

Looking Back – And Forward – At The Turn of the Century : The Flowering of Legal Discussion in the Early Soviet Union

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Introduction

One of the most maligned and least understood political and legal experiences of the 20th century remains that of the October 1917 Russian Revolution. The turn of the century, preceded as it was by the collapse of Stalinist state in the Soviet Union, provides an opportunity to draw some lessons from the rise and fall of the USSR - and to think about the future.

Arising out of the horrors of World War I, the Russian Revolution marked the first attempt (apart from the short-lived and localised 1871 Paris Commune) to fundamentally reorganise economic, social and legal life along egalitarian lines. The subsequent degeneration of the Soviet Union at the hands of Stalin after 1923 has been taken by many as proof these aspirations were utopian. A closer examination of how both the victory and betrayal of the revolution were reflected in legal policy and jurisprudence may shed important light on the achievements and problems of the early Soviet Union.

In relation to legal theory and practice, the 1917 revolution launched the boldest and most radical experiment of the century. The government led by

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Vladimir Lenin initially dispensed entirely with the previous court system and sought to fashion a radically new approach to the state, law and legal theory, with some striking results in fields such as criminal and family law. Moreover, it attempted to create the conditions for the ultimate fading away ("withering away") of law and the state.

But what is the relevance of this today? Has not communism failed? Only a decade ago, certain writers asserted 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.

As the century ends it is more apparent many of the issues that plagued humanity at the turn of last century - economic instability, colonialism, war, inequality, exploitation and oppression - 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.

Most Western legal texts assert, or simply assume, the Soviet experience was a dismal failure - and treat the subsequent rise of the Stalinist apparatus as living proof of the non-viability of the Marxist perspective. Indeed, some textbooks on jurisprudence no longer even make reference to Marxist theories of law and the state.

Yet, little has been written in the West about the intense debates and conflicts over the role of the law in the early days of the Soviet Union. After 1956, Krushchev's attempts to distance the Kremlin bureaucracy from the most grotesque and hated features of Stalinism led to some renewed interest in one of the early Soviet legal theorists, Eugene Pashukanis and, to a lesser extent, Peter Stuchka¹. These studies largely treated Pashukanis and Stuchka in isolation. There was scant regard for the wider jurisprudential debate that

¹ See, for example, E Kamenka and A Tay, "The Life and Afterlife of a Bolshevik Jurist" (1970) *Problems of Communism*; C Arthur, "Towards a Materialist Theory of Law" (Winter 1976-77) 7 *Critique*; S Redhead, "The Discrete Charm of Bourgeois Law: A Note on Pashukanis" (1978) 9 *Critique*; P Beime & R Sharlet (eds) *Pashukanis: Selected Writings on Marxism and Law*, Academic Press, London, 1980. For earlier works see H Kelsen, *The Communist Theory of Law*, Stevens. London 1955; J Hazard, *Soviet Legal Philosophy*, Harvard University Press, 1951; L Fuller, "Pashukanis and Vyshinskii: a study of the development of Marxist Legal Theory" (1949) *Michigan Law Review* and R Schlesinger, *Soviet Legal Theory*, Routledge, London, 1951.

developed between 1917 and 1924, which was not fully extinguished by the Stalinist regime until the 1930s.

More fundamentally, the existing works are generally flawed by insufficient attention to the concrete historical and material circumstances facing the young Soviet state. I refer particularly to the exigencies of the civil war period of 1919-21, in which the Western powers intervened behind the military opponents of the revolution, and 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 temporarily restore market relations to a certain degree in an attempt to revive domestic economic life. Both these developments had a marked impact on legal practice and theory.

Furthermore, most of what has been written in the West does not refer at all to the formidable socialist opposition to the post-1924 Stalinist regime, an opposition that Stalin sought to extinguish in the great purges of 1936-39. Virtually no mention is made of the Left Opposition led by Leon Trotsky. Nor is a great deal written about the right-wing faction led by Nikolai Bukharin. But it is impossible to assess the writings of Pashukanis, or the evolution of the legal discussion as a whole, outside the context of the NEP and then the Kremlin's struggle against the Opposition.

Finally, Western theorists usually display limited understanding of Marxist theory, with a marked tendency to dismiss its relevance or to assert that it had little to say on the practical issues facing the Bolsheviks.

The pre-Stalinist period between 1917 and 1924 saw free-ranging and scholarly discussion on legal theory. It began to emerge even during the difficult days of the 1919-21 civil war but was largely provoked by the complex issues raised by the NEP. One author, Michael Jaworskyj, has discerned the existence of at least four "Marxist" schools: (a) sociological, (b) psychological, (c) social function and (d) normativist². According to this classification, Stuchka and Pashukanis, often simplistically referred to as commodity-exchange theorists, formed part of the predominant sociological school.

One of the participants in the debates of the 1920s advanced a somewhat different view. F. D. Kornilov wrote of two conflicting approaches, saying the first (personified by Stuchka) identified law with social relationships,

² M. Jaworskyj, *Soviet Political Thought - An Anthology*, John Hopkins, Baltimore, 1967, pp 50-51.

while the second (including Pashukanis) was best described as normativist. To these, he added an ideological school and a "social function" tendency.³

Regardless of how one classifies the legal theorists, there is no doubt the discussion was lively. Writers freely criticised each other. Leading figures such as Pashukanis and Stuchka publicly contested the other's writings and those of many lesser-known critics.⁴ 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 vigorously on questions of religion, morality, philosophy, psychology, education, law, art and literature. Yet, any conception of seeking to dictate or suppress differences on such profound and intellectually-rich issues was anathema to them. To take the example of art and literature, passionate debates arose involving Trotsky, Aleksandr Voronsky and other Left Oppositionists against the doctrines of proletarian culture and socialist realism.⁵

This article outlines some aspects of the post-1917 legal changes and jurisprudential debates and reviews them in the light of Marxist theory, the objective problems confronting the new state and the emergence of the Stalinist regime. It does not attempt a full critical analysis - that task lies ahead. Rather, it focuses 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.

After 1924, 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, as this article will review, Stalin's central doctrine of "socialism in one country" - adopted in 1924, about six months after Lenin's death -

³ F D Kornilov, "A Critical Review of Soviet Theories of Law" in Jaworskyj, above n 2, p 207.

⁴ For example, in his main treatise, *Law and Marxism, A General Theory*, Moscow, 1924; Pashukanis refers to a host of other writings on legal theory published in the early years following the Russian Revolution. These include: V W Adoratsky, *On the State*, Moscow, 1923; I Alexeyev, *Introduction to the Study of Law*, Moscow, 1918; A Goichbarg, *Economic Law*; T Il'insky, in *Molodaya Gvardiya*, J M Magaziner, *General Theory of the State*, 2nd ed, Petrograd, 1922; I Podvolotsky, *The Marxist Theory of Law*, 1923, 2nd ed 1926; I P Razumovsky, *Problems of the Marxist Theory of Law*, Moscow, 1925; M A Reisner, *The State*, 2nd ed, Moscow 1918; P I Stuchka, *The Revolutionary Part Played by Law and the State: A General Doctrine of Law*, 3rd ed, Moscow, 1924.

⁵ See A Voronsky, *Art as the Cognition of Life*, Mehring Books, Michigan, 1998.

collided with the basic Marxist understanding of the *international* basis of socialism, with terrible consequences for the role of the Soviet state.

These implications became more apparent over time. Pashukanis' 1924 attempt to outline a general theory of law derived from the method and analysis of Marx's *Capital* initially became part of the regime's official doctrine. The main reason appears to be that it helped reconcile the requirements of the NEP, including the legal protection of private property rights, with the need to refer to Marxist orthodoxy, including the eventual withering away of the state. Despite various dismissive critiques in the West⁶, his theory provided some profound insights into the nature of law under capitalism, including criminal law.⁷

By the early 1930s Pashukanis was under attack within the Soviet Union because he not only maintained, in keeping with authentic Marxism, the law and indeed the state apparatus of the Soviet Union would ultimately disappear with the construction of a genuinely communist society, but also resisted the Stalinist notion the law and the state itself had become organically "socialist" and therefore occupied a permanent place in social organisation. By 1935 the Kremlin based itself on the wholly self-contradictory claim 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 ritual denunciations of the "Trotskyites" and "Bukarinites" in the early 1930s. His revisions became more grotesque by the mid-1930s but failed to save him. 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. 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.

⁶ See, for example, Kelsen, Hazard and Schlesinger, above n 1 and A Hunt, *Explorations in Law and Society*, Routledge, London, 1993.

⁷ 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 (Inks Links, London), which is the edition cited in this article.

Such was the depth of the socialist opposition to his regime that Stalin undertook the Moscow show trials, the execution of Old Bolshevik leaders and mass purges of the 1930s in 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.⁸ Trotsky and other leaders of the Left Opposition within the Soviet Union and worldwide were assassinated.

The extent of the repression was also a measure of the power and grandeur of the ideas the regime sought to silence. This article concludes by suggesting some features of early Soviet legal thought and experience provide signposts for a future transition to a truly democratic and egalitarian society.

The context: the Russian Revolution and Marxist theory

In leading the Bolshevik revolution, Lenin and Trotsky always explained that socialism could not possibly be built in poor and backward Russia on its own. They insisted that the revolution's fate depended entirely on the development of the worldwide struggle against capitalism. Whereas the weak and belated character of Russian capitalism had made it possible and necessary for the Russian workers to, in a certain sense, leap ahead of their European and American fellow workers in seizing power, the 1917 Revolution was only the opening shot in the world revolution.

Trotsky demonstrated that Stalin's sudden discovery, within months of Lenin's death in 1924, that "socialism can be built in one country"- even one saddled with such inherited backwardness as the Soviet Union - was a fundamental repudiation of Marxism. As a higher stage in the development of humanity's productive forces, genuine socialism could only arise on a global scale. In *The Revolution Betrayed*⁹ and *The Permanent Revolution*¹⁰, Trotsky demonstrated the inherent inviability of the Soviet state as an

⁸ See Rogovin, *1937: Stalin's Year of Terror*, Mehring Books, Michigan, 1998.

⁹ L Trotsky, *The Revolution Betrayed: What is the Soviet Union and Where is it Going?* Labor Publications, Michigan, 1991.

¹⁰ L Trotsky, *The Permanent Revolution & Results and Prospects*, Pathfinder Press, New York, 1972.

isolated entity. In fact, the more industrialised and complex its economy became, Trotsky explained, the more exposed it would be to the pressures of global capitalism through trade and competition. In the final analysis, the emergence of the privileged Kremlin bureaucracy reflected this pressure--the bureaucrats emerged as the policemen over scarcity within the USSR. Externally, the doctrine of “socialism in one country” became, by the mid-1930s, a justification for Stalin's various attempts to seek partnerships with the capitalist powers, whether fascist or democrat.

These circumstances had a profound impact on legal theory and practice. In the initial years after 1917, the official policy was referred to as “war communism”. It was largely adopted to meet the exigencies of the civil war of 1919-1921, in which the Western powers armed and financed the “White” armies that failed to overturn the revolution. Yet, the policy was also predicated on the expectation that the revolutionary process would spread rapidly to other more economically advanced European countries and allow a speedy transition to communism. In this period, as examined below, the new government sought to dispense with formal legality, particularly in the fields of private commercial law and criminal law.

By 1921-22 while the revolution had survived - at great human and social cost - it was clear the post-war period of revolutionary upheaval across Europe had receded, leaving the impoverished and economically primitive Soviet Union surrounded by a capitalist world. Lenin initiated the New Economic Policy (NEP), which sought to relieve some of the acute hardship in the USSR and buy time for its survival by restoring limited market relations. This turn, regarded by the Bolsheviks as an unavoidable, temporary retreat with immense political and social dangers,¹¹ inevitably required the restoration of legal forms, most notably in the protection of business transactions and the punishment of property crimes.

Jaworskyj and other commentators hardly refer to this objective background, if mentioning it at all. They also assert Soviet legal theorists found themselves confronting uncharted waters for which Marxist theory had no answers. It is certainly true unprecedented challenges were posed in the years after 1917 that earlier Marxists could not have fully anticipated. Nevertheless, there was a Marxist heritage that provided some guiding principles. Karl Marx and his close collaborator, Frederick Engels, did not

¹¹ Trotsky, above n 9, Chapter Two.

write systematic expositions on legal theory but many of their works did examine the role of law in society.¹²

It is impossible to review this legacy in this paper, but it is necessary to tackle one or two myths in order to understand the debates that erupted between 1917 and 1924.

In most 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 were 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. As Marx wrote in his well-known Preface to *A Contribution to the Critique of Political Economy*, law is one of the ideological forms through which men become conscious of this conflict and "fight it out".

This relationship is far from passive. While the decisive factor in shaping law is the economic relations, the legal system remains one of the arenas within which the class struggle is "fought out". Nor is this conflict automatically reflected in legal doctrines. It is refracted through the need to elaborate legal principles that have the appearance of internal coherence and universality.

Hence, on law, as other social phenomena, Marx and Engels had a *dialectical* materialist analysis that examined the interaction between the economic base of society and the ideological superstructure. 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.

To take one example, in *Ludwig Feuerbach and the End of German Classical Philosophy*, written in 1886, Engels compared the French Civil Code and Roman law with English and Prussian law. He contrasted the gradualist and

¹² See, for example, Marx, *A Contribution to the Critique of Political Economy*, Progress, Moscow 1977; Engels, *The Origin of the Family, Private Property and the State*, International Publishers, New York 1942; Engels, *Ludwig Feuerbach and the End of German Classical Philosophy*, Progress, Moscow 1978, especially part IV; Engels, letters to Schmidt, Blockh, Mehring and Borgius in the period 1890-94 in Paul Phillips, *Marx and Engels on Law and Laws*, Martin Robertson, Oxford, 1980, or Selsam & Martel, *Reader in Marxist Philosophy*, International Publishers, New York, 1977.

pragmatic evolution of the English common law, often wrapped in old feudal forms, with the sweeping approach of French legal theory 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... 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.¹³

This active materialist conception guided Marx and Engels and those who developed their analysis, particularly Lenin and Trotsky, in their understanding of the role law would play in future communist society, and in the preceding transformation of economic and social life. They explained that in taking power, a socialist government would have to decisively overturn the state apparatus and legal system, but that it would not be possible to immediately overcome the economic, ideological and legal problems inherited from capitalism.

Lenin devoted much attention to these issues in the months before the 1917 revolution, resulting in his treatise, *The State and Revolution*. Quoting extensively from Marx and Engels, he 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 entirely and create a unique new system. This regime - originally dubbed by Marx as the dictatorship of the proletariat - 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.

¹³ Engels, *Ludwig Feuerbach and the End of German Classical Philosophy*, Progress, Moscow 1978, p 54.

The Stalinist regime later claimed to have created communism in the Soviet Union, even as it elevated the powers of the state apparatus to new dictatorial heights. This was the antithesis of the Leninist conception, by which the old state machine would be abolished and replaced by a more egalitarian and genuinely democratic state as soon as the working class took power and began to construct socialism, the first stage of the transition to communism.

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.

Writing against the social reformists such as Karl Kautsky, Lenin wrote in *The State and Revolution*:

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.¹⁴ [My emphasis]

Writing in 1916, Lenin did not expect an isolated revolution in backward Russia, followed by a prolonged capitalist encirclement. Nevertheless, he did not expect this process to be automatic, even in the most favourable circumstances. 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.¹⁵

Only with the advent of true communism, would the root causes of social antagonisms--private and conflicting ownership of the productive forces, the

¹⁴ Lenin, *The State and Revolution*, Progress, Moscow, 1970, pp 37, 43.

¹⁵ Lenin, above n.14, pp 62-63.

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.

Trotsky defended this underlying conception in *The Revolution Betrayed*:

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.¹⁶

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 egalitarian 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.¹⁷ 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.

¹⁶ Trotsky, above n 9, chapter three, "Socialism and the State". See also Trotsky, *Terrorism and Communism*, New Park, London 1975, chapter three, "Democracy".

¹⁷ Marx, *Critique of the Gotha Program*, International, New York, 1970, p 10.

Lenin drew a further remarkable conclusion from Marx's analysis - that not only law, but also the workers' state itself would be "bourgeois" in this period of transition.

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!¹⁸ [Lenin's emphasis]

This analysis of the state remaining bourgeois, at least as regards the unequal distribution of production, provides a key to understanding the subsequent rise of a privileged bureaucracy 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.

How the legal system was restructured

The early Soviet debates about law need to be seen in the light of the actual changes made in the legal system. Five periods stand out in the Soviet government's approach to law between 1917 and World War II:

1. The establishment of Soviet power and the civil war - "War Communism" (1917-21)
2. The New Economic Policy (1921-26)
3. The defeat of the Left Opposition (1927-29)
4. Stalin's Third Period and forced collectivisation (1929-35)
5. The Popular Front and the great purges (1935-39)

This article can only briefly review - and contrast - the first two periods, but these, especially the second, were crucial for what was to follow.

"War Communism"

Neither the first months of the 1917 revolution nor the civil war period allowed for a great deal of theoretical elaboration. As one of the early Soviet legal theorists, A.G. Goikhbarg, noted in 1923, (by which time the NEP had dramatically changed the legal outlook):

¹⁸ Lenin, above n. 14, p 138.

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...¹⁹

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.²⁰

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...[Emphasis in original]

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 the peasants, and the task of securing the workers' control over the production and distribution of goods.²¹

¹⁹ Z Zile, *Ideas and Forces in Soviet Legal Theory: Statutes, Decisions and Other Materials on the Development and Processes of Soviet Law*, College Printing, Madison, Wisconsin, 1970, p 50.

²⁰ E H Carr, *A History of Soviet Russia*, MacMillan, London, 1958, vol. 5, p 67.

²¹ Zile, above n 19, 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. The Soviets, 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. The events of February unleashed a burst of popular democratic creativity. Soviets, together with factory and work committees, were formed throughout Russia as working people sought to assert power and reorganise society along anti-capitalist lines. 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.²² Just before the October Revolution, the Second All-Russian Congress of Soviets assembled, with 390 Bolshevik delegates, 160 Socialist-Revolutionaries and 72 Mensheviks.

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.²³ All people 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".²⁴

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.²⁵ 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 immense implications for the role of law, given 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.

²² See Harold Shukman, (ed), *The Blackwell Encyclopedia of the Russian Revolution*, Oxford, Blackwell Reference, 1994, p 22.

²³ "Forty Years of Soviet Law 1917-57" in Zile, above n 19, p 12.

²⁴ "Constitution (Fundamental Law) of the Russian Socialist Federative Republic (1918)" in Zile, above n 19, p 13.

²⁵ See Zile, above n 19, pp 14-15, 25.

An initial judicial decree of November 1917²⁶ abolished the previous judicial institutions. It set up local courts, elected or nominated by local Soviets (workers' councils), with two rotating lay assessors to sit with each judge. It removed the legal profession's monopoly on representation, enabling any citizen of good character to appear as a prosecutor or defence counsel. Laws enacted by previous regimes would be treated as valid only in so far as they "have not been abrogated by the revolution, and are not in contradiction with the revolutionary conscience and the revolutionary concept of law". To be somewhat more precise, the decree added that all laws contrary to the decrees of the central Soviet, the government and the minimum programs of the two ruling coalition parties, the Russian Social Democratic Workers (Bolshevik) and the Social Revolutionary, were abrogated.

This 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.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. It was not until June 1918, under conditions of armed resistance to the revolution, that Stuchka, newly appointed as People's Commissar of Justice, lifted this restriction, allowing the death penalty. At the same time the tribunals were given the sole power to pass sentences, displacing the Extraordinary Commissions (Chekas) that arose during the October 1917 revolution. The punitive powers of the Chekas were restricted to cases of armed activity, except in areas under martial law or where a state of war had been declared.²⁸

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. It also preserved the civil and criminal procedures of the Tsarist 1864 Judicial Code, insofar as they were not abrogated by the revolution and stated that in civil cases considerations of equity should prevail over rules of limitations and other formal objections.²⁹

²⁶ Zile, above n 19, pp 35-37.

²⁷ Carr, above n 20, vol. 5, p 68.

²⁸ Zile, above n 19, pp 42-48.

²⁹ Zile, above n 19, pp 37-38.

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.³⁰

In keeping with the Marxist rejection of any separation of powers doctrine, a 1921 decree gave the People's Commissariat of Justice not only the responsibility to supervise and train the judicial bodies but 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.³¹

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)³² 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 definition, as Stuchka explained elsewhere, sought to apply the Marxist understanding of law as essentially an instrument of class rule, enforced by a coercive state apparatus.

Similarly, criminal law was defined 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 elsewhere, this flowed from the conception that the state's role was social protection, not the assignment of individual guilt and retribution.

Moreover, the criminal law's operation was stated as *transitional*:

³⁰ Zile, above n 19, pp 38-41.

³¹ Zile, above n 19, p 41.

³² Zile, above n 19, p 50.

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.

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"³³. 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 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, recruited and forged the Red Army that ultimately, after four years of severe fighting, prevailed in the civil war.³⁴

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.

In family law and relations, 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.

³³ Zile, above n 19, p 51.

³⁴ See *The Military Writings and Speeches of Leon Trotsky, Vol 1: 1918 How the Revolution Armed*, New Park, London, 1979.

Overall, the revolution's leaders hoped for a relatively early disappearance of legal forms, arising out of a short period of transition from socialist revolution to socialism and then communism. As Trotsky later acknowledged in *The Revolution Betrayed*, these hopes were predicated on expectations of victorious social revolutions elsewhere in Eastern and Western Europe. 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, would hopefully provide the material conditions for socialism, which did not exist in backward Russia on its own.

The New Economic Policy

By 1921 it was obvious 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 25 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.³⁵

Facing economic collapse and a delay in the European revolution, Lenin and his co-thinkers were forced to make a certain 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"³⁶ 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.

This led to a definite 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

³⁵ A P Pogrebinskii, V E Motylev, T K Pazhitnova and A M Podkolzin, *History of the National Economy of the USSR*, Moscow 1964, cited in Zile, above n 19, pp 96-97.

³⁶ Lenin's report to the 10th Congress of the Russian Communist Party (Bolshevik), March 15, 1921, cited in Zile, above n 19, pp 55-58.

dangers of creating a new economic elite and warned of difficult and inevitable political and legal problems.

“We know full well that before revolutions sweep over other countries the socialist revolution in Russia can be saved only if we come to an agreement with the peasantry,” he told the Bolshevik party’s 10th Congress.

Essentially two things are needed to satisfy the small farmer. First, it is necessary to have a certain freedom of market... Second, it is necessary to get manufactured goods and products...

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.³⁷

In a resolution, the party congress declared: “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”.³⁸

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 key conclusion in relation to law: “the immediate task is to introduce strict principles of revolutionary legality into all areas of life”.³⁹

This notion of “revolutionary legality” was a far cry from the “socialist legality” later proclaimed by Stalin to be inherently associated with the achievement of socialism. On the contrary, for Lenin it was an unavoidable concession made to private property relations in order to revive the economy. The 11th Congress resolution stated:

³⁷ Lenin, above, n 36.

³⁸ Zile, above n 19, p 65.

³⁹ Zile, above n 19, pp 66-67.

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 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.⁴⁰

This directive gave rise to a great codification effort, with seven legal codes adopted from 1922 to 1923: Criminal, Civil, Land, Criminal Procedure, Labor, Civil Procedure and Forestry.

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

Every citizen of the RSFSR and the union soviet republics has the right to move 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.⁴¹

Much discussion in Soviet legal circles centred on Article 1, which sought to embody the relationship between the recognition of civil-law rights and the needs of socialism. It subordinated these rights to the requirements of production:

⁴⁰ Zile, above n 19, pp 66-67.

⁴¹ Zile, above n 19, p 69.

Civil-law rights shall be protected by law, except in those instances when they are exercised in contradiction to their socio-economic purpose.⁴²

While these provisions established a *prime 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*, S. 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 the public interest should always prevail over private interests, but 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.⁴³

Lenin, who had been ill, intervened decisively in the debate on the new legality in early 1922 to insist local and provincial committees had to be subordinated to the People's Commissariat of Justice and a new central procuracy (a legal and judicial supervisory body). He wrote a letter "On Dual Subordination and Legality" to Stalin explaining the necessity for the "dual" subordination to the central as well as the provincial procuracy. His letter displays a determination to establish the legality necessary to provide commercial certainty throughout the Soviet republics.

"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 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 a statement sometimes taken as a repudiation of the Marxist outlook on law, Lenin continued:

⁴² Zile, above n 19, p 84.

⁴³ Zile, above n 19, pp 87-89.

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.⁴⁴

In associating legality with culture Lenin was not ascribing an ahistorical permanence to legality but pointing to its association with the struggle against feudal particularism and rural backwardness. Moreover, there was now a pressing need to make certain concessions, including the guaranteed protection of commercial property rights across the entire country, as part of the NEP.

In the same context, 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.⁴⁵

As is apparent from the latter clause, the constitution rejected the doctrine of separation of powers. In an accompanying article, A. Turubiner maintained 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. 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.⁴⁶ I intend to examine this aspect of Soviet legal theory more fully in a future paper.

Another theme that warrants further treatment is 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 I. 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

⁴⁴ Zile, above n 19, p 70.

⁴⁵ Zile, above n 19, p 72.

⁴⁶ Zile, above n 19, pp 73-74.

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...⁴⁷

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 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 bureaucratism 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. For example, the party program of 1919 stated:

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.⁴⁸

With Lenin largely incapacitated by illness 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 1917 German revolution and eight months after Lenin's death, Stalin had unveiled the new

⁴⁷ Zile, above n 19, p 76.

⁴⁸ Carr, above n 20, vol 1, p 248. For Lenin's last article on this struggle, see "Better Fewer, But Better", *Collected Works*, Progress, Moscow, 1980, Vol 33, p 487.

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.

And the consolidation of a corresponding legal regime played a role in bolstering this elite layer and its nationalist doctrine. According to the historian E H Carr:

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.⁴⁹

Correctly understood, this suggestion provides a crucial key for analysing the early Soviet debates about law.

From debates to diatribes

Jaworskyj, who is not a Marxist, nevertheless describes the 1920s as "a dynamic and prolific period in the history of Soviet legal thought".

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.⁵⁰

Here, Jaworskyj points to some of the central features of the discussion: its ferment, diversity and connection to pressing, uncharted, practical problems.

⁴⁹ Carr, above n 20, vol 5, p 88.

⁵⁰ Jaworskyj, above n 2 at p. v.

One of the earliest contributions came from A. Lunacharskii, 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. According to Jaworskyj, the 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.

Lunacharskii first observed 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.⁵¹

Secondly, 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 characters, its growth, and its significance in the social life.⁵²

Some may find Lunacharskii's references to "customary law" and "spiritual movement" suggestive of an appeal to some conception of natural law, but the context of the October Revolution points to a more democratic conception of forming popular institutions to fashion new social norms that would reflect the interests and aspirations of the majority of people.

Like other Bolshevik leaders, Lunacharskii 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 Berolzheimer, Anton Menger, Georg Jellinek and L.

⁵¹ Jaworskyj, above n 2, p 53.

⁵² Jaworskyj, above n 2, p 54.

Petrazhitskii. The latter was known across Europe for his psychological approach to legality. Lunacharskii referred to Petrazhitskii's emphasis on the need for "positive" (written) law to correspond to the "intuitive" law, or sense of justice, of the population, or be swept aside through social revolution.

The legal theorist, Goikhbarg, said the revolution could not limit itself to the "mere negative activity of issuing decrees". It had to completely change the conditions of human existence in order to regenerate social psychology so 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. Writing in 1918, he 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.⁵³

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.

Another early legal writer, M. Kozlovskii, sought to apply the Marxist approach to criminal law. In this sphere too, law would gradually be replaced by economic and social regulation. 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

⁵³ Jaworskyj, above n 2, p 61.

self-defence or the protection of society against encroachments.⁵⁴

The advent of the NEP brought a more complex view. Among the first legal theorists to reflect that was D. Magerovskii. His 1922 article “Soviet Law and Methods of Its Study” observed 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. This 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.

Magerovskii 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.⁵⁵

Interestingly, he 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 I. Podvolotskii’s *The Marxist Theory of Law*, with an Introduction by Bukharin. The author 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 law could have a reciprocal influence on economic development, including under socialism.⁵⁶

From these premises, he maintained that in the transition to communism, law could be proletarian as well as “bourgeois”. By placing “bourgeois” in

⁵⁴ Jaworskyj, above n 2, pp 70-71.

⁵⁵ Jaworskyj, above n 2, p 95.

⁵⁶ Jaworskyj, above n 2, p 107.

quotation marks, he sought to show law, as a form, could serve the proletariat despite being "bourgeois". He cited only half of Lenin's above-quoted comment in *The State and Revolution*, leaving out Lenin's reference to the continued existence of a bourgeois state in the transitional period. Podvolotskii misleadingly asserted Lenin declared there could be no bourgeois law in a proletarian state. Podvolotskii went further, asserting a permanent need for law under socialism. "But does the proletariat need law in general?" Podvolotskii asked. "Yes, beyond any doubt," he answered.⁵⁷

These views did not go unchallenged. In 1924 Goikhbarg produced 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".

Drawing on Marx's *Critique of the Gotha Program*, Goikhbarg also emphasised 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, Goikhbarg drew attention to the dependence of the economically backward Soviet state on the victory of a revolution in Germany. Such a victory would enable a more rapid reduction in the "unavoidable concessions" to bourgeois legal conceptions.⁵⁸ This very mention of the international environment and its impact on the Soviet state contradicted Stalin's theory of "socialism in one country".

Likewise, another early legal theorist, N.V. Krylenko 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 invoked Lenin's comment of March 1923:

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.⁵⁹

⁵⁷ Jaworskyj, above n 2, p 113.

⁵⁸ Jaworskyj, above n 2, p 134.

⁵⁹ Jaworskyj, above n 2, p 162. Lenin's comment is from "Better Fewer, But Better", above n 46.

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.”

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:

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.⁶⁰

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

Stuchka and Pashukanis: from knowledge to nonsense

It was in the economic and social context of the NEP that the two pre-eminent Soviet legal theorists, Stuchka and Pashukanis, began to more systematically enunciate a theory of Soviet law.

⁶⁰ Jaworskyj, above n 2, pp 177-78.

Initially, Stuchka had 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, law 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."⁶¹

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.⁶²

By 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."⁶³ 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 Podvolotskii in placing inverted commas around "bourgeois law" Stuchka was already, as Podvolotskii had proposed, softening Lenin's sharp characterisation of the contradiction facing the workers' state. Nevertheless, Stuchka adhered to the classical Marxist conception of the withering away of law, insisting that Soviet law was not eternal.⁶⁴

In the meantime, Pashukanis had published the first comprehensive treatise on Marxism and law, his 1924 *The General Theory of Law and Marxism*. It is not possible here to review his thesis in any length or depth. His essential proposition was that all law was inherently related to the commodity

⁶¹ Jaworskyj, above n 2, pp 72-73.

⁶² Zile, above n 19, p 229.

⁶³ Zile, above n 19, p 211.

⁶⁴ Zile, above n 19, pp 211-15.

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 ...," he wrote. "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."⁶⁵

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.⁶⁶

Pashukanis also 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, replaced by the notion that defined ill-conduct had to be repressed as a matter of social self-defence. Krylenko had explained:

Pashukanis typically went further, and was more profound. 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 *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."⁶⁷

⁶⁵ Pashukanis, above n 7, pp 58 and 81.

⁶⁶ Zile, above n 19, pp 215-19.

⁶⁷ Jaworskyj, above n 2, p 137.

Second, Pashukanis examined the prevailing forms of punishment – death, imprisonment and fines - and sought to show 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 *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.⁶⁸

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, 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.⁶⁹

⁶⁸ Pashukanis, above n 7, p 179.

⁶⁹ Pashukanis, above n 7, p. 61.

Pashukanis 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 Pashukanis' conception covered only bourgeois law and glossed over the class role of law, including feudal law and Soviet law. His five main points 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.⁷⁰

These criticisms have some force, as I intend to examine in a fuller work, 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 Marxian dialectic.⁷¹

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

⁷⁰ Zile, above n 19, p 230.

⁷¹ Zile, above n 19, p 229.

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.⁷²

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.⁷³

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.⁷⁴

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.⁷⁵

Stuchka died before the great purges of 1936-37, but there is every reason to believe he would have been executed along with Pashukanis. By 1938

⁷² Zile, above n 19, p 233.

⁷³ Zile, above n. 19, p. 234.

⁷⁴ Trotsky, above n. 9, p. 62.

⁷⁵ Trotsky, above n. 9, p. 62.

Stalin's judicial henchman, A Vyshinskii had made the improbable discovery that the entire jurisprudential leadership of the Soviet Union had for years been enemies of the state.

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.

Vyshinskii, the chief prosecutor of the Moscow Trials, denounced the "Trotsky-Bukharin band headed by Pashukanis, Krylenko and a number of other traitors".

Vyshinskii'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".

Equally revealing was the way Vyshinskii 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.⁷⁶

Lessons and prospects

My research, critique and analysis are still at an early stage but certain conclusions can be drawn. First, there is a marked contrast between the post-1917 discussion and the post-1924 degeneration. The period after the revolution was characterised by genuine legal debates and efforts, despite horrendous economic and social problems, to minimise legal formality, replacing state coercion with a more democratic and humane approach.

⁷⁶ Zile, above n 19, pp 258-59.

The adoption of the NEP in 1921 caused a shift back to legalism, particularly with regard to the protection of private property rights. After 1924, with the ascendancy 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.

Second, the early Soviet regime advanced several worthwhile features:

- It sought active popular participation in political and legal life.
- It was open and democratic in academic discussion.
- It sought to create social equality as the only true guarantee of human rights.
- It not only extended formal legal equality, and abortion rights, to women but also endeavoured to genuinely free them from their double oppression by transforming the conditions of social life.
- In relation to misconduct, it sought to ameliorate the underlying social causes and address any mental health problems of the individual involved, instead of criminalising and punishing.

More fundamentally, the early Soviet leaders and theorists attempted to chart a course for the disappearance of a separate state machine standing above society and for the future emancipation of humanity from the narrow legal form itself. To lightly dismiss these efforts as utopian or irrelevant as we enter a new century would be short-sighted in the extreme. Indeed, the growing economic and social polarisation produced by the present hegemony of the market presents a challenge to re-examine and draw lessons from these ground-breaking endeavours.