REVIEW ARTICLE

MARXISM AND THE PROBLEM OF LEGAL CONTINUITY

RECENT TRENDS IN COMMUNIST LEGAL THEORY

by

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Friedrich-Christian Schroeder, *Wandlungen der sowjetischen Staatstheorie* [Changes in Soviet Theory of the State], together with a selection of texts. Verlag C.H. Beck, Munich, 1979, pp. 175. Price (FRG): DM 18.50.

Neno Nenovski, *Preemstvennost' v prave* [Heritability in Law]. Translated from the Bulgarian, with an Introduction by Yu. Zavyalov. Yuridicheskaya Literatura Publishing House, Moscow, 1977, 166pp. Price (USSR): 1 rouble 10k. (approx. Aust. $1.20).

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I

Communism, it used to be said by critics and adherents alike, is the most radical and thorough-going negation of law. Marxist theory 'exposes' law as a historical phenomenon, as a phenomenon, indeed, that belongs to the 'pre-history' of mankind and represents its alienation. Born of class conflict, law is a tool of class domination, an expression of the will of the ruling class, fraudulent in its claim to be impartial, to represent the general interests of society, or

to embody a timeless concept of justice. In the truly human communist society of the future in which there were no longer any classes, Marx and Lenin believed, law and the State would wither away. The government of men would be replaced by the administration of things; rational discussion and internalised moral habits, backed by the conscious will of the community, would replace constables, courts and codes.

Marxist practice 'negated' law in a different sense and to a significant extent still does. It elevated policy and politics over publicly stated and observed laws and regulations, put social requirements and demands over individual rights, the State over law and the Party as the vanguard of the proletariat over the State. It rejected, in practice and in principle, the abstract elevation of the rule of law, of the concept of justice, of abstract human and legal rights.

In recent years, these classical Marxist positions have made remarkable headway among young law teachers and a proportion of law students in the United Kingdom, non-communist Europe and Australia, especially in fringe areas and fringe universities. The trend feeds readily on the English positivist tradition of seeing law as an act of State, as the will of the sovereign and not as a set of propositions deriving their legal character from a certain systematic interrelationship, a formal quality and the moral end and foundation on which they are based. It then represents a ready extension, in a Marxist direction, of legal realism and of cruder sociologies of

law, positions so congenial to the unlearned.

The radical negation of law, and revolutionary ideology generally, tend to emphasise social and legal discontinuity. They see *the* revolution, or each revolution, as a new beginning, a total overthrow, a purging of the old world. But this mood lasts only in the period of revolutionary enthusiasm, while the revolution is still fundamentally preoccupied with distinguishing itself from the past. Already in the 1920s, one of the early communist chairmen of the Soviet Supreme Court, P.I. Stuchka, noted, very perceptively, that every revolutionary government begins by enacting laws that are retroactive for all time - but when it has become stable, when it has come to be concerned with the future development of the post-revolutionary society, with stability and orderliness, it accepts the practice that laws should come into operation from a specific period. The radicalisation of a western university intelligentsia deprived of responsibility or social power and taking public affluence and technological competence for granted has proceeded in inverse proportion to the stabilisation, to the growing acceptance of the importance of State and law, in communist countries. There, those classical Marxist doctrines that amount to 'juristic nihilism' (as communist theoreticians now call it) are now being more and more flatly rejected as vulgar pseudo-Marxism, infantile left-wing communism, anarchistic Maoism or as bourgeois misrepresentations of Marxist doctrine, invented for the purpose of discrediting it. The importance of law, let alone of the State, as a social category, as a means of regularising social life, steering society, safeguarding

production and development and protecting the individual is now proclaimed - at least in theory - in every communist capital from Berlin through Moscow to Peking. Law may have been, according to Marxists indeed it was, an instrument of class domination in past and present societies of class conflict, including early Soviet society. But it is now seen as not only or entirely that. In developed Marxist-Leninist societies in the stage of socialism, however, where class conflict has been overcome and the State is the State of All the People, law is now presented as an administrative imperative. It safeguards and secures the socialist system and the life and values of citizens; it requires technical knowledge and scientific study - i.e., specialisation and expertise - as well as devotion to the practice of socialist legality and to the task of the creative development of socialist law.

The history of legal philosophy in the Soviet Union and the countries it has influenced, then, displays a remarkable retreat from Lenin's doctrines on the nature of law and from his belief in the ultimate withering away of State and law under communism, at least as he expressed them in his *State and Revolution*.[1]

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[1] Lenin's actual practice, which was in many respects authoritarian and elitist, with a strong emphasis on administrative efficiency, is a different matter, as is made evident by his decision to rule the country through the Council of Ministers (then called Peoples' Commissars), a State organ, and not through the Party Executive Committee. On this point, see the interesting discussion of Lenin's attitudes to bureaucracy by Martin Krygier in his 'Weber, Lenin and the Reality of Socialism', in Eugene Kamenka and Martin Krygier (eds.), *Bureaucracy: The Career of a Concept*, Edward Arnold, London and Melbourne, 1979, pp. 72-87. See also the much fuller treatment in T.H. Rigby, *Lenin's Government: Sovnarkom 1917-1922*, Cambridge U.P., 1979.

The legislative activity of the 1920s - the proclamation of a Constitution, codes of civil, criminal and other law, drawing on 'bourgeois' law and pre-revolutionary drafts - could still be represented and was represented as a transitional measure based on the requirements of the New Economic Policy and its safefuarding of controlled capitalist relations. But the retreat came with the mounting criticism, in the early 1930s, of E.B. Pashukanis' desire to replace law with the principles of social policy and socialist construction once the NEP and its licensed capitalism had been abolished and of his theory that law was in its very essence a bourgeois phenomenon based on the elevation of abstract contractual rights and duties between formally free, autonomous and equivalent individuals who represent the abstract goods-possessor projected into a juristic heaven from the reality of a commercial market.[2]

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[2] See E.B. Pashukanis, *Obshchaya teoriya prava i Marksizm*, The Socialist Academy, Moscow-Leningrad, 1924, translated in Hugh W. Babb and John N. Hazard (eds.), *Soviet Legal Philosophy*, Harvard U.P., Cambridge, Mass., 1951, pp. 111-225. For a brief summary of Pashukanis' central doctrines, career and subsequent reputation in the Soviet Union, see our 'The Life and Afterlife of a Bolshevik Jurist', (1970) 19 *Problems of Communism*, pp. 72-79, partly reproduced in our Editors' Introduction to A.E.S. Tay and Eugene Kamenka (eds.), *Law-making in Australia*, Edward Arnold, London and Melbourne, 1980, pp. 20-38 at 31-34.

The retreat, the elevation of socialist law and the Soviet State, reached its first peak with the proclamation, in 1936, of the achievement of socialism in the USSR and the accompanying new Stalin Constitution. State and law under socialism would not begin to wither away; on the contrary, Stalin announced, they would now enter into a new creative period in which these pre-socialist forms would be given new content and function and thus achieve their fullest development. The socialist State would be the perfection of the historical category of the State; socialist law would be the most truly legal law. Of course, the essence of the State and of law were still seen as lying in their coercive function,under socialism in their character as weapons against internal and external enemies, as tools of the Dictatorship of the Proletariat. But to explain their importance as tools, there had to be an ever-increasing emphasis, heralded in Stalin's chapter on historical and dialectical materialism in the *History of the Communist Party of the Soviet Union: A Short Course* (1938), on the relative independence of ideological elements of the superstructure and their capacity within limits to react back on the economic base. One-way determinism, the reduction of law to economics, was denounced as vulgar materialism and as failing to exhibit a correct grasp of either dialectical materialism or Soviet reality. Soviet law and the Soviet State were a mighty social and cultural force in the building of socialism.

Ironically, in spite of the Great Terror, of the monstrous illegalities that Stalin wreaked upon his people in the 1930s, the 1940s and even as late as 1952, the doctrine of the importance of law under socialism grew stronger and stronger during his rule and under his guidance. Fundamentally, however, socialist law was still treated under Stalin as essentially discontinuous from bourgeois law or the law of earlier periods. It might use and perfect the same forms, but by giving them new content and function - by using them for different purposes and in the interests of a different class - it radically transformed all legal concepts and the whole legal enterprise. For Stalin, the essence of law still lay in its systematic application of coercive norms and rules in the interests of a ruling class - under socialism, the proletarian class, though from 1936 onward, he emphasised the role of the State in external defence, in the organising of the economy and production, and in education and culture, rather than its internal coercive functions, allegedly rendered obsolete by the disapperance of antagonistic classes in the Soviet Union.

A much more radical change, for which some cautious foundations had been laid in the period between 1948 and 1953, came with the elevation of N.S.Khrushchev and his concern with more stable and less repressive government at home and (comparative) peaceful co-existence abroad, especially with his bold, if fitful, programme of de-Stalinisation at home. For the first time within Soviet Marxism, certain fundamental or general human values were elevated against the end-directedness of Leninist morality; law

was presented as protecting individuals against arbitrary action, even by the State and the party officials, and as securing and safefuarding such human values. Above all, Khrushchev's announcement at the XXII Congress of the Communist Party of the Soviet Union in 1961 that the Soviet Union had now attained a fully developed socialism and embarked upon the accelerated building of communism, of the final stage of human development, was accompanied by the proclamation that the Dictatorship of the Proletariat had ended and that the State was now the State of All the People. The consequences for Soviet Marxist theory were, of course, immense.[3] Neither State nor law under socialism could any longer be defined as organs of class rule. They became expressions of general social interest and the consequence of administrative imperatives and requirements, independent logically of class division and class struggle. Even ethics, at any time, in any place and of any class, came to be regarded as containing certain general, social and human norms as well as norms expressing class interest, though the former might be coloured or used by their class context.

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[3] The conception of the State of All the People, as Schroeder notes in the book under review (p.25), was already implicit in Stalin's 1938 characterisation of law as representing the will of all the people in the Soviet Union, where antagonistic classes had disappeared, but it was not till Khrushchev's declaration in 1961 that the implications of this for the general theory of State and law were openly acknowledged and explored. Generally speaking, the most radical shifts in Soviet Marxist theory, which burst upon the citizen like a thunder-clap, turn out on closer inspection to be taking up little-noticed aspects, qualifications or concessions in the earlier theory.

While many of the most liberal trends of the Khrushchev era - the elevation of general 'human' values such as kindness against Stalinist ruthlessness in a cause, the elevation of law as protecting the individual against the State - did not survive into the renewed bureaucratisation and growing repression of the Brezhnev period, the view that State and law express certain general social interests and general social requirements has been steadily strengthened. So has the professionalisation of Soviet philosophy and political and legal theory. The emphasis now is on complexity, on recognising continuity as well as discontinuity in historical stages and between socialist and non-socialist forms of society and the relative independence and integrity of legal institutions, concepts and problems. In papers presented to the World Congress of the International Association for Philosophy of Law and Social Philosophy (IVR) held in Australia in August, 1977, and again at the Association's subsequent World Congress in Basel in 1979, legal philosophers from communist countries emphasised the importance of law and legal philosophy in their countries, the complexity of legal problems and the expert knowledge they required and rejected bluntly any suggestion that Marxism was a form of 'juristic nihilism'. Precisely because these are comparatively new waters for the Marxist theoretician of law, not charted by the classics, there is considerable disagreement and discussion among communist legal philosophers on the precise implications of this: - the extent to which pre-socialist and socialist law display continuity, heritability or common problems; whether the State and law will wither away in a very distant future or not at all; whether the future of law is to some extent a separate question from the future of the State.

Thus the Czech legal philosopher, Vladimír Kubeš, agrees with the West German liberal social theorist and former Minister of Interior, Werner Maihofer, that the *original* Marx does not speak of the withering away of State and law at all and insists that replacing the government of men by the administration of things does not mean that one can do without a system of norms for regulating the system of production. Law and the State, he insists, are separate, and while the State may wither away, the law cannot do so as long as human society endures.[4] The Hungarian legal philosopher Csaba Varga argues similarly that the ideal of simple, rational laws immediately accessible to the population at large, the ideal of the laicising of law, is a utopian illusion that characterises the early stages of a revolution and does not survive subsequent development under a revolutionary regime.[5] At the Basel Congress, a legal philosopher from the People's Republic of China participated, at short notice, for the first time in the history of the I.V.R. He arrived by air directly from Peking, read a paper in English calling for the development of the legal system in China, shook hands with great warmth with his chairman - a co-author of this review article, the first foreign Chinese legal philosopher, he said, he had ever met - explained he had no

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[4] V. Kubeš, 'Das Recht und die Zukunft der Gesellschaft' [Law and the Future of Society], in F.C. Hutley, Eugene Kamenka and A.E.S. Tay (eds.), *Law and the Future of Society*, Franz Steiner Verlag, Wiesbaden, 1979, pp. 1-25.

[5] C. Varga, 'Utopias of Rationality in the Development of the Idea of Codification', in F.C. Hutley, Eugene Kamenka and A.E.S. Tay (eds.), *op. cit.*, pp. 27-41.

time to answer questions and flew straight back to Peking. But the Soviet bloc, the Basel Congress had been shown, were not the only communists to take law and legal philosophy seriously.

II

Philosophy of law in Russia grew up, in the 19th century, under German tutelage, which shaped Russian academic language, concepts and attitudes even more than it shaped Russian academic institutions. The imposition of Marxism with the Bolshevik revolution of 1917 closed off many interesting and fruitful traditions and lines of enquiry, and destroyed academic independence, but if anything it strengthened the Germanic style and character of Russian philosophical and legal theory. Soviet Marxist texts translate easily and comparatively convincingly into German: they simply sound odd in English. Germany, at the same time, for the most obvious geopolitical reasons, has had by far the closest relationship with and the greatest interest in Russia of any European nation. It is a relationship characterised by extraordinary ambivalence, a mixture of love and hate, grudging respect and over-compensatory contempt. But no country has rivalled Germany in the systematic and sustained examination of Soviet law and legal theory, or for that matter, of Soviet philosophy. Friedrich-Christian Schroeder, Professor of Criminal Law, Criminal Procedure and *Ostrecht* (the law of the Soviet Union and East European countries) in the University of Regensburg

and Director of the Institute for *Ostrecht* in Munich, is one of the thoroughly respected scholars in this field, who has written a great deal on theory of State and law in Eastern Europe and on criminal law and comparative law. His new volume, *Changes in Soviet Theory of the State*, examines in a succinct and knowledgeable 60-page introduction Lenin's theory of the State, developments under Stalin and the more recent conceptions of the 1960s, especially the new view that the State represents 'the political organisation of society' rather than the organ of class rule. In an appendix, he translates extracts from a number of crucial texts: from Lenin's *State and Revolution* (1917), Stalin's 'On Dialectical and Historical Materialism' (1938), Stalin's Report to the XVIII Congress (1939) and his *On Marxism and Linguistics* (1950), the Party Programme of the CPSU of 1961 and three important articles by Soviet theoreticians of the 1960s - S.L. Fuks' 'The General Concept of the State' (1964), A.K. Belych's 'The Reciprocal Relationships between the State and the Political Organisation of Society' (1967) and L.S. Mamut's 'Karl Marx on the State as the Political Organisation of Society' (1968).

The developments traced by Professor Schroeder are very much those we have outlined above. There could not be a greater transformation, he concludes, than that which has taken place in the theory of the State in the Soviet Union in the last sixty years. 'At the beginning stands the conception of the State as "a special apparatus for the systematic application of force and the subjugation of men by force". At the end stands the

conception of the State as "the condition for the maintenance of the very living together itself of human beings living together as an integrated, if internally contradictory,whole, as a specific union of ruler and ruled, of those who exercise power and those who are subjected to it, as an organisation of *Herrschaft* [rule, domination or sovereignty]."' The element of coercion increasingly drops off, while the emphasis on an integrated whole becomes more and more important and the concepts of the political organisation of society and of the political system patently owe much to systems theory taken over from the West.

Professor Schroeder is conscious of the close relationship in past Soviet theory between State and law (what we call jurisprudence Soviet university courses call 'theory of State and law'). But, unfortunately, he does not enter into questions of legal theory, choosing to focus his volume quite specifically on the theory of the State. He also ends his detailed examination with the 1960s, though he devotes a brief section of his introduction to the important work by V.O. Tenenbaum, *The State: A System of Categories* (1971) and to V.G. Kalenski's *The State as an Object of Sociological Analysis* (1977) - two books that present complex and non-reductive theories of the State in considerable detail and that emphasise the reciprocal relations between social classes and groups, as well as questions of political culture and style. Professor Schroeder does take up, briefly but intelligently, the disparity between Soviet theory and Soviet reality. The fact that coercion is disappearing from Soviet

theory, he knows full well does not mean that it is disappearing from Soviet life. The emphasis in theory of State and law under Brezhnev has been on the integrative character of these institutions, but it is an emphasis on integration through bureaucratic control, an emphasis on steering society as opposed to Khrushchev's more mobilisational conceptions. The new Soviet Constitution of 1977, indeed, represents the most systematic elaboration of this bureaucratic view of law and legal relations. There is considerable disparity between this trend of Soviet and satellite practice and the increasing elevation, especially by East Europeans, of the moral and social values enshrined in law and the comparative independence and integrity of legal concerns. That is why the latest new Polish constitutional amendments, centralising and bureaucratic rather than liberal, have shocked even middle-of-the-road Polish lawyers and intellectuals, let alone the people.

The developments in Soviet theory of the State (a subject politically even more sensitive than the theory of law) both parallel and give foundation to the latest developments in the theory of law. The most interesting of these developments do not take place in the Soviet Union, whose conception of law has always been excessively bureaucratic-administrative and whose legal institutions, legal education and legal theory have always been comparatively weak. The best legal work in communist countries comes out of Czechoslovakia and Hungary, countries that have maintained closer links with contemporary and comparatively recent

western legal philosophy and that have a longer tradition of doing so. On the logical and sociological side, Poland, also as a result of its pre-revolutionary traditions and achievements, ranks far ahead of the Soviet Union. Nevertheless, the most interesting discussion of the problem of heritability or continuity in law - a basic problem for the old Marxism and an interesting one for the new - comes, surprisingly, out of Roumania and Bulgaria, countries whose contributions to Marxist theory have not in the past been of great importance. Nenovski's book, *Heritability in Law*, perhaps the most detailed and interesting discussion of a problem that almost all Marxist theorists (apart from the young Karl Renner) have shirked, appeared in Bulgaria in 1973 and has commendably been translated into Russian, with a brief and patently cautious introduction by the Soviet scholar Yu. Zavyalov, who gives the impression of waiting to see which way the wind will blow. Nenovski himself grasps the bull firmly by the horns, taking his departure from an interesting and important series of articles by the Roumanian legal theorist Anita M. Naschitz in the Roumanian academic journal of law and legal theory in 1966. Law, Nenovski insists, does not have a single essence but a complex one, which displays internal contradictions or tensions. It cannot be reduced to class rule - at best it can be reduced to two elements: a common social element and a class element, each standing in complex relations with the other. The common social element explains why the transition from one social form to another is not accompanied, in law, by radical discontinuity, by a total rejection of earlier legal institutions, concepts and techniques. There is both continuity and discontinuity

in the passage from one social formation to another. This is true not only in law but in social life generally, even in those productive relationships that law reflects. There are legal institutions and legal values which, within definite limits, have general significance, which are directly related to the general conditions of the existence of human society and which therefore penetrate into both socialist and non-socialist law, creating the possibility of heritability between the two systems, just as they create the possibility of heritability between any two systems.

Naturally, either out of conviction or because he is under censorship, Nenovski must emphasise that he is not taking an idealist or a natural law position; he is not accepting, as it stands, Francois Geny's distinction between *le donné* and *le construit* in law, and his only reference to Renner (surely as a result of self-censorship) is to treat him as a social-democratic opportunist. Nevertheless, both Nenovski and Naschitz have a strong conception of law as concerned, in part, with certain general human or social problems which are not shaped, solely or exhaustively, by class relationships and as responding to what Anglo-American theorists have called infra-jural facts. Law expresses both ontological factors and objective social laws, besides class relationships. It has to be seen not as a passive reflection of the economic, but as a conscious creation by people for the attainment of consciously defined goals. The concept of the foundations of law must include both material and intellectual factors; above all, it must include man as the subject

of social relations, as having both a social and biological nature. It will thus have class factors and non-class factors. though the two sets do not constitute discrete elements that fail to interact with each other.

The detailed working out of this position by Nenovski, serious and intelligent as it is, will unquestionably be too abstract and general for tastes shaped by British empiricism and the Common Law tradition. The tendency is to erect general categories and consider their place within a system, a general theory of law, not to use them for the solution of particular problems. In a society and a political system in which everything has to be squared with an official ideology, the attempt to tackle that ideology first and make it more flexible, commonsensical and intellectually receptive is both a necessary and a laudable task, and Nenovski deserves to be ranked among those communist legal theorists whose effort should command sympathy and respect from their western colleagues,even if the upshot is to tell us what we had never doubted.

Basically, Nenovski accepts Naschitz's view that social links and relations, economic, political, cultural and familial, change under different types of class rule, in different social formations, but nevertheless display *les éléments de liaison et de continuité* that transcend class viewpoints in the one society and provide heritable material in the transition from one social formation to another. To this have to be added objective laws

of nature and objective social laws which any legislator must take into account and which are reflected in the conceptual and formal apparatus of law as well as in some of its norms and specific solutions. The biological and social nature of man also provides us with 'constants' taken into account by and reflected in law. Thus, all legal systems in principle take account of human sexual characteristics, age and psychic state and seek to guarantee society against chaos and violence and to promote justice and equality - even if these are understood differently by different classes and in different times. Nenovski himself goes on to emphasise (pp. 28-32) administration as an inescapable and permanently operating factor in any human society, no matter what its stage of development, in which we will find continuity and heritability as well as discontinuity and change. The relative independence of social consciousness and in part of legal consciousness also work toward continuity and heritability and so do the achievements of human culture over millenia. Both the economic base and the ideological superstructure provide continuity as well as discontinuity; the laws of nature introduce into law general elements of which man's relation to the environment must take account and so do the complex links and relationships in the field of international relations, of relations between governments. Of course, in the transition from one social formation to another, one kind of law is replaced by another, and the transition from bourgeois society and law to socialist society and law is more widespread in its destruction of previous norms and arrangements than earlier transitions. Nevertheless, the destruction is not

total and bourgeois and socialist law have similar institutions and even some identical components of legal regulation. This is precisely because law itself and legal institutions, both in form and in substance, are complex, mingling universal and specific elements, objective and general social laws and class interests, concerns and viewpoints. One cannot suppose that communist society will deny itself those features of law which characterise it as a conscious and rational factor in social administration (p. 139). For above all, socialist law must take into account the complex and multi-faceted character of social relations and therefore adopt from the theory of administration 'the principle of necessary multiplicity'. The problem is to create an administrative apparatus which is not artificially made complicated (bureaucratised) and is at the same time sufficiently varied from the point of view of its functions and elements. Such an administrative apparatus will have to take into account also the variety of functions and complexity of development of the objects with which it deals (p. 140). The transition from socialist law to the norms of the communist society of the future will also involve, for Nenovski, the most interesting (but uncharacterised) question of heritability between socialist law and communist norms; it will not involve, he is clear, the withering away of law 'in toto', the disappearance of the judicial category in human affairs. On the contrary, it will involve the strengthening of the scientific and rational foundations of law as a system of administration and of the appreciation and internalisation of legal norms among the people.

Socialist legal norms, as rational and scientific, stand in fundamental contradiction to religious norms and religion will indeed wither away. Legal consciousness will not.

The Soviet Union is not a *Rechtsstaat*. The continuing improvement in and increasing seriousness of Soviet legal theory has not been accompanied by an improvement of the citizens' position vis-à-vis the State and under the law. Repression of a very serious sort continues; so does the flagrant violation of principles of legal impartiality and protection of the citizens' rights. One has only to look at any daily newspaper, or at the recent Report of the Joint Committee on Foreign Affairs and Defence of the Parliament of the Commonwealth of Australia, *Human Rights in the Soviet Union* (Canberra, 1979), for confirmation that the position in regard to the rule of law in the Soviet Union and to democratic rights is, for a stable and secure country, pretty bad. The Report takes up nine separate questions, treated at some length: the nationality question in the Soviet Union, the relationship between its citizens and the Soviet State, freedom of religion, the cultural and linguistic rights of Soviet minorities, anti-semitism, the right to emigrate, human contact and the right to communicate freely, the right to protest and the dissident movement, and the treatment of Soviet prisoners and the use of psychiatric hospitals. On all these questions, the Report concludes, the situation has much improved since the end of the Stalin era in 1953, but still falls far short of recognised international norms and desirable standards. Three members of the Committee expressed

reservations on the Report, in writing and as part of it, being especially unhappy over Parliament undertaking enquiries for which it has neither the resources nor the authority to ensure a report based on adequate examination of all aspects of the matter under enquiry. Nevertheless they, too, reiterate their view that, based on the substantial evidence available, the civil rights of certain groups in the Soviet Union, especially of minorities, are seriously infringed and fall below that which should be expected in any civilised society.

The very marked improvement in Soviet legal philosophy in recent years, then, like the increasing elevation of Soviet law as worthy of respect, in no way guarantees the actual observance of law by the authorities that rule the USSR. The theoretical developments do provide an obstacle, we should argue, to any renewed attempt to base repression in the Soviet Union on the requirements of class war. It is noticeable that in the 1960s, when Soviet theoreticians and politicians felt that they had to combat a Maoist theoretical threat, they did not fall back on class war positions. The new trends involve above all the elevation of general social interests, allegedly pervasive in the Soviet Union and at least present, in embryo or in part, in other societies. Repression in the Soviet Union and among its friends is now justified primarily on the basis of that social interest. Political conditions are such that legal theorists who wish to hold their jobs have not been in the forefront, or indeed in any front, of open and public protest against State abuse of power.

It would not be true to say, either, that the increasing professionalisation, recognition of complexity and readiness to take part in an international debate in a commonsensical way have made either Soviet or communist legal theory an important intellectual movement in modern legal philosophy, worth studying for its own sake as a major contribution to legal thinking. The requirements of Marxist theory, let alone those of political censorship, still act as a seriously debilitating intellectual strait-jacket. Soviet and communist legal philosophers, even at their most sensible, have to draw their conceptions from a restricted range of categories, have to fit their recognition of continuity, complexity and relative independence of law into a general theory of quasi-economic determinism that is simply not invariably true or consistently illuminating. They have to be simply dishonest in avoiding favourable reference to people or ideas, within and outside the Marxist fold, politically out of favour. The result is that current Soviet legal philosophy at its best is basically an increasingly sensible eclectic mixture of watered-down Marxism with ideas and trends adopted from Western writing and fitted, often with some intellectual ingenuity, into 'orthodox' Marxism. The advantage of this trend is that it does facilitate international communication between Soviet and other communist scholars and scholars outside the Marxist fold, that it gives the Soviet student a better and more complex picture of law, and that it does further, or at least lay the foundations for furthering,a recognition in communist countries of the comparative integrity and independence

of law. Its great disadvantage is its eclecticism - heavily bureaucratic and non-committal,in an intellectual sense, in the official textbooks, and still somewhat mushy in even the better writings, including Nenovski's. There is, after all, an intellectual paradox that many students learn in their first or second year of philosophy. The commentator Kemp-Smith is a very much 'sounder' philosopher than Descartes; the historian and textbook writer Adamson sees all sorts of philosophical difficulties and complexities that David Hume failed to see. But we have no doubt which are the better minds or the more important philosophers. Contemporary Soviet philosophy of law is very much more sensible and 'sound' than Soviet philosophy of law was in the 1920s - better informed, less partisan and biased, more professional. Yet the philosopher Deborin and the legal theorist Pashukanis are intellectually much more exciting in their work, give us more ideas to think about, are bolder and more innovative figures than any contemporary Soviet or East European philosopher and lawyer.

III

Recent developments in Chinese legal theory, in spite of the ever-increasing national hostility between the People's Republic of China and the Soviet Union, closely parallel Soviet development. The new trends in Chinese legal theory, and in intellectual life generally, represent a renewed recognition of complexity, a refusal to reduce all issues to the class struggle, and a readiness to think in terms of intellectual exchange and

contact - at least at restricted levels - with the intellectual world outside China. The Chinese Academy of Sciences, Academia Sinica, has not only been revitalised, but a special Chinese Academy of the Social Sciences has now been created. It is renewing Chinese contacts with professional associations and international congresses in the social sciences and the humanities. In May, 1980 a delegation from the Australian National University, the Australian Academy of the Humanities and the Academy of the Social Sciences in Australia will be paying a reciprocal official visit to that academy and in the last year or so lawyers visiting China have found it very much easier to come into contact with their professional colleagues and to see at least some instances of the work of the courts. That this renewal of intellectual contacts, this opening up of a prefessional elite's access to the world, is not accompanied by a general relaxation of repression, the troubles of the Chinese dissidents and the splendid series of books and translations from the pen of Pierre Ryckmans (Simon Leys) show clearly enough. Nevertheless, there is now a total retreat from the Maoist insistence that law is fundamentally to be resolved into techniques of mediation and conciliation for dealing with 'contradictions' among the people and savage repression of the people' enemies, except when they repent. The new Constitution of the People's Republic of China, promulgated in March, 1978 after the fall of the Gang of Four, is still a comparatively informal document, with only 60 articles compared with the 174 in the new Soviet Constitution. It still emphasises informality and, though it reverts

in some respects to the earlier more legalistic provisions of the 1954 constitution, it does not bear full witness to the enormous change that has taken place in China's conception of law since Chairman Hua and Deng Xiaoping have again become recognised spokesmen of current orthodoxy.

The new trend is to emphasise the importance of legality and of law, the complexity of legal and administrative imperatives, the need for a trained and specialised cadre of functionaries and lawyers to respond to these imperatives. Law faculties, closed for many years, are now actively recruiting people with legal training to meet a growing demand for court lawyers, following the introduction of a new criminal code on 1 January, 1980. Other laws - the Criminal Procedure Code, the Electoral Act, and the Law Governing Joint Enterprises - have recently been promulgated. There is growing discussion and serious consideration of the need for further legislation. Much of the public, officially-supported, propaganda in favour of law has emphasised its role in securing the rights of the citizens against arbitrary action, in producing stability, in helping to modernise China - even if the current leadership has been very quick indeed to retreat from any suggestion that criticism of the Communist Party and the communist system would be allowable. Just as the Gang of Four proceeded by ignoring the provisions of what was then China's current constitution, at least formally, so the current leadership is already ignoring in significant respects the provisions of the new constitution promulgated less than two years ago. Some of the new leaders are already questioning the appropriateness of its proclamation

(under Article 45) of the four rights to 'speak out freely, air ... views fully, hold great debates and write big character posters', since these rights had been used to criticise the regime in fundamental and far-reaching ways.

Nevertheless, there is today greater, more serious and more detailed discussion of the role of law in (Chinese) Communist society than there has been at any time since the great discussions of 1957, which ended with the condemnation of 'legalism'. The journal *Faxue yanjiu* (Legal Research) has become available abroad for the first time for many years. Interestingly enough, the journal contributors revert to a discussion of 1957 concerning continuity of law: the question whether legal institutions, concepts, principles and techniques can be taken over from pre- and non-socialist law for use in the People's Republic of China and socialist legal systems. The discussion thus parallels closely the concern of Nenovski and shows considerable acquaintance with past Marxist tradition and theory on the matter, though it is certainly nowhere near as detailed or sophisticated as Nenovski's book or Naschitz' series of articles.

'At the beginning of the 1950s' Lin Rongnian (林榕年) writes in *Faxue yanjiu's* first issue for 1979, under the heading 'A Little Discussion on the Heritability of Law',

> a fervent discussion developed in legal circles on whether law was or was not inheritable; some said it was, some said it was not; everybody put forward his own views; in this, some erroneous

> views could hardly be avoided, such as the idea that law transcended classes or that some laws of the exploiting classes did not only reflect the will of the suppressing classes but also the will of the suppressed classes. But on the whole, the atmosphere of the discussion was healthy and its thinking lively.
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> Later, however, a curious phenomenon appeared. Every view that law was heritable was described as an 'old law point of view'. In the Great Proletarian Cultural Revolution, some comrades who had formerly advocated the view that law was heritable were again criticised. Legal research became a stagnant pool, the problem of the heritability of law became a 'forbidden zone' that must not be entered. To strengthen research on legal literature in Chinese and foreign history and to attain the aims of [the slogans] 'old things must be put to the use of the present' and 'foreign things must be put to Chinese use', a renewal of the discussion of the problems of the heritability of law has genuine significance.

Lin avoids saying baldly that law transcends classes, in the way that he believes language and literature can, or that it can embody the will of a subjected as well as a ruling class. But he insists that law is heritable and draws on Marx to argue that classes ushering in a new social order - e.g. the bourgeoisie in overthrowing feudalism - become the representative of the rest of society, embody wider demands and common interests of all subjected classes in the early phases of their struggle for supremacy. 'Therefore, the substance of the legal thinking and the legal system of the exploiting classes during the period in which they are ascending and flourishing has a certain objectivity and reasonableness and is also consistent with some interests of the working people. All this can be considered

by the proletariat as a precious, cultural heritage and can be inherited critically.' Chinese history, he argues, has given us many valuable legacies to law and jurisprudence - for instance, in some of the sayings of legal philosophers during the Spring and Autumn Annals period and during the period of the Warring States, when such thinkers as Han Fei and Shang Yang emphasised equality before the law and the strict and sacrosant character of the law as promulgated. The first general legal act of the Central Committee of the Chinese Communist Party in February, 1949, before proclaiming the People's Republic of China, was the total abrogation of the Six Codes of the Kuomintang Nationalist Republic. But this, says Lin, is not to be understood as a denial, in principle, of the heritability of past laws. Even the law of a ruling class in its period of decline continues the laws of the earlier period in which it flourished and was ascendent and they cannot therefore be simply thrown away. Thus some of the laws and legal institutions of Western imperialist countries - 'especially their economic legislation, such as the system of contracts, of enterprise management, of responsibility at the place of work, protection of the environment and of natural resources, and norms concerning weights and measures, health, traffic and the inspection of merchandise - should, in accordance with our needs, be adopted, filled with new content and put to our use. The creation of a socialist legal system professing a specific Chinese flavour requires the critical inheritance, on the principles of Marxism-

Leninism, of the many valuable legacies of jurisprudence and legal development created in the millenia of previous Chinese and foreign history.

Li Changdao (李昌道), under the heading 'The Old Law cannot be Critically Inherited, It can only be Used for Reference', in no. 3 of the same journal, enters into a dispute with Lin which centres on the fact that Lin's concept of critical inheritance involves positive affirmation of at least part of the old law, the suggestion that some of it is positive even if other parts of it are negative. No particular old law, Li says, can be critically inherited, because we cannot make any such old law lose its original attributes. Concepts and words - including the technical concepts and terms of the old law - according to Li, are another matter. They 'are commonly agreed upon and used throughout history; they have no class nature and do not belong to the realm of critical inheritance.' They can be adopted by socialism. But other technical terms reflect wider legal ['class-based'] ideology. These include such notions as (abstract capitalist) equality before the law, independence of the judiciary, consultation between judges, role of the defence counsel and open courts. The so-called critical inheritance of these is the taking over of pre-socialist culture and ideology.

Against such critical inheritance which involves the illegitimate taking over of concealed ideological elements, Li advocates the use of old law as a reference [literally in Chinese, as a mirror giving clarity to the thing reflected]. The form of laws, the substance of norms, legal principles, the construction of rules, concepts and technical terms, can all be used as a mirror, they are all, the article concludes triumphantly, 'worthy of our attention'. The difference between critical inheritance and using as a reference, the crucial issue between Lin and Li, is not discussed as a logical issue and certainly not made clear. There is, rather, a significant difference in tone- comparative enthusiasm for adopting good laws and legal principles from the past in Lin and a warning by Li that past laws must be sifted to make sure they do not contain ideologically unacceptable presuppositions, with both agreeing that not all past laws or legal principles should simply be thrown away. Lin is betting his shirt, Li has a bit each way. At the moment in China and in the Soviet Union, it is possible for both to be heard provided that they do not follow Mao in seeing the exceeding of proper limits as part of the creative task of the revolutionary, or of the critical intellectual. There is no doubt that the current discussion, the first such public discussion in China for many years, has not reached the vitality, scholarliness or sophistication of the discussion on independence of the judiciary, character of socialist law and heritability of law during the ill-fated period of the Hundred Flowers in 1957. China's

legal philosophers, and her social and humanistic thinkers generally, are still only just recovering from the long years spent in the wilderness. It is the dissidents who have displayed a heroic and penetrating, if for them personally dangerous and even disastrous, capacity for critical thinking about socialism, law and freedom. Such critical thinking, many non-Chinese observers (including Australians) used idiotically to assure us, was totally alien to the Chinese character and the so-called Chinese mind.

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