate commented: ‘The advocate is like a talking machine. He continues to operate as long as you drop money in him.’ Krylenko suffered a defeat when he moved an amendment to transfer supervision of the new colleges of defenders from the local sovets to new regional courts that he had charge of.177

Pre-revolution jurists were invited to draft legal codes and re-entered legal debates, seeking the re-establishment of the old legal profession. These interventions helped provoke considerable disagreement in VtisIK to proposals to restore a virtual monopoly of legal practice to professional lawyers. Delegates insisted that any citizen be able to defend in court, and it was only with some difficulty that Krylenko and Brandenburgsky introduced a qualifying clause that the right of representation by a non-advocate was subject to court approval.178

The outcome was a relatively self-regulated profession, but with definite legal aid obligations, augmented by the establishment of legal consultation bureaus and, later in the 1920s, trade union legal aid centres. There was clear evidence that ‘NEPmen’ and other wealthier layers benefitted most from the profession’s services, whereas the working poor went unrepresented.179

During the summer of 1922, an interesting debate occurred in the pages of Pravda over whether Communist party members should join the profession. Brandenburgsky, head of the Justice Commissariat’s judicial institutions department, contributed a front-page discussion article, arguing that it was essential for party members to enter the profession to exercise control over it and to handle sensitive cases. This view was strenuously contested by two replies. Andres said scarce party cadres should not be wasted on an institution with no future under socialism.

174 Ibid. pp. 74-77.
175 Ibid. pp. 81-82.
176 Ibid. p. 82.
177 Ibid. pp. 82-84.
178 Ibid. p. 87-89.
179 Ibid. pp. 90-134.
Communists should be active at the ‘commanding heights of revolutionary legality’ where their role was to ‘discuss and decide, and not to illuminate or obscure, cases’. Krasikov, deputy justice commissar and a long-standing party leader, warned against communists joining an organisation that served the bourgeoisie. If party members were permitted to do so, their work should be confined to specific trials or legal consultation bureaus. The debate continued for three months in the pages of the official legal journal Soviet Justice Weekly before the party Central Committee published guidelines in a November 1922 circular, ‘On the Entrance of Communists into the College of Defenders’. It specified that party members be permitted to join the profession on a number of conditions, notably that they devoted themselves to organising legal consultation bureaus for the working class and did not take civil cases defending capitalist interests or criminal cases defending ‘unhealthy elements’ such as bribers and rapists.180

The suppression of the Left Opposition in 1926-27 was accompanied by a new turn toward clamping down on the legal profession and establishing a new profession that would operate as an adjunct of the emerging ruling clique. An early leading figure in this process was Solts, chairman of the party Central Control Commission, a body that was instrumental in bureaucratically crushing the opposition within the party.181 Solts led a campaign to replace private practitioners with union legal aid centres.182 This policy did not survive beyond Stalin’s ‘Third Period’ of forced collectivisation from 1928 to 1932, but it helped pave the way for the ultimate course taken by the Stalinist regime: the creation of a highly-controlled legal profession to serve as an essential cog in the political order. To a certain extent, the 1928-32 period, in which legal policy was dubbed ‘Revolution of Law’, provided an interlude, during which the Stalinist regime lurched to the ‘left’, carrying out drastic economic measures in reaction to a number of threats produced by the NEP, including the rise of wealthy, labour-employing peasants (kulaks). Krylenko came to the fore in this period, serving as the first RSFSR Procurator, then deputy justice commissar and finally, from 1931, as justice commissar. Between 1927 and 1929 he pushed sought to push through measures to greatly reduce the role of defenders in the law enforcement process, meeting opposition from the Communist Academy, headed by Pashukanis, who favoured the retention of procedural norms. While Pashukanis advocated the eventual elimination of the legal form, he considered that Soviet society was not yet ripe for such a transformation.183

In 1931, Vyshinsky, a former Menshevik, was appointed RSFSR Procurator and increasingly directed Stalin’s legal policies. His view, summed up in a 1933 article, was that the legal profession was not an outmoded institution; on the contrary, it was essential to the functioning of a socialist legal system. He described advocates as ‘soldiers in the socialist army who help the court to quickly and accurately decide the tasks of Soviet justice, in keeping with the interests of the masses and socialist construction’.184 The great purges and show trials of 1936-1938 provided the ultimate model of the Stalinist legal profession. Baude, a defence advocate in the Case of the Anti-Soviet Trotskyite Centre (January 1937) and the Case of the Anti-Soviet Bloc of Rights and Trotskyites (March 1938) provided a classic description of his function in the first of these frame-up trials. In his opening address to the court, he identified himself with the prosecution and merely pleaded for clemency.

180 Ibid. pp. 105-108.
182 Huskey, Russian Lawyers and the Soviet State, pp. 140-42.
183 Ibid. pp. 170-73. Huskey contends that Western scholars, notably Robert Sharlet, have incorrectly labelled Pashukanis as a legal nihilist when in practice he showed himself to be a ‘moderate’.
All the facts have been proved, and in this sphere the defence does not intend to enter into any controversy with the Procurator. Nor can there be any controversy with the Procurator concerning the appraisal of the political and moral aspects of the case. Here, too, the case is so clear, the political appraisal made here by the Procurator is so clear, that the defence cannot but wholly and entirely associate itself with that part of his speech.\textsuperscript{165}

From his study of the Soviet legal profession from 1917 to 1939, Huskey drew the following conclusion:

With the triumph of Stalinism in the mid-1930s, law was called on to combat spontaneity and localism. Cadres were ordered to reject revolutionary legal consciousness in favour of a rigid adherence to written rules. By virtue of its ability to promote organisation and discipline law became one of the essential components in the construction of a centralised Stalinist bureaucracy. The renewed emphasis on law in the 1930s did not represent, therefore, a ‘Great Retreat’ to earlier traditions but a belated recognition by the political leadership of the power of law in the service of state socialism.\textsuperscript{166}

One can agree with this conclusion to a considerable extent, except that Huskey, in common with many Western scholars, falsely associates Stalinism with socialism. The historical record demonstrates that the early approaches of the Bolsheviks to law and the legal profession, which emphasised the de-legalisation of society and the abolition of the profession’s monopoly over representation, were repudiated and overturned in favour of an anti-socialist regime, in which ‘legality’ and a state-controlled legal elite became tools of repression, directed above all against those who had led the 1917 Revolution.

\textsuperscript{165} \textit{Report of Court Proceedings in the Case of the Anti-Soviet Trotskyite Centre.} Moscow, 1937, p. 517.

\textsuperscript{166} Huskey, \textit{Russian Lawyers and the Soviet State}, p. 228.
CHAPTER FIVE

LAW AND LENIN

Lenin was undoubtedly the most important figure in the Russian Revolution. Arguably, Trotsky had a more profound impact by elaborating the international paradigm -- the theory of permanent revolution -- that clarified the necessity for a socialist revolution in Russia, as discussed in Chapter Three. But Lenin provided the pivotal theoretical, political and practical leadership in the establishment and administration of the Soviet government. This was not simply a product of his formal position as chairman of the Council of People's Commissars. His protracted record since the 1890s, his leadership in forging the Bolshevik tendency from 1903, combined with his exacting attention to the strategic experiences of the international working class movement, gave him enormous political authority within the ruling party. While he strenuously opposed all forms of formal glorification and personal deference, he exercised critical intellectual authority, backed by widespread popular support.¹

Lenin's pre-eminent role continued until his first stroke in May 1922, and resumed before his second stroke of December that year. That is not to say that Lenin's views prevailed automatically. They were invariably the topic of considerable discussion and subject to variations in implementation. The Bolshevik party was far from the monolithic apparatus that it later became under Stalin, and Lenin often had to overcome deep differences and sharp resistance within the government.² But time and again, he would write an article, deliver a speech or give a lecture that would lead to definite policy shifts. On occasions, he would write or amend decrees or other declarations himself.

More fundamentally, Lenin's capacity to direct the trajectory of Soviet Russia was deeply limited by the underlying and often dire circumstances of the Russian Revolution explored in Chapter Three -- rooted in the primitiveness and isolation of the first socialist-inspired state. These problems particularly dominated the last part of his active political life, from January to March 1923, when he suffered a third stroke that virtually incapacitated him until he died in January 1924. During that period, in alliance with Trotsky, he fought to combat the Russian nationalism and bureaucratism that he saw imperiling the entire revolution.³

A brief review of Lenin's positions on the state and law is therefore essential to understanding the debates over early Soviet law, as well as the subsequent degeneration under Stalin. Between 1917 and 1923, Lenin intervened continuously on issues large and small that impinged on legal policy and administration, often cutting across the niceties of the theoretical discourse. More generally, his views shaped the overall theoretical and practical terrain within which the debates occurred.

Interestingly, Lenin was a lawyer by training. In fact, he received a 'first' in the state law examination of 1891 and practiced law for a year before devoting himself full-time to revolutionary politics.⁴ Like Marx before him, he drew the conclusion that the ills of society could not be resolved through legal practice but only through a more systematic overturn of the

¹ Trotsky, Lenin, New York, Blue Ribbon Books, 1925.
² See Chapter 9.
⁴ Berman, Justice in the USSR, p. 25.
existing legal order itself. But Lenin was certainly well acquainted with legal theory and practice and, as Stuchka later related, took a lively interest in legal matters at times.  

Much has been written, or speculated upon, regarding Lenin's alleged disdainful and manoeuvring positions on law and the state. In particular, Lenin was supposedly duplicitous in arguing for the withering away of the state and law under communism, while often energetically strengthening the state apparatus under Soviet rule. Some authors have suggested that Lenin's views on de-legalising society were fatally compromised by a letter he wrote to the Political Bureau in May 1922, in which he called for greater respect for law as an essential element of culture.

These assertions are bound up with wider debates over Lenin's responsibility for the subsequent degeneration of the Soviet state into authoritarianism under Stalin. According to the widely-held traditional and social democratic interpretation, Stalinism arose directly out of Leninism — Lenin's alleged ruthlessness, centralism and contempt for the rule of law led inexorably to Stalinist repression. In two detailed reviews of Lenin's writings on law and the state, Beirne and Hunt take a different view. They argue that Lenin's diverse and fragmented views about the nature of legal relations in the period of socialist transition between capitalism and communism unintentionally created a theoretical vacuum that contributed to the intensification of authoritarian centralism during the late 1920s. Above all, they contend, Lenin failed to establish an institutional separation of powers or juridical or other means of maintaining limits on the powers exercised by Soviet authorities. They specifically suggest that in the field of crime and penal policy, Lenin combined both libertarianism and authoritarianism in a manner that opened the door for Stalinist abuse. Beirne and Hunt sum up their argument as follows:

Our underlying thesis is that the origins of authoritarianism in general, and of authoritarian penal practices in particular, were intrinsic neither to the early Bolshevik project nor to Lenin's discourse as its major exponent. Rather, authoritarianism was the unintended consequence of the silences, omissions, and absences in Lenin's political theory and practice, including its libertarian tendencies. Specifically, it derived from the absence of any sustained theory of what we have designated as the constitution of Soviet society.

It will be suggested in this chapter that while there is some truth in Beirne and Hunt's thesis, it underestimates the extent to which the unfavourable material circumstances confronting the Soviet state, both internally and internationally, weighed down upon Lenin's program. Beirne and Hunt's analysis, it will be argued, also ignores the degree to which Stalinist authoritarianism arose in direct response to the challenge of the Left Opposition, led by Trotsky, which fought for the

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5 Sharlet, Maggs and Beirne, Stuchka Selected Writings, p. 89.
10 Beirne, Revolution in Law, p. 100.
continuation of the emancipatory theory and practice of Lenin against the emergent bureaucratic layers upon which Stalin rested. Their assessment makes no mention of Lenin's 1922 bloc with Trotsky, the existence of the Left and Joint Oppositions of 1923 and 1926, and the Stalinist response to these developments.

Before examining these issues, it is helpful to recall that Lenin's *Collected Works*, setting out his political views, run to 55 volumes. It is best to make them the starting point of any objective examination of his positions on law and the state. Beirne and Hunt attempt to systematically review the content of Lenin's voluminous writings. Although they regard Lenin's views on the subject as often contradictory, they ascribe to his outlook a coherence that can be expressed in the form of five theses, which I have simplified as follows:

1. Bourgeois law, albeit founded on unequal relations, provided a significant arena of struggle to secure concessions from the ruling classes.
2. Law is a minor but useful educative vehicle in disseminating the socialist program under the dictatorship of the proletariat.
3. Under the dictatorship of the proletariat, 'socialist legality' -- characterised by informality, flexibility and political content -- can help realise the emancipatory capacity of the popular masses.
4. For both the immediate and long-term achievement of the transition to communism, there must be a complete rupture with the political and legal institutions of capitalism, and their replacement by soviets and other forms of socialist democracy.
5. Because communism abolishes the conditions that produce law and also greatly simplifies and extends participation to all citizens, communist society will be a non-legal social order.

Beirne and Hunt argue that within this coherence lay a serious tension, produced by Lenin's repeated emphasis, most notably expressed in *The State and Revolution*, of the need for the disappearance of the state and law under communism. This tension, they contend, led to and was part of an inadequate constitutionalism in Lenin's view of law, which thereby lacked a distribution of powers, checks and supervisory mechanisms. In my view, this blames the central feature of Lenin's conception -- the necessity for the withering away of the state -- for the subsequent rise of a totalitarian state under Stalin.

From my own reading of Lenin's writings, while agreeing with Beirne and Hunt that Lenin's views had an overriding coherence along the lines they suggest, I would differ with their summation in three key respects. First, to my knowledge Lenin did not use the term 'socialist legality', which implies at least a semi-permanent role for law, as well as a specifically 'socialist' role for law. Instead, he referred to the need for 'greater revolutionary legality' during the NEP, in order to develop relations with the peasantry and to promote trade. In general, Lenin regarded law as a residual, essentially bourgeois, instrument that a socialist state was obliged to use as long as it remained incapable of achieving the conditions for genuine communism. Second, Lenin emphasised in *The State and Revolution* that the state formed after a socialist revolution must begin to wither away immediately. To the extent that a coercive and distributive state apparatus continued to exist, it remained a 'bourgeois' state. Third, Lenin arrived at that position during the course of 1917, following the February Revolution and his April Theses, where he revised his strategic conception of the Russian Revolution, as discussed in Chapter Three. Until then, he

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13 Lenin, 'Ninth All-Russia Congress of Soviets', *Collected Works*, vol. 33, p. 176.
conceived of the Russian Revolution as a radical bourgeois democratic revolution led by the working class, not as a socialist revolution.

The single most consistent theme running through Lenin's relevant writings is that law and the state machinery are not neutral and necessary instruments of social regulation but historical products of class society. They are essentially mechanisms whereby the most powerful social class enforces its economic and political rule. From the moment of the revolutionary taking of power by the working class and other oppressed masses, leading to the eventual creation of a classless society, the need for law and an enforcing state apparatus would begin to fade away.

In his early writings on law, Lenin focussed on the class nature of the Tsarist legal order, pointing out, for example, how the majority of the government's legislation served the practical needs of the emerging capitalist class or the Tsarist state machinery itself. He polemised against police brutality, denounced the penal servitude regulations and forced labour, and demanded basic democratic reforms. In condemning the fatal police bashing of a peasant, and the lenient sentences handed down by a court of crown judges on the guilty police officers, Lenin noted that the absence of a jury trial for such offences, abolished in 1887, confirmed the fraud of the 1864 legal reforms. Jury trials had been withdrawn, he noted, because:

The street [ordinary people who might sit on juries] is discovering the truth for which our official, professorial jurisprudence, weighed down by its scholastic shackles, is groping with such difficulty and timidity -- namely, that in the fight against crime the reform of social and political institutions is much more important than the imposition of punishment.

These views, full of contempt for the authoritarian state apparatus and its legal apologists, and informed by a humane, materialist approach, remained constant throughout Lenin's later writings. They can be detected in Lenin's reconsideration of the issue of the state in The State and Revolution, written during the months following the February 1917 revolution that ended the Tsarist dictatorship. Lenin saw the factory and soldiers committees, the workers' militia and the soviets of workers, soldiers and peasants deputies thrown up by the revolution as the seeds of a future socialist society. This new social order would be 'no longer a state in the proper sense of the term, for ... these contingents of armed men are the masses themselves, the entire people.' In the future, it would be possible to 'cast 'bossing' aside and to confine the whole matter to the organisation of the proletarians (as the ruling class), which will hire 'workers, foreman and bookkeepers' in the name of the whole of society.'

After the October Revolution, Lenin continued to argue for the democratic superiority of the Soviet system. Responding to German Social Democrat Karl Kautsky's 1918 condemnation of the 'dictatorial' methods of the Soviet government, Lenin questioned Kautsky's claim that, by contrast, modern capitalist states provided 'democracy':

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17 Lenin, 'The Drafting of 183 Students Into the Army', Ibid, vol 4, pp. 414-419.
Take the fundamental laws of modern states, take their administration, take freedom of assembly, freedom of the press, or 'equality of all citizens before the law,' and you will see at every turn evidence of the hypocrisy of bourgeois democracy with which every honest and class-conscious worker is familiar. There is not a single state, however democratic, which has no loopholes or reservations in its constitution guaranteeing the bourgeoisie the possibility of dispatching troops against the workers, of proclaiming martial law, and so forth, in case of a 'violation of public order,' and actually in case the exploited class 'violates' its position of slavery and tries to behave in a non-slavish manner.\textsuperscript{20}

Lenin returned to this issue in a lecture on 'The State' delivered to students at the Sverdlov Communist University in July 1919:

One of the most democratic republics in the world is the United States of America, yet nowhere is the power of capital, the power of a handful of multi-millionaires over the whole of society, so crude and so openly corrupt as in America. Once capital exists, it dominates the whole of society, and no democratic republic, no franchise can change its nature.\textsuperscript{21}

In the same lecture, he reiterated the need for the role of the state and law to be demystified, given that the state was often presented as something divine and supernatural, and as impartial. Under class society, 'the state is a machine for maintaining the rule of one class over another'.\textsuperscript{22} Socialism meant the abolition of classes, and only then could the state wither away:

We reject all the old prejudices about the state meaning universal equality -- for that is a fraud: as long as there is exploitation there cannot be equality. The landowner cannot be the equal of the worker, or the hungry man the equal of the full man... So far we have deprived the capitalists of this machine and have taken it over. We shall use this [state] machine, or bludgeon, to destroy all exploitation. And when the possibility of exploitation no longer exists anywhere in the world, when there are no longer owners of land and owners of factories, and when there is no longer a situation in which some gorge while others starve, only when the possibility of this no longer exists shall we consign this machine to the scrap-heap. Then there will be no state and no exploitation.\textsuperscript{23}

This lecture has assumed added significance because of the interpretations placed upon it. Beirne and Hunt regard it as a statement by Lenin, albeit an aberrational one, that the Bolsheviks should use the old bourgeois state against the bourgeoisie.\textsuperscript{24} Lenin's consistent view, both before and after this lecture, was that the old state had been shattered and a new one created, albeit with bourgeois distortions, which would ultimately disappear.

Kelsen, a prominent scholar, and opponent, of Marxist legal theory, asserted that this lecture amounted to a first attempt to modify the doctrine of the withering away of the state. There was a 'hint' that Lenin had changed his opinion, by declaring that exploitation must disappear everywhere, and not just in one country, before 'we' -- which could only mean the Soviet government, according to Kelsen -- would consign this machine to oblivion. Kelsen argues that

\textsuperscript{22} Ibid, p. 478.
\textsuperscript{23} Ibid, p. 488.
\textsuperscript{24} Beirne, \textit{Revolution in Law}, p. 91, fn 5.
this abandons the conception of the state gradually and automatically withering away. 25 But, in the first place, Lenin's 'we' seems to refer to the Soviet people, not just the government or the party. Secondly, Lenin, following Marx and Engels, never portrayed the withering away of the state as a purely objective or spontaneous process. That is why they proposed definite measures, such as instant recall of elected representatives, to guard against the dangers of careerism and the usurpation of power. They did insist that the very nature of the proletarian state had to be such that it would ensure its own dissolution. But they recognised that this unprecedented task presented considerable political challenges.

The withering away of the state

These conclusions can be supported by a further review of the evolution of Lenin's writings. In *The State and Revolution*, quoting extensively from Marx and Engels, Lenin insisted that a socialist revolution could not adapt the old state machinery of capitalist society to its needs but would have to abolish the existing legal and bureaucratic apparatus and create a unique new system. This regime would be required to overcome the resistance of the old ruling class, but it would be democratic for the majority of the population and it would be transitional, leading to the emergence of a classless society.

Beirne and Hunt postulate the existence in Lenin's texts of three distinct forms of the dictatorship of the proletariat. The first was the exceptional, quasi-military form required for the immediate seizure and defence of state power. The second was based on the need to completely abolish (smash) and replace the previous state machinery. The third was to actively promote and popularise the social relations and institutions needed for the transition to communism. 26 With this categorisation, they suggest a tension or contradiction between the first two, 'negative' strands in Lenin's conception and the third, more long-term form.

Yet, Lenin emphasised that even under the temporary dictatorship of the proletariat, the state would immediately begin to die away and would ultimately 'wither away' altogether when communism was really achieved, that is, when the productive forces of man had developed and been rationally planned to the point where, for all practical purposes, scarcity and inequality was eliminated and along with it, the struggle for individual existence.

'According to Marx, what the proletariat needs is only a state in process of withering away, i.e., so constituted that it will at once begin to wither away and cannot help wither away.' Further on he added: 'The proletarian state will begin to wither away immediately after its victory, since in a society without class contradictions, the state is unnecessary and impossible.' 27 [My emphasis]

Lenin did not expect an isolated revolution in backward Russia, followed by a prolonged capitalist encirclement. Nevertheless, even in the most favourable circumstances, he did not expect the process of withering away to be automatic. Drawing from Marx's writings on the Paris Commune, he advocated the introduction of definite protections against the misuse of official power: political representatives would be paid no more than the average workers' wage; they would be subject to instant recall by their electors; and representatives would be obliged to participate in administrative work. 28

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Only with the advent of true communism, would the root causes of social antagonisms -- private and conflicting ownership of the productive forces, the division of the globe into nation-states and the inherent social inequality produced by the capitalist market -- be overcome. By then, the great majority of working people would be accustomed to administering their own affairs and those of society without the need for legal and physical coercion. This would eventually dispense with the need for a state -- that is, a separate body of politicians, bureaucrats, judges and armed personnel.

Lenin drew a further remarkable conclusion from Marx’s analysis -- that not only law, but the workers’ state itself would be ‘bourgeois’ in the period of transition to communism.

As regards the distribution of products of consumption, bourgeois law, of course, inevitably presupposes the bourgeois state as well, because law is nothing without a mechanism capable of compelling the observance of legal norms. It follows that under communism not only does bourgeois law remain for a certain time but so does the bourgeois state, without the bourgeoisie!²⁹ [Lenin’s emphasis]

As we shall see in Chapter Six, this passage generated much debate among Soviet legal theorists and caused considerable difficulty for the emerging Stalinist bureaucracy in justifying the ever-greater gathering of power in the hands of the state apparatus. Lenin’s analysis of the state remaining bourgeois, at least as regards the unequal distribution of production, provides a key to understanding the rise of privileged layers under Stalin, presiding over gross inequality. It points to the inherent danger that the state apparatus, as well as the law it enforces, will be used by a new elite against the interests of the broad masses of people.

Lenin insisted that this danger had to be consciously combatted. In 1919, he wrote in his Theses on Bourgeois Democracy and the Dictatorship of the Proletariat, which was presented to the founding conference of the Communist International:

Only the Soviet organisation of the state can really effect the immediate breakup and total destruction of the old, i.e., bourgeois, bureaucratic and judicial machinery, which has been, and has inevitably had to be, retained under capitalism even in the most democratic republics, and which is, in actual fact, the greatest obstacle to the practical implementation of democracy for the workers and the working people generally. The Paris Commune took the first epoch-making step along this path. The Soviet system has taken the second. Destruction of state power is the aim set by all socialists, including Marx above all. Genuine democracy, i.e., liberty and equality, is unrealisable unless this aim is achieved. But its practical achievement is possible only through Soviet, or proletarian democracy, for by enlisting the mass organisations of the working people in constant and unfailing participation in the administration of the state, it immediately begins to prepare the complete withering away of any state.³⁰

In their analysis of Lenin’s views on law in the period of socialist transition, Beirne and Hunt discern six distinct yet intersecting themes that are both complementary and contradictory: (1) eradication (abolishing old institutions and issuing instructions), (2) education, (3) discipline, (4) transition, (5) participation, and (6) routinisation, or accounting and control. They detect in these varying purposes, particularly the last one, the tension alluded to earlier, produced by Lenin’s commitment to de-legalising society.³¹ Rather than attempting to review each of these six features

²⁹ Ibid. p. 138.
³⁰ See Founding the Communist International, Pathfinder Press, pp. 157-158.
seriatim, as the authors do, this thesis will primarily examine the evolution, and changing emphases, of Lenin’s stances in relation to the key turning points in early Soviet Russia: the seizure of power in October 1917, the Western-backed military interventions and Civil War from mid-1918, the NEP from 1921 and Lenin’s final campaign against bureaucratism from 1922.

Initial problems

Ironically, one of the initial difficulties that faced the Soviet government was deep popular hostility and distrust toward any form of state authority, flowing from centuries of Tsarism and months of duplicity under Kerensky. In his 1918 article, ‘Immediate Tasks of the Soviet Government,’ Lenin observed:

The state, which for centuries has been an organ for oppression and robbery of the people, has left us a legacy of the people’s supreme hatred and suspicion of everything that is connected with the state. 12

Facing violent attempts to overturn the revolution and the outbreak of petty crime, Lenin emphasised the need for swift and ruthless suppression of both exploiters and hooligans. Nevertheless, he called for the people’s courts to become the forum through which the mass of the population could deal with these threats:

As the fundamental task of the government becomes, not military suppression, but administration, the typical manifestation of suppression and compulsion will be, not shooting on the spot, but trial by court. In this respect also, the revolutionary people after October 25, 1917, took the right path and demonstrated the viability of the revolution by setting up their own workers’ and peasants’ courts, even before the decrees dissolving the bourgeois bureaucratic judiciary were passed. But our revolutionary and people’s courts are extremely, incredibly weak. One feels that we have not yet done away with the people’s attitude towards the courts as towards something official and alien, an attitude inherited from the yoke of the landowners and the bourgeoisie. It is not yet sufficiently realised that the courts are an organ which enlists precisely the poor, every one of them, in the work of state administration (for the work of the courts is one of the functions of state administration), that the courts are an organ of the power of the proletariat and of the poor peasants, that the courts are an instrument for inculcating discipline (emphasis in original). 13

These words are revealing in several respects. First, the formation of the people’s courts lagged somewhat behind what was already happening on the streets. That is, the mass character of the revolution influenced the decisive form of the ouster of the old judicial authorities. Second, Lenin sought the maximum popular involvement in the new system of justice. Third, the new courts were not presented as neutral arbiters but as expressions of popular will and weapons of popular rule.

Lenin took pride in the sweeping away of the old courts and the creation of people’s courts. Whereas the authority of the old courts rested on punitive measures, the new ones would serve an educative role, helping to lay the basis for a truly socialist society, even if that society could not be created overnight:

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12 Tucker, The Lenin Anthology, p. 446.
Let then shout that we, without reforming the old court, immediately scrapped it. By that we cleared the way for a real people’s court and not so much by the force of repressive measures as by massive example, the authority of the working people, without formalities; we transformed the court from an instrument of exploitation into an instrument of education on the firm foundation of socialist society. There is no doubt whatever that we cannot attain such a society at once.34

According to Stuchka, Lenin often took a lively interest in legal matters. In 1918, Lenin noted with satisfaction the publication of Goikhberg’s volume on civil law and the decree on divorce, one of the most advanced in the world.35 Stuchka recalled that Lenin regarded decrees as means of popularising, educating and even agitating for the Soviet government’s policies among the masses. Believing in the persuasiveness of decrees, Lenin insisted that they be promulgated as accessibly as possible, and that the Constitution be displayed prominently in all Soviet institutions.66

**Lenin, crime and the Civil War**

As numerous scholars have documented and commented, under Lenin’s leadership the early period of Soviet Russia saw remarkably liberal penal policies, including decriminalisation of some common crimes affecting working people, less use of custodial sanctions, emphasis on rehabilitation, and reduced use of capital punishment.37 'Russian Bolshevism was in the vanguard of the neoclassical movement,' conclude Beirne and Hunt.38 Lenin was in the forefront of these initiatives. In January 1918, despite strong opposition, he supported a decree that raised the age of criminal responsibility from 10 to 17.39 He advocated the use of 'educational' and 'medical' institutions for juvenile delinquents.40 During the debates on the 1919 party program, Lenin urged a reduction in the use of incarceration, while encouraging (1) extensive use of conditional convictions, (2) increased use of public censure, (3) replacement of imprisonment by compulsory labour at home, (4) replacement of prisons with educational institutions, and (5) introduction of comrades’ courts to handle certain categories of anti-social behaviour.41 (By contrast, while proposing leniency and understanding for offences committed by the poor, Lenin demanded heavy sentences for war-profiteers and sabotaging remnants of the old bourgeoisie, and for state officials, particularly party members, who were corrupt or abused their power.42)

However, the gains of this enlightened approach soon came under intense pressure. As reviewed in Chapter Four, the outbreak of the Civil War saw not only the Tsarist generals and officials but also the capitalist parties, and most of the Social Revolutionaries and the Mensheviks, attempt to overthrow the Soviet government by military force. In response, the Soviet government unleashed the tactics of the ‘red terror’ to combat the ‘white terror’ of the counter-revolutionary forces.43 There is no doubt that Lenin led the way in insisting on drastic measures, including the establishment of detention camps, the Cheka secret police and revolutionary tribunals to deal ruthlessly with counter-revolutionary conduct, while encouraging people to take matters into their

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34 Sharlet, Maggs and Beirne, *Stuchka Selected Writings*, p. 96.
35 Ibid., pp. 91-93.
41 Ibid., pp. 109-111.
42 For a review of these policies, see Ibid., pp. 115-131.
own hands. He wrote to Zinoviev, for example, criticising him for restraining Petrograd workers who wanted to respond with mass terror to the murder of a leading Bolshevik. 'We must encourage the energy and mass character of the terror against the counter-revolutionaries,' he wrote.15

At the same time, Lenin insisted on the rigorous and universal enforcement of Soviet laws. He initiated the Decree on the Exact Observance of Laws. As the decree itself recited, the foreign military interventions and counter-revolutionary plots made 'extreme measures' inevitable and 'the strictest observance of the laws of the RSFSR' essential.46

Clearly, there was a danger that the exceptional measures taken in order to defeat the White armies and their supporters would become more permanently institutionalised. This danger was increased by the utterly devastated condition of Soviet Russia after the Civil War and the forced retreat to the NEP, which began to cultivate a new privileged layer in the party and official bureaucracy. The Cheka was abolished in 1922, but many of its functions were transferred to the GPU (State Political Administration). There is evidence that Lenin became increasingly concerned by these trends. At the Eleventh Party Congress in 1922, the last he was able to attend, he opposed the irregular extension of the scope of the GPU.47

A letter that Lenin wrote to Justice Commissar Kursky in May 1922 about a new clause in the proposed Criminal Code is sometimes cited as evidence that Lenin proposed the permanent legalisation of the 'red terror'. The words of Lenin usually quoted are:

The courts must not ban terror -- to promise that would be deception or self-deception -- we must formulate the motives underlying it, legalise it as a principle, plainly, without any make-believe or embellishment. It must be formulated in the broadest possible manner, for only revolutionary law and revolutionary conscience can more or less widely determine the limits within which it should be applied.48

However, the full letter shows that, as with the drafting of the first decree on the courts in 1917, Lenin was concerned to ensure that the law was clear, explanatory and specific. The Criminal Code clause in question dealt with the offence of seeking to overthrow the government. Lenin insisted that the provision must explain the substance of the proposed punishment, its necessity and limits, and provide justification for it. He proposed a clause as follows:

Propaganda or agitation, or membership of, or assistance given to organisations the object of which (propaganda and agitation) is to assist that section of the international bourgeoisie which refuses to recognise the rights of the communist system of ownership that is superseding capitalism, and is striving to overthrow that system by violence, either by means of foreign intervention or blockade, or by espionage, financing the press, and similar means, is an offence punishable by death, which, if mitigating circumstances are proved, may be commuted to deprivation of liberty, or deportation.49

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15 See, for example, D. Shub. Lenin, Doubleday & Co, New York, 1948.
17 Sharlet, Maggs and Beirne, Stachka Selected Writings, p. 93.
48 For example, Beirne, Revolution in Law, p. 122. The words are from Lenin, 'To D.I. Kursky', Collected Works, vol. 33, p. 358.
Lenin's recommendations found their way into Articles 57, 58, 61 and 70 of the Criminal Code, which was adopted by the All-Russia Central Executive Committee.\textsuperscript{50}

\textbf{Lenin, the NEP and 'socialist law'}

A critic of the Soviet system, Schlesinger, cited another 1922 letter sent by Lenin to Kursky as evidence that Lenin viewed Soviet law as socialist in character, and not as a bourgeois remnant. The author asserts that Lenin's view contrasted with the early theorising of Pashukanis and Stuchka about the capitalist nature of law. The letter in question was written in the discussions preceding the enactment of the Civil Code, giving effect to the NEP. The passage from Lenin's letter to Kursky quoted by Schlesinger is as follows:

\begin{quote}
We do not recognise any 'private' thing, with us, in the field of economics, there is only public, and no private law. The only capitalism we allow is that of the State... For this reason, we have to widen the sphere of state interference with 'private' legal relations, and to enlarge the right of the State to abolish 'private' agreements. Not the \textit{corpus juri Romani}, but our revolutionary consciousness of Justice ought to be applied to 'Civil Law relations'.\textsuperscript{51}
\end{quote}

It is difficult to justify the conclusion that Schlesinger draws from this extract. In the first place, it is clear that the letter was written in the context of being forced to make legal concessions for the purposes of the NEP. The letter is entitled 'On the Tasks of the People's Commissariat of Justice Under the New Economic Policy'. Secondly, Schlesinger omitted to quote the preceding sentences, where Lenin emphasised the need to curtail the return to bourgeois law as much as possible, given the necessities of the NEP:

\begin{quote}
The new civil legislation is being drafted ... [T]he task [of the People's Commissariat of Justice] is to create a new civil law, and not to adopt (rather, not to allow itself to be duped by the old and stupid bourgeois lawyers who adopt) the old bourgeois concept of civil law.\textsuperscript{52}
\end{quote}

Thirdly, Schlesinger did not refer to the previously-cited passage from \textit{The State and Revolution}, where Lenin warned that not only law, but also the state, would remain 'bourgeois' in the transition to communism. (Schlesinger dismissed the relevant sections of \textit{The State and Revolution} as 'vague sayings of Lenin').\textsuperscript{53} Given Lenin's record of rigorous attention to all matters theoretical and doctrinal, it is likely that if he were seriously re-appraising or abandoning the analysis he made in 1917, his reconsideration would be explicit.

Rather, Lenin's letter indicates his desire to limit as far as possible the concessions made to bourgeois law under the NEP. It underscores his concern about the political and economic pressures produced by the operation of capitalist law under the NEP. While it was necessary to restore 'private legal relations' in order to sustain the NEP, in drafting the Civil Code the government had to retain the maximum scope for socialist principles and state ownership. Lenin was not saying that bourgeois law would cease to exist, but that its domain should be constrained. While Lenin referred scornfully to Roman law, the final draft of the Civil Code did in fact borrow

\begin{itemize}
\item \textsuperscript{50} Ibid, Vol 33, p. 528 (fn).
\item \textsuperscript{51} Schlesinger, \textit{Soviet Legal Theory}, p. 150.
\item \textsuperscript{52} Beine, \textit{Revolution in Law}, p. 78.
\item \textsuperscript{53} Schlesinger, \textit{Soviet Legal Theory}, p. 150.
\end{itemize}
from Roman law -- but reserved the power of courts to overrule private property rights to prevent injustice or harm to the Soviet economy.\textsuperscript{51}

In another letter to Kursky during the same period of discussion, Lenin reiterated the need to ‘move farther in intensifying state interference in “private legal relations” in civil affairs’. Lenin emphasised the importance of not showing ‘a lack of spirit’ on the eve of the Genoa conference, where a Soviet delegation was about to meet the representatives of 29 countries to discuss economic cooperation.\textsuperscript{55} This latter consideration demonstrates Lenin’s recognition of the intense international economic pressure on the Soviet state and the need for Soviet economic regulation to play a part in combatting that pressure. Again, Lenin did not see ‘law’ as an independent entity but as an aspect of economic and social policy, both domestic and international.

**Lenin and the political role of law**

Lenin often saw laws and decrees as instruments of social policy and political communication, whose importance and role varied according to the stage of development. In 1922 at the Eleventh Party Congress, he said:

> Passing laws, passing better decrees, etc., is not now the main object of our attention. There was a time when the passing of decrees was a form of propaganda. People used to laugh at us and say that the Bolsheviks do not realise that their decrees are not being carried out; the entire white guard press was full of jeers on that score. But at that period this passing of decrees was quite justified. We Bolsheviks had just taken power, and we said to the peasant, to the worker: ‘Here is a decree; this is how we would like to have the state administered. Try it!’ From the very outset we gave the ordinary workers and peasants an idea of our policy in the form of decrees. The result was the enormous confidence we enjoyed and now enjoy among the masses of the people.\textsuperscript{56}

At times, Lenin intervened forcefully into the legal system, using his position as Chairman of the People’s Commissars to propose specific changes to legislation. One constant theme was that harsh and exemplary measures should be taken against state and party officials who abused their positions. In May 1918, he instructed Kursky, the Justice Commissar, to draft a bill imposing a minimum sentence of 10 years’ imprisonment for bribery, an offence that went to the heart of protecting the young Soviet state from corruption:

> It is essential immediately, with demonstrative speed, to introduce a Bill stating that the penalty for bribery (extortion, graft, acting as an agent for bribery, and the like) shall be not less than ten years’ imprisonment and, in addition, ten years of compulsory labour (emphasis in original).\textsuperscript{55}

Lenin wrote the letter after the Moscow Revolutionary Council passed a sentence of only six months’ imprisonment on four members of the Moscow Commission of Investigation convicted of bribery and blackmail. Lenin also proposed to the party Central Committee that the tribunal members who passed the lenient sentence be expelled from the party. Acting on Lenin’s letter, the Council of People’s Commissars adopted a decision obliging the Commissariat of Justice ‘immediately’ to draft a Bill stipulating a ‘heavy minimum sentence for bribery and any

\textsuperscript{51} See Chapter Four.
\textsuperscript{56} Ibid, p. 94.
connivance in bribery'. The Bill was discussed by the Council of People's Commissars four days later and amended by Lenin before coming into effect.\(^8\)

Beirne and Hunt catalogue similar instances in which Lenin condemned and called for action against what they term 'red-collar crimes'.\(^9\) Notably, in 1922 he demanded that differential penalties be imposed on party members. 'Triple penalties should be inflicted on Communists, as compared with non-Party people,' he insisted.\(^60\)

Lenin's regard for legality in this context was bound up with a strict sense of correctness and equality. This is illustrated by an indignant letter he wrote in May 1917 rebuking V. D. Borch-Bruyevich, office manager of the Council of People's Commissars, for unlawfully increasing Lenin's salary:

> In view of your failure to fulfil my insistent request to point out to me the justification for raising my salary as from March 1, 1918, from 500 to 800 rubles a month, and in view of the obvious illegality of this increase, carried out by you arbitrarily by agreement with the secretary of the Council, Nikolai Petrovich Gorbunov, and in direct infringement of the decree of the Council of People's Commissars of November 23, 1917, I give you a severe reprimand.\(^61\)

Lenin's objection was not a purely personal one. The November 1917 decree had set a maximum monthly salary for Commissars at 500 rubles, with an allowance of 100 rubles for each member of the family unable to work.\(^62\) This was in line with the proposition, derived from Marx's writings on the Paris Commune, that socialist leaders should not be paid more than the average wage. Lenin had emphasised the importance of this principle, as a safeguard against careerism, in *The State and Revolution*.

Lenin consistently argued that Marxists must operate with a definite ethical and moral compass, centring on the active and informed involvement of ordinary people in shaping a society free of economic exploitation. He strenuously denied the allegation, levelled by critics of the revolution, that communism was amoral. In a 1920 address to the Russian Young Communist League congress, he stated:

> The old society was based on the principle: Rob or be robbed, work for others or make others work for you, be a slave owner or a slave. Naturally, people brought up in such a society imbibe with their mother's milk, so to speak, the psychology, the habit, the concept: You are either a slave owner or a slave, or else a small owner, a small employee, a small official, an intellectual – in short, a man who thinks only of himself, and doesn't care a hang for anybody else... [Communist] Morality serves to help human society rise to a higher level and get rid of the exploitation of labour.\(^63\)

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\(^{8}\) Ibid, Vol 35, p. 604 (fn).


\(^{62}\) Ibid, Vol 35, p. 605 (fn).

Another occasion on which Lenin intervened directly into legal affairs illustrates a further important aspect of his political approach to law. Under the NEP, Lenin wrote a May 1922 letter ‘On Dual Subordination and Legality’ to the Political Bureau, opposing ‘dual’ subordination of the proposed new central procuracy (a legal and judicial supervisory body) to local authorities as well as the People’s Commissariat of Justice. Lenin criticised a recommendation by a commission of the All-Russian Central Executive Committee that local procurators be subordinate to regional executive committees. ‘The law must be uniform and the basic evil in our life and in our lack of culture is our toleration of the primordial Russian view and the habit of semi-savages to the effect that legality in Kaluga may be different from legality in Kazan,’ he wrote. Lenin emphasised that the procuracy’s duties were purely supervisory. ‘The procurator has both the right and the duty to do just one thing: to pursue a truly uniform understanding of legality throughout the republic, irrespective of any local differences and contrary to any local influences.’

In elaborating his argument further, Lenin provided an insight into how the Soviet government conceived of the role of the People’s Courts in balancing between strict enforcement of national laws and local circumstances. His approach confirms that his concern for legal uniformity was modulated by a sensitivity to local conditions. Whereas the procuracy was obliged to pursue uniform legal standards, the People’s Courts, elected by local Soviets, could take into account local sentiment:

The only right and duty of the procurator is to take the matter before the court. What sort of court? Our courts are local courts. Our judges are elected by the local Soviets. Hence, the authority to which a procurator submits a case of infringement of the law is a local authority which, on the one hand, must strictly abide by the laws uniformly established for the whole Federation and, on the other hand, in determining the penalty, must take all local circumstances into consideration. And it has the right to say that although there has been a definite infringement of the law in a given case, nevertheless, certain circumstances, with which local people are closely familiar, and which come to light in the local court, compel the court to mitigate the penalty to which the culprit is liable, or even acquit him. Unless we strictly adhere to this most elementary condition for maintaining the uniformity of the law for the whole Federation, it will be utterly impossible to protect the law, or to develop any kind of culture.

Lenin’s references to developing culture are an important indicator of his motives. He regarded law as an instrument in elevating social and cultural consciousness. He was seeking to overcome centuries of backwardness imposed by Tsarism – hence his scorn for the ‘primordial Russian view’. In a statement sometimes taken as a repudiation of the Marxist outlook on law, Lenin continued: ‘There can be no doubt that we live in a sea of lawlessness and that local influences are one of the greatest, if not the greatest, enemy of the establishment of legality and culture.’ In associating legality with culture, however, Lenin was not ascribing an ahistorical permanence to legality. He was pointing to its function in the struggle against local prejudice, privilege and bureaucratism. He referred to the need to overcome ‘local and personal influences’ and ‘the interests and prejudices of local bureaucrats and local influences’.

In summary, Lenin’s concern for legality in the transition to communism flowed from several considerations: ensuring equal treatment of all citizens, and informing and educating the public.

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64 Lenin, Collected Works, Vol 33, pp. 364-5
65 Ibid.
66 Zilc, Ideas and Forces, p. 70.
on the principles of the Soviet order, as well as strengthening the authority and efficiency of the state machinery. His views were later distorted by the Stalinist regime to proclaim the necessity of ‘socialist legality’ as a permanent institution, justifying the establishment of a draconian and repressive state.

**Lenin and bureaucratism**

In the final period of Lenin’s active life he was increasingly preoccupied with fighting bureaucratism, which he labelled ‘red tape,’ and making the Soviet administration more accessible to ordinary people.\(^{69}\) In September 1921, after receiving a complaint from Professor Graftin, a hydro-electricity project chief engineer, about bureaucratic attitudes toward the project, Lenin he wrote to Kursky instructing the Justice Commissariat to take more public and energetic measures to combat ‘red tape’:

This red tape is just what is to be expected, especially in the Moscow and central institutions. But all the more attention should be given to fighting it. My impression is that the People’s Commissariat of Justice is purely formal, i.e., radically wrong, in its attitude to this question. What is needed is:

1. to bring this matter before the courts;
2. to secure the disgrace of those guilty, both in the press and by strict punishment;
3. to stiffen up the judges through the Central Committee, so that they punish red tape more severely;
4. to arrange a conference of the Moscow People’s Judges, members of tribunals, etc., to work out effective measures for fighting red tape;
5. without fail, this autumn and winter of 1921-22, to bring up for trial in Moscow 4-6 cases of Moscow red tape, selecting the more ‘vivid’ cases, and making each trial a political affair;
6. to find some, if only 2-3, sensible ‘experts’ on questions of red tape, among the more fierce and militant Communists (get hold of Sosnovsky), so as to train people to hound out red tape;
7. to publish a good, intelligent, non-bureaucratic letter (a circular of the People’s Commissariat of Justice) on the struggle against red tape.

I impose this most important task on the People’s Commissar and his deputy, on their personal responsibility, and request that I be given regular information as to its fulfilment (emphasis in original).\(^{69}\)

This letter is instructive in several respects. It displays Lenin’s keen awareness of the problem of bureaucratism – ‘just what is to be expected’ – and his determination to stamp it out. His realism stands in contrast to the later rosy pictures painted of the Soviet state machinery under Stalin. The letter demonstrates Lenin’s highly political approach to the use of legal measures, rejecting a formalist stance of separating the justice system from political considerations. It also shows Lenin’s recognition of the limitations of law enforcement and the need to combine punitive measures with remedial programs, including a plain language circular alerting the general public to the problem and the government’s attitude.

\(^{69}\) For another summation of Lenin’s interventions against bureaucratism, see Beirne, *Revolution in Law*, pp. 80-83.

Four months later, in January 1922, Lenin again wrote to Kursky, expressing his dissatisfaction with the latter’s response. Kursky had written to Lenin stating that the campaign against ‘red tape’ was slow-moving and difficult because ‘red tape is the result of the activity of persons, and not an objective consequence of the insufficiently smooth working of our apparatus’. A second communication from the Justice Commissariat had, Lenin complained, ‘set forth platitudes about bureaucracy, complexity of apparatus, etc., etc.’ Lenin rejected this approach, insisting that the source of the problems lay in ‘organisational defects’ for which ‘responsible persons’ were to blame. He urged Kursky to re-examine the question and organise a war-like campaign. Lenin called for an exhaustive reply to the tasks he had set earlier and instructed Kursky to send monthly reports on the course of the campaign.30 Lenin clearly intended to monitor this campaign closely but was incapacitated by a stroke within weeks of this letter.

As soon as Lenin recovered partially, he wrote his last article, ‘Better Fewer, But Better,’ published in February 1923, roundly criticising the Soviet state apparatus as ‘deplorable’ and ‘wretched’.31 It was written as a campaign, including the drastic revamping of the Workers and Peasants Inspection (WPI), established at Lenin’s insistence in 1919 to combat Soviet and Party bureaucracy. ‘We have bureaucrats in our Party offices as well as in Soviet offices,’ Lenin emphasised.32 His remarks were intended as an unmistakeable criticism of Stalin, who was responsible for the activities brought under the scrutiny of the Inspection.

Beirne and Hunt, however, accuse Lenin of pursuing a ‘myopic strategy’ of seeking to remedy the deficiencies of the existing institutions by creating new ones. These mechanisms, including the WPI, became bureaucratised and further ossified the whole system. ‘His strategy was therefore doomed,’ the authors conclude.33 This criticism is not easily reconciled with their underlying contention that Lenin’s chief fault was a failure to establish an institutional separation of powers or juridical or other means of maintaining limits on the powers exercised by Soviet authorities. The WPI was an attempt to create such a mechanism. To understand its failure to halt the emergent Stalinist layer it is necessary, in my view, to focus again on the extraordinarily unfavourable circumstances confronting Soviet Russia by late 1923, especially after the defeat of the German revolution of October 1923, as well as on the ferocious campaign launched by Stalin’s faction against the newly-formed Left Opposition.

Was Lenin responsible for Stalinist authoritarianism?

This brings us back to the issue canvassed at the beginning of this chapter. Was Lenin responsible for Stalinism? As mentioned, Beirne and Hunt argue that Lenin’s varying and incomplete views about the nature of legal relations in the period of socialist transition unintentionally created a theoretical vacuum that contributed to the intensification of authoritarian centralism during the late 1920s. After reviewing Lenin’s writings, the authors go further and indict Lenin for laying the groundwork for Stalin’s régime. They contend that Lenin’s strongly libertarian thrust, with its emphasis on popular sovereignty, inherent variability and situational character, in coexistence with the conflicting need for uniformity and centralization, created a politically legitimate mechanism for overriding formal legality.

The juxtaposition of revolutionary exceptionalism and bureaucratic formalism concentrates the determination of the outcome in the hands of that person or body

30 Ibid., Vol. 35, pp. 533-534.
31 Tucker, The Lenin Anthology, p. 734.
33 Beirne, Revolution in Law, p. 83.
empowered to effect the choice between the antithesis and then, with equal legitimacy, to swing to the opposite moment. Insofar as Lenin created and justified this alternation between revolutionary justice and legal formalism, he bears historical responsibility for the subsequent deployment of this sublime instrument of authoritarianism by the Stalinist regime.\textsuperscript{71}

Above all, the authors maintain, Lenin failed to elaborate a satisfactory constitutional framework. The authors state their argument most fully in the form of a paradox produced by Lenin’s adherence to the withering away of law:

The political and theoretical objections to constitutionalism, which motivated Lenin and the Bolsheviks, contributed greatly to the ultimate failure to constitute Soviet society in a form by which the radical democratic motives of the revolutionary process can be realised. Indeed, this failure was a dangerous vacuum that within a decade of Lenin’s death was filled with the paradoxical coexistence of law and terror.\textsuperscript{72} Our argument extends beyond the standard liberal critiques of the Soviet Union that point to the absence of a separation of powers between party and state as the origin of the authoritarian potentiality exemplified under Stalinism. This failure, we contend, was only a symptom. The problem of Soviet society is the failure to develop a civil society able to provide and sustain processes for handling social conflicts and choices, compatible with some sustainable conception of democracy and an expanding public participation as needed in any attempt to construct a viable socialist society.\textsuperscript{76}

To explain the key fault with Lenin’s conception, the authors suggest the term ‘fusion model’ to attribute to Lenin a belief that the separation of state and people could be overcome through the progressive fusion of popular and mass organisations, and the ruling party, with the decision-making and administrative work of the state. While admitting that Lenin never espoused this position in general terms, Beirne and Hunt contend that it underlay all his declared views on the relations between state and civil society.\textsuperscript{77} In particular, they suggest that the soviets were ‘over-invested’ with power, partly as a result of Lenin’s ‘naïve’ and ‘optimistic’ hopes for popular participation. Without dealing with every facet of this analysis, it is apparent that the authors’ objections to Lenin’s approach lie deeper. They call into question the soviet model of democracy itself, as well as the whole notion of the withering away of the state and law. Thus, they describe Lenin’s hopes of massively reducing social conflict under communism as “dangerously crude”:

It is possible to imagine a society in which there is an abundance of the immediate needs of life, but no abundance could ever be envisaged that would either abolish the need to make choices about resource allocation or eliminate conflicts about the priority between alternative projects and aspirations.\textsuperscript{78}

I will not attempt to answer this unsubstantiated assertion in this chapter. The issue of the viability of the withering away of law is dealt with elsewhere in this thesis, in Chapters One, Six and Eight on the Marxist view of law, the early legal debates and the rise and fall of Pashukanis. It is pertinent here, however, to explore something of a contradiction in the authors’ argument. On

\textsuperscript{71} Beirne, Revolution in Law, pp. 79-80.
\textsuperscript{72} R. Sharlet and P. Beirne, ‘In Search of Vyshinsky: The Paradox of Law and Terror’ in Beirne, Revolution in Law, pp. 136-156.
\textsuperscript{76} Beirne, Revolution in Law, pp. 84-85.
\textsuperscript{77} Ibid. pp. 87-91.
\textsuperscript{78} Ibid. p. 84.
the one hand, they ascribe the Stalinist degeneration to inherent flaws in the soviet model; on the other hand, they point to a fatal 'de-sovietisation' of political life. They arrive at that position by observing that 'the exigencies of the Civil War destroyed many local soviets' and 'inevitable pressures tended toward centralization and militarisation and toward the absorption of the soviets by the state'. But after briefly noting these powerful objective pressures, they describe the most salient pressure as 'the basic claim of soviet power that the soviets were the source of sovereignty'. Without actually examining the terrible toll taken by the Civil War, this conclusion is an a priori one, based on unstated assumptions about the inevitable abuse of political power.

Elsewhere the authors state: 'Had no Western military intervention occurred in 1918 and had the Civil War not been so protracted, then the emergent Soviet society would have developed, or at least could have developed, in a far more libertarian direction.' The path to authoritarianism was not inevitable, they conclude. With these suggestions I agree -- as explained in Chapter Three, the wars of intervention and the subsequent forced reliance on market forces under the NEP had a devastating impact on the soviets and the communist party -- yet the authors do not explore these issues. Rather, from the outset they eschew the 'fruitless' pursuit of what they term 'if only' discussion of what might have happened under less severe circumstances: 'for example, "if only the civil war had been so protracted, then the democratic soviets would have had a chance to develop"; or, "if only Bukharin's strictures about the growth of the bureaucracy had been heeded, then ..."' It is precisely such 'if only' questions, however, that can point to the underlying, material and international causes of the Stalinist degeneration.

Another fundamental omission in the authors' argument, as stated earlier, is that it ignores the extent of the widespread socialist opposition to Stalinist authoritarianism and the degree to which the Stalinist regime emerged in direct response to the challenge of the Left Opposition, led by Trotsky. They do not mention Lenin's 1922 bloc with Trotsky, while Lenin's Last Testament of January to March 1923, in which Lenin called for Stalin's removal as party general secretary is referred to only obliquely in a footnote. The few fleeting references to Trotsky relate to earlier developments during which Trotsky occupied a central role in the party, not to the opposition he organised against Stalin's usurpation of soviet rule. There is no mention of the existence of the Left and Joint Oppositions of 1923 and 1926, or the Stalinist response to these developments. These major struggles indicate that continuing support for Lenin's conceptions led to and guided intense resistance to Stalin's methods. The causes of the ultimate defeat of this resistance are to be found, it is suggested, primarily in the poverty, primitiveness and protracted international isolation of the Soviet state. If Lenin can be accused of fatal error, it is, as Trotsky later commented, that he underestimated the difficulties that would arise if the Russian Revolution did not spread to the more economically advanced countries of Western Europe and America.

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79 Ibid. p. 89.
80 Ibid. p. 102.
81 Ibid. p. 82.
82 Ibid. pp. 94-94, fn 27.
83 See Chapter Nine.
CHAPTER SIX

THE PASSIONATE LEGAL DEBATES

Introduction

Numbers of scholars have acknowledged the richness of the legal debates that emerged during the first decade of the revolution, from 1917 to 1927. It was a period of wide-ranging discussion and intellectual output. The audacity of the contributions are all the more striking when contrasted with the stultified regurgitation of Stalinist orthodoxy that increasingly pre-dominated after 1927. Beirne and Sharlet, the editors of a valuable collection of Pashukanis' writings, noted:

Pashukanis was merely one of a dozen authors in the Soviet Union to publish on the Marxist theory of law and state during the years 1923 to 1925. In fact, he was one of the less well-known authors whose works appeared during this early flowering of Soviet legal philosophy. It was a crowded and distinguished field which included the Marxist philosopher Aderatsky; the pupil of Petrashtsky, M. A. Reisner; the jurist and civil war hero Nikolai Krylenko; and of course Piotr Stuchka, an Old Bolshevik and the Soviet Russian founder of Marxist legal philosophy.¹

The same authors commented that the language and vocabulary of the legal discourse of the 1920s was 'rich, open-ended and diverse, and varied tremendously with the personal preferences of the individual author'. By the 1930s, however, this gave way to 'a standardised and simplified style of prose devoid of nuance and ambiguity, and which was very much in keeping with the new theoretical content which comprised official textbooks on the theory of state and law'.²

Likewise, Jaworskyj, who compiled an important anthology of the debates, describes the 'revolutionary twenties' as 'a dynamic and prolific period in the history of Soviet legal thought,' characterised by 'intellectual ferment, optimism and impatience'.³

The literature of this period -- produced by political and legal theorists, economists, philosophers, historians, and ideologists -- is diverse, original, and full of cognitive content; and the range of both theoretical and practical problems discussed is indeed impressive. Soviet social thinkers in the twenties took these problems seriously, much more so than did their Western counterparts, for they were engaged in a new type of social engineering. They considered themselves to be the builders of a new, 'rational' social order founded on principles presumably never before applied.⁴

Here, Jaworskyj points to some of the central features of the discussion: its ferment, diversity and connection to pressing, uncharted, practical problems. Ironically, he attributes the intensity of the debates to the alleged inconsistencies of Marxism, arguing that its vagaries produced scope for a variety of contending interpretations. Lenin's writings, in particular, are said to be 'too far removed from existing reality and hence could not contribute much to the solution of the immediate problems'.⁵ This contention is not only questionable; it denies that the contributions

² Pashukanis. Selected Writings, p. 274.
³ Jaworskyj, Soviet Political Thought, pp. v, 4.
⁴ Jaworskyj, p. 47.
⁵ See Chapters Four and Five.
made by the early Soviet theorists arose from the intellectual tradition that inspired them, that of Marxism. The kernel of Jaworskyj's argument is as follows:

Unable to find the answers in the 'classics' of Marx and Engels, Soviet writers began to study Western literature on this subject. Originally, they intended to subject various Western theories of law to a Marxist analysis, hoping that in the process they would develop a systematic Marxist theory of law. This attempt, however, proved abortive. Its outcome was a split among Soviet writers into various schools of thought roughly corresponding to those in the West.\(^6\)

Schlesinger advanced a similar scenario.

Marxism recognises the existence of purely legal ideologies, and even their influence on the real development of Law. But it certainly rejects the explanation of Law by the development of legal or supposedly general ideologies. Anyone desiring purely legal theories had to look round the existing ones elaborated by bourgeois jurists, and choose those he found most compatible with a Marxist approach to sociology and politics. All the classical bourgeois theories, based on certain assumed fundamental rights, were excluded by their evident function as idealisations of the foundations of capitalist society. So Duguit's functional approach became popular among Soviet jurists. By its influence on Goikhberg, who shaped the Civil Code, it certainly influenced the latter's formulation.\(^7\)

It will be suggested in this chapter that these propositions are flawed. The extraordinarily rich legal debates provoked by the October Revolution were far from a simple reworking of concepts borrowed from Western authors. The early Soviet theorists regarded their tasks as (1) developing, or contributing toward an overall Marxist theory of law, something that Marx and Engels had been unable to complete, and (2) clarifying the immediate and long-term approaches and policies that were needed to effect the transition to a genuine communist society.

Rubinshtein, a Ukrainian contributor to the debates, addressed this issue in his 1924 article, 'New Ideas in Bourgeois Jurisprudence and the Marxist Theory of Law'. After reviewing some similarities between the Marxist theory of law and recent trends in bourgeois jurisprudence, he concluded:

What differentiates the Marxist theory of law from its bourgeois counterparts is its philosophical depth, consistency and completeness, but the main difference is its class principle, which is not always adhered to by bourgeois jurists. At the same time, however, the corresponding trends in bourgeois jurisprudence remain of interest to us; they reveal a deep, almost insoluble crisis in jurisprudence (not only of bourgeois jurisprudence), a crisis that is developing under the direct influence of Marxism.\(^8\)

A review will show that while the Soviet theorists naturally studied Western writers and were influenced by them -- some Soviet writers more than others -- it is unhelpful and even misleading to regard them as adherents of Western schools of jurisprudence. In the main, they remained firm, yet perceptive and profound, critics of Western scholars. Two of the theorists -- Reinsner and Goikhberg -- were established pre-revolutionary scholars who sought to develop aspects of

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\(^6\) Jaworskyj, p. 50.
\(^8\) Jaworskyj, p. 153.
previous jurisprudence. Reisner was a student of Petrazhitsky and his psychological theory of law, while Goikhberg drew on the social function analysis of the French writer Daguit. But both regarded themselves as Marxists, solidarized with the October Revolution and sought to utilize the theories of their respective schools to shed light upon and deepen Marxist analysis.

Jaworskyj groups the Soviet writers into four schools: sociological, psychological, social function and normative. He begins with the sociological school, describing it as the strongest and most popular. He names Stuchka, Pashukanis, A. K. Stalgevich, N. V. Krylenko, A. Piontkovsky, S. Keechekyan, M. M. Isaev, N. N. Polyanenko, N. Totsky, F. Ksenofontov, A. Trainin, L. Uspensky, F. D. Kornilov, M. Dotsenko and I. Razumovsky.

The psychological school consisted of M. Reisner, I. Ilnisky, E. Engel, M. Chelstov-Bebutov, D. Dembsky, Ya. Berman, M. Rezunov and A. Popov. The social function school comprised A. Goikhberg, S. Raevich, E. Kelman and S. Asknazy. The smallest group, the normativist school, was represented by D. Magerovsky, I. Podvolotsky, I. Voitinsky and V. Veger.

The views exchanged in the early legal debates were more diverse than Jaworskyj's matrix suggests, and changed over time, according to the shifting economic and political climate. There were important differences between contributors assigned to the same school. For example, Stuchka's views differed from Pashukanis' and diverged at different points between 1924 and 1932, yet Jaworskyj includes them both in the sociological school. Moreover, it is not clear that Jaworskyj has correctly classified each scholar. For example, Ilnisky drew quite different conclusions from Reisner, but Jaworskyj includes Ilnisky in the psychological school. In addition, Jaworskyj's list is not exhaustive. Others who participated in the early debates included Krestinsky (one of Trotsky's supporters), Lunacharsky (an early Bolshevik leader), I. Naumov, M. Kozlovsky, A. S. Rubinshtein and S. Volkson.

More importantly, the suggested classification obscures more critical issues in the debates. The early Soviet writers were in dispute over three main questions, which were bound up with the entire trajectory of Soviet Russia: (1) the class character and function of the Soviet state and Soviet laws, (2) whether and how quickly the state would wither away in the transition to communism, and (3) the underlying role of law in socialist and communist society. Wherever possible, this thesis examines each contribution to the debates from the standpoint of these three issues.

From 1924, a pivotal year which saw the launching of the political war against 'Trotskyism' and also the publication of Pashukanis' General Theory of Law and Marxism, new alignments emerged. Most notably, the group of jurists working with Pashukanis in the Communist Academy became known as the commodity exchange school of law, which was identified as the official Marxist theory of law for the remainder of the decade. A number of commentators have pointed to a division of that school into two wings after 1927 -- a radical branch led by Pashukanis and a moderate one led by Stuchka.10

Before examining the evolution of these debates chronologically, it is worth noting that the number of Soviet writers listed suggests broad involvement in the debates. It also indicates that neither Pashukanis nor Stuchka, nor anyone else, enjoyed or exercised unchallenged authority in the scholarly exchanges that took place. Jaworskyj concludes that the fact that early Soviet

10 Schlesinger, Soviet Legal Theory, pp. 147-148.
11 For a list and brief biographies of the early Soviet legal scholars, see Appendix 1.
writers offered conflicting theories showed that during the twenties, they 'were free to determine the meaning of 'the Marxist method' in their own way, without political interference'. Certainly, in reading the legal theorists' articles, one is struck by the open and democratic spirit in which they conducted their polemics. No one was above reproach or critique, and there appeared to be no attempt to lay down a 'party line'. But that is not to say that the disputes were unrelated to the political challenges confronting the Soviet government, or the political conflicts that developed within the Soviet leadership.

1917-21: From revolution to civil war

One of the earliest contributions came from Lunacharsky, one of the foremost Bolshevik leaders. As Commissar of Education, he wrote a December 1917 article for Pravda on 'Revolution and the Court,' stating the case for the abolition of the old court system and its replacement by People's Courts. As Jaworskyj notes, perhaps drawing on Stuchka's discussion of this episode, Lunacharsky's article sought to answer two factions within the Bolshevik party. One, the more conservative, favoured the retention of the pre-revolutionary courts; the other opposed all courts on the grounds that they were incompatible with the aims of the revolution.

Lunacharsky observed that it was hardly realistic to expect workers and peasants, having taken power, to tolerate the old judges and laws that had served the Tsarist autocracy. 'The revolution itself is a fact of counterposing a new law to the old one, an act of a popular mass trial over the hated system of privilege.' On the other hand, while outlining the foundations of new people's courts, the revolution had to proceed gradually and cautiously, because 'there is no precedent in history for a proletarian law'.

Since under capitalism the proletariat was deprived of the opportunity to develop its legal creativity, it has no choice now but to learn how to adjudicate pragmatically and create its own customary law, deducing it from the sources of the same spiritual movement that led the proletariat to the victorious revolution and that reflects its class character, its growth, and its significance in the social life.

Some may find Lunacharsky's references to 'customary law' and 'spiritual movement' suggestive of an appeal to a conception of natural law that ascribes law to inner human instincts or deeply rooted historical customs. But the context of the October Revolution points to a more democratic and class-oriented conception of forming popular institutions to fashion new social norms that would reflect the interests and aspirations of the majority of previously down-trodden people. Like other Bolshevik leaders, Lunacharsky was familiar with traditional social and legal theory, as well as in the writings of Marx and Engels. He referred to various Western and pre-revolutionary Russian legal theorists to justify the introduction of new revolutionary norms. Among the scholars he cited were Fritz Beroizheimer, Anton Menger, Georg Jellinek and L. Petrzhitsky. The latter was known across Europe for his psychological approach to legality. Lunacharsky referred to Petrzhitsky's emphasis on the need for "positive" (written) law to correspond to the 'intuitive' law, or sense of justice, of the mass of the population, or be swept aside through social revolution.

While Jaworskyj suggests that the early Soviet writers turned to Western theorists because they found no answers in Marxist literature, Lunacharsky's references to Petrzhitsky were of a

\(^{12}\) Jaworskyj, p. 51.
\(^{13}\) Ibid, p. 53.
\(^{14}\) Ibid, p. 54.
different character altogether. Lunacharsky was arguing for a Marxist approach. He quoted Petraszhtitsky, a respected liberal figure within traditional Russian ruling circles, in order to turn some perceptive observations of a representative of the old order against the former political and legal establishment itself.

Lunacharsky noted that Petraszhtitsky was regarded by official Russian science as ‘one of the greatest authorities in Europe,’ before quoting a prophetic passage from Petraszhtitsky, published in 1909, four years after the first Russian Revolution of 1905:

The simultaneous existence and functioning of the positive (written) law with the intuitive law (with the ideal of the new classes) is possible only if there is general agreement between them; if the discord reaches a certain degree, then the disintegration of the positive law becomes inescapable; in a case of opposition, the disintegration is brought about through a social revolution.\(^{15}\)

Lunacharsky continues:

Petraszhtitsky describes in detail how the new ideal grows among the lower classes ... under the influence of changing conditions. He states that the sense of justice becomes even more offended when it encounters opposition, then, it reaches a fanatical hatred of the existing order with its laws, and ultimately it arouses an explosion—'the Revolution'.\(^{16}\)

Lunacharsky may have adopted Petraszhtitsky's concept of 'intuitive law,' but he gave it a new content, treating it as a reflection of the objective class interests of the working people. Lunacharsky concluded as follows:

The people engender a new intuitive law, which calls, first of all, for the destruction of all organs of the old law that are perceived by them as complete injustices. This intuitive law (reflecting class interests of the masses, and corresponding to the new rising social structure) can be distinctly formulated only in the process of direct, revolutionary legal creativity.\(^{17}\)

Again, it should not be assumed that Lunacharsky was advancing a mystical conception of popular will or psychology, let alone a view of eternal natural law. His observations about the 'complete injustices' perceived by the mass of people can only be understood in relation to the considerable rejection of the old legal system that had already taken place among broad layers of the population.

At the same time, Lunacharsky's utilisation of concepts developed by an eminent non-Marxist theoretician to elucidate the significance of these developments was entirely in line with the overall Marxist approach to previous political and social philosophy. Rather than discarding the achievements of bourgeois theory, Marx and Engels themselves emphasised the need to recognise its strengths (and weaknesses) as insights into underlying historical processes.

Another early contributor was Goikhburg, a professor who was influenced by the social function view advanced by Duguit. Goikhburg said the revolution could not limit itself to the ‘mere

\(^{15}\) Ibid. p. 55-56. The quote is from L. Petraszhtitsky, The Theory of Law and State in Connection with the Theory of Morality, Petersburg, 1909.

\(^{16}\) Ibid., p. 56.

\(^{17}\) Ibid., p. 56.
negative activity of issuing decrees'. It had to completely change the conditions of human existence in order to regenerate social psychology so that legal coercion would no longer be needed as an instrument of social control. Essentially, he argued that only by fundamentally uplifting social conditions could human relations be improved.

Completely changed conditions of human existence will bring about such a regeneration of social psychology that the individual arbitrariness, which disturbs the harmony of humanity's life, will become such an infrequent anomaly that it can either be discarded or eliminated by means other than the contemporary legal guarantees.18

Writing in 1918, Goikhbarg pointed to the profoundly different role of social regulation under capitalism and socialism. Comparing the French Revolution of 1789 with the Russian Revolution of October 1917, he laid the basis for drawing a fundamental distinction between bourgeois law and socialist regulation:

Decrees—which in brief but harsh statements have abolished survivals of the past, have untied old fetters that bound men and hindered their activity, and thus have given to individuals a complete freedom of action, while assuming or hypocritically pretending that the clash of egos would produce general well-being—were appropriate and have attained their goal in the period of the exemplary French bourgeois Revolution, which aimed at creating a system of anarchistic individualism in the sphere of economic relations. But the proletarian revolution, which pursues entirely different goals and which faces the task of constructing and consolidating a diametrically opposed system of regulated collectivism, cannot, obviously, limit itself to the mere negative activity of issuing decrees (emphasis in original).19

Goikhbarg gave the following example of bourgeois law versus a socialist program of work and education:

The bourgeois law declares: 'You, subjects of bourgeois law, may or should build houses with such and such legal limitations.' Such an order is issued with one stroke of the pen. On the other hand, the social, general will proclaims: 'We will build accommodations for everyone.' The latter law is no longer an order but a program of work.20

This process, Goikhbarg described as 'the transition from legislation to administration'. That is, law would be superceded by social improvements, giving rise to higher social norms. Decrees would 'merely furnish the stimuli that accelerate movement in this direction'.21 His approach was reflected in the works of Stuchka and Pashukanis, who sought to develop the distinction between the capitalist legal form and socialist social regulation.

Likewise, in an early article, Kozlovsky, a former legal advocate who joined the Justice Commissariat, wrote of proletarian 'law' in quotation marks, throwing a question mark over the very conception of law under socialism:

With the final suppression of the bourgeois, the function of proletarian 'law' will gradually diminish and be replaced by the organisation rules of economic life—

18 Ibid, p. 58.
19 Ibid, p. 58.
20 Ibid, p. 61.
21 Ibid, p. 68.
production, distribution and consumption. The organs of law will be transformed into
economic, administrative organs. Judges will be replaced increasingly by workers,
overseers and bookkeepers.22

Kozlovsky criticised proponents of the sociological school of law, such as Menger, for agreeing
that the legal order would be transformed gradually into an economic organisation, but refusing to
accept that law would disappear completely. He disputed the view that crime would continue
because of the ‘basic instincts of man’s nature’. In the first place, the source of most crime lay in
the anarchy, personal insecurity and class antagonisms produced by capitalism. These gave rise to
‘excesses, extremism and crime, indeed, most atrocious crimes. Exploitation of the masses
produces want, misery, ignorance, savagery and vice’.

Moreover, because offenders were products of the social milieu, it would be absurd to resort to
retribution or seek to ‘reform’ individuals through punishment. Instead, the state of society had to
be improved. Punishment should be confined to preventing danger to society. ‘In conformity with
our view of the causes underlying criminality, the only aim of the imposed punishment should be
self-defence or the protection of society against encroachments’.31

Given the difficulties of the civil war, from mid-1918 to 1921, the first period of discussion was
truncated and limited. For almost three years, the survival of Soviet Russia hung in the balance
and the harsh conditions were hardly conducive to theoretical contemplation. But these early
contributions displayed considerable knowledge, as well as confidence in effecting a reasonably
short transition to socialism.

1921-24: The impact of the NEP

The advent of the NEP brought a more complex view. One theme that emerged, which warrants
further examination, is a discussion of the relationship between socialism and individual rights.
As the civil war drew to a close and the NEP emerged, Soviet legal theorists insisted on a strict
protection of individual as well as economic rights. ‘It is slanderous to maintain that the working
class does not want to safeguard the interests of the individual,’ wrote Slavin in an officially-
published 1922 article on the ‘The Judiciary and the New Economic Policy’. He went on:

On the contrary, the working class, as the class of the majority, is interested in giving the
broadest and the most complete guarantees of the rights of the individual. Consequently,
when the present objective conditions evoked by the civil war change, the courts of
Soviet Russia will be free to defend the rights of the individual in the near future...34

There is much to be said for the view that socialism is the only guarantor of genuine individual
freedom, liberating people from the dictates of market forces. But a proper treatment of the
relationship between individual and collective rights in the transition to communism would
involve an historical assessment of the rise of individualism and its actual content under
capitalism.

Magerovsky was another legal theorist to reflect the changed economic climate and requirements.
His 1922 article “Soviet Law and Methods of Its Study” observed that law was necessitated not
only by the inner class contradictions of a society but also by society’s relation to nature and to

22 Ibid, p. 70.
31 Ibid, pp. 70-71.
34 Zile, p. 76.
other antagonistic societies. In other words, the transition to socialism could take longer than previously acknowledged because of external pressures on Soviet Russia and also deep historical legacies. His view expressed, in part at least, the ongoing capitalist encirclement of the Soviet state and its inability to immediately overcome the primitivism and backwardness inherited from Tsarism. Magerovsky, regarded as a normativist who was influenced by sociological jurisprudence, drew attention to the “dual” nature of Soviet law:

On the one hand, it is still directed toward the past, toward bourgeois society; it still comprises elements of bourgeois law. On the other hand, it is directed toward the future, toward a socialist society, and, owing to this, it comprises elements of socialist law.²⁵

Stuchka later criticised this view²⁶ but it is in accord with Lenin’s warning, in *The State and Revolution*, about the bourgeois nature of law in the first stages of socialism. Interestingly, Magerovsky also commented that after the revolution, the Bolsheviks had brilliantly exploited the organisational force of legal norms. Here was an assertion that legality and legally-sanctioned force had a role to play in the struggle to consolidate the revolution.

Another sign of the shifting debate came with the 1923 publication of Podvolotsky’s *The Marxist Theory of Law*, with an Introduction by Bukharin. Bukharin and his supporters were at this stage on the ‘left’ of the Bolshevik party, initially critical of the NEP’s concessions to market relations, but their views were rapidly evolving. Podvolotsky openly criticised Stuchka for defining law purely in terms of social relationships and for presenting law as simply the juridic expression of economic relations. He posed the question: if law equals social relationships, why speak of law at all? Law, he argued, was a coercive norm established by the dominant class for the purpose of sanctioning existing relationships. In other words, law was, and would remain, an active instrument of class rule. Furthermore, quoting Marx and Engels, he pointed out that law could have a reciprocal influence on economic development, including under socialism.²⁷

From these premises, he maintained that in the transition to communism, law could be proletarian as well as ‘bourgeois’. By placing ‘bourgeois’ in quotation marks, he sought to show that law, as a form, could serve the proletariat despite being ‘bourgeois’. He cited only half of Lenin’s previously-quoted comment in *The State and Revolution*,²⁸ leaving out Lenin’s reference to the continued existence of a bourgeois state in the transitional period. Podvolotsky misleadingly asserted that Lenin declared there could be no bourgeois law in a proletarian state. Podvolotsky further asserted a permanent need for law under socialism. ‘But does the proletariat need law in general?’ Podvolotsky asked. ‘Yes, beyond any doubt,’ he answered.²⁹

As a supporter of Bukharin, Podvolotsky’s views could be expected to be aligned with Bukharin’s emerging right-wing faction in the party. Known for being ultra left-wing in the early years after the revolution, Bukharin shifted ground remarkably by the mid-1920s to become a champion of making major concessions to the peasantry and other small property holders and proceeding toward socialism at a ‘snail’s pace’. Bukharin’s followers aligned themselves with Stalin’s faction against the Left and United Opposotions in 1924-27, only to have Stalin move against them in 1929, during the forced collectivisation of the peasantry.³⁰

²⁵ Jaworskyj, p. 95.
²⁶ Sharlet, Maggs & Heirne, *P. I. Stuchka Selected Writings*, p. 45.
²⁷ Jaworskyj, p. 107.
²⁸ Chapter Five.
²⁹ Jaworskyj, p. 113.
³⁰ See Chapter Nine.
Podvoitsky’s arguments did not go unchallenged. In 1924 Goikhberg published his *Foundations of Private Property Law*, which began with a stinging attack on all law as ‘even more poisoning and stupefying opium for the people’ (borrowing Marx’s phrase about religion). He referred to the dangers of a ‘new mythology’ of law, quoting Marx’s warning in *The Eighteenth Brumaire* that ‘the traditions of the deceased generations haunt the minds of the living like a nightmare’.

Jaworskyj classifies Goikhberg as belonging to the ‘social function’ school, as did some of Goikhberg’s protagonists in the legal debates, but Goikhberg’s writings, at least his early publications, do not correspond entirely to that categorisation. He argued strenuously against the conception that law has a natural or indispensable social function to perform. Drawing on Marx’s *Critique of the Gotha Program*, Goikhberg emphasised that all law is an expression of inequality. Proletarian legislation should not present itself as ‘any presumed, eternally existing concept of law’ but instead refer to the expediency of measures to meet certain goals, notably the development of the productive forces.

Importantly, Goikhberg drew attention to the dependence of the economically backward Soviet state on the victory of revolutions in more advanced countries, notably Germany. Such a victory would enable a more rapid reduction in the ‘unavoidable concessions’ to bourgeois legal conceptions:

Our revolution took place earlier than in other countries, and hence under less mature conditions. In addition, it was accomplished in a most economically backward country. The forthcoming revolution in Germany will take place not only later but also under more mature economic conditions than those existing in our country six years ago. It will do away with the survivors of the bourgeois system in a more radical manner.

These hopes of early support from a socialist Germany were dashed by the defeat of the bungled German revolution in October 1923, one of the events that precipitated the emergence of the Left Opposition and the subsequent Stalinist campaign against ‘Trotskyism’. Goikhberg’s very mention of the international environment and its impact on the Soviet state contradicted Stalin’s theory of ‘socialism in one country’.

Krylenko, an early Bolshevik, produced, in his 1924 *Discourse on Law and State*, a passionate call for action to combat the degeneration of the Soviet state apparatus, and a recognition of the mounting obstacles facing the country. Krylenko had been a supporter of Bukharin and an opponent of Trotsky but his intervention seemed to reflect Lenin’s concerns. Krylenko invoked Lenin’s comment of March 1923 that: ‘The conditions in our state apparatus are to such a degree grievous, if not shocking, that we must begin to think all over again of how to struggle against its deficiencies.’

Krylenko decried the impetus given to material inequality by the NEP and blamed it for the revival of privilege. ‘We have re-established bureaucracy as a special cadre of man, have made it directly dependent upon the “ruling hierarchs,” and consequently have made it again independent of the masses.’

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31 Jaworskyj, p. 121.
32 Ibid, pp. 130-32.
Displaying a sense of urgency, he asked what should be done at ‘this very minute, to come at least a little bit closer to at least the first phase of the communist society outlined by Lenin and Marx?’ Before answering that question, he stated the following:

Objectively, it is not our fault that the proletarian revolution in Russia stumbled over two objective obstacles that it could not overcome by itself, single-handed. These two obstacles were the following: (1) the belatedness in the coming of the proletarian revolution in the West; (2) the economic structure of our own country.

Krylenko said the objective pre-requisites did not exist to achieve Lenin’s egalitarian and participatory principles but

We undoubtedly should be capable of reforming our state apparatus so as to liquidate its negative features, which have been so vividly manifest in recent times and which we were incapable of paralysing in years past. These features are: separation from the masses, bureaucratisation, red tape, bureaucratic attitudes towards work, and the colossal inequality in the material position of workers and public functionaries.\(^35\)

Krylenko’s ability to issue such a broadside is testimony to the fact that political opposition to the emerging Stalinist apparatus was still possible in 1924. It was not long, however, before that debate was suppressed in law, as in other fields.

Volfson wrote a 1924 article, ‘Contemporary Critics of Marxism’, offering a critique of Hans Kelsen’s *Socialism and the State*, as well as Karl Kautsky, Max Adler and various ‘pseudo-Marxists’. Answering Kelsen’s normative view of law, Volfson pointed to some of the underlying issues in the early Soviet legal debates. He emphasised that ‘Marxists erect their concept of the state not on the principle of juridical normativism but on the basis of a living, dynamic, sociological approach to society’:

According to Marx, society and the state are by no means categories in opposition to each other. The state is nothing but a form of existence of society, a form determined by economic relationships: it is ‘a product of society at a given stage of development,’ as Engels stated. At a certain stage in the development of human society, the economy forced society to assume the form of a state, whereas at succeeding stages of development the economy will force society to get rid of the state. The great merit of Marx and Engels lies precisely in the fact that they ceased to regard the state as a certain eternal norm; they converted the state from a logical into a historical category.\(^36\)

One sign of the shifting climate was Veger’s 1924 volume, *Law and the State in the Transition Period*. Verger was regarded as a normativist. On the one hand, he specifically referred to Lenin’s often disregarded warning, in *The State and Revolution*, that the new state established by a social revolution would remain a capitalist state, albeit without a bourgeoisie, during the transition to communism. Veger noted that while the new state was organised on transformed economic, moral and intellectual foundations, it still bore ‘the imprint of the old society in whose womb it originated’. He also reiterated the Marxist thesis that ‘in the higher stage of communism, there will no need for the apparatus of an organised coercion’.\(^37\)

\(^35\) Ibid, pp. 177-78.
\(^36\) Ibid, pp. 183-184.
\(^37\) Ibid, pp. 192-193.
On the other hand, Veger emphasised that the transition would 'constitute a long process,' including the 'creation of a new psychology' for solving conflicts without state force and that 'such organisation now is hardly conceivable'. This could be seen as foreshadowing the later insistence on the protracted nature of the transition to communism and the need for a strengthened state apparatus in the meantime.

1924 saw the adoption of the Fundamental Law (Constitution) of the USSR, setting out the Union's legislative, administrative and judicial bodies. 'In order to maintain revolutionary legality,' Clause 43 established a Supreme Court, attached to the Central Executive Committee of the USSR. As is apparent from the latter clause, the constitution rejected the doctrine of separation of powers. In an accompanying article, Turubiner maintained that the judicial power could not be set apart from the country's political and social structure. He cited Marx's reference in *The Civil War in France* to the lack of independence of judges from the ruling elite. To substantiate Marx's observation, Turubiner quoted a work on congressional government by United States President Woodrow Wilson, in which Wilson traced out the changing political complexion of the US Supreme Court in connection with different governments and historical periods. This is an important issue that goes beyond the scope of this thesis. The separation of powers doctrine, developed in England and France during the struggle against feudal absolutism, may have a place in socialist legal theory in facilitating the withering away of the state. Yet, a full discussion of this question would require a detailed historical examination of the doctrine and its possible relationship to the transition to genuine communism.

**Stuchka and Pashukanis**

Before examining the 1924-27 period, it is necessary to briefly outline the views of the two pre-eminent Soviet legal theorists, Stuchka and Pashukanis. It was in the economic and social context of the NEP that Stuchka and Pashukanis began to more systematically enunciate a theory of Soviet law. Their efforts are examined critically in Chapters Seven and Eight of this thesis. But first it is helpful to relate their contributions to the evolving legal debates.

Initially, Stuchka eschewed the very notion of a written proletarian code. In 1919, he dismissed the term 'proletarian law' because 'the goal of the socialist revolution is to abolish law and to replace it with a new socialist order'. He said the expression 'proletarian law' could only be used in a special sense: 'When we speak of a proletarian law, we have in mind law of the transition period, law in the period of the dictatorship of the proletariat, or law of a socialist society, in a completely new meaning of the term.' [Emphasis in original] To illustrate his point, he quoted Voltaire, the French Enlightenment figure: 'Law and right are inherited like an eternal disease.'

Stuchka modified these views with the advent of the NEP. He later related that on 31 January 1921 -- with the launching of the NEP -- the Organizing Bureau of the Central Committee of the Russian Communist Party (Bolsheviks) commissioned him to write a textbook on the Theory and Practice of Soviet Law within a span of three months. He took Lenin's *The State and Revolution* as his principal guide, besides drawing on the practical experience of the revolution, manifested in the early judicial decrees.

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38 Ibid., p. 192.
39 Zile, p. 72.
40 Ibid., pp. 73-74.
41 Jaworskyj, pp. 72-73.
42 Zile, p. 229.
Nevertheless, Stuchka still regarded the process of the state and law withering away as having already commenced. The fifth edition of his *The Theory of the Proletariat's and Peasant's State and Its Constitution*, published in 1926, included the following strong assertion:

All our People's Commissariats are divided into two groups: economic organs (production and distribution) and organs of coercion (military, internal affairs, and judiciary)... It is quite apparent that the latter are gradually withering away and that they undergo atrophy, while the former, directing the economic orchestra, are growing. This development may ultimately result even in an 'orchestra without a conductor,' but this is a matter of the distant future. One thing remains indisputable: the state, as well as the law in its class meaning, evaporates, i.e., withers away, together with the organs of coercion (emphasis in original).\(^{43}\)

In 1927, in his *Introduction to The Theory of Civil Law*, Stuchka explicitly related Soviet civil law to the NEP. 'The Soviet code of civil law is the economic policy of our transition period, or more precisely the NEP, put into the form of articles of law.'\(^{44}\) In an echo of Lenin's warning in *The State and Revolution* of the continuation of bourgeois law in the transition to communism, Stuchka wrote that during the first phase, socialism, 'bourgeois law' was not abrogated in full, but only in relation to the socialisation of the means of production. 'Bourgeois law' remained in the determination of the distribution of production and the allotment of labor among members of society. By joining Podvolotsky in placing inverted commas around 'bourgeois law' Stuchka was already, as Podvolotsky had proposed, softening Lenin's sharp characterisation of the contradiction facing the workers' state. Nonetheless, Stuchka adhered to the classical Marxist conception of the withering away of law, insisting that Soviet law was not eternal.\(^{45}\)

In the meantime, Pashukanis had published his 1924 *The General Theory of Law and Marxism*, which is examined more fully in Chapter 8. His essential proposition was that all law was inherently related to the commodity exchange relationship that reaches its highest point under capitalism. The very form of law was derived from the acquisition by individuals of private property interests, which inevitably gave rise to conflicts.

It is only with the advent of bourgeois-capitalist society that all the necessary conditions are created for juridical factor to attain complete distinctness in social relations ... A basic prerequisite for legal regulation is the conflict of private interests. This is both the logical premise of the legal form and the actual origin of the development of the legal superstructure. Human conduct can be regulated by the most complex regulations, but the juridical factor in this regulation arises at the point when differentiation and opposition of interests begin.\(^{46}\)

To law, Pashukanis counterposed the use of technical regulation to achieve common purposes. He gave the examples of the technical rules for the operation of a railway system and for medical treatment. These rules would be devised and revised by technical and scientific experts, not jurists. Any element of official coercion would be determined by technical expedience, and would only become a legal issue in the realm of conflicting individual interests, such as those between a doctor and patient.\(^{47}\)

\(^{43}\) Jaworskyj, p. 243.
\(^{44}\) Zile, p.211.
\(^{45}\) Ibid, pp 211-15.
\(^{46}\) Pashukanis, Selected Writings, pp. 58 and 81.
\(^{47}\) Zile, pp. 215-19.
Central to Pashukanis' conclusions was his criticism of the demand for a new theory of 'proletarian law'. This tendency, he commented, appeared to be 'revolutionary par excellence' but was thoroughly flawed.

In reality this tendency proclaims the immortality of the legal form, in that it strives to wrench this form from the particular historical conditions which had helped bring it to full fruition, and to present it as capable of permanent renewal. The withering away of certain categories of bourgeois law (the categories as such, not this or that precept) in no way implies their replacement by new categories of proletarian law. 48

1924-27: The final period of debate

Even after the Left Opposition's struggle against the emerging Stalinist bureaucracy commenced at the end of 1923, it was not possible for the ruling layers to immediately shut down the legal debates. In a 1925 article, Ilinsky, a supporter of the psychological school, said the interpretations of various laws generated 'hot discussions' among legal practitioners and theorists alike. 49 Yet, his article also evinced a new sharpness in the debates, stridently demanding recognition of 'proletarian law'. He identified the main axis of disagreement as follows:

We are issuing laws every day ... and juridical publishing houses print voluminous commentaries on them... the Supreme Court quite frequently delivers lengthy theories of principal juridical concepts... Does this mean that we have law? Indeed, we do. One could claim, as A. K. Goikhbarg and others do, that our law is merely a system of socio-technical norms, or one could invent other euphonious formulas, but the essence of things is not changed thereby. It is obvious that, in the communist society, law as a coercive social order will not exist. But, in a class society, even in the transition period, the existence of law is inevitable (emphasis in original). 50

Ilinsky lightly dismissed the argument of Goikhbarg and others that Soviet 'law' should have an entirely different character, akin to, or at least pointing in the direction of, collective regulation. Moreover, his emphatic tone and use of italics suggest that a less tolerant atmosphere was beginning to emerge. Ilinsky went on to mock and scold his opponents.

Furthermore, private property is recognized in our country by law, and legal punishments are provided for violation of property... Our law is class law, a proletarian law, but nevertheless a law; it is neither an instruction to military units concerning the shoeing of horses nor a recipe for making cold or hot soap... Those who participate in building up socialism ought to know the nature and qualities of the law that is used as an instrument in constructing socialism. 51

Even so, Ilinsky's writings displayed a continuing readiness to engage in lively exchanges, pay attention to the history of legal theory and make considered use of non-Marxist thought. In his 1925 An Introduction to the Study of Soviet Law, he wrote:

48 Pashukanis: Selected Writings, p. 61.
49 Jaworskyj, p. 203.
50 Ibid, p. 203.
51 Ibid, pp. 203-204.
The supremacy of domination of law is not simply an innocent juridical speculation or an adornment of bourgeois constitutions. One can speak ironically of the idolatry of law, but it would be absurd to deny that respect for the law, cultivated among the masses, is one of the most powerful means for bringing about mass conduct in the interest of the ruling class. Jurists and historians, who carefully study the influence of positive law upon social life, know this quite well. For example, P. B. Vinogradov stated: ‘The decisive moment in the existence of law is not so much its coerciveness as the psychological habit of recognising the bindingness of norms created by social authority and of subordinating one’s self to these norms.’

By ruling class, Ilinsky meant the Soviet working class. There is an evident tension in this passage. On the one hand, Ilinsky argues the need for the Soviet government not to rely solely upon formal legal measures, but to command the respect of the population. On the other hand, he cites a pre-revolutionary legal scholar— one influenced by Petrazhinsky’s psychological theories—to call for the inculcation of ‘respect for the law’.

In 1925, Kornilov, a supporter of the sociological school, published *Juridical Dignitism and Dialectical Materialism*. He sought to survey and critique the development of Soviet theories of law. He said the debates saw three contending schools: one identifying law with social relationships, the second taking a normative approach and the third approaching law as an ideological question.

Kornilov criticised Stuchka, said to be the main representative of the first approach, for defining law as ‘a system of social relationships corresponding to the interests of the ruling class and protected by its organised power’. Citing Engels’ *Ludwig Feuerbach and the End of Classical German Philosophy*, Kornilov insisted that law is merely the formal reflection of economic and social relationships. He concluded that ‘law is not a system of social relationships but a form of these relationships— a form that finds its concrete expression in the juridical norm’.

Kornilov stated that Pashukanis represented the second, normativist, trend. Turning to the ideological camp, Kornilov focussed his attention on Goikhbarg, describing him as the most consistent representative of the ‘social function’ school, a ‘still fashionable’ theory that had exerted the greatest influence upon Soviet civil legislation. Kornilov accused Goikhbarg of sanctifying private property by referring to it as a social function, placed in the hands of a person for use in the interests of society. This indictment was based on Goikhbarg’s comment that:

> Private property is looked upon as a certain good placed in the hands of a person for safekeeping in the interests of society; and, therefore, the person holding private property has positive obligations toward society... This view permeates also the construction of the institution of property in our civil code.

According to Kornilov, Goikhbarg’s views were derived from the French theorist Duguit, who was ‘an ideologist of finance capital’. Kornilov quoted Duguit:

> With regard to property, it is no longer treated in modern law as an inalienable right ... It simply exists and must exist. It constitutes an indispensable prerequisite for the growth of...

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society, whereas all collectivist doctrines are tantamount to a return to barbarism. However, property is not a right; property is a social function. The proprietor, or to put it differently, the owner of wealth, shall, because he owns this wealth, fulfill a social function.\textsuperscript{55}

Kornilov attributed Duguit’s theory to the development of the finance bourgeoisie, as the ownership of the means of production became increasingly concentrated in the hands of trusts, cartels and joint-stock companies. But while Goikhberg may have utilised Duguit’s concepts in an attempt to elucidate the contradiction inherent in the restoration of limited property rights and market relations under the NEP, Kornilov’s attempt to label Goikhberg a defender of finance capital was one-sided and far-fetched. Goikhberg appears to have been grappling with the real problems of defining, delineating the use of, and providing a rationale for the state regulation of, revived private property rights.

Kornilov dealt with two other ‘ideologists’ in similar fashion. The first was Razumovsky, a philosopher who had written a 1923 article entitled ‘Marx’s and Engels’ Conception of Law’ and delivered a lecture at the Socialist Academy, subsequently published in 1924 under the title Sociology and Law.\textsuperscript{56} Kornilov asserted that the two works present mutually contradictory views. Razumovsky’s article treated law as an ideology, whereas the lecture was based on the concept of ‘relationship’. Nevertheless, Kornilov suggested, the latter work gave the impression that law was not a reflection of social and economic reality but a product of the ideological activity of legal theorists.

Kornilov criticised the following sentence from Razumovsky’s article: ‘Law ceases to be an ideology and becomes an undisguised expression of the class domination of the proletariat; it becomes a theory of this class domination.’\textsuperscript{57} Kornilov declared this formulation to be completely contradictory to the views of Marx and Engels, cited by Razumovsky, because it implied that law did not exist in bourgeois society, but would exist in proletarian society. Kornilov’s assertion was drawing extravagant conclusions from a single sentence, taken out of context. As discussed below, Razumovsky was pointing to the ideological role of capitalist law in contributing to the camouflage of the social relations of wage labour and commodity production, which Marx termed ‘commodity fetishism’.\textsuperscript{58} This mystifying function ceased under socialism, with ‘law’ being presented openly as an instrument of proletarian rule, subject to the limitations and problems of making the transition to genuine communism.

Displaying a somewhat mechanical approach, Kornilov denied that law was a form of social consciousness, insisting that it was simply a formal reflection of the relationships of production. Rejecting Razumovsky’s suggestion that law is ‘a peculiar reflection of a definite aggregate of economic relationships within the human consciousness,’ Kornilov stated: ‘Law is not a form of social consciousness but a form of social relationships.’\textsuperscript{59} This position ignores the ideological role of law.

Kornilov was even more dismissive of the work of Professor Reisner, the most prominent Soviet follower of Petrazhitsky, who had earlier been criticised by Lunacharsky. Kornilov accused Reisner of uncritically following Petrazhitsky’s psychological theory of law. Kornilov sought to

\textsuperscript{55} Ibid. p. 211.
\textsuperscript{56} Ibid. p. 213.
\textsuperscript{57} Ibid. p. 214.
\textsuperscript{58} See Chapter One.
\textsuperscript{59} Jaworskyj, p. 214. Both sets of emphasis appear to be Kornilov’s.
ridicule Reisner's attempt to trace a connection between economic life and subconscious psychological emotions. Reisner wrote that Petrazhitsky dwelt on the individual psychic aspects of man's emotional life 'which characterise his activities—primarily his economic activities'. According to Kornilov, this amounted to seeking the lever of economic relationships in man's psyche and 'one could hardly outdo this psychological fanaticism'. As a matter of fact, Reisner's statement does not make that contention; it merely points to a psychological element in how economic relations are experienced and perceived. Reisner himself claimed that his work refashioned Petrazhitsky's doctrine concerning intuitive law, placing it upon a Marxist foundation. Whatever the merits of that claim, it deserved more serious treatment than it received at Kornilov's hands.

Indeed, Reisner's contributions to the legal debates raised important questions. Reisner had first outlined his views in his 1908 volume *The Theory of Petrazhitsky: Marxism and Social Ideology*. He restated his theory in a modified form in his 1925 book *Law, Our Law, Foreign Law, General Law*. Both Stuchka and Pashukanis devoted pages of their writings to answering his approach, which argued for an ideological role for law to continue under socialism and communism.

Reisner was impressed by Petrazhitsky's view that law consisted of normative ideas existing as psychological reality in the mind of humanity, not identical with the law of the state and sometimes directed against it. This 'intuitive law,' he wrote in 1980, differed according to social groups, including families, social circles and classes. 'And to the extent that it embraces ever broader and broader circles intuitive law becomes pro tanto both powerful and dominant in a given milieu.'

Long before the October Revolution, Reisner had sought to enrich the concept of intuitive law with the Marxist understanding of the class struggle and the revolutionary upheavals produced by the economic and social impasse produced by capitalism.

When the production forces outgrow a particular means of production, and when the latter turns into a brake pressing upon them and fetters confining them, then intuitive law is born under the veil of the existing traditional law. Sometimes it grows for a long time in the unconscious stillness. Finally - as a real law existing and operative, defining the psyche of a given class - it collides with positive law (and in particular with official law) and on this basis of the struggle of the two laws, the tragedy of insurrection and suppression, of revolution and a turn backward, is played. Each class takes its stand under the banner of its own law: the oppressing class clings to the authority of traditional symbols, ideas and state practice; while the insurgent class relies on the demands of a 'justice' whose foundation is in philosophy and morality and history, and not on considerations of historical necessity or on the laws of sociology.

He substantially maintained this analysis of intuitive law in 1925. 'It needs no force in order that it may exist ... the norms of intuitive law ... are an exalted standard and criterion for the appraisal of positive norms [law of the state] and for disapproving them if their content is incongruous.'

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609 Ibid. p. 215.
611 See biographical note in Appendix 1.
614 Hazard (ed) *Soviet Legal Philosophy*, p. 86.
614 M. Reisner, *Law, Our Law, Foreign Law, General Law* in J. Hazard (ed) *Soviet Legal Philosophy*, p. 84
Moreover, he claimed that this conception had guided the initial decrees and measures of the October Revolution.

I refashioned Petraszhitsky’s doctrine concerning intuitive law in the sense that I put it upon a Marxist foundation, and thereby obtained not intuitive law in general (which could here and there furnish individual forms adapted to certain social conditions) but the most genuine class law which was worked out in the form of intuitive law (in the ranks of the oppressed and exploited mass) independently of any official framework whatsoever; and it is for this reason alone that we were able to utilize ‘the revolutionary legal consciousness of the proletariat’ as the foundation of the activity of our revolutionary justice, which at the beginning was without any positive norms whatsoever.65

As a purely factual claim, Reisner’s account of the initial measures of the revolution was one-sided. It will be recalled that Lenin intervened in the drafting of the first decree on the courts to insist that some objective, ascertainable standards, based on the minimum programs of the Bolsheviks and the Social Revolutionaries, had to be included to guide or limit the interpretation of ‘revolutionary legal consciousness’. Nonetheless, there is no doubt that Reisner’s approach was influential in the early period.

In mounting this argument, however, Reisner had a further agenda. He contended that law could not be identified with capitalist law per se and that law would continue to have a role in communist society. Even more, he argued that law could perform a valuable ideological role under socialism and communism in legitimizing the demands and authority of the working people. He had originally outlined this thesis in 1908, criticizing those Marxists who adopted a ‘lawless ideal’ with ‘extraordinary practical disadvantages’:

The claims of the proletariat, asserted as the basis of new social conditions, are thus bereft of all the vigour of legal demands and sink to the position of economic and political importunities. They lose all the force of an ideal robed in legal vestments and all the authority of a categorical legal demand admitting of no objections. They are positively weakened by reason of the unsteady ideology of economic expediency, even though it be founded on the inevitability of the social process... Only when the worker class shall be conscious of its fundamental demands in law, when the legal ideology shall become a part of the social ideal of that class and when law shall have been transferred as an organized element by that class into its future society freed from constraint of every sort – only then will the mighty struggle for economic freedom attain its culmination, and only then will the new law triumphantly take the place of the official constraint of the present time.66

Reisner modified his conception in 1925, stating that he had ‘exaggerated the significance of the legal element’ in insisting that the ‘revolutionary masses must have their own class intuitive law which must lie at the foundation of its future dominance’.67 Defending himself against those who criticized him for taking an idealist approach, he also sought to relate his theory to the materialist interpretation of history.

That the basis of law in class society is economic is beyond doubt: for each class here builds its law on the basis of its position in production and exchange, and the general

65 Hazard (ed) Soviet Legal Philosophy, p. 85.
66 Ibid, p. 72.
67 Ibid, p. 89.
legal order reflects in itself the features of that form of production which in its turn defines the class order. We must make the same observation also with regard to the future communist society whereof the modern Soviet and socialist order is the precursor: law is here built in conformity with its collective economy and with the part played by the proletariat in production. The association between law and economy thus provides us with the first point of our definition: law is the result of economic relationships – and in particular of production relationships. ⁶⁸

Nevertheless, Reisner adhered to his view that law would continue to exist under communism, where it would serve an ideological purpose. He criticized Soviet scholars for denying or underestimating the ideological character of law. 'The fundamental teaching of Marxism concerning law – its teaching as to the ideological character of law – is, with negligible exceptions, either ignored or perverted.'⁶⁹ Reisner argued that legal ideology was not changed by being dependent upon an economic basis.⁷⁰

Referring to Marx’s statement, in his critique of the Gotha Program, that ‘the narrow horizon of bourgeois law’ would be overcome in the communist society of the future, Reisner asked ‘Does this mean that when the narrow horizon of bourgeois law is abandoned every sort of law will disappear as well?’ His answer was:

This problem is not so simply decided, inasmuch as the excerpt taken from Marx contains a proposition which – pointing out the contrast between factual inequality and juridic equality – say that ‘in order to eliminate all these evils, law must be unequal, instead of being equal’. From this it may be supposed that law can continue to exist in communist society in the form of a juridic ideology which, however, will inscribe on its banner the formula of the higher justice to be found only in communist society – that is to say, the law which says: ‘From each according to his ability, to each according to his needs.’⁷¹

However, Reisner’s final answer was that this communist ‘law’ would not be law, at least not in the sense understood by capitalist legal theory. ‘Law,’ as ideology, would no longer exist under communism. His conclusion appears to be at odds with his earlier call for law to remain an ideological tool in the struggle for socialism. But his somewhat strained line of reasoning drew on his consistently maintained insistence that law is an ideological form.

Law and legal ideology are by no means a merely objective (we would say, a merely technical) formulation of existing production relationships. Then it would cease to be an ideology and would become merely a scientific and technical expression of the given relationships without the slightest addition of any subjectivism, refraction, or perversion of any character whatsoever. It must not be forgotten that law is an ‘ideological form,’ and so always bears within itself the seed of a similar perversion and is capable (with the aid of the formal method of presentation) of being isolated from reckoning with reality.⁷²

In another 1925 work, *Problems of the Marxist Theory of Law*, Razumovsky strongly defended the necessity to recognise the ideological role of law. Jaworskyj classifies Razumovsky in the sociological school, yet his analysis had similarities to Reisner’s psychological approach.

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⁶⁸ Ibid. p.97.
⁶⁹ Ibid. p. 95.
⁷⁰ Ibid. p. 103.
⁷¹ Ibid. p. 107.
⁷² Ibid. p. 108.
Razumovsky quoted some of the key passages from Engels' letters to Conrad Schmidt (October 27, 1890) and Franz Mehring (July 14, 1893), where Engels emphasises the need to take into account the ideological peculiarities of jurisprudence, as Marx' and Engels' The German Ideology. Moreover, he correctly pointed out that Marx and Engels commenced their studies with the ideological forms in which law was presented, and, while they had been concerned to trace the socio-economic roots of these forms, had never denied the need to take into account their influence:

The problem of ideology and, in particular, the problem of law, were for Marx and Engels the starting points in the development of their historical view. A critical re-examination of Hegel's philosophy of law ... led them to the material conditions of life in which legal relationships are rooted (emphasis in original).

Razumovsky summed up the conclusions drawn by Marx and Engels as follows:

Marx and Engels quite frequently asserted that reflection of the real economic process takes place in an 'inverted way,' by means of 'placing it on its head.' They used these expressions in order to demonstrate that, in the process of the objectivisation of the thought material, the real relationship between this process and the social reality reflected in it is inverted: it is not the economic process which gives rise to the corresponding forms of consciousness but the other way around; the thought appears as the real source of social actions.

Razumovsky did not deny the economic processes ultimately determine social consciousness; but he pointed out they do not do so directly. On the contrary, because of the 'inverted' appearances generated by the commodification of economic and social relationships, thought itself appears to shape human consciousness. In a passage that echoes some of the analysis made by Plekhanov, Razumovsky elaborated on the 'inverted' process involved:

The reflections of fundamental economic relationships in social consciousness (that is, reflections that historically separate themselves from economic relationships and that are regarded as 'free ideas') become the point of departure of a further thought process: they become a 'condensing lens' and thus give to the new, more particular reflections of social reality an appearance of deductions made from the fundamental guiding 'principles'.

Developing his argument further, Razumovsky pointed out that ideological concepts, properly understood, could serve as essential analytical tools, contributing to more concrete understanding of underlying economic and social relations:

As stated by Engels, ideological notions are not the ultimate foundation. They do not enter into the economic process, into the development of material social relations, as a causal element, but they do serve as a medium for the expression and representation of those of man's activities which constitute this process. Hence, they are an indispensable condition for the development of social relationships... Only such a truly dialectical understanding of the nature of ideology will make it possible to see in it an 'inverted reflection' and at the same time an inevitable side of the social process, that is, a form of

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71 All cited in Chapter One.
72 Jaworskyj, p. 220.
73 Ibid, p. 222.
74 Ibid, p. 222. For Plekhanov, see Chapter One.
social relationships. Only then shall we understand why ideology, because of inner contradictions, abstracts itself from social relationships and at the same time contributes toward their concretisation (emphasis in original).\(^{77}\)

It is not clear how far Razumovsky intended this analysis to apply to law in the transition to communism. Certainly, the Soviet leaders recognised that ‘legality’ continued to play both legitimising and normative roles in their administration. But Razumovsky could be seen to be arguing for an ongoing, or even inevitable, role for ideological ‘inversion’ under socialism. It also seems that he identified himself with Bukharin, whom he cited as an authority for his analysis. Nevertheless, his views were a serious contribution to the legal debates.

The 1925-27 period produced an interesting discussion on the nature of ‘rights’ under socialism. Uspensky's 1925 article ‘Law and Socialism’ argued for a collectivist approach to rights based somewhat on Duguit’s social function theory. Uspensky examined three basic economic rights: to work, to the full product of one's labor and to sustenance (existence). On the first, he argued that capitalism was incapable of providing the right to work, yet the right was unnecessary under socialism, in which work became a public obligation. With regard to the second, the demand for the right to the produce of one's labour was a justified reaction of the exploited, dissatisfied with the unequal distribution of society's produce under capitalism. But it had validity under socialism only in the negative sense that uneamed income was unjust. As Marx had explained in his *Critique of the Gotha Program*, distribution according to labour remained unequal in relation to social needs.

On the third basic right, to the indispensable conditions for existence, Uspensky argued against Novgorodtsev, who based the right on an individualistic conception of a human personality and its dignity. Uspensky preferred Pokrovsky's argument that the complete realisation of the right could only be attained through the socialisation of all means of production. He drew from this some important observations on the nature and role of law under socialism:

> The socialist system of law is distinct from a capitalist system, not because it expands the concept of subjective rights, but because it advances a new principle of juridical regulation. It is well known that the very idea of subjective right—as a right presumably prior to and independent of objective legal norms—has the character of natural-law individualism. This idea came into being as a protest against police-state absolutism and found its expression in the theory of the innate and inalienable rights of man. Indeed, the idea of subjective rights is connected with the goods-producing society. And, if this idea were indispensable to the creation of law, then Pashukanis would be quite right in connecting all legal regulation to the relationships of goods producers in a capitalist society. But is it really so?\(^{78}\)

To answer this question, Uspensky examined Duguit’s social function theory. While Duguit was not a socialist and his construct presupposed private property, nevertheless ‘property, in his opinion ceases to be a right of the individual and is transformed into a social function’.\(^{79}\) Uspensky suggested that Duguit’s view reflected the shift in capitalist economy from independent producers to finance capital and state capitalism. This shift, Uspensky implied, undermined Pashukanis' commodity exchange analysis.

\(^{77}\) Ibid. pp. 224-225.

\(^{78}\) Ibid, p. 230.

\(^{79}\) Ibid, p. 231.
Uspensky argued, in agreement with Goikhbarg, that the Soviet civil code had adopted social function theory to a certain extent. Where Article 1 of the code stated, ‘Civil rights are protected by law, with the exception of when they are used in conflict with their socio-economic purpose,’ it indicated that the scope of rights was determined by collective, not individual, interests.

The rights that we grant are not the innate rights of man; they are rights granted by the state for the purpose of attaining the goals that are indispensable to collective preservation. Such a fundamental goal is the development of the productive forces of the country... The theory of law as a social function is entirely opposed to the concept of law as a system of subjective rights.80

In reaching his conclusions, Uspensky sought to unify aspects of Marxist and capitalist legal theory. He presented the collectivist approach as the logical end-product of a shift in the concept of property made under finance capitalism. He presented his thesis as the ultimate realisation, in a socialist form, of the transition pointed to by not only Duguit but also Comte:

The problem of the socialist system of law implies the replacement of juridical regulation, based on the principle of subjective rights, by the regulation grounded upon the principle of objective law. The juridical system, conceived as a system of subjective rights, did not regulate all aspects of life; it halted before a subject with his rights as an inviolable sanctuary. On the other hand, regulation in conformity with the principle of objective law implied a thorough mastery of social reality, a complete victory of law over life. Following the translation of such a regulation into practice, the idea of rights and the idea of obligations will blend together. Then, August Comte's precept will be fulfilled: 'In the positive state each has duties toward everyone, but no one has any rights ... To put it differently, no one has a right other than the right to fulfill his duty.'81

Although he did not cite Lenin, some support for this view could be derived from Lenin's analysis of finance capitalism in *Imperialism, the Highest Stage of Capitalism.* Writing in 1916, Lenin observed that the rise of giant monopolistic corporations, the dominance of finance capital via the banks and other institutions, the ‘interlocking’ of ownership of the means of production via the stock exchange and the intricate planning of production and distribution on a global scale by rival conglomerates had transformed social relations. In Lenin's words:

It becomes evident that we have socialisation of production, and not mere 'interlocking'; that private economic and private property relations constitute a shell which no longer fits its contents, a shell which must inevitably decay if its removal is artificially delayed.82

However, Uspensky's reference to a 'complete victory of law over life' and his uncritical comparison to Comte's model of 'the positive state' under capitalism indicate a tendency to entrench legality as a means of enforcing new Soviet social relations. This approach was at odds with the classic Marxist view of the withering away of law and the state.

Naumov voiced basic opposition to the 'social function' school in a 1926 article entitled 'The Role and Significance of Legal Forms in the Transition Period'. Naumov emphasised Marx's insistence, in the *Critique of the Gotha Program*, that law protects economic inequality. Under socialism, in the transition to communism, inequality would remain and that was why Marx

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designated the law operating in this first stage of communist society as bourgeois law. Naumov concluded:

Since law, which at the first stage of communist society has a bourgeois character, will disappear completely under full-scale communism, it is inadmissible to speak of communist law, communist property, etc. First, this would be a logical fallacy, *contradictio in adjecto*. Second, this would be a false methodological approach, pregnant with unfortunate consequences concerning the meaning of law, and its significance in man's social life.\(^{83}\)

Naumov rejected the 'very popular view' that human society was inconceivable without law. It was true that law occupied a very significant place in social life and was not artificially invented. It was equally true that legal life changed with social life. But it was not true that law was an inescapable attribute of human society at all stages of its development. 'In a developed communist society -- in which not antagonism but cooperation and economic collaboration will be the motivating forces -- there will be no law and no legal norms.'\(^{84}\)

Naumov addressed the apparent contradiction involved in regarding Soviet law as bourgeois when it sought to promote the development of communism. His views can be seen as an attempted bridge between the classical Marxist view and the developing Stalinist insistence upon the existence and sanctity of 'proletarian law'. Naumov observed that capitalist law protected the interests of the bourgeoisie as a class, not necessarily the interests of individual members of that class, and sought to draw an analogous class role for bourgeois law under socialism. In the course of his exposition, he poured scorn on the social function school.

We say that, judging by its principles, contemporary Soviet law is bourgeois law; and at the same time, we assert that it is proletarian law. There seems to be a contradiction. We are told that only one of these assertions can be true... These objections call for an explanation. First of all, we do not assert that contemporary Soviet law is, *on the one hand*, a bourgeois law and, *on the other hand*, a proletarian law. We reject eclecticism unconditionally. Bourgeois legal codes comprise norms that protect the interests of the working class, for example, the norms limiting the working day. But, with the exception of hopeless Philistines, no one would assert that bourgeois law therefore begins to lose its class character and becomes gradually 'socialised'. The same is true of our civil code. It comprises norms that protect even the interests of private owners. This, however, does not mean that our law is losing its proletarian class character. We assert that our Soviet law is *at one and the same time* both proletarian and bourgeois.\(^{85}\)

Naumov acknowledged Lenin's warning that in the transition period, the state would remain 'a bourgeois state without the bourgeoisie'. But he suggested that just as the bourgeois state protected the interests of the ruling class as a whole, so it did under socialism.

*Being a bourgeois law in its principle, it protects the interests of the proletariat as a class, whose ultimate objectives are the destruction of all classes, all law, all states, and the creation of a classless society without law and without a state.*\(^{86}\)

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\(^{83}\) Jaworskyj, p. 237.

\(^{84}\) Ibid, p. 238.

\(^{85}\) Ibid, p. 245.

\(^{86}\) Ibid, p. 246.
These mental gymnastics ignored the material circumstances confronting the Soviet state. The contradiction between the bourgeois character of the state and the interests of the working masses was a real one. It reflected the continued recourse to capitalist property rights and norms of distribution, which entrenched inequality and therefore threatened the interests of ordinary people.

As Trotsky observed at around the same time—in November 1925—in the English foreword to *Towards Socialism or Capitalism*, the Soviet government was quite aware that the NEP brought with it the dangers of renewed class polarisation, particularly in the rural areas between wealthy, employer peasant farmers and pauperised hired labourers. In a prescient warning of the future evolution of the Soviet Union, Trotsky wrote:

> As far as there is struggle between the capitalistic and socialistic tendencies in our economic life -- it is the cooperation and competition between them which actually constitutes the essence of the New Economic Policy -- the issue of the struggle depends on the rate of development of the two tendencies. In other words, should State industry develop more *slowly* than agriculture and should the latter *with increasing speed* produce the two opposite poles we have spoken of -- the capitalistic farmers at the top, the proletarians at the bottom -- this would, of course, lead to a restoration of capitalism.  

While praising Pashukanis and Stuchka for their contributions to Marxist legal theory, Naumov criticised Stuchka for insufficiently taking up the cudgels against 'legal nihilism,' which Naumov identified with Goikhbarg. This 'nihilism,' Naumov argued, was an echo of earlier 'militant communism' and had its roots in nihilist tendencies that emerged in the struggle against Tsarism in the 1860s, protesting against all forms of oppressive law. According to Naumov, in combatting the 'normativists,' Stuchka had underlined the fact that law was a social relationship, but had failed to 'see the connection between law and other social phenomena.'

Naumov condemned Goikhbarg for restating in his 1924 *Foundations of the Private Property Law*, that law was a 'stupefying opium of the people'. Even though, as Naumov noted, Goikhbarg denied that Soviet rules and regulations were 'law,' Naumov declared that, to be consistent, Goikhbarg would have to advocate anti-state propaganda.

> He proposes to struggle against all law in general. He proposes to conduct anti-law propaganda in the same way as anti-religious propaganda is being conducted. In his opinion, legal regulation of social relationships has no place in the transition period: 'That which we call Soviet law is not a law *but rules established by the Soviet authorities, correct norms, expedient rules, rules realising the goals for which they have been created...* To be consistent, A. G. Goikhbarg should also advocate anti-state propaganda.'

Naumov asserted that the principal defect in Goikhbarg's views lay in an under-estimation of the significance of legal forms in the history and commodity-producing society. By depicting law as a bourgeois invention for deceiving and exploiting the masses, Goikhbarg had jumped to the conclusion that all law simply could be abolished following a socialist revolution, regardless of the continuation of commodity-money relationships. This approach, Naumov declared, smacked of the views of the French socialist Proudhon, whom Marx had criticised. For all the vehemence

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88 Jaworskyj, p. 247.
89 Ibid, p. 249.
of this rhetoric, Goikhberg's insistence that Soviet regulatory measures were not 'law' in the same sense as bourgeois law has merit and accords with Lenin's view that the state would begin withering away, in the sense of taking on a qualitatively different character, immediately following the seizure of power.

**1927-37: From debates to diatribes**

Even though Pashukanis lined up against the Left Opposition, he came under criticism as early as 1927, which was the year in which Trotsky and other leaders of the Left Opposition were sent into exile. Stuchka made a critique of Pashukanis' treatise in a report reprinted in his 1927 *Revolution of Law*. He differentiated himself from Pashukanis by asserting that Pashukanis' conception covered only bourgeois law and glossed over the class role of law, including feudal law and Soviet law. His five main objections were that Pashukanis (1) underestimated the role of the state, (2) rejected the class character of law, (3) linked law exclusively to exchange relations, (4) denied the concept of Soviet law and (5) displayed extreme abstractness.90

These criticisms have force, as discussed in Chapters Seven and Eight, but the key issue for the present purpose is (4) – the reference to 'Soviet law'. By 1927, the role of law was being entrenched, as a special category called 'Soviet law'. Its transitory character as an inevitable but risky and contradictory consequence of the continuation of unequal, market relations was being downplayed.

This process took a new turn after Stalin, in his political report to the 16th party congress in 1930, effectively repudiated Lenin's insistence on the inherent and immediately-commencing withering away of the state. Stalin now labelled that as Bukharin's position.

> We are for the withering away of the state, and at the same time, we stand for the strengthening of the dictatorship of the proletariat, which represents the mightiest and most powerful authority of all forms of state that have ever existed. The highest development of the state power for the purpose of preparing conditions for the withering away of the state power, ... this is the Marxist formula. Is this 'contradictory'? Yes, it is 'contradictory'. But this contradiction springs from life itself and reflects completely the Marxist dialectic.91

Stuchka felt compelled to 'correct' his earlier stance on the withering away of the state in a 1931 article 'My Journey and My Errors'. He drew a distinction between 'proletarian law,' which existed in the transition to socialism, and a new sense of law -- 'the law of the socialist society' that would last beyond the elimination of the state as an organ of class oppression.92 Pashukanis followed suit in his 1932 article 'Theory of State and Law,' which mirrored Stalin's pronouncement.

> The achievement of the practical construction of socialism must be accompanied by a growth of the might of the state, both externally and internally. This does not in the least contradict the theory of Marx and Lenin concerning the withering away of the state during the higher phase of communism.93

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90 Zilic, p. 230.
91 Ibid. p. 229.
92 Ibid. p. 233.
93 Ibid. p. 234.
These recantations did not save Stuchka, Pashukanis and others. The crowning glory of the Stalinist regime’s repudiation of Marxism came at the 7th Congress of the Communist International in August 1935. It declared that with the nationalisation of industry, the collectivisation of agriculture and the liquidation of the kulaks as a class, ‘the final and irrevocable triumph of socialism and the all-sided reinforcement of the state of the proletarian dictatorship, is achieved in the Soviet Union’. Trotsky pointed out that this resolution was entirely self-contradictory.

If socialism has ‘finally and irrevocably’ triumphed, not as a principle but as a living social regime, then a renewed ‘reinforcement’ of the dictatorship is obvious nonsense. And on the contrary, if the reinforcement of the dictatorship is evoked by the real needs of the regime, that means that the triumph of socialism is still remote. Not only a Marxist, but any realistic political thinker, ought to understand that the very necessity of ‘reinforcing’ the dictatorship -- that is, governmental repression -- testifies not to the triumph of a class less harmony, but to the growth of new social antagonisms.  

Stuchka died before the great purges of 1936-37, but there is every reason to believe that he would have been executed along with Pashukanis. By 1938 Stalin’s judicial henchman, A. Vyshinsky had made the improbable discovery that the entire jurisprudential leadership of the Soviet Union had for years been enemies of the state. Vyshinsky, the chief prosecutor of the Moscow Trials, denounced the ‘Trotsky-Bukharin band headed by Pashukanis, Krylenko and a number of other traitors’.

Over the course of years an almost monopolistic position in legal science has been enjoyed by a group of persons who have turned out to be provocateurs and traitors -- people who actually knew how to contrive the work of betraying our science, our state and our fatherland under the mask of defending Marxism-Leninism.

Vyshinsky’s diatribe drew a connection between the new doctrine of ‘socialist legality’ and the program of ‘socialism in one country’. He railed against anti-Soviet ‘runt-theories’ such as ‘the impossibility of constructing socialism in the USSR’ and ‘the provocateur theory of Pashukanis and others concerning Soviet law as bourgeois law, as law withering away’.

Vyshinsky gave a number of examples of the need for law, all of which concerned the protection of private property interests. ‘To reduce law to policy would be to ignore such tasks confronting law as that of the legal defence of personal, property, family and inheritance rights and interests, and the like.’

**Conclusion**

Certain conclusions can be drawn. There is a marked contrast between the post-1917 discussion and the post-1923 degeneration. The period after the revolution was characterised by genuine legal debates and efforts to minimise legal formality, replacing state coercion with mass involvement.

The adoption of the NEP in 1921 caused a shift back to legalism, particularly concerning the protection of private property rights. After 1923, with the ascendency of Stalin and the doctrine of

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95 Ibid, p. 62.
96 Zile, pp. 258-59.
'socialism in one country,' a new atmosphere of 'corrections' and diatribes set in, accompanied by a strengthening of the repressive state apparatus. The classical Marxist perspective of the withering away of the state and law was ditched in favour of the entrenchment of a legal edifice, erected in the name of 'socialist legality'. In this sphere, as in others, Stalinism was a repudiation of Marxism, not a continuation of it.
CHAPTER SEVEN

PETER STUCHKA: THE FIRST SOVIET JURIST

Introduction and biography

Latvian-born Bolshevik Piotr Ivanovich Stuchka (1865-1932) was probably, apart from Lenin, one of the most pivotal participants in the early development of legal practice and theory following the October 1917 Revolution. In various roles, as a party leader, Commissar of Justice, text writer, judge and academic, he remained a central figure in the realm of legal policy throughout the period of the New Economic Policy (1921-24), the defeat of the Left and United Oppositions (1923-27) and the consolidation of Stalin’s grip on power (1927-30).

In these capacities, Stuchka initiated many of the policies and statutes of the Soviet government and was actively engaged in the lively legal debates of 1917-24, often serving as a reference point for the contending schools of thought. While never brilliant, and often turgid in his attempts to apply the writings of Marx, Engels and Lenin, Stuchka was clearly earnest, dedicated and principled. Having been a revolutionary socialist all his adult life, a leader of the Marxist movement in Latvia and an early supporter of Lenin and the Bolsheviks following the 1903 split, with the Mensheviks, he loyally served the Soviet government throughout times of enormous turmoil and hardship. Moreover, to his death (of natural causes) he defended the basic tenets of classical Marxist jurisprudence: the purely transitional character of the dictatorship of the proletariat; the withering away of the state; the possibility of organising human society without formal legal forms; the vision of communism as a classless and stateless society.

Nevertheless, he sided with the emerging Stalinist regime against the Marxist Opposition after 1923, adopted Stalin’s doctrine of building socialism in one country and increasingly adapted his views to those of the ruling layer. Indeed, both in his prestige and his writings, he provided a veneer of orthodoxy to the bureaucratic caste that formed Stalin’s power base, justifying the concentration of power in its hands under the banner of ‘socialist legality’. Even so, toward the end of his life, his continued adherence to basic Marxist concepts brought him under officially-sponsored criticism, even laced with barbs that some of his contributions to Soviet law had been ‘counter-revolutionary’. Dying in 1932, he was spared the full ignominy and probable execution that would have been his fate in Stalin’s great purges of 1936-37. By the 1950s, after Stalin’s death and Khrushchev’s efforts to find new political support for the Kremlin apparatus, Stuchka became officially recognised as one of the principal architects of the Soviet legal system.

His relationship with Pashukanis, the 1920s legal theorist now best-known in the Western world, was somewhat complex and symptomatic of the broader rise and degeneration of political and legal discussion in the early years of the Russian Revolution. Stuchka was initially a mentor and vigorous defender of Pashukanis, welcoming the latter’s probing of the commodity-related form of law as an important contribution to Marxist theory in dealing with the contradictions posed by the NEP. By 1927, in aligning himself with Stalin and Bukharin against the United Opposition of Trotsky, Zinoviev and Kamenev, Stuchka began to differentiate himself from Pashukanis, making substantial criticisms of Pashukanis’ theories. While, as this chapter will examine, Stuchka’s critique had merit, it also assisted the Stalinist machine by attacking Pashukanis’ insistence that in the transition from socialism to communism, law and the state itself necessarily retained vestiges of capitalist social and economic relations. By 1931, following Stalin’s blunt assertion of the necessity for a protracted historical period of a strengthened dictatorial state apparatus, both Stuchka and Pashukanis retracted aspects of their writings and became reduced to accusing each other of undermining the Soviet order.
For these reasons, a study of the essential features of Stuchka's role and writings is critical to an understanding of both the richness and subsequent decay of early Soviet legal thought. Many, but not all, of his prodigious writings - treatises, textbooks, essays, articles, reviews and encyclopedia entries - have been published in English since the late 1980s, facilitating this work.\(^1\)

Stuchka was born to a peasant family near Riga, the capital of the Latvian province of the Russian Empire, in 1865. Little is known of his early life, but he entered St Petersburg University as a law student in 1884. St Petersburg was the most industrialised, European and cultured city of Tsarist Russia, and therefore the most politically active and radicalised. As a student, Stuchka began to acquaint himself with the writings of Russian revolutionaries, as well as Marx and Engels and the father of Russian Marxism, Plekhanov.\(^2\) Stuchka obtained a law degree in 1888, but immediately began work as a political activist and journalist, writing for liberal Latvian newspapers. He became associated with Lenin as early as 1895. For his activities, he was exiled in 1897 but returned and in 1904 founded the Latvian Social Democratic party and led it into an alliance with the Russian party. He participated in the 1905 Revolution and moved to St Petersburg, where he defended many revolutionaries in the Tsarist courts. In 1906 he resigned from the central committee of the Latvian party in opposition to the Menshevik leadership and became leader of the Latvian Bolsheviks the next year. During World War I, he helped politicise the Latvian rifle regiments, which became strong supporters of the Bolshevik cause in 1917.

Stuchka is known to have been a member of the Petrograd Committee of the Bolsheviks in February 1917, and a member of the Bolshevik faction of the Petrograd Soviet following the February 1917 overthrow of the Tsar. Trotsky recorded that Stuchka was one of 14 Bolshevik candidates for the Presidium at the Congress of Soviets of October 1917, with Stuchka representing the Lettish Bolsheviks.\(^3\) In the first Soviet government, Stuchka was named Commissar of Justice and was actively involved in drafting the first revolutionary decrees, including those on the abolition of the old Tsarist courts.

He returned to the Baltic region in late 1918 as the political situation developed there. Shortly after, the German army was finally driven out and Stuchka became the first prime minister of the Latvian Soviet Republic. However, in January 1920 his government was overthrown in the course of the Russian Civil War, through the foreign military intervention against the Russian Revolution.

Stuchka then returned to Moscow and resumed his legal work. The launching of the New Economic Policy posed major issues for the development of the legal system. Stuchka and his pupil Pashukanis were prominent in the legal debates that ensued. Stuchka held leading positions in the Communist Academy, was a delegate to the Central Executive Committee of the Communist International and leader of the Latvian section. In 1921, he was appointed a commissar in the Justice Commissariat, from where he guided the programs of re-legalisation and re-codification necessitated by the 'retruct' to the limited, state-regulated capitalism of the NEP. At the request of the Party leadership, he wrote *The Revolutionary Role of Law and State: A General Doctrine of Law* in just four months during 1921, making the first attempt to outline a Soviet theory of law. In January 1923, Stuchka became Chairman of the Supreme Court of the Russian Republic and a member of the Control Commission of the Communist International. As a

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2 *Stuchka Selected Writings*, p. ix.
leading figure in the Communist Academy, Stuchka organised its section on the general theory of law, which became the leading authority on Marxist jurisprudence. He was also a Professor of Law at Moscow State University, a law lecturer in the Institute of Red Professors, and the first Director of the Moscow Institute of Soviet Law.⁴

Role as early Commissar, legislator and judge

Between November 1917 and July 1918, the Soviet Government, led by Lenin, enacted some 950 decrees and other pieces of legislation. These included the abolition of the police, the standing army and the civil service, as well as the nationalisation of basic industries and land. One of the earliest decrees, decree number one on the Court, was initiated by Stuchka and drafted by the People’s Commissariat of Justice. As previously noted, the decree replaced the old legal system with a minimal system of People’s Courts and Revolutionary Tribunals, with judges instructed to be guided by revolutionary consciousness and the programs of the Russian Social Democratic Party and the Party of Revolutionary Socialism. According to Stuchka, in his essay, ‘Lenin and the Revolutionary Decree,’ Lenin supported the decree vigorously, added his own amendment to its passage through the Council of Peoples Commissars, by-passing the Central Executive Committee, where it might have met opposition from the Left Socialist Revolutionaries, who were then in coalition with the Bolsheviks.

In December 1919, Stuchka, who had returned from Latvia, drafted the first official Soviet definition of the concept of law. As noted earlier, the ‘Guiding Principles of the RSFSR Criminal Law’ declared: ‘Law is the system or order of social relations corresponding to the interests of the ruling class and protected by the organised force of that class.’ Stuchka later wrote that the ‘most fundamental merit’ of this definition was that compared to bourgeois jurisprudence

for the first time it puts upon firm scientific ground the problem of law in general: it renounces the purely formal view of law and sees in law a changing social phenomenon rather than an eternal category.⁵

There is no doubt that Stuchka’s definition pointed to the class nature of law. Yet, his sweeping definition was problematic in that it reduced law to a social relationship, without clarifying what was unique or significant about the legal form in which the social relations were expressed. Indeed, there was a tension with another section of the Guiding Principles, which stated:

Criminal law is composed of legal norms and other legal measures with which the system of social relationships of a given class society protects itself from violations (crimes) by means of repression (punishment).⁶

The references to ‘norms’ and ‘measures’ indicate a more concrete content than that suggested by Stuchka’s ‘social relations’.

In two early essays – ‘A Class Court or a Democratic Court?’ (1917) and ‘Proletarian Law’ (1919) – Stuchka reinforced the need to discard entirely the Tsarist legal system. At the same time, he pointed to two types of law in the old Russian Empire: rules of a more or less technical nature that ‘did not contradict revolutionary legal consciousness’ and rules determining the very

⁴ Stuchka Selected Writings, p. xvi.
⁶ Ibid., p. 63.
nature and course of the old regime. The initial phase of the socialist revolution would seek
to promote policies that would achieve the ‘burning’ of the latter and the retention of the former.

In his 1919 article, Stuchka sought to develop the de-legalisation and democratisation of social
regulation, arguing that civil relations should be fully comprehensible to all citizens. He also saw
decrees as having an educational and normative value. ‘Proletarian law is primarily a
simplification, a popularisation of our new social order,’ he wrote. He insisted that the very term
‘proletarian law’ was only permissible within definite limits.

We may speak of proletarian law itself only as the law of the transitional period, of the
period of the proletarian dictatorship... Alternatively, we may speak of law in the
socialist society, using an entirely new meaning of the word. With the elimination of the
state as an oppressive mechanism in the hands of one class or another, social relations
and the social order will be regulated not by coercion but by the conscious good will of
the working people, i.e., of the whole new society.\(^8\)

Stuchka also drew attention to the fact that the Russian masses had substantially abolished the old
legal system before the October Revolution. The standing army and police were destroyed and
‘the popular masses abolished the old courts in practice’ well before the Workers and Peasants
Government did so formally. In doing so, the masses also overturned the ‘misleading’ notion of
three separate powers – legislative, executive and judicial.\(^9\)

Stuchka further reviewed the sweeping scope of the eight principal opening decrees of the
revolution and the extent to which they fundamentally overturned the old property relations that
underpinned the legal system: the abolition of private land ownership, the nationalisation of the
means of production and the abolition of inheritance except for small items of property. He
concluded:

We see how the proletarian revolution has directly or indirectly overthrown the
foundations of bourgeois society one after the other. We have listed in this section a total
of eight short decrees. As a result of them, stone by stone, nothing remained of bourgeois
law.\(^10\)

**Codifier of Soviet law for the NEP**

Stuchka initially recognised the dangers inherent in the retreat made in adopting the NEP, and
maintained his view that, while legal forms were necessary during the NEP, all law would wither
way with communism. While praising Magerovsky as ‘a Marxist scholar who has played an
outstanding role in works on Soviet law,’ he criticised Magerovsky for treating law as a social
institution, rather than a class one. At the same time, Stuchka laid the basis for entrenching the
role of law in Soviet society by embracing a prognosis whereby the attainment of communism
would be a prolonged process. He said it would be ‘contrary to expectation’ for the final
disappearance of class and class differences to occur ‘within our lifetimes’. Thus, Soviet society
would have to be a ‘legal state’ and this legal order would have to be protected in every possible
way ‘at least at the present time’.\(^11\)

\(^7\) *Stuchka Selected Writings*, p. 5.
\(^8\) Ibid., p. 9.
\(^9\) Ibid., pp. 13-14.
\(^10\) Ibid., pp. 16-18.
\(^11\) Ibid., pp. 25-27.
Stuchka also insisted, in replying to criticisms of Soviet policy from the Moscow journal *Law and Life*, that Marxists were falsely accused of having no faith in law in general. Rather, he said, the revolution had overturned "their laws". Stuchka then proposed a general definition of law as "a system or order of social relations or, in other words, a system of the organised defence of class interests". This formulation, which was to form the bedrock of the Soviet, and later Stalinist, definition of law, was conceived with the purposes of the NEP in mind. Law was defined in class terms to bolster its revival under the NEP, with the task of rendering law historically outmoded relegated to the indefinite future.

Stuchka felt obliged to argue that in abolishing the old courts and laws in 1917, the Bolsheviks, far from becoming "anarchists," had created new class courts and granted them the power to fill the legal vacuum by making law in the same sense as English common law judges. He also contended that the 1917 invocation of "revolutionary legal consciousness" to guide the courts was adapted from Petrashtsky's psychological school of legal theory. This suggestion is difficult to reconcile with the debates that Stuchka had with Petrashtsky's principal Soviet follower, Reisner.

At the same time, Stuchka's views were clearly influenced by his and other Bolshevik leaders' concerns about the pro-capitalist political pressures that the NEP would generate. "If before this, coherent laws were extremely desirable for the revolution, in retreat they became positively necessary." He also insisted that the courts must be guided by an understanding of the purposes and objectives of the socialist revolution, and not only by the codes being legislated to give effect to the NEP. In fact, the codes had to be regarded as transitional concessions made by the Soviet government in the interests of securing the revolution's future:

The laws of the NEP period are a retreat but not a return to the old. And all the gaps, unclear points, and exact meanings must be explained from the perspective of the revolution rather than the counterrevolution. The People's Court, the class jurist, must firmly remember that the laws of the Workers' and Peasants' Government, and the workers' parliament (the all-Russian Central Executive Committee), are obligatory for them. They are not merely externally obligatory, but are obligatory as the reflection of the conscious of the present stage, in the form of part of the class interest, namely concessions in the interests of further victories of the class, and no more. [emphasis in original]

*Legal text writer, theorist and participant in legal debates*

In his 1921 text, *The Revolutionary Role of Law and State*, which was widely used in law schools, Stuchka sought to provide a theoretical framework for re-legализation under the NEP. Sharlet, Maggs and Beirne suggest that Stuchka's volume contains three major arguments:

1. Law is the system or order of social relationship corresponding to the ruling class and protected by the organised force of that class. Law has two types: a) rules stem from sectional private interest and b) technical rules of a purely administrative nature.

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15 Ibid, p. 32.
14 Ibid, p. 35.
13 Ibid, p. 35.
12 Ibid, p. 35.
11 Ibid, p. 35.
2. Law is also a product of class struggles that occur in the processes of production and distribution.

3. Law has a vital role to play in the transition from capitalism to communism. But the law of the transitional period -- Soviet Law or 'Proletarian Law' -- is a temporary formal authority that primarily involves a simplification and popularisation of the new social order, supported by both coercion and ideological persuasion.

The NEP required the restoration of a more central role for law in order to protect the private property and other interests of the entrepreneurs and investors, to whom the Bolsheviks were making economic concessions. In two essays -- 'The Marxist Concept of Law' (1922) and 'Notes on the class Theory of Law' (1922) -- Stuchka insisted that Bolshevism was not opposed to all forms of legality. Legality had to be understood in the context of the specific relations of production and the requirements of the Soviet State.

For the Bolshevik jurists, the restoration of law had to be accompanied by a Marxist critique of Soviet Russia’s essentially bourgeois legal system, in preparation for the time when the party could end the retreat and resume the process of the withering away of law. During this period, Stuchka sought to counter bourgeois jurisprudence and its influence within Russia. In particular, he attacked the psychological theories of law that had been advanced before the revolution by Petrakhitsky and after the revolution by Reisner.

A further 1922 article by Stuchka, entitled 'Notes on the Class Theory of Law', illustrates a combative, yet tolerant approach to differences with fellow legal activists and scholars. Energetic debates were beneficial in order to develop ideas. 'Constructive and sharp polemicism is, of course, the best and most lively method of explicating differences of expression and clarifying thought,' he wrote. Stuchka criticised two diametrically opposed tendencies among Soviet jurists -- to equate the NEP codes with old capitalist law, on the one hand, and to insist that Soviet law was entirely new, on the other. Giving the example of allowing judges to annul unjust or usurious contracts, he said such measures were 'old, valuable principles of bourgeois law,' even under Tsarism, which were generally only given lip service before the revolution. Stuchka praised Gorkhbang for going significantly deeper into the question by noting unique peculiarities of Soviet law, such as confiscations and nationalisations, but also chided Gorkhbang for not openly stating that the Soviet order was actually making use of the old, bourgeois principles.

Later in the article, Stuchka criticised Magerovsky for arguing that Soviet law had a 'dual nature': still containing elements of bourgeois law as a legacy of the past, while comprising elements of socialist law as far as it was directed toward the future. According to Stuchka, this was 'an incorrect and deeply unjust accusation'. He emphatically denied any 'dualism' in Soviet law, while conceding that one could perhaps speak of 'parallelism'. Somewhat unclearly, Stuchka merged together two propositions. First, that bourgeois law could not be eliminated by the revolution with one blow, second that bourgeois law was being tolerated because of the NEP retreat. He further asserted that the legal codes amounted to a conscious and regulated compromise under conditions of state capitalism, in which the Soviet government had permitted private capitalism. 'We reach this compromise consciously and in the interests of the politically ruling class of the working people.'

16 Ibid, p. 40.
17 Ibid, p. 41.
18 Ibid, p. 45.
This statement retained considerable validity as long as the Soviet state, and the Bolshevik party itself, remained healthy and democratic political organisations, able to gauge and express the interests of the working people. Yet it seriously underestimated the economic and political pressures produced by the revival of private property market relations. These indeed gave the Soviet state a dual character – socialist in the sense that it was based on the overturning of capitalist property and was led by a genuinely Marxist party; capitalist in the sense that economic relations, including the distribution of society’s products according to money payments rather than social need, reflected substantial capitalist tendencies operating on a national and global scale. The very conception of ‘state capitalism,’ that is, state ownership of basic production within an overall capitalist framework, conceded as much. These pressures could be better understood and combatted if they were frankly acknowledged, as Magerovsky proposed.

Stuchka’s article drew the emphatic conclusion that: ‘Legality is and will remain revolutionary.’ He added that the history of the October Revolution had made it possible to discover ‘post factum’ that ‘all law in class society is class law in the interests of the ruling class, i.e., the class in power.’ These propositions are one-sided, and therefore flawed, in two respects. They deny the primacy of the economic relations, which can ultimately undermine ‘the class in power’ and they leave aside the central aim of revolutionary socialism, the development of a classless, stateless society. Indeed, in the 12 programmatic points that Stuchka drafted at the end of his article, he left open as a ‘debatable academic question’ whether law would exist in post-class society.

In 1923, two articles by Stuchka – ‘A Materialist or Idealist Theory of Law?’ and ‘In Defence of the Revolutionary Marxist Concept of Law’ – substantially took the form of a polemic against Petrachitsky’s psychological theory of law and its principal Soviet adherent, Reinsner. While it involved some unclear and perhaps pedantic disputes, the primary reason for this debate appears to be that, like Magerovsky, Reinsner saw NEP law as potentially contradicting the interests of the Soviet state. In a somewhat confused manner, Stuchka argued that law is part of the economic base of society – a material factor in shaping economic life – rather than part of the ideological superstructure.

In the course of the debate, Stuchka suggested that law has three forms. First, it is the concrete form of a social relation. Second, it is an abstract form of a social relation, the legal form of that relation. Third, it is ‘using Petrachitsky’s fashionable phrase,’ the ‘intuitive form’: ‘the psychological experience which, with respect to a given social relation, occurs within a person, his evaluation of this relation from the point of view of justice, internal legal consciousness, etc.’

These views were thrown into sharper relief in 1924, when Pashukanis published his General Theory of Law and Marxism. As examined elsewhere in this thesis, Pashukanis argued that law is an inherently bourgeois phenomenon because it reflects commodity exchange. There could never be proletarian or socialist law. Pashukanis conceived of the transition to communism not as the utilisation of new legal forms, but as the gradual extinction of the legal form in general. He argued that the Soviet Union had two forms of law; administrative/technical rules that regulated the general economic plan and social life, and the civil and commercial codes that governed the commodity exchange underpinning the NEP. Pashukanis characterised the law of the NEP including the new criminal code, as bourgeois law.

19 Ibid, pp. 52-53.
20 Ibid, p. 53.
21 Ibid, p. 73.
Pashukanis' argument contradicted one of the central aspects of Stuchka's theory of law, namely that law is a class phenomenon. At several points in his *General Theory*, Pashukanis explicitly criticised Stuchka's definition of law and his failure to examine the historical and economic roots of the legal form. Nevertheless, in the preface to the third edition of *Revolutionary Role of Law and State*, published in 1924, Stuchka noted the number of new works on the Marxist theory of state and law and identified Pashukanis' work as the most outstanding. With a few reservations, he praised Pashukanis' book as a 'valuable contribution to our Marxist theoretical literature on law' that 'directly supplements my work, which provides only an incomplete and generally inadequate general doctrine of law.' In this way, Stuchka helped elevate Pashukanis from academic obscurity.

Several scholars, including Sharlet, Maggs and Beirne, have characterised Stuchka and Pashukanis as representing the moderate and radical wing, respectively, of the commodity exchange faction of Soviet jurists. There is no doubt that Stuchka and Pashukanis both adhered to this school, at least to the extent that it provided a framework for reconciling the requirements of the NEP with the withering away of law. Stuchka proposed to restrict the application of Soviet civil law to the regulation of surviving private property relations. Within this realm, Stuchka recognised the principle of equivalence, based on commodity exchange. However, the internal relations of the socialist sector of the economy were to be excluded, as not requiring judicial regulation.

Thus, Stuchka and Pashukanis agreed on distinguishing 'law,' which applied to commodity exchange, from Soviet regulation. But from that point of agreement, their views diverged. A closer examination of their differences in the context of the Stalinist suppression of the Left and United Oppositions between 1924 and 1927 suggests a more complex dynamic in their relationship. Initially, it seems that Stuchka welcomed and fostered Pashukanis' theoretical work, in so far as it made a seemingly coherent and sophisticated contribution to Marxist legal theory and helped to explain the dichotomy between the reinstatement of legal forms during the NEP and the ultimate withering away of law. But the onset of the battle with the Opposition highlighted defects and perceived excesses in Pashukanis' analysis.

The 1923–27 struggle against the Opposition

In his 1925 article 'Lenin and the Revolutionary Decree', Stuchka sought to identify with Lenin. He cited the late leader out of context as supporting the need for law and legality to achieve revolutionary ends.

From 1925 to 1927, Stuchka initiated and undertook a major project, *The Encyclopedia of State and Law*. He edited the three-volume undertaking and wrote many of its key entries. Sharlet, Maggs and Beirne characterise his entries as 'in retrospect, pedestrian, repetitive and unenterprising' and attribute these defects to 'the lack of serious Marxist analysis both of legal history and of the history of ideas'. Their first observation seems fair but not the second. Rather, the increasingly turgid tone and content of Stuchka's contributions relate to their underlying thrust, which is to justify, as a more or less permanent requirement, the use of state repression. Stuchka declared that the dictatorship of the proletariat was likely to be "extremely long".

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22 Ibid, p. xviii.
24 Stuchka Selected Writings, p. 61.
In his entry on ‘Soviet Law,’ written in 1927, just as the struggle against the Left Opposition was at its height, Stuchka reiterated his rejection of the view that Soviet law in any way a remnant of bourgeois law, retained as a temporary measure until the withering away of the state and law. In doing so, he quickly glossed over the well-known passage in The State and Revolution, where Lenin, quoting Marx, warned that post-revolutionary law would still be bourgeois law, enforced moreover by a bourgeois state, until it faded away. Sharlet, Maggs and Beirne conclude:

Thus, while the Encyclopedia entries are often cryptic and dogmatic, they served the important purpose of providing a theory of law that could support the Soviet legal system not for the brief transition period envisioned by the more radical communists, but for decades, indeed for the indefinite future. Their logic in fact suggests the abandonment of the idea of the withering away of the state.25

Stuchka’s entry on ‘bourgeois law’ explicitly repudiated Marx’s comment, in Critique of the Gotha Program, that bourgeois law would continue into the first phase of communism. Stuchka argued that the unexpected length of the transition period required a qualitative reappraisal of Marx’s prognosis. At the same time, suggesting the theoretical mess he found himself in, Stuchka conceded that Soviet law included ‘elements of bourgeois law’:

We see that life, in our revolution, has somewhat departed from Marx’s latter view, because under the extreme length of the transitional period, there has naturally been formed a special Soviet law for the transitional period. This obviously contains elements of bourgeois law, but in essence it introduces profound changes in principle into all social relations, including law (emphasis in original).26

Line up against Opposition

Stuchka, through the Communist Academy, launched the journal Revolution of the Law in 1927. Ostensibly directed against foreign bourgeois jurists, the periodical served the struggle against the Left and United Oppositions. Stuchka’s article ‘State and Law in the Period of Socialist Construction,’ which appeared in the journal’s second edition, denounced the United Opposition, accusing it of sowing discord.27 Stuchka made only a fleeting, unclear and unsubstantiated reference to the Opposition, attributing to it the position that the state was a dual class formation – worker and peasant – and should become a two-party government. No details or quotations were offered to support these allegations.

Stuchka’s article marked an adjustment of his earlier views, justifying a lengthy period of socialist transition, during which Soviet law would have a positive and even creative function, rather than being regarded as a residual product of the poverty and capitalist encirclement of the Soviet state.

Meeting in the wake of the defeat of the British general strike of 1926 and the Chinese revolution of 1926-27, which paved the way for the removal of Trotsky and other Opposition leaders, the Fifteenth Party Congress of 1927 adopted a seemingly optimistic orientation. It called for the end of the NLP’s strategic defeat, the accelerated construction of socialism and a ‘cultural revolution’ throughout Soviet society. Under these conditions, while still praising the originality of Pashukanis’ theses, Stuchka made serious criticisms of them.

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26 Ibid, p. 97.
First, he argued that Pashukanis wrongly identified the origin of law solely in commodity exchange. Law arose out of the appropriation of land and in the class struggles in the processes of production. Law reflected not simply the exchange of commodities but the authority and power of the dominant class.

Secondly, Stuchka argued that while Pashukanis had identified the connection between commodity fetishism, as analysed by Marx, and legal fetishism under capitalism, he had erred in extending this critique to law in general. Law pre-dated capitalism and even commodity exchange, and real differences existed between feudal, capitalist and Soviet law.

Thirdly, Pashukanis had based his theory on simply commodity exchange in the formative period of capitalism, whereas advanced capitalism involved production for capital accumulation, not exchange and saw the advent of imperialism, featuring capitalist monopolies, trusts and syndicates, operating with state support.

Fourthly, because Pashukanis had falsely equated bourgeois law with law in general, he committed the utopian error of seeing the withering away of law involving a direct transition from bourgeois law to non-law.

Finally, flowing from the above, Soviet law could and should have a creative role in the period of socialist construction. 'Soviet law must be the political economy of the transitional period, the economic policy of Soviet power laid out in paragraphs.' Although Soviet law was 'in general a reprint of bourgeois law,' it existed without a bourgeoisie. Soviet law was a necessary, relatively temporary feature of the proletarian dictatorship, whose object was socialist planning and whose Soviet character was guaranteed by the class nature of the workers' state.

In his 1928 article, 'Culture and Law,' Stuchka made a further adjustment. Under the banner of the 15th Congress call for 'cultural revolution,' he outlined the 'cultural revolution of the law'. In essence, he criticised support for a premature withering away of the law, arguing for the need to forge a new Soviet legal culture to supersede bourgeois legal culture. His solution to the paradox of constructing new apparatuses of law and the state while retaining a formal commitment to their withering away was to urge the simplification of law as a prelude to its elimination.

In 1929, responding to Stalin's 'revolution from above,' which paved the way for the brutality of mass forced collectivisation, Stuchka made another shift. Echoing Stalin, in an article 'Revolutionary Legal Perspectives' Stuchka advocated the strengthening of the state as the 'dialectical' path to its ultimate withering away. At the same time, he lamented the increasing bureaucratization of the administration, considering this an unwanted bourgeois legacy, and proposed to counter it by expanding mass political participation via the local soviets. Only mass participation in policy, he suggested, could lay the basis for the eventual withering away of the state. But the same prescription could not be applied to law, because it was a vital mechanism for implementing socialist construction. Stuchka opposed any decentralisation of law. Instead, he urged the continued simplification of the legal process, making it comprehensible and accessible to the Soviet population. Given the flood of complex legislation in the Soviet system, Stuchka saw simplification as an urgent task.

After Stalin disassociated himself from aspects of the forced collectivisation, accusing party members of engaging in excesses, Stuchka chimed in with an essay 'Revolution and

38 Ibid, p. 186.
Revolutionary Legality," which was a variation on Stalin’s theme. Stuchka accused judicial cadre of over zealously and emphasized the need for "revolutionary legality" to curb such excesses. Revolutionary legality became a means of inculcating order and strict social discipline. From being an early champion of the classical Marxist position that legal mechanisms should increasingly give way to self determination and social administration in the transition to genuine communist society, Stuchka had by 1933 come full circle to insist that revolutionary legality was pivotal to the future of the socialist revolution.
CHAPTER EIGHT

THE RISE AND FALL OF A SOVIET JURIST

EVGENY PASHUKANIS AND STALINISM

Introduction – how to approach Pashukanis?

One question looms large in the early history of Soviet legal theory and practice: how and why did Evgeny Pashukanis emerge as the pre-eminent Soviet jurist from 1924 to 1930, come under only minor criticism from 1930 to 1936 and then be denounced and executed in 1937 as a ‘Trotskyite saboteur’?

Of course, Pashukanis was not alone. Virtually every leading figure associated with the October 1917 Russian Revolution and the early years of the Soviet Union fell victim to Stalin's purges by 1937 (from Trotsky, Zinoviev, Kamenev and Bukharin to thousands of less-known socialists).

Yet, there are some particularly revealing aspects in the case of Pashukanis that have not been probed adequately by most Western or Soviet writers.1 His rise to leadership of Soviet legal work in 1924, with the publication of his The General Theory of Law and Marxism, coincided with Stalin’s initial victory over the Left Opposition and the enunciation of Stalin’s program of seeking to build ‘socialism in one country’.

Pashukanis saw his book as only the starting point for Marxist jurisprudence. He described it as a ‘sketch’, ‘a first draft of a Marxist critique of the fundamental juridical concepts.’ He saw this project as one of clarification of a theory already-existent, although not rigorously formulated, in Marx and Engels. ‘The basic thesis,’ he claimed, ‘namely that the legal subject of juridical theories is very closely related to the commodity owner, did not, after Marx, require any further substantiation.’ Beirne and Sharlet comment:

When the General Theory first appeared it is doubtful that anyone, least of all Pashukanis himself, could have foreseen its immediate success and the meteoric rise of its author within Marxist legal philosophy and the Soviet legal profession.4

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1 This chapter by no means attempts to deal with the full range of writings on Pashukanis in the West, let alone the Soviet bloc countries. Rather, an attempt has been made to address the question set at the beginning of this chapter, discussing relevant Western works that either represent wider trends or make particularly critical observations. Among the significant contributions on aspects of Pashukanis’ work not treated in this chapter are A. Norme, ‘Pashukanis and the ‘Commodity Form Theory: A Reply to Warrington (1982) 10 International Journal of the Sociology of Law, p. 419; R. Cotterell, ‘Commodity Form and Legal Form: Pashukanis’ Outline of a Materialist Theory of Law (1979) 6 Ideology and Consciousness, p. 111; C. Sumner, ‘Pashukanis and the Jurisprudence of Terror’ (1981) 10 Insurgent Sociologist, p. 99. Several treatises examining Marxist legal theory, notably H. Collins, Marxism and Law, Oxford University Press, Oxford, 1982, have discussed Pashukanis but not in depth. P. Hirst, On Law and Ideology, Macmillan, London, 1979, contains an extensive treatment of Pashukanis, but in isolation from the problems of socialist transition. For a defence of Pashukanis and an application of his theory to international law, see C. Mieville, Between Equal Rights. A Marxist Theory of International Law, Brill, Leiden, 2004.


3 Ibid., p.39.
4 Beirne and Sharlet, Pashukanis: Selected Writings on Marxism and Law, p. 37.
But the authors do not relate Pashukanis’ unexpected emergence from obscurity to the fact that he publicly lined up against the Left Opposition as early as 1925. Pashukanis joined in the concerted drive that was launched to discredit Trotsky for his alleged ‘Menshevism,’ based on his differences with Lenin at the time of the split between the Bolsheviks and Mensheviks in 1903. In an article on ‘Lenin and Problems of Law,’ Pashukanis drew a crude parallel between the 1903 split and the charges of bureaucratism levelled against Stalin’s faction by the Opposition.

When after the Second Congress [in 1903], Lenin’s opponents had conducted a struggle against ‘bureaucratic formalism,’ they constructed their argument on a deeper and, it seemed, more Marxist understanding of the course of historical development. Lenin, of course, did not think of concealing the fact that his organisational plan had a more definite political significance: to protect the Party from opportunism.5

In the context of the official campaign against ‘Trotskyism’, it is impossible to read this passage as anything else but an endorsement of Stalin, who is, by implication, continuing the course charted by Lenin, against Trotsky the ‘opportunist’ who is making groundless accusations of bureaucratism.

Pashukanis’ central theme in his General Theory, somewhat simplistically referred to as a ‘commodity-exchange’ theory of law,6 was related to the limited restoration of commercial property and market relations under the 1921 shift to the New Economic Policy. The dangers inherent in this temporary retreat became entrenched in Stalin’s bureaucratic elite after 1924.7 As will be discussed below, Pashukanis’ approach, which regarded commodity exchange as the essence of legal relations, to some extent reconciled Marxist theory with the official revival of economic relations based on private ownership and market forces. In his view, law would remain in the sphere of exchange, while law and the state would continue to fade away, and be replaced by non-legal regulation, throughout society more generally.

Some scholars, notably Fuller, have interpreted Pashukanis’ emphasis on commodity exchange as an ‘ingenious’ development of Marxist theory,8 implying that it represented an innovative departure from communist orthodoxy. In my view, this simplifies a more complex interaction between the doctrinal and practical needs of the emerging Stalinist regime. As this chapter will argue, Pashukanis’ theory was not simply an invention to satisfy the requirements of the NEP or the privileged bureaucracy. It was based closely on Marx’s method of analysis of the commodity form in Capital, it was bound up with a more profound examination of the legal form itself and it correctly rejected the crude instrumentalism expressed at times by some early Soviet theorists, including Stuchka. In his original 1924 publication of his General Theory at least, it seems that Pashukanis genuinely sought to make a contribution to Marxist theory, a contribution that he presented in a somewhat preliminary and tentative manner. It must also be borne in mind that the Stalinist faction still felt obliged to adhere to apparent Marxist orthodoxy in the mid-1920s. Stalin’s followers had to work with a population that was imbued with a considerable knowledge of, and loyalty to Marxism. And despite the repressive measures that had been already taken against the Left Opposition from late 1923, the Opposition—which stridently championed

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5 Ibid., p. 152.
6 For example, Fuller wrote that Pashukanis’ theory has been called the "Commodity Exchange Theory of Law": Fuller, ‘Pashukanis and Vyshinsky: A Study in the Development of Marxist Legal Theory’ (1949) 47 Michigan Law Review 1157. Pashukanis himself did not use that term, or accept that sweeping description. This issue is discussed below, under the headings ‘Critique of legal form’ and ‘The commodity exchange theory’.
7 See Chapter Two.
8 Fuller, ‘Pashukanis and Vyshinsky’ p. 1159.
Marxism—remained a potent political threat. Pashukanis, whether fully conscious of his role or not, served an essential function in developing a sophisticated Marxist legal doctrine that could facilitate, or at least not challenge, the shifts taken place in the political and legal winds.

While insisting on the ultimate Marxist perspective of creating the conditions for the withering away of the state, Pashukanis allowed for a lengthy postponement of this process, a thesis that would have suited Stalin in cementing his grip on power after the 1927 defeat of the Chinese Revolution. As early as 1927, Pashukanis made the first of several major ‘corrections’ to his General Theory in order to suit the requirements of Stalin’s faction. Responding to criticisms by Stuchka, he dropped his identification of Soviet law as residual bourgeois law and accepted that it could serve socialist purposes in the transitional period to communism. In 1928, he took up the cudgels against the Joint Opposition, writing an article in the inaugural edition of a new official journal, Revolution of the Law, entitled ‘The Dictatorship of the Proletariat and the Opposition’. Nevertheless, in so far as Pashukanis defended the conception that the state must wither away in the transition to communism, the contradiction in his position became ever more acute. After Stalin’s declaration of a ‘Third Period’ in 1928, which marked the defeat of Bukharin and led to the implementation of forced collectivisation, Stalin soon claimed that socialism necessitated an unprecedented strengthening of the state apparatus. Pashukanis (and Stuchka) may have supported Stalin in the expectation that the liquidation of the kulaks and other non-socialist forces would clear the way for socialism and the abandonment of state and legal forms. Instead, Stalin demanded the reinforcement and recognition of ‘socialist legality’.

Despite further retractions and modifications under mounting official criticism, Pashukanis’ views became incompatible with Stalin’s, who in 1936 announced that socialism had been achieved in the Soviet Union, yet the state apparatus had to be strengthened, not relaxed. Stalin was only able to unveil this travesty of Marxism after a protracted struggle to seal his victory over the Left and Right Oppositions and to crush considerable socialist resistance to his totalitarian regime.

Pashukanis became increasingly abject in his support for Stalin’s perversions of Marxism. In a 1935 textbook on Soviet economic law, Pashukanis and L. Ginsburg glorified Stalin:

He expanded the Marxist-Leninist doctrine on the dictatorship of the proletariat into a grandiose doctrine of the building of socialism in one country. This occurred under conditions of the delay of the world revolution and of intensified internal class struggle against the capitalist classes and their ideological arms-bearers—bourgeois restorationist theorists, right and left opportunists, and counter-revolutionary Trotskyites.

Having extracted from Pashukanis the repudiation of the classical Marxist and Leninist understanding of the state and law, it was not long before Stalin ordered his execution. Before doing so, he employed Pashukanis’ services one last time, on the drafting committee for the 1936 constitution, which proclaimed the triumph of socialism. In one of the many tragic ironies of Stalinism, Pashukanis was put to death in the name of ‘socialist legality’.

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10 Beirne and Sharlet, Pashukanis: Selected Writings on Marxism and Law, p. 194.
11 Ibid. p. 364.
12 Ibid. p. 305.
As noted in the Introduction to this thesis, Pashukanis received admiring, or at least sympathetic, reviews in the West in the 1930s, 40s and 50s (Kelsen, Hazard and Fuller) and 1970s (Kamenka and Tay, Arthur, Redhead, Beirne and Sharlet). An American scholar of Soviet law, John Hazard emphasised the widespread regard for Pashukanis:

Pashukanis was an imaginative Marxist, the most imaginative to appear among Soviet lawyers immediately after the October Revolution, or so Harvard's noted legal philosopher, Roscoe Pound, told me when I contemplated entering upon the study of Soviet law in 1934. Pound said he had been so impressed while reading a German translation of Pashukanis' principal work that he had undertaken to study Russian so as to read his works not yet translated. Pound's verdict on Pashukanis' place among Marxist legal theorists was shared by others. Members of a group assembled to suggest what should be included in a volume on Soviet legal philosophy to be published by the American Association of Law Schools said the same thing in 1947. All of them put Pashukanis first among their choices.

In a 1949 article, Lon Fuller stated that in his General Theory, Pashukanis expounds with clarity and coherence an ingenious development of Marxist theory that has been called the 'Commodity Exchange Theory of Law'. His work is in the best tradition of Marxism. It is the product of thorough scholarship and wide reading. It reaches conclusions that will seem to most readers perverse and bizarre, yet in the process of reaching these conclusions it brings familiar facts of law and government into an unfamiliar but revealing perspective. It is the kind of book that any open-minded scholar can read with real profit, however little he may be convinced by its main thesis.

Fuller's favourable assessment of Pashukanis seems to have been influenced by two related factors. As noted earlier, he was on the opinion that Pashukanis had boldly departed from accepted Marxist doctrine. Fuller wrote that 'the orthodox communist conception regards law as the expression of the will of the ruling class' whereas Pashukanis 'insisted that this view of law was only a kind of truism, which failed to reveal the real essence of legal phenomena, since it was incapable of explaining how something called "law" could reinforce or sanctify the brute force of domination'. As discussed in Chapter One, any assertion that Marxism regards law as the expression of the will of the ruling class is based on a simplistic and mechanical interpretation. But for Fuller, the Stalinist regime's repudiation of Pashukanis' view and his replacement by Vyshinsky, who reinstated the 'orthodox view' demonstrated that the Soviet order had been forced to adjust to human nature. As discussed in the Introduction to this thesis, Fuller suggested that the Soviet leaders had come to recognise that the principle of legality and other 'bourgeois virtues' were 'indispensable ways of getting things done, rooted in the very nature of the human animal'.

The second related factor was that Fuller's article appeared in the context of the Cold War and its purpose was to examine a volume published by Vyshinsky, who became Stalin's chief legal hatchet man. After convincingly showing Vyshinsky's The Law of the Soviet Union to be saturated with mind-numbing vacuity, abusiveness and platitudes, Fuller nonetheless found virtue

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13 Supra. p.3.
14 Ibid. p. 1.
16 Ibid. p. 1164.
17 Ibid. p. 1165.
in the volume. While at first it visited on its reader 'only an acute intellectual nausea' it turned out to 'contain an important message of hope. The hard line of Marxism can bend before the compulsions of life (emphasis in original). Fuller expressed the hope that if the theory (defended by Pashukanis) that all law is capitalist could find its way to the ash heap, so could the theory of inevitable conflict between capitalism and communism. In the end, then, Fuller, to some extent at least favoured Vyshinsky's supposed realism against Pashukanis' perceived doctrinaire utopianism. This view, coming from an eminent Western legal theorist, probably helped elevate Pashukanis' status in academic circles as a genuine Marxist theoretician, a reputation that was revived in the 1970s by more left-wing scholars.

According to Kamenka and Tay, writing in 1970, Pashukanis was 'the foremost and ablest expositor of Marxist jurisprudence.' In an introduction to The General Theory of Law and Marxism, Arthur wrote: 'It remains to this day the most significant Marxist work on the subject.' Moreover, Arthur identified Pashukanis with anti-Stalinism, stating that the revived interest in Pashukanis' theories signalled a 'renaissance of Marxist debate' as 'part of a process of recovery of the heritage Bolshevik thought repressed by the Stalinist bureaucracy and its international supporters'.

In general, these writers portray Pashukanis as a more genuine, intellectual or humane Marxist, as against the Stalinist epigones, such as Vyshinsky, who replaced him. At the same time, many of his concepts are dismissed as unrealistic or doctrinaire, as if to prove the hopeless utopianism of crude determinism of classical Marxism. Despite the apparent contradiction between these two approaches to Pashukanis, there is an underlying thread. Overall, these writers largely distort the relationship between Pashukanis and Marxism, uncritically presenting him as a Marxist scholar and using his fate as proof of the allegedly fatal flaws in Marxist legal and political theory.

Several writers, including Warrington, present the paradox of Pashukanis' rise and fall as a divorce between (pure) Marxist legal theory and (ruthless) Stalinist practice. While it seems true that some gap between theory and practice existed, and Stalin's faction may have cynically tolerated that gap to help provide a theoretical legitimacy for their methods of rule, this oversimplified view is not borne out by an examination of the historical record. In the first place, as reviewed in Chapter Six, there were contending tendencies in early Soviet legal theory. Secondly, there were definite connections between the theoretical debates, on the one hand, and the twists and turns of the Stalinist regime, on the other. Thirdly, as discussed earlier, Pashukanis' early prominence and later retractions need to be seen in the context of the various stages of the struggle against the Left, Joint and Right Oppositions.

How should one assess Pashukanis' legacy? Did he make a contribution to jurisprudence? I believe that a careful examination will show that, in some respects, he did. He offered some profound insights into the economic roots of the legal form, even if displaying several basic confusions in Marxist economics. However, he was weaker on the ideological and repressive role.

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18 Fuller, 'Pashukanis and Vyshinsky', p. 1165.
21 Ibid, p. 9.
of law and the state apparatus. And key aspects of his theory served the interests of the emerging Stalinist bureaucracy, with whom he aligned himself against the Left Opposition. From 1927, Pashukanis progressively repudiated other prominent features of his theory to appease the ruling clique. Nevertheless, he remained true to some Marxist concepts, including the withering away of the state and law, and pointed to alternative approaches in social organisation, including the treatment of crime.

In order to make a concrete appraisal of Pashukanis and his role, what must be explored is the connection between Pashukanis' writings and the following turning points, which were discussed in Chapter Three:

a. The New Economic Policy, adopted in 1921
b. The struggle against the Left Opposition from late 1923
c. Stalin's adoption of the program of 'Socialism in One Country' in 1924
d. Stalin's 'left turn' to industrialisation and forced collectivisation in the late 1920s.
e. Stalin's abandonment of the 'revolution from above' and renewed suppression, culminating in the Great Purges of the mid-1930s

This thesis, given its time frame, focusses on the first three periods, but it is impossible to give a full accounting for Pashukanis' evolution and fate, without at least outlining the subsequent twists and turns performed by Stalin and how they impacted on Pashukanis' work. After his initial corrections made in 1927, Pashukanis undertook three major self-criticisms — in 1930, 1934 and 1936 — making ultimately unsuccessful attempts to render his theory acceptable to the Stalinist bureaucracy.25

While there is no doubt that Pashukanis' 1924 General Theory was shaped by the conceptions and requirements of the New Economic Policy launched in 1921, Pashukanis barely referred to the NEP. At one point, he made an oblique observation about the NEP. He commented on Marx's warning in the Critique of the Gotha Program, that 'the narrow horizon of bourgeois right' will continue for a time in a social order where the means of production are socially owned and the producers do not exchange their products — a stage in the transition from capitalism to communism. Pashukanis simply noted that Marx 'assumes a higher stage of development than the 'new economic policy' which we are presently experiencing.'25 Thus, already in 1924, Pashukanis was suggesting that there would be a lengthy process before communism could be achieved in Soviet Russia.

Schlesinger points to a connection between the NEP, the codification of Soviet law and the development of Pashukanis' work, arguing that the concessions to the free market encouraged Pashukanis and his supporters to identify law with bourgeoisification and project a ‘Utopian’ disappearance of law when socialism finally arrived:

To understand the later theoretical disputes about the compatibility of Law and Socialism, quite apart from all the statements of classical Marxism on this issue, it must be remembered that one historical fact stood out before the controversialists: the codification of Soviet Law had been the outcome of the NEP, i.e., of a series of concessions made, if not to capitalism, then to certain principles of capitalist economics.

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25 As explored later, Pashukanis did not deny the ideological and repressive aspects yet insisted that these were not fundamental but rather derivative of the social relations of production.

24 Beine and Sharlet, Pashukanis: Selected Writings on Marxism and Law, p. 4.

And, like most of their colleagues in continental European countries, Soviet legal theorists regarded only codified Law as Law proper. Thus the contemporaneity of the codification of Soviet Law and the NEP was bound to have a strong influence on the sociological interpretation of that Law.\(^\text{26}\)

Schlesinger's unsubstantiated assertion, that the Soviet scholars shared the view of their Western European contemporaries that only codified law qualified as law proper, may be open to question. Nonetheless, these observations have considerable validity. It was only after the NEP necessitated a retreat from the early hopes of quickly delegalising life, and required the codification of private property rights in law, that Stuchka, Pashukanis and others took up the task of endeavouring to produce general theses on the role of law in socialism.

Arthur discounts Schlesinger's suggestion of an underlying connection between Pashukanis and the requirements of the NEP, without providing any explanation, contending instead that 'this historical conjuncture does not of itself affect Pashukanis' theoretical position, of course'.\(^\text{27}\) That may be true if one is confining oneself to considering Pashukanis' analysis in the abstract, but Arthur's approach separates Pashukanis' thought from the contradictions and tasks confronting the Soviet Union, as if these would not have, at the very least, influenced Pashukanis' work. Arthur's assessment presents Pashukanis' ideas as divorced from the material circumstances in which his work developed.

**Pashukanis' rise and fall in relation to the shifts in Soviet policy**

Pashukanis was born in February 1891 to a Lithuanian family. Details of his early life are sketchy but he only joined the Bolsheviks in 1918, previously having aligned himself with the Mensheviks. Before World War I, he had been a student at the University of St Petersburg and active in the anti-Tsarist movement before finding it necessary, as a result of his political activity, to complete his studies at the University of Munich, where he specialised in law and political economy.\(^\text{28}\)

Initially, from 1918, Pashukanis was a relatively junior figure in the Soviet administration, serving briefly as a local and circuit judge in the Moscow region before spending several years, from 1920 to 1923, as a legal adviser in the People's Commissariat of Foreign Affairs. He then became assistant organiser of the legal section of the Communist Academy of Russia. Based on the lectures he delivered there, in 1924 he published his most important work, *The General Theory of Law and Marxism*, which quickly earned him promotion to some of the highest posts within the Soviet academic legal institutions.\(^\text{29}\)

When the *General Theory* appeared, Pashukanis was a member of Stuchka's Section of Law and State, and of the Institute of Soviet Construction, both parts of the Communist Academy. He soon became a member of the executive committee of the Section and Institute, as well as head of a subsection on the General Theory of Law and State. During 1925, Pashukanis became editor of the new *Revolution of Law* journal, contributing the opening article on Lenin's understanding of law, in which Pashukanis denounced Trotsky. The following year, he joined the law faculty of


\(^{27}\) Editor's introduction to Pashukanis, *Law & Marxism*, p. 28.

\(^{28}\) *Pashukanis: Selected Writings*, p. 17.

Moscow State University and the Institute of Red Professors, the Communist Academy's graduate school, and was named chief editor for law of the Soviet Encyclopedia.

By 1927, three editions of his book had been published in Moscow and it had been translated into French, German, Japanese, Serbo-Croatian and English, despite the fact that Pashukanis regarded it as only an outline of the tasks of constructing a Marxist general theory of law. His monograph was subtitled An Experiment in the Criticism of Basic Juridical Concepts and Pashukanis emphasised that he had written it primarily for 'self-clarification' and to stimulate further discussion.30

As noted earlier, in the Preface to the third Russian edition of 1927, Pashukanis stated that his volume was merely a first draft -- 'only briefly sketched' -- of a Marxist critique of law.31 He foreshadowed writing a text on the general theory of law, yet this text does not appear to have seen the light of day. One initial reason for the wide publication of the book may have been, as Pashukanis suggested in his Preface to the second Russian edition (undated), that it became a teaching text in the absence of other literature presenting a general outline of a Marxist theory of law.32

The underlying political and economic climate must be considered also. Pashukanis' volume appeared in 1924, the year in which Stalin, then part of a triumvirate with Zinoviev and Kamenev, usurped power following Lenin's death, defeating the Left Opposition formed by Trotsky.33

He became one of the leading authorities in Soviet legal theory, publishing articles in Encyclopaedia of State and Law (Moscow 1925-27), editing legal journals, writing many scholarly articles, particularly on international law, and several books. By 1929, Pashukanis reached the pinnacle of the official legal theory establishment, eclipsing Stuchka. Until 1937, he led the Institute for Soviet construction of the Communist Academy and became publisher of its legal theory journal. From 1935, he worked on drafting Stalin's 1936 constitution and in 1936 became deputy Commissar for Justice.

Within a year, however, according to official statements, he became, together with Krylenko, a 'counter-revolutionary Trotskyist-Bukharinite parasite' and 'fascist agent' (Vyshinsky). The NKVD shot him without a trial.

After the 20th Congress of the Communist Party and the Soviet Union and Khrushchev's secret speech in 1956, Pashukanis was legally rehabilitated in March 195634 but his works were not republished. The official view remained opposed to his concept of Soviet law as dying bourgeois law.35 Thus, his analysis renounced a threat to the post-Stalin bureaucracy, despite its claims to be de-Stalinising.

30 Pashukanis: Selected Writings, p. 17-18.
31 Pashukanis, Law & Marxism, p. 36.
Pashukanis' theoretical contribution

Pashukanis set out to overcome what he perceived as various shallow and mechanical 'Marxist' interpretations of law. Existing approaches generally treated law either as an ideological device, a blunt instrument of class rule or a sociological product of conflicting interests. Pashukanis did not deny that law can have an ideological function -- he saw there to be 'no argument about this' 36 -- but regarded that as derivative and secondary. Law's roots lay in economic relations. 'Having established the ideological nature of particular concepts in no way exempts us from the obligation of seeking their objective reality, in other words the reality which exists in the outside world, that is, external, and not merely subjective reality.' 37 Another conception of law, the 'sociological' theories, 'treat[ed] law as the product of conflict of interest, as the manifestation of state coercion.' 38 This position is essentially positivist, in that law is seen as the will of the state. '[m]any Marxists assumed that by simply adding in the element of class struggle to ... [positivist] theories, they would attain a genuinely materialist, Marxist theory of law.' 39

Critique of legal form

Thus, while Pashukanis' theory of law has commonly been depicted as a 'commodity exchange' theory, this hardly does justice to the full scope of his intellectual endeavour. He sought, drawing closely on Marx and Engels, particularly Marx's Capital, to outline a general theory of law that went, in Berman's words, 'deeper into the nature of law than any Marxist hitherto.' 40 In the Preface to the 1929 German edition of his General Theory, Pashukanis defined his purpose as follows:

The task of the Marxist critique was not confined to refuting the bourgeois individualistic theory of law, but also consisted of analysing the legal form itself, exposing its sociological roots, and demonstrating the relative and historically limited nature of the fundamental juridical concepts. 41

This perspective challenges not simply the role of law under capitalism but also the very form of law itself as an inherent or eternal instrument of social regulation. Pashukanis' examination of law as a 'relative and historically limited' form necessarily implies the disappearance of law and its replacement by other social relations under genuine socialism.

Pashukanis was critical of Stuchka's definition of law as a system of social relationships. As discussed in Chapter Seven, Stuchka defined law as 'the system or order of social relations corresponding to the interests of the ruling class and protected by the organised force of that class'. Pashukanis asked: 'How do social relationships become juridic institutions? How is law converted into itself?' 42 Pashukanis said the definition was useful in disclosing the class content of legal forms and in asserting that law rests on social relations, but it masked the difference between law and all other regulative norms. It did not explain how or why social relations became converted into legal relations. What was peculiar about the legal form that made it indispensable in enforcing the social relations of class society? Indeed, if law was said to be a form of social

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36 Pashukanis, Law & Marxism, p. 74.
37 Ibid, p. 75.
38 Ibid, p. 53.
40 Berman, Justice in the USSR, p. 28.
41 Pashukanis, Law & Marxism, p. 34.
relationship, while law regulated social relationships, a tautology resulted: social relationships regulate themselves.

Pashukanis posed the more general problem of a theory of law as follows: ‘Can law as a social relationship be understood in the same sense as that in which Marx called capital a social relationship.’ 43 Since law was only one social phenomenon among others, such as morals, religion and art, the question was how to distinguish legal relationships from other social relationships.

Pashukanis’ answer was that legal relationships are essentially those between possessors of goods. He rejected the view that law can be explained abstractly as a system of norms per se:

We find that the juridic relationship is generated by the material production relationships of human beings immediately at hand – from which it follows that an analysis of the legal relationship in its simplest form need not start from the concept of a norm as an external authoritative imperative. It is sufficient to take for a basis a juridical relationship ‘whose content has been provided by the economic relationship itself’ (in the words of Marx) and to investigate the ‘legal’ form of this juridical relationship as one of the particular cases. 44

By beginning with commodity exchange, Pashukanis’ methodology was that of Marx in the Grundrisse and later, of ‘rising from the abstract to the concrete’. 45 For Marx, the concrete ‘appears in the process of thinking ... as a process of concentration, as a result, not as a point of departure, even though it is the point of departure in reality and hence also the point of departure for observation and conception’. 46 Thus the simplest categories of analysis – commodity, value, labour, money, etc. -- are abstractions necessary for the analysis of that concrete. They constitute the essential components of any analysis of the real world, because of, rather than despite, their abstraction. They are the ‘determinant, abstract, general relations’ from which analysis ‘ascends’ to more complex and concrete categories. This is ‘the scientifically correct method’, given that “[t]he concrete is concrete because it is the concentration of many determinations’. 47 Pashukanis cited this passage in his opening chapter on method. He saw these observations as ‘directly pertinent to the general theory of law. The concrete totality -- society, the population, the state -- must in this case, too, be the conclusion and end result of our deliberations, but not their starting point’. 48

Pashukanis contended that while the analysis of Marx and Engels had informed Marxist critique of bourgeois legal ideology, it had not been applied to studying the legal superstructure. 49 Instead, Marxist scholars had tended to regard the state and law simply as instrument of ruling class power.

The few Marxists who concerned themselves with legal questions undoubtedly considered the aspect of social (state) coercion as the central, fundamental and only

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43 Ibid, p. 131.
44 Ibid, p. 149.
48 Pashukanis, Law & Marxism, p. 66.
49 This thesis will not attempt to enter the arguably barren debate over whether Pashukanis regarded law as part of the ‘base’ or ‘superstructure’ of society mentioned in Marx’s Preface to A Contribution to the Critique of Political Economy. For a review, see Mievile, Between Equal Rights.
characteristic trait of legal phenomena... Hence it was quite natural to think that the Marxian critique of the legal subject which arises directly from analysis of the commodity form had nothing to do with the general theory of law, since of course external coercive regulation of the relations between commodity owners forms only an insignificant part of social regulation as a whole.50

There is no doubt that this approach, based on examining the nature and contradictions of the legal form itself, came far closer to a genuinely Marxist analysis than the crude class instrumentalist view that Pashukanis criticised. Pashukanis was correct to probe in a more nuanced manner the relationship between commodity exchange and the legal form. As discussed in Chapter One, the critique of law developed by Marx and Engels was far from the mechanical economic determinism and bourgeois 'will' theory sometimes ascribed to them. Pashukanis' comment on the source of legal power is also true. Although the coercive powers of the state can be brought to bear to crush infringements of, or challenges to, the rights of private property, these rights are far more pervasively entrenched in the economic and political power exercised by the holders of capital. An employer, for example, may call in the police if employees leak sensitive documents or otherwise appropriate any part of their production for the employer, but more compelling is the employer's capacity to dismiss employees, depriving of them of their livelihood. This latter power is derived from the employer's freedom, as a matter of commodity exchange, not to purchase the employee's labour power.

As Pashukanis stated, this power relationship is not primarily the result of an ideological process, based on the history of ideas. It is part of an actual process, by which the social relations based on money become legal relations. Pashukanis summed up his conception as follows:

Law in its general definitions, law as a form, does not exist in the heads and the theories of learned jurists. It has a parallel, real history which unfolds not as a set of ideas, but as a specific set of relations which men enter into not by conscious choice, but because the relations of production compel them to do so. Man becomes a legal subject by virtue of the same necessity which transforms the product of nature into a commodity complete with the enigmatic property of value.51

It must be noted that Pashukanis here used the expression 'relations of production' rather than 'relations of exchange'. This demonstrates that he understood commodity exchange as only one part of bourgeois economic relations, or, more accurately, as an essential cell of the capitalist mode of production, which is based on production for exchange. Nevertheless, his concise summation is somewhat mechanical compared to the more complex and subtle explanations of Marx and Engels. They emphasised that ideas do indeed play a vital role in legal and other history, but that ultimately, these ideas reflect, more or less consciously, the prevailing social relations based on production.

Pashukanis attempted to sketch his essential thesis more fully in the preface to the second Russian edition of his General Theory. He argued that the significance of Marxian analysis had been limited to exposing the bourgeois ideology of freedom and equality, and criticising formal democracy, without shedding light on the fundamental characteristics of the legal superstructure as an objective phenomenon.

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50 Pashukanis, Law & Marxism, p. 39.
51 Ibid, p.68.
In the process, people failed to take two things into account: first, that the principle of legal subjectivity (which we take to mean the formal principle of freedom and equality, the autonomy of the personality, and so forth) is not only an instrument of deceit and a product of the hypocrisy of the bourgeoisie, insofar as it is used to counter the proletarian struggle to abolish classes, but is at the same time a concretely effective principle which is embodied in bourgeois society from the moment it emerges from and destroys feudal-patriarchal society. Second, they failed to take into account that the victory of this process is not only and not so much an ideological process (that is to say a process belonging entirely to the history of ideas, persuasions and so on), but rather is an actual process, making human relations into legal relations, which accompanies the development of the economy based on the commodity and on money (in Europe this means capitalist economy), and which is associated with profound, universal changes of an objective kind. These changes include: the emergence and consolidation of private property; its universal expansion to every kind of object possible, as well as to subjects; the liberation of the land and the soil from the relations of domination and subservience; the transformation of all property into moveable property; the development and dominance of relations of liability; and, finally, the precipitation of a political authority as a separate power, functioning alongside the purely economic power of money, and the resulting more or less sharp differentiation between the spheres of public and private relations, public and private law.\footnote{Ibid, pp. 40-41.}

In this way, Pashukanis outlined the kernel of an historical materialist approach to the rise and evolution of the legal form.

The 'commodity exchange' theory

It was in this context of probing to the heart and historical origin of the legal form that Pashukanis turned to the reciprocal rights and obligations attached to commodity exchange. He sought to follow the methodology of Marx in Capital, who began his exposition of the organic contradictions of capitalist mode of production by examining the essential contradiction inherent in the commodity itself: that between use value and exchange value.\footnote{Marx, Capital, Chapter One. On the methodological significance of Marx's starting point, see T. Kemp, Karl Marx's 'Capital' Today, New Park Publications, London, 1982 and E. Ilyenkov, The Dialectics of the Abstract and the Concrete in Marx's Capital, Progress Publishers, Moscow, 1982.}

Pashukanis' essential proposition was that all law was inherently related to the commodity exchange relationship that reaches its highest point under capitalism. The very form of law was derived from the acquisition by individuals of private property interests, which inevitably gave rise to conflicts.

It is only with the advent of bourgeois-capitalist society that all the necessary conditions are created for juridical factor to attain complete distinctness in social relations ... A basic prerequisite for legal regulation is the conflict of private interests. This is both the logical premise of the legal form and the actual origin of the development of the legal superstructure. Human conduct can be regulated by the most complex regulations, but the juridical factor in this regulation arises at the point when differentiation and opposition of interests begin.\footnote{Pashukanis, Selected Writings, pp. 58 and 81.}
Pashukanis contended that legal fetishism complements commodity fetishism, the Marxist concept of which was discussed in Chapter One. Under capitalism, according to Pashukanis, de facto possession was transformed into an absolute and constant right, which adheres to a commodity during exchange. Pashukanis noted Marx's statement in *Capital* that 'commodities cannot send themselves to a market and exchange themselves with one another. Accordingly we must turn to their custodian, to the commodity owner.'

Following Marx's outline of commodity production and exchange in *Capital*, Pashukanis traced the legal form to the exchange of commodities on the market:

> The juridic subject is, therefore, the abstract goods-possessor elevated to the heavens. His will – understood in the juridic sense – has its real basis in the wish to alienate as it acquires, and to acquire as it alienates. In order for this wish to be realised, it is essential that the wishes of goods-producers go out to meet each other. This relationship is expressed juridically as a contract or accord of independent wills, and contract is therefore one of the central concepts in the law. In more grandiloquent phraseology, it becomes a constituent part of the idea of law.\(^{56}\)

Whereas under feudalism 'every right was a privilege', every right was identified with a specific social position vis-à-vis others, capitalist exchange is characterised by the generalisation of 'equal rights'. This is why contract was so vital to Pashukanis' theory of law. Abstract and equal subjects, the atoms of the legal relationship, cannot relate to each other according to principles of 'traditional' privilege, but do so by means of contract, which is the formalisation of mutual recognition of equal subjects. Without a contract, Pashukanis wrote, 'the concepts of subject and of will only exist in the legal sense, as lifeless abstractions. These concepts first come to life in the contract.'\(^{58}\)

Pashukanis' argument was that in commodity exchange, each commodity must be the private property of its owner, freely given in return for the other. In their fundamental form, as Marx established in *Capital*, commodities exchange at a rate that is ultimately determined by their exchange value, not because of some external reason or because one party to the exchange demands it. Therefore, Pashukanis suggested, each agent in the exchange must be an owner of private property, and formally equal to the other agent(s). Without these conditions, what occurred would not be commodity exchange. The legal form was the necessary form taken by the relation between these formally equal owners of exchange values. Thus Pashukanis argued that 'reciprocity' and 'mutuality' were integral to the conception of bourgeois private property, as compared to feudal property, which was determined by estate:

> Hauriou, one of the most astute bourgeois jurists, quite rightly emphasises reciprocity as the most effective security for property, which can be brought about with the minimum use of external force. This mutuality, which is ensured by the laws of the market, lends property the quality of an 'eternal' institution. In contrast to this, the purely political security vouchsafed by the coercive machinery of state amounts to nothing more than the protection of specified personal stocks belonging to the owners – an aspect which has no fundamental significance.\(^{59}\)

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\(^{55}\) Pashukanis: *Selected Writings*, p. 9.  
\(^{57}\) Pashukanis, *Law & Marxism*, p. 119.  
\(^{58}\) Ibid, p. 121.  
\(^{59}\) Ibid, p. 123.
While Pashukanis' theory has been described as a bold deviation from accepted communist doctrine, Pashukanis was at pains to emphasise his fidelity to Marx's method. In the Preface to the second Russian edition, Pashukanis insisted that his general approach of connecting law to commodity exchange presents nothing original but simply fuses the ideas of Marx and Engels. Apart from Capital, Pashukanis refers to the chapter 'Morality and Law -- Equality' in Engels' Anti-Dühring. Engels' chapter did contain, albeit in embryo, the relation between commodity production and formal legal equality. Discussing the drive by capitalism to overturn the local restrictions and status-based inequalities of feudalism, Engels commented:

Trade on a large scale, that is to say, particularly international and, even more so, world trade, requires free owners of commodities who are unrestricted in their movements and as such enjoy equal rights; who may exchange their commodities on the basis of laws that are equal for them all, at least in each particular place.

Engels pointed out that such formal, legal equality did not long satisfy the working class that capitalism had created.

The proletarians took the bourgeoisie at its word: equality must not be merely apparent, must not apply merely to the sphere of the state, but must also be real, must also extend to the social, economic sphere.

While, as noted earlier, Pashukanis did not attach the label 'commodity exchange theory' to his analysis, he acknowledged in the preface to the second Russian edition that 'Comrade Suchka has quite correctly defined my approach to the general theory of law as an "attempt to approximate the legal form to the commodity form".' For Pashukanis, private law was the 'fundamental, primary level of law.' The concept of public law, for example, 'can only be developed through its workings, in which it is continually repulsed by private law, so much that it attempts to define itself as the antithesis of private law, to which it returns, however, as to its centre of gravity.' A complex legal system regulating all levels of social life can be thrown up which appears to differentiate itself from private law, but it ultimately derives from the clash of private interests. Pashukanis sought to find in commodity exchange the ultimate root of labour law (employer-employee contracts), family law (marriage and parent-child relations based on mutual rights and duties), criminal law (punishment measured by exchange equivalents), constitutional law (social contract) and morality (based on seemingly autonomous personalities). As will be discussed below, these efforts were not as far-fetched as they may sound, and Pashukanis offered numerous valuable insights, particularly in the fields of crime and morality.

Insofar as Pashukanis traced law not to production but to exchange, to contract instead of property and to reciprocal relations rather than the exploitation of labour power, it can be argued that he departed from Marxism. However, as discussed below under 'Criticism and Flaws', such

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60 Fuller, 'Pashukanis and Vyshinsky' at p. 1164.
61 Pashukanis quotes a footnote by Engels: 'This derivation of the modern ideas of equality from the economic conditions of bourgeois society was first demonstrated by Marx in Capital.' See Pashukanis, Law & Marxism, p. 34 and Engels, Anti-Dühring, Progress Publishers, Moscow 1978, p. 130.
62 Engels, Anti-Dühring, p. 130.
63 ibid, pp. 131-2.
64 Pashukanis, Law & Marxism, p. 38.
65 ibid, p. 103.
66 ibid, p. 106.
criticisms fall short of the mark, primarily because they over-simplify Marx’s critique of capitalist economy.

In his *General Theory*, Pashukanis drew certain implications of his theory for the transition to communism:

> In future the vestiges of equivalent exchange in the sphere of distribution, which will be retained even in a socialist organisation of production (until the transition to developed communism), will compel socialist society to enclose within itself the ‘narrow horizon of bourgeois law’ for a time, as Marx himself foresaw.⁶⁷

However, while Pashukanis thus saw ‘bourgeois law’ continuing under the dictatorship of the proletariat, he did so only insofar as relations, including wage labour and trading between government corporations, remained governed by exchange. As discussed in the next sections, he drew a distinction between ‘law’, which remained bourgeois, and ‘regulation’, which was socialist. As I shall argue, this demarcation has merit to the extent that it postulates the possibility of a future communist society guided by regulation rather than law, but it is highly problematic in the context of seeking to differentiate ‘socialist’ from ‘bourgeois’ features of a state, like the Soviet state, supposedly in transition to communism. As canvassed in Chapter One, Marx, and Lenin following him, warned that all transitional law and other forms of social regulation, and indeed the state as a whole, would be tainted by the inability of the socialist state to immediately provide genuine social equality. The legal and political system in its entirety would be obliged to enforce degrees of inequality until production could be developed sufficiently to overcome this unavoidable capitalist legacy.

**Law versus regulation and planning**

Both Stuchka and Pashukanis regarded the application of civil law in Soviet society as confined to the regulation of surviving or revived market relations based on commodity exchange. The internal economic relations of the socialist sector of the economy did not need juridical regulation. Pashukanis argued that the Soviet Union already had two systems of economic regulation. On the one hand, administrative-technical rules governed the general economic plan. On the other, legal rules (civil and commercial codes, courts, arbitration tribunals, etc.) governed the commodity exchange, including trading between government corporations, which was the essential feature of the NFP. The victory of the former type of regulation would signify the demise of the latter, and the realization of Marx’s description of human emancipation.

Legal regulation referred to conflicting interests rooted in private property rights; whereas socialism was based on unity of purpose. To law, Pashukanis counterposed the use of technical regulation to achieve common purposes. He gave the examples of the technical rules and timetables for the operation of a railway system and for the provision of medical services. These rules would be devised and revised by technical and scientific experts, not jurists. Any element of official coercion would be determined by technical expediency, and would only become a legal issue in the realm of conflicting individual interests, such as those between a doctor and patient.⁶⁸

The treatment of a sick person presupposes a series of rules, both for the patient himself and for the medical personnel; but inasmuch as these rules are established from the point

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of view of a single purpose - the restoration of the patient's health - they are of a technical character. In conjunction with their application, there may be a certain constraint as regards the patient. But so long as this constraint is regarded form the viewpoint of the same purpose (which is identical for the person exerting the restraint and for the person subjected thereto), it remains a measure which is technically expedient - and nothing more. Within these limits, the content of the rules is established by medical science and changes as that science progresses. There is nothing for the jurist to do here. His role begins where perforce we abandon this basis of unity of purpose and pass to an investigation from another viewpoint - the viewpoint of isolated subjects opposed to each other, each of whom is the bearer of his own private interest.69

Technical regulation, which Pashukanis saw as based on the premise of 'unity of purpose', 'is undoubtedly strengthened over time through being subjected to a general plan of the economy'.70

Some Western legal commentators have tended to lightly dismiss the historical validity of this distinction between law and regulation, but it contains the germs of an alternative approach to social and economic life. Both Schlesinger and Kelsen, for example, dismissed the conception of achieving a social unity of purpose as utopian. According to Schlesinger, only a 'rather utopian mind' could visualise complete unity of purpose among members of a society, even after class divisions and social inequalities were eliminated. Schlesinger asserted that it was 'completely wrong' for Pashukanis to give a railway by-law as an example of technical regulation because such measures were addressed to people, not inanimate objects, such as rails and train engines. This was surely obvious to Pashukanis, who did not suggest that technical regulations were addressed to objects. Schlesinger objected: 'Whether it works as mere technical advice which the engine-driver, to whom it is addressed, follows because he is convinced of its reasonableness, depends on the general character of the society in the framework of which this railway works.'71

It seems that Pashukanis would have regarded such a proposition as axiomatic. The real issue is whether a social framework can exist that will inspire such conviction of its 'reasonableness'.

To support his objection, Schlesinger proceeded to list the disciplinary powers and penalties enforced by the railways management in the Soviet Union. The existence of these punitive enforcement mechanisms points to the fact that inequality, oppression and economic hardship continued to exist in Soviet Russia, including for railway workers and train drivers. As seen in Chapter Three, social conditions in the Soviet Union remained harsh, despite the ludicrous self-serving claims of the Stalinist regime to have created socialism. In the context of social ownership, plentiful production, genuine democracy and a widely-held collective approach, it is possible to conceive of a more broadly self-administering society in which engine-drivers and other citizens were economically secure and 'convinced of the reasonableness' of regulations.

Pashukanis confined his argument to so-called technical matters. But it is difficult to see why this vision of a communist future should be so narrow. Over time, on the basis of more advanced social conditions, by democratic agreement and consent, rules could exist not just for regulating technical matters but for clarifying and communicating basic social and moral norms. Of course, this perspective challenges the prevailing conception of human nature as immutably selfish and greedy. But as discussed in Chapter One, there is good reason to regard human nature as socially conditioned.

69 Hazard. Soviet Legal Philosophy, p. 137.
70 Pashukanis, Law & Marxism, p. 131.
71 Schlesinger, Soviet Legal Theory, p. 162.
The withering away of law (against 'proletarian law')

One of the most important passages from Pashukanis occurs in his Introduction, where he replies to criticisms of his work from those who demanded a theory of proletarian law. In the first place, he points to the ahistorical nature of this objection:

In raising a demand for new general concepts specific to proletarian law, this line appears to be revolutionary par excellence. In reality, however, this tendency proclaims the immortality of the legal form, in that it strives to wrench this form from the particular historical conditions which had helped to bring it to full fruition, and to present it as capable of permanent renewal.  

He continued by linking the fate of law to the economic conditions that gave rise to it, suggesting that just as full socialism will supersede production for private profit and all the concepts associated with profit, so will it lead to the withering away of law:

The withering of certain categories of bourgeois law (the categories as such, not this or that precept) in no way implies their replacement by new categories of proletarian law, just as the withering away of the categories of value, capital, profit and so forth in the transition to fully-developed socialism will not mean the emergence of new proletarian categories of value, capital and so on. The withering away of the categories of bourgeois law will, under these conditions, mean the withering away of law altogether, that is to say the disappearance of the juridical factor from social relations.  

Quoting a passage from Marx, Pashukanis argued that as long as distribution continues to be governed by exchange, the form of law or 'right' will persist. Since this allocation according to individual contribution takes no account of the natural inequality of individual circumstances, it will still produce inequality. Indeed, distribution by exchange is 'a right of inequality, in its content, like every right'.  
Pashukanis then quoted the passage from The State and Revolution, where Lenin draws the conclusion from Marx's view, that under socialism there remains for a time, not only bourgeois law but also a bourgeois state.  

Once, however, production has developed to such a level that scarcity has been overcome and individuals need no incentive to work to their ability -- when, in Lenin's words, no one will be forced to 'calculate with the heartlessness of a Shylock whether one has not worked half an hour more than somebody else' -- then the legal form will wither away. This was the essential conclusion that Pashukanis refused to relinquish throughout his various corrections and recantations. He eventually abandoned his opposition to the concept of 'socialist law' and embraced the unprecedented boosting of the powers of the Soviet state, but still adhered to the view that legal forms of regulation would disappear under communism.

Morality, state and 'crime'

Pashukanis attempted to provide a theoretical framework for the Soviet conception of criminal law. By 1924, terms such as 'punishment' and 'guilt' had been dropped from the Criminal Code,

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71 Pashukanis, Law & Marxism, p. 61.
72 Ibid, p. 61.
75 Ibid, p. 139.
replaced by the notion that defined ill-conduct had to be repressed as a matter of social self-defence. Krylenko had explained:

In principle, this view of repression as essentially an act of self-defence by the working people's state is the antithesis of the principle 'an eye for an eye' and the principles of 'retribution' and 'punishment' as they are understood by the classical school of law.\textsuperscript{77}

Pashukanis went further. In the first place, he argued that the social roots of crime lay in capitalist inequality and oppression. 'Crime' could be largely eliminated by providing economic security for all and by focussing on proper medical and mental health treatment.

For even bourgeois advanced criminologists are convinced theoretically that the struggle against criminality may itself be regarded per se as a task of medical pedagogy, for whose solution the jurist - with his \textit{corpus delicti}, his codes, his concept of 'guilt,' his 'unqualified or qualified criminal responsibility' and his subtle distinctions between participation, complicity and instigation - is entirely superfluous.\textsuperscript{78}

Secondly, Pashukanis examined the prevailing forms of punishment - death, imprisonment and fines - and sought to show that they derived from primitive forms of vengeance. They fixed a monetary value on retribution in terms of labour-time, reflecting a society based on equivalent exchange of commodities, as measured by the expenditure of labour required to produce them. While the re-emergence of the most brutal punishments, such as the death penalty, expressed the need of the capitalist elite to engage in repression to secure its rule, the very \textit{form} of punishment, with its preoccupation with individualising guilt and ranking various levels of culpability, was intrinsic to a society based on market relations.

If, in place of the punishment, we substitute treatment, that is to say a concept of medical-health, what follows is entirely different, since we would then be interested, not primarily in whether the punishment fits the crime, but in whether the measures taken are adequate to the goals set, that is, whether they are adequate to the protection of society, to having an effect on the offender, and so forth.\textsuperscript{79}

In his chapter on Law and Morality, Pashukanis outlined but did not fully develop, an underlying relationship between commodity exchange and capitalist morality based on the ethical idea of the equal worth of human personalities. His analysis was signalled in his opening statement:

For the products of human labour to be able to relate to each other as values, it is necessary for people to relate to each other as autonomous and equal personalities.\textsuperscript{80}

Pashukanis insisted that there are three preconditions for exchange according to the law of value - man as a moral subject, a legal subject and a subject operating egoistically. He explained this as follows:

The person engaged in exchange must be an egoist, that is to say, he must stick to naked economic calculation, otherwise the value relation cannot be manifested as a socially necessary relation. The person engaging in exchange must be the bearer of rights, that is, he

\textsuperscript{77} Zille, p. 220.
\textsuperscript{78} Jaworsky, p. 137.
\textsuperscript{79} Pashukanis, \textit{Law \& Marxism}, p. 179.
\textsuperscript{80} Ibid, p. 151.
must be able to make autonomous decisions, for his will supposedly 'resides in objects'. Lastly, he embodies the principle of the essential equivalence of human personalities for, in exchange, all forms of labour are equalised and become human labour in the abstract.\textsuperscript{81}

In other words, morality under capitalism was inherently related to individual economic calculation, not necessarily as a matter of ill-intent, but flowing from the entire framework of social relations based on commodity exchange. These concepts are very different from the view of man that prevailed under slavery or feudalism, in which relations were based on status rather than individuality, although Pashukanis notes that the idea of equal worth of personality passed from Stoic philosophy to Roman law, thence to Christianity and natural law doctrines.

In the course of his discussion, Pashukanis offered a critique of Kant's categorical imperative: "Act only on the maxim through which you can at the same time will that is should become a universal law."\textsuperscript{82} This axiom urges every individual to be guided by a rule that, being absolutely independent of moral content, could become a universal rule of behaviour. Pashukanis established the connection between Kant's precept and the role of the individual in commodity exchange. Kant's categorical imperative was:

Supra-individual because it has nothing to do with natural inclinations at all, with fear, sympathy, pity, the feeling of solidarity. According to Kant, it neither intimidates, nor convinces, nor flatters. At the same time, it appears independently of any external pressure in the direct, crude sense of the word. It is effective by virtue of the consciousness of its universality... Kant gave a logically perfected shape to the form which atomised bourgeois society sought to embody in reality...\textsuperscript{83}

Pashukanis observed that this outlook corresponds to bourgeois propriety.

There is no place for heroism and heroic deeds within the framework of the Kantian imperative. One is by no means obliged to sacrifice oneself, so long as one does not expect any such sacrifice of others. 'Irrational' acts of self-sacrifice and disregard for one's own interests for the sake of fulfilling one's individual historical destiny, one's social function, acts which stretch the social instincts to its limits, are beyond morality in the strict sense of the word.\textsuperscript{84}

In other words, while Kant sought to divorce the content of the mutual expectation that should guide human conduct from the historically and economically derived norms of capitalism, Kant's individualised conception of social obligations expressed those norms. Pashukanis' observations undermine the accusation, often made against Marxists, that they advocate amorality. Pashukanis did not develop this point, but sympathy, pity, solidarity, self-sacrifice, consciousness of historical necessity can be regarded as components of a truly human ethics.

\textit{Law and ideology}

\textsuperscript{81} Ibid, p. 152.
\textsuperscript{82} H. Paton (ed). The Moral Law or Kant's Grundwerk of the Metaphysics of Morals, London, Hutchinson's University Library, 3\textsuperscript{rd} ed. 1956, p. 88.
\textsuperscript{83} Pashukanis, Law & Marxism, p. 154.
\textsuperscript{84} Ibid, p. 155.
As part of his critique, Pashukanis responded to criticism by Stuchka that he regarded the legal form as a 'mere reflection of purest ideology'. Pashukanis appeared to bend the stick in the other direction by arguing that law -- or at least its enforcement machinery -- becomes an objective factor in production, that is part of the productive forces. By contrast, Marx referred to law as part of the political and ideological superstructure shaped by production and within which men ultimately became conscious of the underlying class conflicts and fought them out.

Pashukanis argued:

The more or less unfettered process of social production and reproduction -- formally carried out in commodity-producing society through individual legal transactions -- is the practical purpose of legal mediation. This purpose cannot be achieved with the help of forms of consciousness alone, that is to say through purely subjective aspects: it requires exact criteria, statutes, interpretation of statute, casuistry, law courts, and the compulsory execution of court decisions. For this reason alone one cannot limit oneself, when analysing the legal form, to 'pure ideology,' nor can one disregard the whole of this objectively existing machinery. Every legal action, for example the outcome of a lawsuit, is an objective fact which has its place outside the consciousness of the parties to it in just the same way as the economic phenomenon which it mediates.

By treating legal decisions as 'objective facts,' this presentation equates the legal result -- the outcome of a lawsuit -- with the underlying property relations that shaped the law in the first place. Particular legal outcomes may have impacts that reinforce, or at times even contradict or inhibit, existing property rights. But, over time, the law will be modified to conform to the requirements of the prevailing economic order.

Stuchka also criticised Pashukanis for recognising the existence of law only in capitalist society. While acknowledging the criticism, Pashukanis maintains that law in previous societies existed only in rudimentary and undeveloped forms. In the Preface to the second Russian edition of the General Theory, he stated:

The purport of my analysis was not at all to deny the Marxist theory of law access to those historical periods which were as yet unfamiliar with developed capitalist commodity production. On the contrary, I was and still am concerned to facilitate understanding of the embryonic forms we find in those epochs, and to link them to the more developed forms through a general line of development.

Interestingly, Weber, who insisted that law was relatively autonomous from economic forces, came to a similar conclusion. Weber portrayed capitalism as the ultimate realisation of legal rationality -- based on 'free' exchange and formal equality -- which was incomplete in earlier historical societies.

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57 Pashukanis, Law & Marxism, p. 44.
58 Ibid, p. 44.
59 Ibid, p. 45.
In his Introduction: The General Tasks of General Legal Theory, Pashukanis displayed a working knowledge of bourgeois jurisprudence as well as previous Marxist writings. He referred to the debate between natural law and legal positivism, before dealing with Kelsen. Pashukanis mocked Kelsen's neo-Kantian methodology that reduces law to various norms derived from formal logic and an ill-defined underlying basic norm (grundnorm), or defining law of the state. He pointed out that such a conception strips law of all socio-economic content and historical development.

Such a general theory explains nothing and turns its back from the outset on the facts of reality, that is of social life, busyig itself with norms without being in the least interested in their origin (a meta-juridical question!), or in their relationship to any material matters.\(^1\)

Turning to sociological and psychological theories of law, Pashukanis criticised them for dismissing the legal form as a series of ideological illusions. As noted earlier, he reproached Marxists, including Stuchka, for ‘assuming that by simply adding in the element of class struggle to the above-mentioned theories, they would attain a genuinely materialist, Marxist theory of law.’\(^2\)

Pashukanis maintained that, while juridical ideology might be important for the ruling class, in camouflageing class conflict and creating illusions in legal equality, that does not explain how the ideology arose: ‘The conscious exploitation of ideological forms is not the same as their emergence.’\(^3\) In other words, while ideology may be a distorted expression of reality, it had a definite connection to that reality. To understand law’s ideological role, one had to trace the development of law’s actual function. Pashukanis insisted that law is an ‘objective social relation’ with its history determined by commodity exchange.

**Criticisms and flaws**

An article by Warrington\(^4\) provides a useful starting point to assess various criticisms of Pashukanis’ theory. Warrington’s views have had a certain influence, being cited and substantially reproduced by Freeman in his *Lloyd’s Introduction to Jurisprudence*,\(^5\) a widely used Western Jurisprudence text. Warrington accuses Pashukanis of lacking objectivity, on the basis of the following quote:

> The legal form only encompasses us within its narrow horizon for the time being. It exists for the sole purpose of being utterly spent. The task of Marxist theory consists of verifying this general conclusion and of following up the concrete historical material.\(^6\)

According to Warrington:

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\(^3\) Ibid, p. 53.

\(^4\) Ibid, p. 140.


Pashukanis' enquiry was then in no sense an attempt at an 'objective' theory of law; it was very definitely overlaid with the political demands of orthodox Bolshevism. It was designed to meet a purely political end, the speeding of the revolution which he saw as being in process, the revolution to end property relations entirely.\textsuperscript{98}

This is a jaundiced and caricatured view. In the first place, the quote from Pashukanis is taken out of context. Pashukanis insisted that his project was to contribute toward establishing a comprehensive theory of law, not one purely applicable to the Russian Revolution. More importantly, Warrington presents a false dichotomy between objectivity and engagement in the social and legal processes associated with the Soviet experiment. Pashukanis was involved in the attempt to forge a socialist society, one in which the state and law would no longer be required as instruments of social control and regulation. But that does not automatically invalidate his strivings to draw theoretical conclusions from those experiences. As Trotsky argued in the Preface to The History of the Russian Revolution, being an active and partisan participant in great events is no automatic disqualification from objectivity.\textsuperscript{99}

Furthermore, it is simplistic to suggest that Pashukanis was seeking to 'speed' the revolution in some artificial sense. Marxists understand that, while great social revolutions require conscious and clear-sighted leadership, they remain enormous social transformations that depend, ultimately, on underlying productive, technological, economic and cultural factors, not just in one country but on a global scale. As discussed in Chapter One, Marxists regarded law and legal relations as important contributors to, and facilitators of, changes in society and social consciousness, and capable of playing a key political role in periods of decisive political contest. Nevertheless, they recognise that the level of legal development remains fundamentally dependent upon and derived from the level of economic, political and social development.

Warrington, apparently relying upon Sharlet, mistakenly refers to Pashukanis as an 'orthodox Old Bolshevik'.\textsuperscript{100} Pashukanis joined the Bolsheviks in 1918, only after the October 1917 Revolution. The purpose of Warrington's label appears to be to depict Pashukanis as a blind adherent to Bolshevism who proceeded 'according to the orthodoxy of his day (to which Pashukanis adhered with unhealthy rigidity)'.\textsuperscript{101}

The chief 'orthodoxy,' in Warrington's view, was the two-stage transition to communist society outlined by Marx in the Critique of the Gotha Program and developed by Lenin in The State and Revolution. Warrington distorts Pashukanis' role as an academic jurist in relation to this transition. Correctly enough, Warrington describes two reasons that a transitional process is required. The first task is to raise the productive forces to a sufficient level to make it unnecessary to restrict access to wealth by legal restraints. The second is to overcome the traces of bourgeois mentality in society. But Warrington asserts that Pashukanis' function related only to the second process. His assignment was to 'overthrow bourgeois attitudes' in general and specifically in relation to legal theory.\textsuperscript{102}

\textsuperscript{98} Warrington, p. 180.
\textsuperscript{100} Warrington, p. 181; R. Sharlet, 'Pashukanis and the withering away of law in the USSR' in S. Fitzpatrick (ed.) Cultural Revolution in Russia 1928-1931, Bloomington, Indiana University Press, 1978, p. 170
\textsuperscript{101} Warrington, p. 181.
\textsuperscript{102} Ibid, p. 181.
It is a caricature to equate legal theorising with 'overthrowing bourgeois attitudes,' as if social consciousness could be changed merely by ideological argument, rather than by elevating the social conditions of life. Pashukanis was engaged in seeking to expose the flaws and contradictions in bourgeois legal theory, as Marx, Engels and Plekhanov had done before him. But, as philosophical materialists, Marxists do not conceive of such clarification as a purely pedagogical or theoretical exercise. Indeed, they argue that bourgeois legal theorists essentially reflect the constraints of the prevailing socio-economic order.

On another issue, Warrington distorts one of Pashukanis' core theses. Because Pashukanis observed that formal juridical concepts continued to exist in Soviet statute books and commentaries, Warrington concludes that this was the basis for Pashukanis' characterisation of Soviet law remaining bourgeois: 'Thus for Pashukanis, Russia in the 1920s was still dominated by a recognizable bourgeois legal system.' In reality, Pashukanis ascribed the bourgeois nature of law not to ideological befuddlement but to its very form, which was historically rooted in commodity exchange. The continued reliance on law as a central instrument of social regulation reflected the continued need to resort to capitalist norms of private production and distribution, given the poor and primitive level of Soviet economy -- the danger that Lenin had warned of in *The State and Revolution*.

Warrington sets out to establish that Pashukanis' 'central insight' -- 'the commodity form theory' -- has merits but is marred by 'several major flaws.' Six defects identified by Warrington provide a means of reviewing some of the inherent weaknesses in Pashukanis' jurisprudence. They are that Pashukanis (1) wrongly denied pre-capitalist law, (2) over-emphasised commodity exchange, (3) misread Marx, (4) ignored the role of state coercion and the class struggle, (5) overlooked the interactive role of law in shaping economic life and (6) failed to recognise certain contradictions in his commitment to the withering away of law. There is force in each of these propositions. Yet Warrington's critique is often superficial, whereas the problems in Pashukanis' theory are usually more profound than Warrington indicates.

**Denial of pre-capitalist law**

Warrington insists that Pashukanis' view that law was a uniquely capitalist institution was central to Pashukanis' argument that legal forms are not eternally necessary and can therefore wither away under communism. Warrington contends that the fact that Pashukanis later abandoned his contention about law and capitalism undermined his conclusions.

According to Warrington, Pashukanis held law to be a peculiarly capitalist institution and denied its existence under previous modes of production:

> As Pashukanis defined all law as merely the outgrowth of the exchange of commodities, it follows that to be consistent social arrangements prior to the commodity form of society were not legal. Thus he wrote of the Middle Ages having 'no abstract concept of the legal subject' and of slavery not being a legal relation and thus requiring no specifically legal formulation.

This simplifies and distorts Pashukanis' view. In fact, Pashukanis' view was less absolute than Warrington suggests. Nevertheless, Pashukanis did acknowledge that his argument needed

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103 Ibid. p. 181.
104 Ibid. p. 187.
clarification. As already mentioned, he qualified his conclusions as early as the writing of the Preface to the second Russian edition of the General Theory. However, Pashukanis' subsequent corrections did not alter his argument that capitalism clothes all social relations in legal form for the first time in human civilisation. Nor did his modifications alter his view that law would wither away under genuine communism.

**Commodity exchange over-emphasised**

Warrington accuses Pashukanis of illogically maintaining that commodity exchange pre-dated law and of ignoring the process of production. His second criticism has force, but not the first.

On the first point, Warrington is hardly original. He essentially takes the formal position that is simply untenable to postulate the existence of any form of property prior to law. Pashukanis' 'concept of property existing prior to law is unacceptable'. However, Marxists, and indeed other historians, have suggested that the concept of private property, based upon the exclusion of others, arose out of definite economic and productive requirements that were reflected ultimately in evolving legal definitions. Among these writers was Macpherson, whose analysis was considered in Chapter One.

On the second point, Warrington contends that Pashukanis has written production out of the law, whereas capitalism is a process of production, and exchange is merely part of that process. Warrington does not offer any suggestions as to how this alleged defect deforms Pashukanis' theory or point to how considerations of production would affect legal theory. Nevertheless, Warrington makes a valid point, albeit abstractly. Others, including Schlesinger, have pointed out that Pashukanis contradicts the Marxist explanation of social phenomena, which refers primarily to the relations that people enter in production, as distinct from distribution, which Marxism analyses as secondary.

**Misreading Marx**

Warrington also accuses Pashukanis of misreading Marx by confining his analysis to the exchange of commodities in simple commodity production, a process that Marx began with in *Capital*, Volume One. By simple commodity production, Marx meant the elementary production of goods for exchange on a small, one-to-one, basis - for example, a farmer bringing produce to market. In Volume One of *Capital*, Marx commenced his analysis by examining the contradiction inherent in this rudimentary process.

Simple commodity production did not commence with capitalism; it occurred under slavery and feudalism, but only marginally. As others, including Fine and Picciotto, have pointed out, in volumes Two and Three of *Capital*, Marx examined the production, circulation and distribution of surplus value under a much more developed and complex economic system - that of capitalism. It is only with capitalism that commodity production becomes predominant and that

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wage working, the buying and selling of labour-power as a commodity, becomes the means of surplus value creation.

According to Pashukanis: "The legal system differs from every other form of social system in that it deals with private isolated subjects." While capitalism began with the atomisation of the old collective social relations of feudalism into relations between individuals, and this is an important starting point for jurisprudential analysis, it did not stop there. Capitalism gave rise to the formation of giant companies, the necessity for credit and the dominance of financial institutions and the development of workers' organisations (trade unions, political parties). It socialised production, while individualising appropriation.

However, as Picciotto points out, Pashukanis' failure to follow Marx in developing his analysis of the expanded reproduction of capital as a whole, does not negate his entire enterprise. Insofar as law under capitalism is largely concerned with mediating social relations in the sphere of circulation, analysis at the level of commodity production can reveal much about the forms developed by capitalist law.

To grasp the real problem with Pashukanis' theory it is necessary to go further. Under capitalism, production is undertaken almost entirely for the purposes of exchange. As Marx explained, the capitalist must make money, not products. Marx began Capital by drawing out how commodities -- that is, products produced for exchange -- contain within them an inherent contradiction between use value and exchange value, a contradiction that is central to the capitalist mode of production. Pashukanis, by seeking to apply Marx's analysis of this contradiction to legal theory, made some important observations about the legal form.

Yet, as Marx also showed, the source of surplus value under capitalism lies not in exchange but in production. While capitalists must find markets for their commodities -- and their immediate profits may be affected spectacularly by success or failure in that quest -- the only source of surplus value in the economy as a whole is the labour power of the working class, which is consumed in production. Given that, in general and on average, commodities will be exchanged for equivalent value in the market, the capitalist must find a commodity that can create value over and above the value embodied within it. As Marx put it:

Moneybags [Marx's embryonic capitalist] must be so lucky as to find, within the sphere of circulation, in the market, a commodity whose use-value possesses the peculiar property of being a source of value, whose actual consumption, therefore, is itself an embodiment of labour, and, consequently, a creation of value. The possessor of money does find on the market such a special commodity in capacity for labour, or labour-power.

Therefore, the essential role of law must relate to the extraction of surplus value in the production process. However, in order to retain the ability to exploit labour-power, the capitalists rely substantially on market forces, that is, on the process of exchange, rather than on legal or physical coercion. Capitalism differs from previous forms of class exploitation, such as slavery and

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112 Pashukanis, Law & Marxism, p. 100.
116 Capital, Chapter 1.
feudalism, in that the bond between the exploiter and the exploited is not fixed formally by status but instead appears to be based on individual freedom. In the main, the worker is not compelled by law or force to sell his labour-power to the employer. On the contrary, he is 'free' to do so ... or go hungry. Because the capitalist class has acquired a monopoly over the basic productive forces -- the large factories, mines, agri-businesses, media outlets, banks and other financial and commercial corporations -- the working masses, the vast majority of the population, have, in reality, little choice but to become wage-workers. The illusion of freedom is an important component of capitalist ideology, including legal theory.

Nonetheless, capitalists do resort to both violence and law to enforce their position when market forces prove inadequate. Some of the most obvious examples include the use of security guards and strikebreakers to combat collective resistance by workers, and the master-servant laws (more latterly workplace relations legislation) to define the legal rights of employers. Ultimately, in times of economic, social or political breakdown, the full force of the state is mobilised -- police riot squads, military special forces and intelligence agencies -- to restore or maintain order, protect capitalist property and ensure the continued existence of the socio-economic structure.

**Absence of coercion and the class struggle**

Warrington states that Pashukanis ignored the role of coercion, something that Pashukanis' contemporaries, including Stuchka, commented upon. Yet, as Warrington acknowledges, Pashukanis did write a chapter on the state, in which he discussed its coercive nature. Pashukanis regarded the state as having a dual character -- political and legal -- with political power not necessarily wielded through a legal form.

The state is an organisation of class domination, and as an organisation for the conduct of external wars, does not require legal interpretation and in essence does not allow it. This is where ... the principle of naked expediency rules.

Particularly at critical points, when the political establishment was under threat, the state was the authority for the organised force of one class against others. On the other hand, the legal state embodied the mutual guarantees that commodity owners gave each other.

In a society of commodity owners, and within the limits of the act of exchange, coercion is neither abstract nor impersonal -- hence it cannot figure as a social function. For in the society based on commodity production, subjection to one person, as a concrete individual, implies subjection to an arbitrary force, since it is the same thing, for this society, as the subjection of one owner of commodities to another. That is also why coercion cannot appear here in undisguised form as a simple act of expediency. It has to appear rather as coercion emanating from an abstract collective person, exercised not in the interest of the individual from whom it emanates ... but in the interest of all parties to legal transactions.

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120 Pashukanis: Selected Writings on Marxism and Law, p. 92.
Pashukanis was concerned to refute some distorted interpretations of Marxism, which depicted its analysis as based upon crude force. Warrington himself is guilty of this distortion. He writes:

The dominant Leninist view of the time included the conception that all law is but the expression of the will of the ruling class to crush other classes and that in the revolutionary period of the dictatorship of the proletariat the role of law was to help crush the bourgeoisie.

As discussed in Chapters One and Six, the Marxist and Bolshevik view of law was more nuanced, complex and open to debate.\(^{122}\) It recognised that, while law ultimately reflected ruling class interests, it did so imperfectly.

In 1932, in one of his recantations, Pashukanis wrote of his error in not referring to coercion and personal subordination as essential to all legal systems.\(^{123}\) Warrington and others\(^{124}\) have linked Pashukanis’ weakness in this sphere to his failure to relate his theory to the struggle between the contending classes in society.

**One-sided view of law**

Warrington charges Pashukanis with ‘taking a fairly unsophisticated approach to the base-superstructure metaphor’ and hence ignoring ‘the potential of law for shaping economy’ and reducing ‘law to the mere reflex response of the given economic’\(^{125}\). As discussed earlier, if this were true, Pashukanis’ approach would be mechanical and one-sided. Pashukanis did not ignore the ideological role of law, while insisting that its ideological trappings were derived from its underlying economic function. But his reference to legal outcomes as ‘objective facts’ belittled the dialectical role of law analysed by Marxists. Law fundamentally reflects and serves the needs of the prevailing economic order, but often does so incompletely or in contradictory ways, and can have a considerable impact on economic life.\(^{126}\)

**The withering away of law**

Warrington quotes Stuchka from 1927: ‘Communism means 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 die out altogether.’\(^{127}\) Warrington suggests that this summarises Pashukanis’ view, which constitutes ‘his most important contribution to legal theory’.\(^{128}\)

Warrington acknowledges that ‘the most heated legal debate in the 1920s in Russia’ related to the characterisation of the legal system of the transition period. He does not raise any criticism of Pashukanis on this issue, quoting him as follows:

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\(^{124}\) See, for example, Fine and Picciootto, op cit.

\(^{125}\) Warrington, p. 192.


\(^{128}\) Ibid, p. 194.
The proletariat may well have to utilise these forms [bourgeois legal forms], but that in no way implies that they could be developed further or be permeated by socialist content. These forms are incapable of absorbing this content and must wither away in an inverse ratio with the extent to which this content becomes reality.\textsuperscript{129}

But Warrington charges Pashukanis with being ‘not totally consistent’ in arguing that crime, state and morality would disappear under communism. Following Korsch\textsuperscript{130}, he claims that Pashukanis contradicts himself by writing: ‘Only the complete disappearance of classes will make possible the creation of a system of penal policy which lacks any element of antagonism.’\textsuperscript{131} On the face of it, this seems a strained argument, based on interpreting ‘the creation of a system of penal policy’ as meaning the continuation of punishment by law. Rather Pashukanis, following Marx, Engels and Lenin, suggested that under communism members of society will find ways to deal with social problems and individual conflicts in non-punitive ways that focus on remedying their sources.

Warrington accuses Pashukanis of adding a chapter on criminal law only ‘to attempt a spurious theoretical consistency,’ an effort Warrington finds ‘faintly comic.’\textsuperscript{132} Without elaborating, Warrington asserts that Pashukanis displays a far more sophisticated approach to criminal policy elsewhere. He does not attempt himself to examine the possibility of organising society’s responses to social problems, currently labelled as ‘crime,’ on a more humane, curative and non-legal level.

\textit{Law and force}

In \textit{Lloyd’s Introduction to Jurisprudence}, Freeman adds to Warrington’s critique two further ‘puzzles’ with Pashukanis’ theory. First, Freeman asks why the capitalist class uses law, when it could use brute force\textsuperscript{133}. Pashukanis answered this question:

\begin{quote}
[W]hy does class rule not remain what it is, the factual subjugation of one section of the population by the other? Why does it assume the form of official state rule, or – which is the same thing – why does the machinery of state coercion not come into being as the private machinery of the ruling class; why does it detach itself from the ruling class and take on the form of an impersonal apparatus of public power, separate from society?\textsuperscript{134}
\end{quote}

Freeman ignores not only the ideological function of law in mystifying the real class relations in capitalist society but also, more profoundly, the very basis of capital accumulation in the ‘free’ (unfettered) purchase and consumption of labour power as a commodity. Second, Freeman asserts that ‘if’ law is so central, one would have expected Pashukanis to believe not in revolution but in legal reformism\textsuperscript{135}. Pashukanis regarded law as a transient phenomenon, elevated to a prominent

\begin{enumerate}
\item ibid, p. 160.
\item Pashukanis, \textit{Law and Marxism}, p. 175.
\item Warrington, p. 197.
\item Freeman, \textit{Lloyd’s Introduction to Jurisprudence}, p. 984.
\item Pashukanis, \textit{Law & Marxism}, p. 139.
\item Freeman, p. 984.
\end{enumerate}
role under capitalism, but destined to fade away if and when a communist society could be created. Before that task could even be approached, capitalism first had to be overthrown. 136

Conclusion

Pashukanis must be assessed historically and politically. The NEP, adopted in 1921, made key concessions to capitalist market relations and necessitated a return to traditional legal forms in order to protect private property rights. This had a profound impact on Soviet legal theory, particularly reflected in the writings of Pashukanis. There was a further distinct shift in content and tone after 1924, signalled by Stalin’s usurpation of power and the adoption of the ‘socialism in one country’ perspective. In the same year, Pashukanis’ General Theory was published and rapidly became the central legal text. It was followed by Pashukanis’ 1925 denunciation of ‘Trotskyism’ and his subsequent elevation as the doyen of the Soviet legal establishment. A further shift occurred in 1927, amid the defeat of the Joint Opposition, typified by Pashukanis’ first ‘correction’—his acceptance of ‘socialist legality’.

Although Pashukanis made important contributions to the early legal debates, and developed aspects of Marxist legal theory, he played a role in the Stalinist degeneration. Pashukanis shed light on the nature of the legal form, the distinction between law and regulation, the withering away of law and the idea of morality. But by lining up against the Left Opposition, he helped deprive the debates of the analysis and program that could have combatted the political and theoretical degeneration that occurred. In the end, a series of ‘corrections’ did not save Pashukanis from Stalin’s purges because by 1936 Pashukanis’ continued view that the state would eventually wither away under communism became incompatible with Stalin’s insistence that socialism had already triumphed in the Soviet Union.

136 Pashukanis frequently cited Lenin’s The State and Revolution, where the necessity for the overthrow of the capitalist state was outlined.
CHAPTER NINE

THE COMMUNIST OPPOSITION AND THE LEGAL DEBATES

Introduction

From 1917 to 1927, when Stalin’s machine expelled the Left Opposition, the governing Communist Party in Soviet Russia was wracked by a continual series of differences and the formation of opposition groupings. Contrary to the commonly held perception, the Bolshevik Party was far from the monolithic and totalitarian apparatus that it became in Stalin’s grip. Intense debates, conflicts and factional struggles occurred over nearly every major policy. Deep-going discussion and divisions within the leadership accompanied each political and economic turning point. Until the campaign against Trotskyism in 1924, culminating in the 1926-27 defeat of the United Opposition, these debates were conducted with relative freedom and democracy, considering the vicissitudes of economic hardship and foreign military intervention.

As soon as the Bolsheviks seized power in October 1917, the party was struck by rifts and resignations over three major issues: (1) seeking a coalition government with other Soviet parties (Social Revolutionaries and Mensheviks) or attempting to hold power alone, (2) dissolving the Constituent Assembly, and (3) press freedom for interests aiming to overturn the revolution. By the end of 1917, deep splits occurred over whether to sue for peace with Germany and sign the consequent Brest-Litovsk Treaty.

Even during the years of foreign military intervention and the Civil War, at least two major controversies occurred: the 1919 opposition to Trotsky’s professionalisation of the Red Army and the November 1920-March 1921 dispute over the status and role of the trade unions. The March 1921 adoption of the New Economic Policy occasioned considerable political and economic debates, including a sharp conflict in October 1922 over Stalin’s support for ending the foreign trade monopoly. From September 1922 to April 1923, Lenin and Trotsky were at loggerheads with Stalin over Georgia and the national question.

Between October 1923, following the crushing of the German revolution, and December 1924, the conflicts assumed a different and more polarised form: the campaign launched by Trotsky and the Left Opposition against the growing bureaucratisation and nationalist perspective of the party at the hands of the triumvirate of Stalin, Zinoviev and Kamenev that emerged following Lenin’s incapacitation and death.

After suffering serious defeats, and in the face of increasingly anti-democratic measures by Stalin’s faction, Trotsky joined with Zinoviev and Kamenev to form the United or Joint Opposition in April 1926. But following further international working class defeats, in Poland, Britain and China, the United Opposition broke apart and the Left Opposition was bureaucratically suppressed from October 1927. Trotsky was finally removed from the party leadership, expelled from the party, exiled to Central Asia and deported from the Soviet Union.

In 1928 and 1929, Stalin’s faction increasingly turned against its allies in Bukharin’s Right faction, culminating in the capitulation and crushing of the Right Opposition. That marked the

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end of debate within the party, although clandestine oppositions continued to win considerable support, threatening the Stalinist regime.

Throughout these 12 years, there were numerous factions and groupings, as well as independently-minded leading figures, in the Bolshevik party. The principal factions were the Leninists 1917-23, the Centre (Stalin) 1921-38, the Left Opposition from 1923, the Right Opposition 1928-29, the United Opposition 1926-27, the Left Communists 1917-21, the Democratic Centralists 1917-21 and the Workers Opposition 1917-21. Lesser factions included the Workers Group 1921-27 and Workers Truth 1921-27.

How these differences related to the debates on legal policy and practice is difficult to trace in detail. The early Soviet legal debates featured an array of Bolshevik jurists, lawyers, philosophers and legal scholars. Some undoubtedly represented various factions, including opposition tendencies. However, except for Lunacharsky and Krestinsky, neither of whom played an active part in the legal debates after 1918, none were central party leaders. Except for brief periods, Stuchka and Krylenko were secondary party leaders. The legal debates generally flowed from, rather than directly contributed to, the main conflicts and debates over political, economic, social and organisational program.

No clear evidence seems to exist of any direct influence on the legal debates by the 1923-27 Left and United Oppositions to the Stalinist bureaucracy. However, the published views of the Left Opposition did provide an analysis of the economic, political and legal contradictions facing Soviet Russia. Before turning to those documents, it is worth reviewing the extent of the scope that existed for divergent political views in the early years of the revolution. In his work on the communist opposition, Daniels reviews the divergent political biographies of the early Bolshevik leaders and notes their "highly individualist nature." This is another indication of the divergent views and independent spirits of the early leadership.

From democracy to repression

One feature of the politico-legal climate in the early months of the Russian Revolution was the considerable scope of democracy, tolerance of dissent and reluctance to take organisational measures against opponents in the Bolshevik (Communist) Party. For example, the Bolsheviks, having seized power and organised a transitional government, headed by Lenin as chairman of the Council of People's Commissars, with majority support in the Second Congress of Soviets, were immediately divided over the issue of whether to form a coalition government representing all the socialist parties.

Negotiations to this end were carried on between the Bolsheviks and other parties for several days. Lenin and Trotsky, the two foremost leaders of the revolution, opposed a coalition with the Mensheviks and Social Revolutionaries, who were demanding Lenin and Trotsky's removal from office as a precondition for coalition. Support for coalition within the Bolshevik leadership was so strong that five Central Committee members - Zinoviev, Kamenev, Rykov, Miliutin and Nogin - and five People's Commissars - Teodorovich and Shliapnikov, as well as Rykov, Miliutin and Nogin - resigned their posts in opposition to the majority who voted with Lenin and Trotsky. The dispute was finally settled in late November 1917 when the Bolsheviks and the Left Social Revolutionaries reached an agreement on a coalition. Those who had opposed the majority were quickly reinstated in their positions.1

3 Ibid, pp. 63-68.
After the stresses and privations of the civil war, party democracy reached a high tide at the Ninth party conference in September 1920, by which time the civil war was nearing an end and the immediate danger to Soviet Russia's survival was dissipating. Two 'left' opposition groups, the Workers' Opposition and the Democratic Centralists, were afforded representation on a commission to consider party organisation and the conference opened with scathing criticisms of the party machinery. Among other things, it was accused of insufficient ties with local organisations, insufficient attention to economic tasks, and lack of centralised direction of educational activities. The conference ended with a manifesto that called for 'broader criticism of the central as well as of the local party institutions,' cessation of the appointment of local secretaries by the center, and rejection of 'any kind of repression against comrades because they have different ideas'. Emphasised above all was 'the need again to direct the attention of the whole party to the struggle for the realisation of greater equality; in the first place, within the party; secondly within the proletariat, and in addition within the whole toiling mass'.

As discussed in Chapter Three, a regrettable ban on party factions was introduced, together with the NEP, at the Tenth Congress in 1921. Nevertheless, opposition groupings continued to exist. Only one prominent party member, Workers Group leader Gabriel Miasnikov, was expelled from the party in Lenin's time. The Central Committee expelled Miasnikov in February 1922 after continuing to defy party discipline despite a written plea by Lenin. The ban on formal factions was coupled with the insistence that free discussion and criticism remain protected. Lenin specifically defended the right to dissent on major questions and opposed any attempt to prohibit competing policy platforms within the party.

However, fundamental differences over economic and national policy, as well as the state apparatus, emerged from the second half of 1922. The November 1922 Plenum of the Central Committee, sitting without Lenin and Trotsky, unexpectedly moved to end the state monopoly on foreign trade, which would have created a new layer of NEPmen and opened the still primitive Soviet economy to the direct pressure of international capital. Lenin wrote to Trotsky, urging him to 'take upon yourself' at the coming Plenum the defense of our common view as to the unconditional necessity of preserving and enforcing the monopoly. The alliance was directed primarily against Stalin, who had presented the question to the Central Committee. Sensing the danger to his position, Stalin yielded and the decision was revoked at the December Plenum. Over the same months, Lenin and Trotsky combined to defeat a proposal by Stalin, as Commissar for Nationalities, to adopt a bureaucratically centralist policy toward the proposed transformation of the Soviet state into a federated union of national republics.

These struggles provided the backdrop to Lenin's political testament of December 1922 and January 1923, in which he called for Stalin's removal as party general secretary. Concealed by Stalin and his group from the party, the testament was published and distributed secretly by Oppositionists, hundreds of whom were arrested and exiled for doing so. Thus, Lenin commenced a fight within the party against the growth of the bureaucracy and its usurpation of political power, a fight that was continued by the Left Opposition, formed by Trotsky in late 1923.

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5 Ibid. pp. 159-64.
6 Ibid. pp. 148-150.
9 For the text of the testament, see Ibid. pp. 6-8.
The analysis of the Left and Joint Oppositions

*The New Course*, one of the first documents issued by the Left Opposition in 1923, identified bureaucratism as one of the principal dangers confronting the Soviet state. It demanded a return to the Marxist course of involving the mass of the population in the administration of the state:

The state apparatus is the most important source of bureaucratism. On one hand, it absorbs an enormous quantity of the most active party elements and it teaches the most capable of them the methods of administration of men and things, instead of political leadership of the masses. On the other hand, it preoccupies largely the attention of the party apparatus over which it exerts influence by its methods of administration. Hence, in large measure, the bureaucratization of the apparatus, which threatens to separate the party from the masses. This is precisely the danger that is now most obvious and direct. The struggle against the other dangers must under present conditions begin with the struggle against bureaucratism. 10

It is noticeable that none of the participants in the legal debates referred directly to this document or the bitter struggle that it opened up between Stalin's bureaucratic machine and the Left Opposition. Nevertheless, its trenchant defence of the classical Marxist outlook may have influenced some of the objections to the emerging repudiation of the withering away of the state apparatus.

The 1927 Platform of the Joint Opposition, which was joined by Zinoviev and Kamenev, continued the struggle for a genuinely socialist approach to the state. It emphasised the necessity to restore the ideals of the October Revolution:

The bureaucratic apparatus of every bourgeois state, no matter what its form, elevates itself above the population, solidifying its rule by cultivating a mutual loyalty among the ruling class and systematically propagating among the masses fear of and subservience to the rulers. The October Revolution, replacing the old state machine by the workers', peasants' and soldiers' soviets, dealt the heaviest blow in history to the old idol of the bureaucratic state.

Our party program says upon this question: Waging the most bitter struggle against bureaucratism, the Russian Communist Party applies for the *complete conquering of this evil* the following measures: (1) The obligatory drawing of every member of a Soviet into some definite work in the administration of the state. (2) A continual rotation of these tasks so that every member is gradually familiarized with all branches of the administration. (3) The gradual attraction of the entire labouring population, to the last man, into the work of State administration.

A full and all-sided carrying out of these measures—which are a further step along the road taken by the Paris Commune—means a simplification of the functions of administration, and together with a rise in the cultural level of the workers will lead to the abolition of the State power. 11

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The Platform insisted that these tasks, together with the struggle for greater equality, remained among the party's most important challenges during the period of the NEP, in order to ensure that the NEP was a road to socialism, not capitalism. It noted that 'instructions' issued in 1925 extending electoral rights to NEPmen and other employer layers, in violation of the Soviet constitution, had been revoked as a result of criticism from the Opposition. These instructions were 'only one very clear expression of the fact that the bureaucratic apparatus, to its very top, has become responsive to the importunities of the wealthy, accumulating elements of the community'.

The submission of this platform to the Central Committee in early September 1927 sparked a new wave of persecution against Opposition supporters. The Central Committee refused to publish the document, contrary to party traditions, and Oppositionists, including Preobrazhensky, Serebriakov and Mruchovsky, who printed it were expelled from the party and later imprisoned. Perhaps it is little wonder than none of the contributors to the written legal debates quoted from the forbidden program.

Nevertheless, the Opposition's analysis of the contradictory character of the Soviet state provided a key to understanding the debates over whether Soviet state and 'law' were bourgeois or proletarian. In essence, the Left Opposition warned that the Soviet state and law had two antagonistic sides. They were socialist in as much as they maintained socialist production and helped develop it toward genuine communism. But they remained bourgeois to the extent that they enforced the continued allocation of products according to market forces, determined by financial capacity to pay. These opposing tendencies were not static—ones would inevitably gain ascendancy over the other, depending on the balance of economic and political forces, both within the Soviet Union and on a global scale. Rather than falsely and complacently proclaim the 'socialist' character of the state and law, as did the increasingly privileged officials supporting Stalin's faction, the essential task was to combat the capitalist pressures, while strengthening the ability of the party and the Soviet masses to take real control over economic, political and social life. The emerging Stalinist bureaucracy was the greatest barrier to doing so.

In *The Revolution Betrayed*, Trotsky restated the warnings that the Left Opposition had sounded since 1923 about the dangers at the heart of the Soviet state.

The bourgeois norms of distribution, by hastening the growth of material power, ought to serve socialist aims—but only in the last analysis. The state assumes directly and from the very beginning a dual character: socialist, insofar as it defends social property in the means of production; bourgeois, insofar as the distribution of life's goods is carried out with a capitalistic measure of value and all the consequences ensuing therefrom. Such a contradictory characterisation may horrify the dogmatists and scholastics; we can only offer them our condolences.

The final physiognomy of the workers' state ought to be determined by the changing relations between its bourgeois and socialist tendencies. The triumph of the latter ought ipso facto to signify the final liquidation of the gendarmerie—that is, the dissolving of the state in a self-governing society. From this alone it is sufficiently clear how immeasurably significant is the problem of Soviet bureaucratism, both in itself and as a symptom!

12 Ibid, p. 49.
Trotsky also made a frank assessment of the Bolshevik leadership's lack of preparedness for the economic and class pressures produced by the failure of the Soviet revolution to spread to the more advanced countries of Europe. He stated that Lenin had not fully anticipated the depth of the difficulties that would beset the Soviet state, because Lenin had not envisaged the Russian Revolution standing for any length of time isolated in a capitalist world.

Basing himself wholly upon the Marxian theory of the dictatorship of the proletariat, Lenin did not succeed, as we have said, either in his chief work dedicated to this question (The State and Revolution), or in the program of the party, in drawing all the necessary conclusions as to the character of the state from the economic backwardness and isolatedness of the country. Explaining the revival of bureaucratism by the unfamiliarity of the masses with administration and by the special difficulties resulting from the war, the program prescribes merely political measures for the overcoming of 'bureaucratic distortions': elections and recall at any time of all plenipotentiaries, abolition of material privileges, active control by the masses, etc. It was assumed that along this road the bureaucrat, from being a boss, would turn into a simple and moreover temporary technical agent, and the state would gradually and imperceptibly disappear from the scene.\(^{15}\)

In other words, Lenin and the Bolsheviks had seriously underestimated the difficulties presented by the primitivism of the economy they had inherited from Tsarism and the implications of the revolution failing to spread to the more advanced countries of Western Europe. This meant that the measures Lenin had prescribed in The State and Revolution for checking the rise of bureaucratic tendencies were inadequate. Organisational safeguards alone could not combat bureaucratism because the root causes lay deeper. These could only be overcome through a difficult combination of mass political participation, rapid industrial development and the completion of the revolution internationally. Trotsky continued:

This obvious underestimation of impending difficulties is explained by the fact that the program was based wholly upon an international perspective. 'The October revolution in Russia has realised the dictatorship of the proletariat.... The era of world proletarian communist revolution has begun.' These were the introductory lines of the program. Their authors not only did not set themselves the aim of constructing 'socialism in a single country' ---this idea had not entered anybody's head then, and least of all Stalin's ---but they also did not touch the question as to what character the Soviet state would assume, if compelled for as long as two decades to solve in isolation those economic and cultural problems which advanced capitalism had solved so long ago.\(^2\)

Trotsky's analysis highlighted the doctrinal and political problems that beset the early Soviet legal debates. The unanticipated international isolation of the Soviet state created immense difficulties that could not be remedied in the legal sphere alone. These problems were compounded by Stalin's insistence that socialism could be built in a single country. Regrettably, there are no indications that these insights were permitted to inform the legal discussion. Instead, the discourse degenerated into name-calling and scapegoating after 1927, as the grip of Stalin's group tightened.

\(^{15}\) Ibid, p. 58.
\(^{16}\) Ibid, p. 58.
The prognosis of the Left Opposition was confirmed in the most malignant fashion. Despite subsequent industrial growth, the stranglehold of Stalin’s henchmen meant that the capitalist tendencies continued to strengthen at the expense of the socialist tendencies. Stalin’s increasingly bureaucratic and repressive regime exterminated its communist opposition in the 1930s. Even before then, genuine Marxist discussion was strangled and replaced by slavish adherence to an official line, falsely presented as Marxism. In the legal sphere this meant ascribing a permanence and sanctity to the ‘dictatorship of the proletariat’ and ‘Soviet law’ and the reversal of all the progressive achievements in democratic involvement, family relations and criminal law. Despite often recanting their previous writings, some of the leading figures in the early legal debates were among the victims of Stalin’s purges. This brutality laid the basis for a protracted economic and social putrefaction that ultimately culminated in Stalin’s heirs, Gorbachev and Yeltsin, dissolving the Soviet state, paving the way for the complete restoration of capitalism after 1991.\(^\text{17}\) Over the following decade, this led to a social catastrophe of widespread impoverishment, mass unemployment, gross inequality, collapsing public facilities and a dramatic decline in life expectancy.\(^\text{18}\)


CHAPTER 10

CONCLUDING THOUGHTS

A series of tentative conclusions can be drawn from the rich legal experiences of the early years of the Soviet revolution.

1. The Russian Revolution produced a political, social and intellectual ferment. Millions of ordinary oppressed people rose up and, having overthrown two regimes within months, demanded the complete restructuring of society. They gave their support to a party, the Bolshevik-led Russian Social Democratic Party, which promised to lead them in reorganising the polity on entirely new foundations.

The legal policy makers and theorists of the October 1917 Revolution faced unprecedented tasks and uncharted waters. The aim of the revolution was to create a classless, egalitarian society based on the abolition of private ownership of the basic means of production. The revolution was fundamentally different in its aspirations and program from the revolutions that paved the way for the ascendency of the capitalist class—the British, American and French revolutions of the 17th and 18th centuries. The leaders of the Russian Revolution did not seek to overthrow the previous ruling elites and replace them with new ones. They did not have as their goal the clearing away of old property and social relations in order to pave the way for the property rights associated with capitalism. Instead, they attempted to end private ownership of production and institute new social and collective relations. There was no precedent to guide this undertaking, except the short-lived, localised Paris Commune of 1870.

The mass character of the revolution added to the dimension of the challenges. The October Revolution was not a military or political coup, nor was it the result of a conspiracy by a few leaders. It was a popular uprising that frequently moved ahead or outside the control of the political leadership, as was shown, for example, in the widespread overthrow and collapse of the authority of the police and courts from February 1917.

2. At the same time, the October Revolution was not a purely spontaneous event. It was prepared by many years of political experiences, the winning of political trust and authority by Marxist leaders and consciousness-raising among critical layers of the population, including workers and intellectuals. These processes produced an impressive generation of theoretically-minded, independently-willed and inspired individuals, in the legal sphere like many others.

The revolution also had the advantage of being guided by a clear strategic conception, first outlined by Trotsky in his theory of permanent revolution and adopted by Lenin in the April Theses. The leading figures who coalesced around the Bolshevik party in 1917 understood that they were attempting to combine the tasks of the democratic, anti-feudal revolution with those of the socialist revolution and that the outcome would not be determined in backward Russia alone – it hinged on the spread of the socialist revolution to the more advanced countries of Europe and internationally.

These leaders knew they were tackling issues that the weak and belated Russian capitalist class had proven incapable of resolving, including the establishment of basic legal equality and democratic rights. They had some awareness of the immense problems that lay ahead, given the poverty of Russia, the small size of the working class and the unmapped course they were embarking upon. The Bolshevik Party could, through decrees, abolish private
ownership of the basic means of production, but it could not abolish a thousand years of Russian history. It could not abolish all the different forms of social, economic, cultural and political backwardness that were the legacy of Russia's historical development over those many centuries.

3. Nevertheless, like the political leaders of the October Revolution, the legal experts and scholars who joined the revolution had a rich Marxist heritage with which to grapple. Marx and Engels did not provide an overall exposition of Marxist legal theory but they did lay the foundations for it. Key works included Engels' *The Origins of the Family, Private Property and the State*, which provided the basis for Lenin's *The State and Revolution*. As well, there were Marx's *Critique of the Gotha Program*, various other writings and correspondence by Marx and Engels, Plekhanov's writings and comments by Trotsky.

None of these works attempted to lay down a blueprint for the role of the state and law in the transition from the socialist revolution to genuine communism, but they did provide methods of analysis and approach. The content, form and role of law and the state were understood to be essentially shaped by the underlying development of society's productive forces and the accompanying social relations of production and distribution.

Equally important, the Marxist literature established some clear principles to be applied by the young Soviet state: democratic (soviet) forms of governance, mass participation in all aspects of administration, the achievement of social equality as quickly as possible, the de-legalisation and de-criminalisation of social life, and the creation of an entirely new kind of state, one that began to wither away from birth. These principles were summarised in the Russian Communist Party program of 1919:

Conducting the most resolute struggle against bureaucracy, the Russian Communist Party advocates for the complete overcoming of this evil the following measures:

1. an obligatory call on every member of the Soviet for the fulfillment of a definite task in the administration of the state;
2. a systematic variation in these tasks in order that they may gradually cover all branches of the administration;
3. a gradual drawing of the whole working population into work in the administration of the state.

The full and universal application of all these measures, which represents a further step on the road trodden by the Paris commune, and the simplification of the functions of administration accompanied by a rise in the cultural level of the workers will lead to the abolition of state power.1

Within that definite framework, there remained considerable scope for theoretical and practical debate, which enhanced the policies applied by the Soviet government. Given the magnitude of the issues facing the Russian Revolution it was hardly surprising that legitimate differences arose. Nor was it unusual for the debates to refer to insights obtained from Western jurisprudence. This was in keeping with the general Marxist approach of not simply discarding the political and philosophical theories that arose under capitalism and earlier forms of class society, but of appreciating those theories in their historical context, and of recognising in them any objective content worth developing.

4. Immense difficulties emerged for the Russian Revolution that were not fully anticipated. As Trotsky concluded, while Lenin proposed critical measures in *The State and Revolution* to ward off the dangers of inequality and bureaucracy, Lenin did not foresee the even greater pressures that would arise from a protracted political and economic isolation of Soviet Russia and delay in the world revolution. The central contradiction of the Russian Revolution – that the world’s first socialist revolution erupted in one of the least developed countries of Europe – could not be overcome within the boundaries of Russia. Yet, the early hopes of successful revolutions in Western Europe in the wake of World War I were soon dashed.

Instead, the brief 'honeymoon' period of Soviet social and legal policy was ended by the so-called civil war of mid-1918 to 1921, in which the major capitalist powers, including the United States and Britain, financed and sent contingents to join the military forces attempting to overturn the revolution. The consequent economic and social devastation largely forced the Soviet leadership to adopt the New Economic Policy in 1921, making key concessions to capitalist market relations and necessitating a return to traditional legal forms in order to protect private property rights. This had a profound impact on Soviet legal theory, particularly reflected in the writings of Stuchka and Pashukanis.

The economic, political and legal pressures generated by the NEP were compounded by the defeats suffered by the Western European revolutions, culminating in the October 1923 crushing of the German revolution. It became apparent that the isolation of the Soviet state would continue for far longer than anticipated. These setbacks coincided with the illness and death of Lenin, removing the most respected and authoritative Marxist from the scene. Stalin, whose social base consisted of NEPmen and apparatchiks, was able to prevail over the Left Opposition and unveil a new nationalist course of 'socialism in one country,' which had a further deep-going impact on Soviet legal policy. Following the 1926-27 defeats of the British General Strike and the Chinese Revolution, Stalin's group was able to cement its grip over the Soviet state, defeating the Joint Opposition. This signalled a new shift in legal discourse, expressed in Pashukanis' first 'correction' – his acceptance of 'socialist legality'.

This degeneration was not inevitable. There was an alternative advanced by the Left Opposition, whose platforms and manifestos, from late 1923 onward, included critical calls for a return to the classical Marxist conceptions of the withering away of the state. The powerful Marxist legacy of the October Revolution was not finally extinguished until the great purges of 1936-37. Nonetheless, the defeat of the Opposition by the end of 1927 set the scene for the shutting down of the free-ranging legal debates of the first 10 years of Soviet Russia.

5. The early years of the Soviet Revolution produced groundbreaking achievements in legal policy. In several spheres, Soviet approaches were the most progressive in the world. They included the transformation of family and sexual relations – the recognition of the rights to divorce, de facto marriage and abortion – and the de-criminalisation of the official response to anti-social behaviour. Underpinning these initiatives were the broader abolition of private ownership of basic production and finance, as well as efforts to de-formalise and provide for popular participation in social administration. As Hazard observed, the Bolshevik vision was one of a new social order in which people would be able to settle their disputes 'with simplicity, without elaborately organised tribunals, without legal representation, without complicated laws, and without a labyrinth of rules of procedure and evidence'.

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These experiments, cut short by the severe difficulties of the civil war and NEP, followed by the Stalinist degeneration, provided a glimpse of what may be possible in a future socialist society.

6. The early legal debates between 1917 and 1924 were substantially democratic, uninhibited and rigorous. It was a period of wide-ranging discussion and intellectual output. In the words of Jaworskyj, the literature was 'diverse, original, and full of cognitive content' and 'the range of both theoretical and practical problems discussed is indeed impressive'. Early Soviet thinkers were neither dictated by official policy nor affected by obsequiousness. Differences and criticisms were freely raised, regardless of the prestige or official posts held by the protagonists. This was the case for the debates that occurred on various levels, political and legal, theoretical and practical. While the needs of official policy were made clear, for example, with the adoption of the NEP, no attempts were made to shut down discussion or suppress divergent opinions.

There was a distinct shift in content and tone from 1924, signalled by Stalin's usurpation of power and the adoption of the 'socialism in one country' perspective. In the same year, Pashukanis' *General Theory of Law and Marxism* was published and rapidly became the central legal text. It was followed by Pashukanis' 1925 denunciation of 'Trotskyism' and his subsequent elevation as the doyen of the Soviet legal establishment. A further shift occurred in 1927, amid the defeat of the Joint Opposition. The passionate, intelligent debates of the early years degenerated into stifled, turgid, repetitious and vacuous diatribes. Although cloaked in formal references to Marxism, contributions no longer made bore any resemblance to genuine Marxist theory or to the actual history and internationalist program of the Russian Revolution.

7. While the early Soviet scholars can be classified in relation to various traditional schools of jurisprudence, the differences between them revolved around several key issues. Whether the participants regarded themselves as belonging to sociological, psychological, normativist or social function schools, the primary axes of the legal debates concerned whether:

(1) legal forms of regulation should disappear in the transition to communism
(2) such 'law' was 'bourgeois' or 'proletarian'
(3) law and the state should immediately begin to wither away.

Stuchka and, later, Pashukanis progressively repudiated their early adherence to the classical Marxist conception that 'law' was a residue of class society that would give way to genuinely collective forms of social interaction as the state withered away.

8. Although Stuchka and Pashukanis made important contributions to the legal debates, and, at least in Pashukanis' case, developed aspects of Marxist legal theory, they played a role in the Stalinist degeneration. Pashukanis shed light on the nature of the legal form, the distinction between law and regulation, the withering away of law and the idea of morality. But both Pashukanis and Stuchka lined up against the Left Opposition, depriving the debates of the analysis and program that could have helped overcome the political and theoretical degeneration that occurred. In the end, a series of 'corrections' did not save Pashukanis from Stalin's purges because by 1936 Pashukanis' continued view that the state would wither away under communism became incompatible with Stalin's insistence that socialism had already triumphed in the Soviet Union.

9. There is little evidence of direct input into the debates by members of the Left Opposition, although its platforms addressed the key questions of bureaucracy and the contradictory, dual

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3 Jaworskyj, *Soviet Political Thought*, p. 4.
character of the Soviet state and law. In the words of the 1923 *New Course*, 'the bureaucratisation of the apparatus ... threatens to separate the party from the masses'. And as Trotsky warned, the capitalist character of Soviet law increasingly predominated over the socialist tendencies. The only possible exceptions to the direct involvement of Left Oppositionists in the legal debates were Krestinsky (briefly) and Volfson. Some supporters of Bukharin and his right-wing faction did feature in the debates.

10. The crowning glory of the Stalinist regime’s repudiation of Marxism came at the 7th Congress of the Communist International in August 1935. It declared that with the nationalisation of industry, the collectivisation of agriculture and the liquidation of the kulaks as a class, 'the final and irrevocable triumph of socialism and the all-sided reinforcement of the state of the proletarian dictatorship, is achieved in the Soviet Union'. As Trotsky pointed out, this resolution was entirely self-contradictory:

If socialism has 'finally and irrevocably' triumphed, not as a principle but as a living social regime, then a renewed 'reinforcement' of the dictatorship is obvious nonsense. And on the contrary, if the reinforcement of the dictatorship is evoked by the real needs of the regime, that means that the triumph of socialism is still remote. Not only a Marxist, but any realistic political thinker, ought to understand that the very necessity of 'reinforcing' the dictatorship -- that is, governmental repression -- testifies not to the triumph of a class less harmony, but to the growth of new social antagonisms.

11. In summary, there was a marked contrast between the post-1917 discussion and the post-1923 degeneration. The period after the revolution was characterised by genuine legal debates and efforts to minimise legal formality, replacing state coercion with mass involvement.

The adoption of the NEP in 1921 caused a shift back to legalism, particularly with regard to the protection of private property rights. After late 1923, with the ascendency of Stalin and the doctrine of 'socialism in one country,' a new atmosphere of 'corrections' and diatribes set in, accompanied by a strengthening of the repressive state apparatus. The classical Marxist perspective of the withering away of the state and law was ditched in favour of the entrenchment of a legal edifice, erected in the name of 'socialist legality'. In this sphere, as in others, Stalinism was a repudiation of Marxism, not a continuation of it.

The early Soviet regime advanced several worthwhile features:

1. It sought mass participation in political and legal life, not legal formality.
2. It was open and democratic in academic discussion.
3. It sought to create social equality as the only true guarantee of human rights.
4. In relation to misconduct, it sought to ameliorate the underlying social causes, instead of criminalising and punishing.

Ultimately, the Soviet Union and its people suffered a cruel fate -- decades of bureaucratic decay and repression, followed by the disastrous 'shock therapy' of capitalism in the 1990s.

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Nevertheless, the debates and achievements of early Soviet Russia can provide valuable pointers for the future, demonstrating the possibility of a democratic, egalitarian and participatory society. Under conditions in which all the fundamental problems that gave rise to the Russian Revolution — war, social polarisation, national and economic oppression — continue to blight humanity, it would be myopic to ignore the lessons offered by the Soviet experiment. The October Revolution proclaimed the principles of a new society, even if it was unable to realise them. The future is likely to thrust forward new opportunities to do better.
APPENDIX 1

SOVIET LEGAL DEBATES: BIOGRAPHIES

Apart from Lenin, Trotsky, Stuchka and Pashukanis, whose biographical details are included in the relevant chapters of this thesis, the early Soviet legal debates featured an array of Bolshevik jurists, lawyers, philosophers and legal scholars. They represented various factions, including opposition tendencies, in the tumultuous politics of the pre-Stalinist party. However, except for Lunacharsky and Krestinsky, neither of whom played a major part in the legal debates after 1918, none were central party leaders. Except for brief periods in which they occupied key posts, Stuchka and Krylenko were secondary party leaders. This underscores the fact that the legal debates generally flowed from, rather than directly contributed to, the main conflicts and debates over political, economic, social and organisational program. Nevertheless, the debates related directly to the political challenges confronting the Soviet leadership and the political conflicts that developed within the Soviet leadership.

Those involved in the lively debates from 1917 to 1927 came from a range of political, professional and academic backgrounds. Among them were Old Bolsheviks, as well as recent converts; lawyers, alongside laymen; professors rubbing shoulders with full-time revolutionary activists. Far from monolithic, their debates, while conducted within a Marxist framework, demonstrated a broad range of influences. The protagonists displayed a considerable knowledge of Marxist writings, as well as Western jurisprudence. The following brief biographical notes vary in detail. But they illustrate the range and calibre of the leading participants in the debates.

V. Adoratsky

Adoratsky wrote On the State (Moscow 1923). Like Razumovsky, he was a philosopher who contributed to the 1925 collection of essays, Revolution of the Law, edited by Stuchka.1 Stuchka referred to him as one of the three pioneers of Soviet legal theory, together with himself and Pashukanis.2 He wrote the entry ‘Ideology (Legal)’ in the 1925-27 Encyclopedia of State and Law.

I. Alexeyev

Alexeyev wrote one the first Soviet legal texts, Introduction to the Study of Law (Moscow 1918).

S. Asknazil

Asknazil was regarded as a member of the social function school. In 1922, he criticised Article 1 of the new Civil Code in the Weekly of Soviet Justice. He argued that the public interest should always prevail over private interests, but that it was also in the public interest for individual property rights to be assured in order to promote the growth of commodity trade. Asknazil proposed that this purpose to be more clearly defined in the Civil Code, to prevent Article 1 being excessively invoked against owners.3

Y. Berman

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1 Sharlet, Maggs & Beirne, P.I. Stuchka Selected Writings, p. 60.
2 Ibid, p. 223.
3 Zile, pp. 87-89.
Berman was regarded as a member of the psychological school.

**Ia. Brandenburgsky**

Sorbonne-educated, he was head of the judicial institutions department of the Justice Commissariat in 1922, when he wrote a front-page *Pravda* discussion article arguing for the party to permit members to enter the colleges of defenders. During this period, he was an associate of Krylenko.

**M. Cheltsov-Bebutov**

Cheltsov-Bebutov was regarded as a member of the psychological school.

**Cherliunchakevich**

A member of the Justice Commissariat, Cherliunchakevich moved a plan at the 1920 Third All-Russian Congress of Justice Workers to replace the colleges of accusers and defenders with a system that periodically assigned jurists working in private or government institutions to cases on the basis of obligatory labour service.

**D. Dembsky**

Dembsky was regarded as a member of the psychological school.

**M. Dotsenko**

Dotsenko was regarded as a member of the sociological school.

**E. Engel**

Engel was regarded as a member of the psychological school.

**A. Estrin**

Estrin was a colleague of Pashukanis in the Communist Academy. His 1927 *Revolution of Law* article, 'XVth Congress of the Party and Questions of Law', argued that the growth of the socialist base of the economy meant 'the simplification and contraction' of the 'legal form'.

**A. Goikhbarg**

Goikhbarg, like Reisner, was a pre-revolution academic, who went to work for the Soviet government. He wrote a book on Soviet civil law in 1918, which, according to Suchka, Lenin leafed through with great interest and recommended for publication in German. Also, author of *Economic Law* and *Foundations of Private Property Law* (1924), Goikhbarg was prominent in the discussion on the nature of NEP civil law. Suchka later described him disparagingly as the Communist Academy’s ‘legal authority’ at the time. In the *Encyclopedia of State and Law*,

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* Sharlet, Maggs & Beirne, *P.I. Suchka Selected Writings*, p. 89.
published in 1927, Stuchka criticised him as a follower of Duguit, the French ‘realist’ theorist who treated law as a necessary social function.  

I. Ilinsky

Author of *An Introduction to the Study of Soviet Law* (1925), Ilinsky argued for recognition of ‘proletarian law’ and for the inculcation of ‘respect for the law’. He was known as a member of the psychological school.

M. Isaev

Isaev was regarded as a member of the sociological school.

S. Kechekyan

Kechekyan was also known as a member of the sociological school.

E. Kelman

Kelman was regarded as a member of the social function school.

A. Kollontai

Aleksandra Kollontai, a leading Bolshevik, intervened in the debates on the 1926 Family Code, which reaffirmed the unconditional right to divorce and provided for maintenance payments for divorcees and their children. She argued that it was demeaning to women and a negation of socialist principles to oblige them to plead before the courts for support from their former husbands. She also pointed to the plight of women who had borne children outside any form of marriage, who were not covered by the Code. Kollontai proposed a General Insurance Fund, based on contributions from the working population.  

F. Kornilov

Author of *Juridical Dogmatism and Dialectical Materialism* (Saratov, 1925), Kornilov criticised what he categorised as three contending schools in the legal debates: social relationships, normativist and ideological. He was known as a member of the sociological school.

M. Kozlovsksy

A former advocate, Kozlovsky was, in 1918, a ‘moderate member of the Board of the Justice Commissariat’. He was active in the earliest debates, arguing against any conception of ‘proletarian law’ and criticising the sociological school.

P. Krasikov

Krasikov was a prominent Bolshevik in 1917, who had been a member of the Bar under Tsarism. He joined the Board of the Justice Commissariat during the Civil War and was characterised by

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8 Ibid, pp. 105-106, 224, 249n.
Huskey as an 'outspoken legal nihilist'.¹¹ In 1922, as deputy justice commissar, he opposed the entry of party members into the colleges of defenders.¹²

N. Krestinsky

Nikolai Krestinsky was another prominent Bolshevik in 1917 who had been a lawyer before the Revolution. In July 1918, as justice commissar of Petrograd and a Central Committee member, he successfully opposed a proposal to allow lawyers to set and charge their own fees. He argued that the Soviet justice system should not facilitate the profit motive.¹³

A supporter of Trotsky, he was elected to the Politburo in 1919 and to the Secretariat and Orgburo in 1920. In 1921 he was voted off the Secretariat, together with other supporters of Trotsky, and sent as Ambassador to Germany, where he remained until 1927. After renouncing his support for the Left Opposition, he became Deputy Foreign Commissar in 1928, but became a victim of the Moscow Trials, being shot in 1938. His trial was notable for revealing the farce of the show trials. When summoned to testify in open court in 1938, he repudiated his confession of anti-Soviet activity, but retracted his repudiation the next day.¹⁴

N. Krylenko


Trained in law and history, he joined the Bolshevik party in 1904 and served periods in Tsarist exile. After serving in the Russian army, where he conducted Bolshevik agitation, he was appointed a commander of the Soviet military in 1917. After the signing of the Brest-Litovsk Treaty with Germany in March 1918, he became a state prosecutor during the Civil War. Under the NEP, he became the first Procurator of the RSFSR. Later he served as deputy Justice Commissar and in 1931 became Justice Commissar.¹⁵

Previously a syndicalist, he was an early supporter of Bukharin, in the latter's 'left' period. He resigned as Co-Commissar of Military Affairs in April 1918 in disagreement with Trotsky's methods of professionalising the Red Army.¹⁶

Generally, Krylenko's early policies seemed in line with Lenin's. Krylenko was regarded as an adherent of the commodity-exchange school. Later, he appeared to adapt to the twists and turns of the Stalinist bureaucracy, surviving as Justice Commissar until February 1938. He was then arrested and replaced by N. Rychkov, a little-known justice official.¹⁷

F. Ksenofontov

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¹¹ Ibid, p. 73.
¹² Ibid, p. 106.
¹³ Ibid, p. 49.
¹⁵ Huskey, Russian Lawyers and the Soviet State, pp. 170-72.
¹⁷ Huskey, Russian Lawyers and the Soviet State, p. 199.
Ksenofontov was known as a member of the sociological school.

D. Kursky

Dmitri Kursky (1874-1932) was RSFSR People's Commissar for Justice in 1918-28, a Presidium member of the All-Russian Central Executive Committee in 1921-23, a Presidium member of the USSR Central Executive Committee in 1923-24, and USSR Ambassador to Italy in 1928-32. A leading Bolshevik in 1917, he had been a member of the Bar before the Revolution. He became the first head of the administrative section of the Justice Commissariat, which had responsibility for advocates and the courts. In 1918, he became Justice Commissar, but was apparently overshadowed by Krylenko. Kursky was regarded as an adherent of the commodity-exchange school.

A. Lunacharsky

A leading Bolshevik, Lunacharsky was asked by Lenin soon after the Revolution to write a Pravda article setting out the case for Decree No. 1 abolishing the pre-revolutionary courts. He referred to Petrovskiy's concept of 'intuitive law' to argue for socialist law to exhibit a popularly-accepted standard of justice.

Immediately after the seizure of power, he had advocated the formation of a coalition government with other Soviet socialist parties. Just weeks after the formation of the interim government, he resigned as Commissar of Education to protest over the shelling of the Kremlin during fighting in Moscow. However, he subsequently remained as Commissar of Education until 1929.

J. Magaziner

Magaziner was author of General Theory of the State (2nd Ed Petrograd 1922).

D. Magerovsky

Magerovsky was known as a member of the normativist school. His 1922 article 'Soviet Law and Methods of Its Study' observed that law was not necessitated only by the inner class contradictions of a society but also by society's relation to nature and to other antagonistic societies.

Stuchka praised Magerovsky in 1922 as 'a Marxist scholar who has played an outstanding role in works on Soviet law'. At the same time, Stuchka criticised an article by Magerovsky as lacking a coherent definition of law and tending in the direction of sociological jurisprudence. Stuchka also objected to Magerovsky's analysis of Soviet law as having a 'dual nature': both bourgeois and socialist.

I. Naumov

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18 Ibid, p. 41.
19 Ibid, p. 63.
20 Sharlet, Maggs & Beirne, P.I. Stuchka Selected Writings, p. 220.
21 Daniels, Conscience of the Revolution, pp. 64-65.
23 Sharlet, Maggs & Beirne, P.I. Stuchka Selected Writings, p. 45.
Naumov wrote a 1926 article, ‘The Role and Significance of Legal Forms in the Transition Period’, rejecting the permanency of the legal form, but also denouncing ‘legal nihilism’.\textsuperscript{15}

\textbf{E. Pashukanis}

Eugene Pashukanis (1891-1937) was Director of the Institute of Soviet Construction and Law of the Communist Academy in 1931-36, and USSR Deputy People’s Commissar for Justice in 1936-37. See Chapter Eight for more biographical information.

\textbf{G. Piatakov}

Piatakov, a supporter of Trotsky, he was chairman of the Revolutionary Tribunal in 1922.\textsuperscript{26}

\textbf{A. Piontkovsky}

Piontkovsky was a legal theorist specialising in criminal law. He criticised aspects of the 1922 RSFSR Criminal Code for following capitalist legal codes in protecting individual interests, but not collective interests.\textsuperscript{27} He was a critic of Pashukanis and member of the Institute of Soviet Law, a rival to the Communist Academy, during the late 1920s. His book, \textit{Marxism and Criminal Law}, which was published in two editions, asserted that Pashukanis had mistaken an ideal-type concept of commodity exchange for a theory of law.\textsuperscript{28}

\textbf{I. Podvolotsky}

Author of \textit{The Marxist Theory of Law} (1923) (2\textsuperscript{nd} Ed 1926), Podvolotsky was a supporter of Bukharin. He was also regarded as a member of the normativist school.

\textbf{N. Polyanlenko}

Polyanlenko was regarded as a member of the sociological school.

\textbf{A. Popov}

Popov was regarded as a member of the psychological school.

\textbf{S. Raevich}

Raevich was regarded as a member of the social function school.

\textbf{I. Razumovsky}

Razumovsky wrote a 1923 article ‘Marx’s and Engels’ Conception of Law’ and published \textit{Sociology and Law} (1924) and \textit{Problems of the Marxist Theory of Law} (Moscow 1925). Regarded

\textsuperscript{15} Jaworsky, pp. 237-246.

\textsuperscript{26} Stuchka Selected Writings, p. 67.


\textsuperscript{28} Beirne, Sharlet & Maggs, \textit{Pashukanis: Selected Writings}, pp. 22-23.
as a member of the sociological school, he was a philosopher who contributed to the 1925 collection of essays, *Revolution of the Law*, edited by Stuchka.  

M. Reisner


Reisner came under suspicion during the Tsarist period, and was forced into exile. His doctoral thesis, *The State and the Church*, was published only after the revolution, in January 1919. He participated as an expert in the trial of Karl Liebknecht in Germany in 1904 and joined the Bolshevik wing of the Russian Social Democratic Labor Party in 1905. He returned to St. Petersburg University in 1906, where he held chairs in Public Law in the law faculty and the Psychoneurological Institute.

One of the few Russian academics to side with the Bolsheviks, he helped draft the first Soviet constitution, worked with Lunacharsky in revamping higher education, helped found the Communist Academy, and then headed the social psychology division at the Institute of Experimental Psychology. (He was also the father of the celebrated Bolshevik activist and writer Larissa Reisner.)

Reisner sought to ‘refashion’ Petrazhitsky’s ‘intuitive law’ doctrine, ‘in the sense that I put it upon a Marxist foundation, and thereby obtained not intuitive law in general . . . but the most genuine class law’. He contended that Soviet law was ‘a complex legal order, whose structure includes large segments of socialist law of the working class’ with peasant and bourgeois law relegated to second and third places. Between 1920 and 1923 Reisner and Stuchka engaged in written debates in Soviet academic journals.

M. Reznov

Reznov was regarded as a member of the psychological school.

A. Rubinshtein

Rubinshtein, a Ukrainian contributor to the debates, wrote a 1924 article, ‘New Ideas in Bourgeois Jurisprudence and the Marxist Theory of Law,’ reviewing some similarities between the Marxist theory of law and recent trends in bourgeois jurisprudence. He rejected the conception that Marxist theorists simply echoed their Western counterparts.

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29 Stuchka Selected Writings, p. 60.
30 Hazard (ed) Soviet Legal Philosophy, p. xxv-xxvi.
33 Stuchka Selected Writings, p. xv, 59. 60, 69, 77, 78, 81-87.
34 Jaworskyj, p. 153.
I. Slavin

As the civil war drew to a close and the NEP emerged, Soviet legal theorists insisted on a strict protection of individual as well as economic rights. 'It is slanderous to maintain that the working class does not want to safeguard the interests of the individual,' Slavin wrote in an officially-published 1922 article on the 'The Judiciary and the New Economic Policy'.

A. Solts

Aaron Solts was chairman of the party Central Control Commission during the mid-1920s. He was instrumental in suppressing the party opposition. In 1924 he presented the official report on revolutionary legality at the Fourteenth Party Conference, the first time that legal policy had been on the agenda as a separate item at a major party gathering. In 1928, he helped organise a public debate on the future of the legal profession, in which he argued for the abolition of the adversary process and professional advocates.

Solts was an 'ardent apparatchik' who replaced Preobrazhensky, a Trotsky supporter, on the Central Control Commission in November 1920. In 1923, as a member of the Control Commission presidium, he was given the right to attend Politburo meetings.

A. Stalgevich

Stalgevich was known as a member of the sociological school.

P. Stuchka

Stuchka (1865-1932) was RSFSR People's Commissar for Justice in 1918-21, and Chairman of the RSFSR Supreme Court from 1923 until his death in 1932. See Chapter Seven for more biographical information.

A. Trainin

Trainin was regarded as a member of the sociological school.

A. Turubiner

In an article on the adoption of the Fundamental Law (Constitution) of the USSR in 1924, Turubiner maintained that the judicial power could not be set apart from the country's political and social structure. He cited Marx's reference in *The Civil War in France* to the phony independence of the judges from the ruling elite.

N. Trotsky

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35 Zile, p. 76.
39 Zile, pp. 73-74.
Stuchka mentions Professor N. Totsky in his 1922 article, 'The Marxist Concept of Law'. He quotes Totsky as denying any return to capitalist law: 'The revolution has been lived through ... never and under no circumstances will return us entirely to the beginning'. Totsky was known as a member of the sociological school.

L. Uspensky

Uspensky wrote a 1925 article, 'Law and Socialism', arguing for a collectivist approach to 'rights' based somewhat on Duguit's social function theory. Uspensky was known as a member of the sociological school.

V. Veger

In 1924, Veger published *Law and the State in the Transition Period*, arguing that the transition to communism would be a 'long process' that would require 'a new psychology'. He was regarded as a member of the normativist school.

I. Voitinsky

Voitinsky was also regarded as a member of the normativist school.

S. Volfson

Volfson wrote a 1924 article, 'Contemporary Critics of Marxism', offering a critique of Hans Kelsen's *Socialism and the State*, as well as Karl Kautsky, Max Adler and various 'pseudo-Marxists'.

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40 *Stuchka Selected Writings*, p. 35.
APPENDIX 2

TIME LINE OF POLITICAL AND LEGAL DEBATES 1917-38

As this time line indicates, the pre-Stalinist Bolshevik party was far from monolithic. The years from 1917 to 1929 saw a constant series of intense debates, conflicts and factional struggles over every major policy. Every turning point was accompanied by deep-going discussion and differences with the leadership.¹ Until the 1926-27 defeat of the United Opposition, these debates were conducted with considerable freedom and democracy, considering the vicissitudes of economic hardship and foreign military intervention.

Major political conflicts


Early 1918: Signing of Brest-Litovsk Treaty with Germany.

1919: Military Opposition to Trotsky’s professionalisation of Red Army.

November 1920-March 1921: Trade union controversy.

March 1921: Adoption of New Economic Policy.

October 1922: Foreign trade monopoly.

September 1922-April 1923: Georgia and national question.

October 1923-December 1924: Left Opposition, defeat of German revolution and ‘socialism in one country’

April 1926-October 1927: United Opposition, defeats in Poland, Britain and China, and bureaucratisation.

1929: Right Opposition and forced collectivisation.

Principal Bolshevik factions

Leninists 1917-23

Centre (Stalin) 1921-38

Left Opposition 1923-

Right Opposition 1928-29

United Opposition 1926-27

Left Communists 1917-21
Democratic Centralists 1917-21
Workers Opposition 1917-21

*Secondary factions:*
Workers Group 1921-27
Workers Truth 1921-27

**Political and legal time line**

**Seizure of power**

1917:
February 27: February Revolution – overthrow of Tsar Nicholas II.
October 25: October Revolution – overthrow of Provisional Government.
November-February 1918: Disputes over coalition government, free press, Constituent Assembly and Brest-Litovsk Treaty with Germany.
November 1917: Decree No. 1 on the courts.
December 1917: Formation of colleges of accusers and defenders.
December 1917-March 1918: Coalition government with Social-Revolutionaries.

1918:
January: ‘Declaration of Rights of Working and Exploited People’.
February: Decree ‘On the Judiciary’.
May 25: Czecho-Slovak revolt, beginning Civil War.

**War communism**
June 28: Decree of nationalisation, launching War Communism.
July 6: Left Social-Revolutionaries revolt, ending coalition government.
November: Decree ‘On the Strict Observance of Laws’.
1918: First Constitution of the Russian Socialist Federated Soviet Republic
1918: First Family Code

1919:

All year: Civil War.


1920:

November: End of Civil War.

November-March 1921: Trade union controversy.

1920: Abortion legalised.

New Economic Policy

1921:

March 8-16: Tenth Party Congress. Beginning of NEP. Ban on party factions.

1922:

October 1922: Foreign trade monopoly.

September 1922-April 1923: Georgia and national question.

December: Lenin's second stroke, physically removing him from leadership.

December 30: USSR established.


Interregnum

1923:

January-March: Lenin's last articles, break with Stalin, final stroke.

October 8: Trotsky's letter attacking the party leadership, followed by Declaration of the 46.

December 8: Trotsky's New Course letter, triggering the struggle against the Left Opposition.

Struggle Against Left and United Opposition

1924:

January: Lenin's death.
1924: Adoption of Fundamental Law (Constitution) of the Union of Soviet Socialist Republics (USSR).

October: Trotsky publishes *Lessons of October*.

December: Stalin proposes theory of 'socialism in one country'

1925:

January: Trotsky forced to resign as Commissar of War.

December: Defeat of Zinoviev Opposition.

1926:

April: United Opposition formed by Trotsky, Zinoviev and Kamenev.

May 12: Collapse of British General Strike.

October 16: Capitulation of Zinoviev and Kamenev.


1927:

April 12: Anti-communist coup by Chiang Kai-shek in China.

October: Trotsky and Zinoviev removed from Central Committee.

November 7: Final Opposition demonstration on Revolution's 10th anniversary.

December: Left Opposition expelled from Communist Party.

**Forced collectivisation and defeat of Right Opposition**

1928:

January 16: Trotsky exiled to Alma-Ata.

September-December: Defeat of Bukharin's Right Opposition.

1929:

February 11: Trotsky deported to Turkey.

November: Capitulation of Right Opposition. Bukharin removed from Politburo.

December: Stalin calls for forced collectivisation.
Popular Front and Moscow Trials

1933:

March: Hitler takes office in Germany.

1934:

December: Kirov’s assassination.

1935-1938:

Moscow Trials.

1936: Adoption of Stalin’s Constitution.

1936-1938: Every surviving feature of Bolshevik jurisprudence overturned. ‘Crime’ and ‘punishment’ restored, as well as the sanctity of marriage and contracts, individual fault as chief criterion of personal injury liability and ‘judicial authority’.

1940:

August 20: Trotsky assassinated in Mexico.