

NATIONAL SOCIALISM AND MARXISM: A COMPARATIVE LEGAL ANALYSIS

HEATH HARLEY-BELLEMORE*

ABSTRACT

Marxism as a concept of legal theory has given birth to a number of subsequent theories, such as communism, socialism and the various forms those ideologies have taken. Curiously, what is seen as the polar-opposite of the children of Marxism, National Socialism or more commonly Nazism, has its roots in, and owes its very existence to the ideas and works of Marxism and its ilk.

I FIRST CONSIDERATIONS

Marxism as a concept of legal theory has given birth to a number of subsequent theories, such as socialism and communism, and the various forms those ideologies have taken. Curiously, what is often seen as the polar-opposite of Marxism, National Socialism (or more commonly ‘Nazism’) has its roots in, and owes its very existence to, the ideas and works of Marxism and its ilk. This paper outlines the historical underpinnings leading to, and the birth of Marxism and National Socialism, their philosophical underpinnings and how National Socialism leans on many of the ideas of Marxism. Additionally, it suggests that whilst being allegedly opposite-ends of the political spectrum, Marxism and National Socialism have a remarkable amount in common – Thus an possible example of the horseshoe theory.

* LLB (Murdoch University)

II PRE-MARXIST LEGAL PHILOSOPHY

Neither Marxism nor National Socialism appeared overnight. Like many philosophies, these were built on or were at least highly influenced by, the legal and social philosophy of the time, most notably evolutionary legal theory, and legal historicism.

A Evolutionary Legal Theory

In the mid-19th century, Charles Darwin published his masterwork *On the Origin of Species by Means of Natural Selection*. The historical and scientific bombshell that was this work is no doubt axiom in modern minds. However, perhaps due to legal culture adopting an increasingly scientific approach during this period in history,² Darwin's work would have a great influence on the emerging legal culture and jurisprudence of the time.

Evolution, in terms of legal theory, had a great effect in reshaping the law. It seems to have diverted the historic approach from a search for 'absolute principles' to a hunt for processes which generate the 'right kind' of change.³ This meant something of a paradigm shift from the structured limits of constitutional law to a more 'organic' approach to legal evolution.⁴ The result was a bolstering of the idea that constitutions were 'living documents' and should be interpreted to reflect the changing needs of a society. Indeed both the Nazis and Marx used this concept for their own means.

² Michael G. Roskin, *19th-century roots of contemporary political science* (12 July 2014) Encyclopaedia Britannica, <<http://www.britannica.com/EBchecked/topic/467721/political-science/247905/19th-century-roots-of-contemporary-political-science>>.

³ Augusto Zimmermann, *Western Legal Theory: History, Concepts and Perspectives* (LexisNexis Butterworths, 2013) 123.

⁴ Scott Dodson, 'A darwinist view of the living constitution' (2008) 61(5) *Vanderbilt Law Review*.

1 *Marx*

Both Karl Marx and his frequent co-author Friedrich Engels read *On the Origin of Species* and agreed with its contents, using it as something of an explanation for the validity and supremacy of their theories. Marx stated that despite the book's 'crude English style' it 'contain[ed] the basis in natural history of our view'.⁵ Engels similarly stated, 'just as Darwin discovered the law of evolution in organic nature, so Marx discovered the law of evolution in Human History'.⁶

This is perhaps best noted in Marx's theory of history.⁷ As Engels stated, Marx believed there was an evolution of society in human history. Marx believed that communism would be the final result of this evolution,⁸ the steps of this process roughly being:

- 'The tribal form' – Society having no social classes but kinship relationships.⁹
- 'Primitive communism',¹⁰ – 'the ancient communal and State ownership which proceeds especially from the union of several tribes into a city by agreement or by conquest',¹¹
- 'Feudal or estate property',¹² – 'Like tribal and communal ownership, it is based again on a community; but the directly producing class standing over against it is not, as in the case of the ancient community, the slaves, but the enserfed small peasantry'.¹³

⁵ P Blackledge and G Kirkpatrick, *Historical Materialism and Social Evolution* (Palgrave Macmillan, 2002) 32.

⁶ Friedrich Engels, *Selected Works, Vol 3* (International Publishers, 1950) 153.

⁷ Andrey D Maidanky, 'The Logic of Marx's Theory of History' (2012) 51(2) *Russian Studies in Philosophy*, 44-82.

⁸ Ibid.

⁹ Dino Felluga, *Modules on Marx: On the Stages of Economic Development Introductory Guide to Critical Theory* (31 January 2011) Purdue University, <<http://www.purdue.edu/guidetotheory/marxism/modules/marxstages.html>>.

¹⁰ Ibid.

¹¹ Karl Marx and Frederick Engels, *The German Ideology Part One, with Selections from Parts Two and Three, together with Marx's "Introduction to a Critique of Political Economy"* (International Publishers, 2001).

¹² Felluga, above n, 8.

¹³ Marx and Engels, above n, 10.

- ‘Capitalism’¹⁴ – Birthed from the growth of human populations and commerce, feudal society evolved from its ‘capital’ into capitalism. Societies then became structured around commodities and profit. This society would alienate the working classes and lead them to socialism.¹⁵

This evolution into socialism was one of the final steps in the process, the final and ultimate form evidently being communism, which curiously, was never defined by Marx.¹⁶

2 Nazis

It is a well-known fact that the Nazis used evolution as a basis for scientific-racism and as a reason to persecute those deemed of being from ‘lesser races’.¹⁷ However, evolutionary theory was not used solely for this purpose. First, it may be of use to outline how Nazis legally achieved and maintained power using these concepts of evolutionary law and living constitutions.

On February 27th 1933, precisely 6 days before the election, was the infamous Reichstag fire.¹⁸ The Nazis, claiming the fire was the pretext to a communist revolution, convinced President Paul von Hindenburg to sign the *Reichstag Fire Decree*, on the basis of Article 48 of the Weimar Constitution.

Article 48 of the Weimar Constitution allowed the (then) German President (Paul von Hindenburg, who was succeeded by Adolf Hitler in 1934), under certain circumstances, to take emergency measures without the prior consent of the *Reichstag*.

¹⁴ Felluga, above n, 8.

¹⁵ Ibid.

¹⁶ Bertell Ollman, *Marx's Vision of Communism*, New York University (undated), <https://www.nyu.edu/projects/ollman/docs/vision_of_communism.php>.

¹⁷ Richard Weikart, ‘*The Role of Darwinism in Nazi Racial Thought*’ (2013) 36(3) *German Studies Review* 537-556.

¹⁸ Michael E. Tigar and John Mage, ‘*The Reichstag Fire Trial, 1933-2008: The Production of Law and History*’ (2009) 60 (10) *Monthly Review*.

As a consequence, under the decree, the Nazi party was able not only to silence political opponents but was able to curtail almost all constitutional rights of citizens. As now, under law, ‘People’s Courts’ were to be set up to prosecute those who were not loyal to the regime,¹⁹ a concept not at all dissimilar to those set up by Lenin in the Soviet Union in 1918.²⁰

The March 5 elections gave the Nazis a majority in the Reichstag allowing them to pass the *Enabling Act* of 1933 which essentially removed all power from the Reichstag and invested it in the authority of the cabinet (in effect, the Chancellor Adolf Hitler) meaning laws were no longer subject to scrutiny in the Reichstag.²¹ On this basis, the Nazis effectively used the valid law of the time to achieve power.

For the Nazis, the legal-Darwinian view of a living constitution, particularly its flexibility, would become an important foundation within the Nazi legal structure.²² As a constitution was considered a ‘living documents’,²³ Nazi judges were able to, and often did, interpret them this way to stay in line with the regime.²⁴

3 *Post-Evolutionary Theory*

Evolutionary legal theory would heavily support and influence other legal viewpoints such as German legal historicism, most notably the works of academics such as Friedrich Carl von Savigny, even earning him the moniker of ‘the Darwin of the science of law’.²⁵ This was yet another stepping-stone on the road to Marxist, and National Socialist thought, and was highly influential on both ideologies.

¹⁹ Ibid.

²⁰ Orlando Figes, *A People's Tragedy: The Russian Revolution 1891-1924* (Jonathan Cape 1996), 533-540.

²¹ Above, n 17.

²² Ibid.

²³ Ann Munster, ‘Current publications in abstract – Hitler’s Justice: *The Courts of the Third Reich* by Ingo Muller and translated by Deborah Lucas Schneider’ (1992) 20(4) *Journal of Criminal Justice* 378-379.

²⁴ Ibid.

²⁵ John Macdonell, *Great Jurists of the World* (Forgotten Books, 2013) 586.

B German Legal Historicism

At the end of the Napoleonic wars emerged the German School of Historical Law.²⁶ Founded by Gustav Hugo and perhaps best represented by the work of Friedrich Carl von Savigny,²⁷ the philosophical school of German legal historicism was very Darwinian in nature, (although not entirely)²⁸. This theory, much like evolutionary legal theory, disregarded the ‘natural law’ philosophy. German legal historicists looked at the law as a product of the *Volksgiest*, or ‘spirit of the people’.²⁹

The historicist idea sat very comfortably alongside evolutionary legal theory, taking the viewpoint that the organic evolution of law is generated by a continuous process of growth throughout the history of the people – That is to say it treated the nation as a living organism,³⁰ a concept both Marx and the Nazis were well acquainted with and influenced by.

1 Marx

Karl Marx while a student at the University of Berlin attended Savigny’s lectures regularly for two terms.³¹ Marx had read and appreciated the contents of Savigny’s book, *Right of Possession*.³² In the book, Savigny argues that in place of property as a ‘natural right’ of the individual, the vast majority of humanity had lived in societies which possession of land was communal and conditional in nature.³³

²⁶ Zimmermann, *Western Legal Theory*, above, n 2, 157.

²⁷ Suri Ratnapala, *Jurisprudence* (Cambridge University Press, 2013) 310.

²⁸ Ibid.

²⁹ Zimmermann, *Western Legal Theory*, above, n 2, 156-158.

³⁰ Ibid.

³¹ Isaiah Berlin, *Karl Marx: His Life and Environment* (Oxford University Press, 4th ed, 1996) 51.

³² Augusto Zimmermann, ‘Marxism, Communism and Law: How Marxism Led to Lawlessness and Genocide in the Former Soviet Union’ (2011) 2 *Western Australian Jurist* 19-20.

³³ Ibid.

The ideas expressed in Savigny's book appear to have influenced Marx significantly, as there are parallels between it and Marx's ideas about law in the Communist Manifesto,³⁴ perhaps most notably the historical concept of communal property being similar to Marx's supposed timeline of human societal evolution.³⁵

In his book, *Dominion and Wealth: A Critical Analysis of Karl Marx' Theory of Commercial Law*, D.C. Kline points out more common themes between the work of Savigny and Marx. He writes:

Marx' rejection of law as a phenomenon independent of history seems to be echoed in Savigny's statement in 'Of the Vocation of Our Age for Legislation and Jurisprudence', where he said that law, like language, was simple the historical expression of the "kindred consciousness" of a particular people. The idea that law is a historical phenomenon, a product of the historical condition of a given people, also occurs in Marx' work. For example, in *The German Ideology*, Marx said: "It must not be forgotten that law has just as little an independent history as religion." [...] Marx argued that when an ideology is scientifically examined, it will be seen to be the product of actual people's "material life-processes". "Morality, religion, metaphysics and all the rest of ideology as well as the forms of consciousness corresponding to these, thus no longer retain the semblance of independence." Law and language as the products of history, thus were linked by Marx as they were by Savigny. Both Savigny and Marx rejected the premise that the laws of a given society reflected universal normative truths, and both held that a society's laws reflected its particular historical situation.³⁶

Ultimately the influence of Savigny's work enabled Karl Marx to believe that 'private ownership is the original cause of social inequality'.³⁷ Arguably Savigny's influence laid the foundation of Marx's ideas.³⁸

³⁴ Ibid.

³⁵ Felluga, above n, 8.

³⁶ D.C. Kline, *Dominion and Wealth: A Critical Analysis of Karl Marx' Theory of Commercial Law* (Springer Science & Business Media, 2012) 48.

³⁷ Augusto Zimmermann, 'The 'Darwin' of German legal theory – Carl von Savigny and the German School of Historical Law' (2013) 27(2) *Journal of Creation* 122.

³⁸ Ibid.

Of course, the influence of the historical school is not limited to just the work of Savigny. While Marx was evidently largely influenced by Savigny,³⁹ another historicist would be his primary philosophical interest; Georg Wilhelm Friedrich Hegel.⁴⁰

Indeed a great deal of ink has been spilt with regard to Hegel's influence on Marx and Marx becoming a 'Young Hegelian'.⁴¹ While the full influence of Hegel on Marx is beyond the scope of this paper, it is important to note some aspects of this influence nevertheless.

Sean Sayers in his paper *Individual and Society in Marx and Hegel: Beyond the Communitarian Critique of Liberalism* brings Marx and Hegel together in the following abstract:

Marx's concepts of individual and society have their roots in Hegel's philosophy. Like recent communitarian philosophers, both Marx and Hegel reject the idea that the individual is an atomic entity, an idea that runs through liberal social philosophy and classical economics. Human productive activity is essentially social. However, Marx shows that the liberal concepts of individuality and society are not simply philosophical errors; they are products and expressions of the social alienation of free market conditions. Marx's theory develops from Hegel's account of "civil society," and uses a framework of historical development similar to Hegel's. However, Marx uses the concept of alienation to criticize the liberal, communitarian and Hegelian conceptions of modern society and to envisage a form of individuality and community that lies beyond them.⁴²

Of course Savigny, Hegel and historical law were not influential to Marx exclusively. The Nazis also found a similar use for these ideas.

2 Nazis

³⁹ Zimmermann, *Marxism, Communism and Law*, above n, 31.

⁴⁰ Kline, above n 35, 41-48.

⁴¹ Lewis S. Feuer and David T. McLellan, *Karl Marx* (14 March 2016) Encyclopaedia Britannica <<https://www.britannica.com/biography/Karl-Marx> >.

⁴² Sean Sayers, 'Beyond the Communitarian Critique of Liberalism*' (2007) 71(1) *Science & Society* 84-102.

The concept of viewing a society as a living organism was of great influence in the Nazi ideology.⁴³ One pillar of the Nazi ideal was to erode capitalism and replace it with a system whereby every member of society would be granted equal economic opportunity so that biological ability and talent would prevail.⁴⁴ A concept such as this, in the minds of the Nazi leaders, would allow those who are biologically superior to succeed economically and contribute to evolutionary progress.⁴⁵ This is a prime and clear example of how these two ideologies (legal historicism and evolution) complimented one another, particularly in the Nazi framework.

In 1944 Adolf Hitler commissioned a booklet entitled *Why Are We Fighting?* In this booklet there is an important link between not only socialism and Darwinism, but legal historicism too;

Socialism means for us not the solution of the labor question, but rather the ordering of all *German racial comrades* into a *genuine living community*; it means the preservation and *further evolution of the Volk* [people] on the basis of the *species-specific laws of evolution*⁴⁶ [emphasis added]

The reference to a ‘living community’ and the ‘further evolution of the *Volk*’ appears to be somewhat influenced by the historicist’s viewpoint of society being a living organism. The mention of ‘species-specific laws of evolution’, (whilst somewhat historicist in nature) makes a blatant remark in regard to evolution, and what influenced this ideology is obvious. Coupled with the reference to ‘German racial comrades’, it is clear that a Darwinian ‘survival of the fittest’ viewpoint had taken root. Adding these ideas to the Nazi prediction that in a system of equal economic opportunity, the gifted would thrive is a clear example of this Darwinian-historicist viewpoint in action. These two

⁴³ Ibid.

⁴⁴ Zimmermann, *Western Legal Theory*, above, n 2, 137.

⁴⁵ Ibid.

⁴⁶ Richard Weikart, *Hitler’s Ethic: The Nazi Pursuit of Evolutionary Progress* (Palgrave Macmillan, 2011) 110.

theories alone did not give the Nazis law authority per se, but they did provide a strong legal positivist foundation upon which their laws stood.

Like Marx, the Nazis too found solace in the work of another Historicist, and again, this person was Hegel. Hegel's views were largely 'legal positivist',⁴⁷ and historicist⁴⁸, in nature. He too believed the state to be a living entity,⁴⁹ going so far as to publish that the state is a 'living organism [...] the manifestation of the Divine on earth, and [...] the march of God through the world'.⁵⁰ That is to say that the state, this 'living entity' (a historicist viewpoint), is essentially a 'god of being'⁵¹, therefore, based on this idea, all law is positive law.⁵² What can be taken from this is that in essence, if the state is god, when Hitler gained absolute power as Führer, he essentially became this 'god'.

3 Conclusions

While there are indeed notable differences in the influences behind Marx and the Nazis, there is an observable pattern between the two which has been outlined above.

The influences of the age of discovery had on the legal fraternity, and the work of Charles Darwin set the wheels in motion. To Marx, this was the evolution of society, and to the Nazis the evolution of man.

The historicists, particularly Savigny and Hegel, demonstrate this 'living society' in action and further the concepts that would fuel Marxist and Nazi thought. With Marx, the state would evolve beyond capitalism, into socialism (or another form), and for the Nazis a similar concept, capitalism would be

⁴⁷ Richard J Bernstein, 'Reviewed Works: Hegel's Theory of the Modern State by Shlomo Avineri; Hegel by Raymond Plant' (1975) 3(3) Political Theory.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Zimmermann, *Western Legal Theory*, above, n 2, 131.

⁵¹ Ibid, 187.

⁵² Ibid, 131.

eroded and economic equality would bring out the best people. It is from these bases in which we see the emergence of Marxism, and later Fascism and National Socialism.

III MARXISM

Marxism is primarily a social, political and economic theory that interprets human history through a progressive prism.⁵³ As noted above, Marx ‘discovered’ a dialectical pattern which controls human development, which would ultimately lead to a communist society of classless individuals.⁵⁴ In short, Marxism is essentially the vehicle which leads to communism. As Zia Akhtar writes;

The ideology of communism is part of a specific political and economic doctrine of state organisation. This legal system rests upon socialist legality which provides a mandate that addresses the structural changes in society on the path to creating a workers state. The vanguard of the ideological imperative to enact socialism is the Communist Party which is entrusted to carry out the transformation that abolishes the state based on the capitalist norms where industrial is a commodity.⁵⁵

A Marx and Law

Marx’s ideas regarding law are primarily expressed in the Communist Manifesto, which was published in 1848 with his frequent co-author Freidrich Engels.⁵⁶ It is there he writes that law (as well as morality and religion) are ‘so many bourgeois prejudices, behind which lurk in ambush just as many

⁵³ Zimmermann, *Marxism, Communism and Law*, above n 32, 1-2.

⁵⁴ Ibid.

⁵⁵ Zia Akhtar, ‘Law, Marxism and the State’ (2015) 28(3) *International Journal for the Semiotics of Law* 661-685.

⁵⁶ Zimmermann, *Marxism, Communism and Law*, above n 32, 18-20.

bourgeois interests’.⁵⁷ He continues in this vein critiquing the constitutional traditions of the west, such as the right to life, liberty, and property, stating:

Your very ideas are but the outgrowth of the conditions of your bourgeois production and bourgeois property, just as your jurisprudence is but the will of your class made into a law for all; a will, whose essential character and direction are determined by the economic conditions of existence of your class [...] The selfish misconception that induces you to transform into eternal laws of nature and of reason, the social forms springing from your present mode of production and form of property – this misconception you share with every ruling class that has preceded you.⁵⁸

Essentially, Marx saw law as primarily an instrument of class domination which was influenced by economic relationships between groups.⁵⁹ Marx believed that there can be nothing that could be considered intrinsically good in the existence of law, going so far as stating in the *Gotha Critique* that lawlessness would be the final stage of communism. Which must ‘[...] predate a period in which the state can be nothing but the revolutionary dictatorship of the proletariat’.⁶⁰

Of course, the most noteworthy example of this is Soviet Russia. The Russian Revolution of 1917 was a ‘critical moment when a Marxist party acceded to power and implemented reforms to transfer the ownership of the means of production from the bourgeois to the working class,’⁶¹ and it is from here we see the attempt to put Marxist theory into practice.

IV MARXISM IN PRACTICE: THE USSR

⁵⁷ J.M. Kelly, *A Short History of Western Legal Theory* (Oxford: Oxford University Press, 2007), 329.

⁵⁸ *Ibid.*

⁵⁹ Zimmermann, *Marxism, Communism and Law*, above n 31, 19-22.

⁶⁰ Karl Marx, *Critique of the Gotha Programme*, cited in Maureen Cain and Alan Hunt, *Marx and Engels on Law* (London Academic Press, 1979), 163.

⁶¹ Akhtar, above, n 55, 661.

Soviet legal theorists considered the legal systems of capitalist societies as ‘designed to oppress the working classes that the Bolshevik Revolution was supposed to liberate’.⁶² For them ‘the idea that there was any higher legal morality that transcended historical change and stood above the state was rejected as an idealist fantasy: states made and enforced law on behalf of particular class interests, and had always done so’⁶³ In a normative sense the Soviet jurists believed the existence of law was merely a ‘theoretically inconvenient fact’.⁶⁴ This can be observed in Soviet constitutionalism, the role of the judiciary in the Soviet era, and how criminal law was handled during this period.

A Constitutionalism in the Soviet Union

The first Soviet constitution is dated from 1918, the second constitution from 1924, the third in 1936, and the final in 1977, which remained in force until the collapse of the Soviet Union in 1991.⁶⁵ Dr Zimmermann writes:

The first constitution explicitly stated that the Soviet Union was a ‘dictatorship of the proletariat’ and that human rights were guaranteed only to the ‘workers.’ In all subsequent constitutions, the people were declared to enjoy fundamental rights to free speech, free press, free assembly, and so on. However nobody really expected to enjoy any of these rights. There were conditions, derived from the constitution itself, which determined that these rights could only be enjoyed if they were exercised in absolute conformity with the general interests of the socialist state.⁶⁶

A further issue, he continues ‘lay in the fact that the special police was immune from respecting the law. So it is argued that all these constitutional rights were merely a façade to deceive naïve foreigners and to advance the cause of

⁶² Zimmermann, *Western Legal Theory*, above, n 2, 200.

⁶³ Richard Overy, *The Dictators: Hitler's Germany and Stalin's Russia* (Penguin Books, 2005) 209.

⁶⁴ Igor Grazin, ‘*The Role of Ideas in Political Change*’, in Suri Ratnapala and Gabriel Moens (eds), *Jurisprudence of Liberty* (Butterworths, 1996), 249.

⁶⁵ Zimmermann, *Western Legal Theory*, above, n 2, 205.

⁶⁶ *Ibid*, 205.

communism worldwide'.⁶⁷ As Raymond notes in regard to Stalin's 1936 constitution:

Because Westerners consider constitutional regulations important, [the Soviet rulers] must be shown that they have no reason to feel superior even in this respect... One of the reasons for the 1936 constitution was possibly to convince world public opinion that the Soviet regime was close in spirit to western constitutional practice and opposed to fascist tyranny or Nazism. The regime wanted foreigners to see the distinction between the party and the state. Without this juridical distinction, relations between the Soviet Union and other states would be compromised.⁶⁸

To a very limited extent, the Soviet legal system created some institutional safeguards for the individual citizen, whoever these safeguards were either nominal at best or a mere façade.⁶⁹ In actuality, despite these so-called safeguards, the Soviet regime had no interest in complying with the rule of law whatsoever.⁷⁰ By and large, the Soviet legal system played hardly any role in the actions of the regime as the real power lay with the leaders of the Bolshevik Party.⁷¹ French philosopher Raymond Aron sums this up in the following statement:

The proletariat expressed in the Party and the latter being possessed of absolute power, is the realization of dictatorship of the proletariat. Ideologically the solution is satisfactory and justifies the monopoly of the party. The party possesses and should possess supreme power, because it is the expression of the proletariat and the dictatorship of the proletariat.⁷²

Building upon this follows naturally the role of the Judiciary in the Soviet Union.

B The Judiciary in the Soviet Union

⁶⁷ Ibid.

⁶⁸ Raymond Aron, *Democracy and Totalitarianism* (Weidenfeld and Nicolson, 1968) 166.

⁶⁹ Zimmermann, *Western Legal Theory*, above, n 2, 204-205.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Aron, above n 68, 168.

In Soviet-era Russia, the power of the state was undivided. The concept of judicial independence and neutrality were passed off as myths of the bourgeois. Instead ‘Soviet courts had two basic functions: to advance socialism and destroy all the real or imagined enemies of the state’.⁷³ A member of The People’s Commissariat, I M Reisner said:

The separation of powers in legislative, executive and judicial branches corresponds to the structure of the state of the bourgeois [...] The Russian Soviet Republic [...] has only one aim, the establishment of a socialist regime, and this heroic struggle needs unity and concentration of power rather than separation.⁷⁴

In a very similar vein, Lenin, a lawyer himself, too believed the judiciary to be ‘an organ of state power and therefore cannot be outside of politics’.⁷⁵ He believed the only task of the judiciary is to ‘a principled and politically correct [...] essence and justification of terror. The court is not to eliminate terror [...] but to substantiate it and legitimise it in principle.’⁷⁶

True to this notion, in 1918 Lenin established the infamous ‘People’s Courts’.⁷⁷ Orlando Figes writes:

The Bolsheviks gave institutional form to the mob trials through the new People’s Courts, where ‘revolutionary justice’ was summarily administered in all criminal cases. The old criminal justice system, with its formal rules of law, was abolished as a relic of the ‘bourgeois order’... The sessions of the People’s Courts were little more than formalised mob trials. There were no set of legal procedures or rules of evidence, which in any case hardly featured. Convictions were usually secured on the basis of denunciations, often arising from private vendettas, and sentences tailored to fit the mood of the crowd, which freely voiced its opinions from the public gallery [...]

⁷³ Zimmermann, *Western Legal Theory*, above, n 2, 205.

⁷⁴ Raoul Von Caenegem, *An Historical Introduction to Western Constitution Law* (Cambridge University Press, 1995), 266.

⁷⁵ Julian Towster, *Political Power in the U.S.S.R.: 1917-1947* (Oxford University Press, 1948) 304.

⁷⁶ Richard Pipes, *A Concise History of the Russian Revolution* (New York Knopf, 1995) 220.

⁷⁷ Zhengyuan Fu, *China’s Legalists: The Earliest Totalitarians and Their Art of Ruling* (An East Gate Book, 1996) 141.

The People's Courts judgements were reached according to the social status of the accused and their victims. In one People's Court the jurors made it a practice to inspect the hands of the defendant and, if they were clean and soft, to find him guilty. Speculative traders were heavily punished and sometimes even sentenced to death, whereas robbers – and sometimes even murderers – of the rich were often given only a very light sentence, or even acquitted altogether, if they pleaded poverty as the cause of their crime. The looting of the 'looters' had been legalized and, in the process, law as such abolished: there was only lawlessness.⁷⁸

The People's Courts however were only a mere step. In 1919 Lenin introduced the Revolutionary Tribunals. The first Soviet Commissar of Justice Dmitry Kursy stated that these tribunals were not intended to be 'real courts' in the 'normal' bourgeois sense, but 'courts of the dictatorship of the proletariat and weapons in the struggle against the counter-revolution' the main purpose of which was the eradication of its enemies, rather than that of justice.⁷⁹

Much to Lenin's dismay, he found these courts were inefficient and many magistrates could be easily bribed. So to combat this he established the Cheka, an entity which became a 'state within the state'. The Cheka had near unlimited power, most notably the power to exterminate anyone deemed to be 'undermin[ing] the foundations of the socialist order'.⁸⁰ Vladimir Gsovski quotes Martin Latsis (one of the chiefs of the Cheka)⁸¹:

Not being a judicial body the Cheka's acts are of an administrative character [...] It does not judge the enemy but strikes. . . The most extreme measure is shooting [...] The second is isolation in concentration camps. The third measure is confiscation of property [...] The counterrevolutionaries are active in all spheres of life [...] Consequently, there is no sphere of life in which the Cheka does not work. It looks after military matters, food supplies, education [...] etc. In its activities the Cheka

⁷⁸ Figes, above n 19, 534.

⁷⁹ Stéphane Courtois et al, *The Black Book of Communism: Crimes, Terror, Repression* (Harvard University Press 1999) 55

⁸⁰ Zimmermann, *Western Legal Theory*, above, n 2, 207.

⁸¹ Internet Encyclopedia of Ukraine, 'Cheka'

<<http://www.encyclopediaofukraine.com/display.asp?linkpath=pages%5CC%5CH%5CCheka.htm>>.

has endeavored to make such an impression on the people that the mere mention of the name Cheka will destroy the desire to sabotage, to extort, and to plot.⁸²

Finally, in 1923 the Soviet Authorities enacted the *Judiciary Act* which created a uniform judicial system until the fall of the regime. However much like its predecessors, this new court system was still intended to be used as ‘obedient instruments of the policy of the government and the Communist Party’.⁸³

C Soviet Criminal Law

The first Soviet Criminal Code came into force on 01 June 1922. However, this code did nothing to alleviate the common practice of arbitrary imprisonment.⁸⁴

Peter Maggs writes:

Criminal procedure was weighted heavily in favour of the state and party. Although the system generally followed the continental European model, which called for extensive preliminary investigation, the investigator in cases of serious crimes was not a judicial official, as in western Europe, but instead was an official of the procuracy, which also was in charge of prosecution. The investigator could hold a suspect without contact with legal counsel for months. From time to time, high party officials initiated campaigns against particular types of crimes, telling prosecutors whom to prosecute and forcing the courts to convict defendants. Starting in the late 1940s, there was severe pressure from the party hierarchy to secure a 100 percent conviction rate, with the result that thereafter there were almost no acquittals.⁸⁵

The criminal codes legislated during the Soviet era provided for arrest, conviction, and imprisonment on ideological grounds. For example, Article 58 of the first *Criminal Code* classified ‘counter-revolutionary’ as any form of participation in the ‘international bourgeoisie’, a definition which provided for

⁸² Vladimir Gsovski, ‘*Preventive and Administration Detention in the USSR*’ (1961) 3(1) *Journal of the International Commission of Justists* 137.

⁸³ *Ibid*, 139.

⁸⁴ Zimmermann, *Western Legal Theory*, above, n 2, 211.

⁸⁵ Peter B Maggs, ‘*Soviet Law*’ *Encyclopedia Britannica* (09 June 2011) <<https://www.britannica.com/topic/Soviet-law>>.

the exile of many. For example, some who committed the apparent ‘political crime’ of establishing a committee to fight against the famine 1921-1922 were exiled.⁸⁶

Further, Article 58 provided for the prosecution of anyone considered a threat to the socialist regime. Anyone considered ‘socially dangerous’ and/or ‘counter-revolutionary’ was likely to find themselves imprisoned, even without the presence of guilt. This is because, as Pointowski states, ‘[S]ometimes for consideration of a political nature [...] it is necessary to apply compulsory measures to persons who have not committed any crime but who on some basis or another are socially dangerous.’⁸⁷

In conjunction with the *Criminal Code* was the Soviet Code of Criminal Procedure of 1926. This Act broadened the definitions of ‘counter-revolutionary and ‘socially dangerous person’. Any comment, for example, about the ‘political and economic achievements of the revolutionary proletariat’ was deemed to be counter-revolutionary.⁸⁸ In addition to these broadened definitions, the Act instructed provincial courts to refuse to ‘admit as counsel for defence any formally authorized person if the court considers such person not appropriate for appearance in the court in a given case depending upon the substance or the special character of the case’.⁸⁹

In 1958 a new *Penal Code* was adopted. The code abandoned terms like ‘enemy of the people’ and ‘counter-revolutionary crimes’ and apparently did away with the use of violence and torture. However, similar to the constitutional safeguards these words did little.⁹⁰ The state of (criminal) law in Russia during this period is perhaps best summed up by Amnesty International in their 1975 report:

⁸⁶ Courtois, above n 78, 128.

⁸⁷ Amnesty International, ‘*Prisoners of Conscience in the USSR: Their Treatment and Conditions*’ (1975) (Amnesty International London) 15.

⁸⁸ Courtois, above n 78, 135-136.

⁸⁹ Gsovski, above n 81, 140.

⁹⁰ Zimmermann, *Western Legal Theory*, above, n 2, 214.

There has never in Amnesty International's experience been an acquittal of a political defendant in the USSR. No Soviet court trying a person charged for his political activity has rejected the prosecution's case on grounds of procedural violations committed during the investigation period or on grounds of insufficient evidence.⁹¹

IV FASCISM: THE FATHER OF NATIONAL SOCIALISM

As an economic system, fascism is socialism with a capitalist veneer writes Sheldon Richman:⁹²

[F]ascism was seen as the happy medium between boom-and-bust-prone liberal capitalism, with its alleged class conflict, wasteful competition, and profit-oriented egoism, and revolutionary Marxism, with its violent and socially divisive persecution of the bourgeoisie. Fascism substituted the particularity of nationalism and racialism—"blood and soil"—for the internationalism of both classical liberalism and Marxism.⁹³

Where socialism would seek totalitarian control of the economic processes of a nation through state operation, fascism sought to control them indirectly through domination of 'nominally private owners'.⁹⁴

Where socialism nationalized property explicitly, fascism did so implicitly, by requiring owners to use their property in the "national interest"—that is, as the autocratic authority conceived it. (Nevertheless, a few industries were operated by the state.) Where socialism abolished all market relations outright, fascism left the appearance of market relations while planning all economic activities.⁹⁵

A Benito Mussolini

⁹¹ Amnesty International, above n 86, 32.

⁹² Sheldon Richman, 'Fascism' *The Concise Encyclopedia of Economics* (2008) <<http://www.econlib.org/library/Enc/Fascism.html>>.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

Benito Mussolini introduced Fascism to Italy after the First World War. Mussolini was the son of an anarchist father and a Marxist mother. By 1912, at the age of 29 Mussolini was considered ‘one of the most effective and widely read socialist journalists in Europe’.⁹⁶

In that same year, Mussolini had taken over the Italian Socialist Party at the Congress of Reggio Emilia. Being opposed to the ‘bourgeoisie’ parliaments as well as ‘proposing that Italian socialism should be thoroughly Marxist’.⁹⁷ Mussolini in *Opera Omnia* wrote ‘Marx is the father and teacher [...] he is the magnificent philosopher of working-class violence’.⁹⁸ Further, he wished for Italy to have the ‘greatest bloodbath of all, when the two hostile classes will clash in the supreme trial’.⁹⁹

Mussolini predicted that in World War Two ‘[w]ith the unleashing of a mighty clash of peoples, the bourgeoisie is playing its last card and calls forth on the world scene that which Karl Marx called the sixth great power: the socialist revolution’.¹⁰⁰ However, this was not the case.

Mussolini noticed that the Marxist belief of ‘international socialism’ failed to work as the Communists had anticipated. It did not prevent World War One, nor did it work when Lenin called for the worldwide ‘proletarian revolution’ in 1919.¹⁰¹ As Barbara Tuchman writes:

When the call came, the worker, whom Marx declared to have no Fatherland, identified himself with country, not class. He turned out to be a member of the national family like anyone else. The force of his antagonism which was supposed to topple capitalism had found a better target in the foreigner. The working class went

⁹⁶ Paul Johnson, *Modern Times: The World from the Twenties to the Nineties* (HarperPerennial, 2001) 57.

⁹⁷ Zimmermann, *Western Legal Theory*, above, n 2, 135.

⁹⁸ Johnson, above n 95, 37.

⁹⁹ *Ibid*, 57.

¹⁰⁰ *Ibid*, 37.

¹⁰¹ Zimmermann, *Western Legal Theory*, above, n 2, 136.

to war willingly, even eagerly, like the middle class, like the upper class, like the species.¹⁰²

The coming of this new war, coupled with Mussolini's determination to bring his country into it, resulted in him losing his position within the Italian Socialist Party. He had become a 'heterodox socialist'¹⁰³ – a national socialist.¹⁰⁴

B The German Model: National Socialism

In Germany, the Nazis followed the lead of the Italian Fascists. Of course, the Nazis famously added to their platform greater elements of racism, anti-Semitism in particular, concepts not part of Italian Fascism.¹⁰⁵ The party's name reflects this; 'The National Socialist German Workers' Party' was founded as a movement to bring together the ideas of socialism and nationalism.¹⁰⁶

In 1920 Adolf Hitler and Anton Drexler published the *25 Points Manifesto*, a document which described their 'unalterable and eternal' objectives. It was the first and only manifesto of the party.¹⁰⁷ Apart from the well-known denunciation of the Versailles Treaty and its anti-Semitism, the manifesto also supported the 'expropriation of land without compensation, nationalisation of industry, abolition of market-based lending, confiscation of income unearned by work' and so on.¹⁰⁸

The intellectual forerunners of Nazism were socialists who firmly believed that capitalism favoured the 'unproductive classes' of industrialists at the expense

¹⁰² Barbara Tuchman, *The Proud Tower: A Portrait of the World Before the War: 1890-1914* (Ballantine Books, New York, New York, 1993), 462.

¹⁰³ Zimmermann, *Western Legal Theory*, above, n 2., 136.

¹⁰⁴ Johnson, above n 95, 96.

¹⁰⁵ Zimmermann, *Western Legal Theory*, above, n 2, 136-137.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Jonah Goldberg, *Liberal Fascism: The Secret History of the American Left, From Mussolini to the Politics of Change* (Three Rivers Press, 2009) 410-413.

of the ‘honest working man’. These intellectuals believed that capitalism should be eroded as it lowered the birth rate of the working class. National Socialism was therefore founded on the view that those on equal economic footing would allow for biological talent and ability to prevail.¹⁰⁹

V NATIONAL SOCIALISM

The Nazi legal system in many ways echoed its Soviet sibling. Indeed its constitution was hailed as a great work (as it used its predecessors’),¹¹⁰ its legal fraternity were loyal to the regime,¹¹¹ and (much like Soviet Russia) special courts were established for ‘enemies of the state’.¹¹²

A Constitutionalism in Nazi Germany

Constitutionalism in Nazi Germany is a strange beast as Constitutional law didn’t change much during the Nazi era; it merely manipulated the existing constitution from the previous government, the Weimar Republic.¹¹³

After forming a coalition with the Nationalists in 1933, Hitler called for an election. On February 27th 1933, 6 days before the election, was the infamous Reichstag fire.¹¹⁴ The Nazis, claiming the fire was the pretext for a communist revolution, convinced President von Hindenburg to sign the *Reichstag Fire Decree*.¹¹⁵

¹⁰⁹ Weikart, *Hitler’s Ethic*, above n 45, 120.

¹¹⁰ Gerald Strauss and Karl Schleunes, *Germany: The Weimar constitution* (19 August 2016) Encyclopaedia Britannica, <<https://www.britannica.com/place/Germany/World-War-I#ref297631>>

¹¹¹ Ralf Beste et al, *From Dictatorship to Democracy: The Role Ex-Nazis Played in Early West Germany* The Spiegel Online (2012) <<http://www.spiegel.de/international/germany/from-dictatorship-to-democracy-the-role-ex-nazis-played-in-early-west-germany-a-810207.html>>.

¹¹² United States Holocaust Memorial Museum, *Law and Justice in the Third Reich* (Undated) Holocaust Encyclopedia <<https://www.ushmm.org/wlc/en/article.php?ModuleId=10005467>>.

¹¹³ Alan Steinweis and Robert Rachlin, *The law in Nazi Germany: ideology, opportunism, and the perversion of justice* (Berghahn Books, 2013) 108.

¹¹⁴ Tigar and Mage, above n 17.

¹¹⁵ Ibid.

As stated above, under the decree on the basis of Article 48 of the Weimar Constitution, the Nazi party was able not only to silence political opponents but was also able to curtail almost all constitutional rights of citizens. The March 5th elections gave the Nazis a majority in the Reichstag allowing them to pass the *Enabling Act* of 1933, an Act which essentially removed all power from the Reichstag and invested it in the authority of the cabinet (in effect, the Chancellor – Adolf Hitler) meaning laws were no longer subject to scrutiny in the Reichstag.¹¹⁶ The Nazis had achieved power via the constitution, which they never bothered to repeal.¹¹⁷

2 *The Nazi Legal Fraternity and Judiciary*

Many lawyers were hostile to the Weimar Republic as over time it had ‘handed lawyers a humiliating political defeat that reduced their incomes, their prestige, and their power’.¹¹⁸ The German legal community (generally speaking) welcomed Hitler’s appointment as Chancellor in 1933 with open arms,¹¹⁹ with 10,000 lawyers swearing ‘by the soul of the German people [they] will strive to course of our Führer to the end of [their] days’.¹²⁰

Judges became particularly important in terms of legitimising ‘Nazi legal theory’ and its application in the regime.¹²¹ The effect of evolutionary theory when applied to law found a welcoming home here. As evolution had influenced the practice of law to enable the concept of ‘living constitutions’,¹²² it is clear that it would not be at all difficult for German judges who were sympathetic to the regime to perpetuate the Nazi philosophy by interpreting the

¹¹⁶ Ibid [27]-[28].

¹¹⁷ Grant Hushcroft and Paul Rishworth, *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, 2002) 184.

¹¹⁸ Kenneth F. Ledford, ‘*German Lawyers and the State in the Weimar Republic*’ (1995) 13(2) *Law and History Review* 317-349.

¹¹⁹ Munster, above n 22, 378-379.

¹²⁰ Zimmermann, *Western Legal Theory*, above, n 2, 167.

¹²¹ Ibid.

¹²² Dodson, above n 3.

constitution to fit the political climate (that is, the constitution would be interpreted as a living document),¹²³ which oftentimes they did.¹²⁴

3 *Nazi Criminal Law*

Law and justice in the Third Reich were eerily similar to that of Soviet Russia; a police state with arbitrary arrest and imprisonment of political and ideological opponents in concentration camps. E. A. M. Wedderburn writes:

In the National Socialist state criminal law is an instrument used by the nation "to cleanse and protect itself." The need for this cleansing is due to the fact that the nation considers itself defiled by the objectionable conduct of its members, while the need for protection is nothing but the national organism's instinct of self-preservation. Hence for National Socialism it is more important to ensure that there should be true substantial justice than that the provisions of the criminal law should be clear. This does not mean that the law does not appear important to the National Socialist criminal legal system. On the contrary, it represents the supreme form of the Fuehrer's will, and hence the supreme expression of the national consciousness, and the needs of the individual cannot prevail against it. The nation, not the individual, must have its rights.¹²⁵

In 1933 'protective custody' essentially became arrest without judicial review. This was used as a tool against any real or potential enemies or opponents of the regime. Protective custody prisoners were not 'confined within the normal prison system but in concentration camps under the exclusive authority of the SS' (*Schutzstaffel*; the elite guard of the Nazi state).¹²⁶ The United States Holocaust Memorial Museum writes:

The Third Reich has been called a dual state, since the normal judicial system coexisted with the arbitrary power of Hitler and the police. Yet, like most areas of

¹²³ Munster, above n 22, 378-379.

¹²⁴ Ibid.

¹²⁵ Ernest Alexander Maclagan Wedderburn, '*Criminal Law in the Third Reich*' (1936) 48 *Judicial Review* 376.

¹²⁶ United States Holocaust Memorial Museum, above n 111.

public life after the Nazi rise to power in 1933, the German system of justice underwent "coordination" (alignment with Nazi goals). All professional associations involved with the administration of justice were merged into the National Socialist League of German Jurists. [...] Judges were enjoined to let "healthy folk sentiment" guide them in their decisions.¹²⁷

Not unlike the Soviets, the Nazis further tried to increase the 'political reliability' of the courts. Dissatisfied with the decision of the Supreme Court in the Reichstag Fire Trial, in 1934 Hitler ordered the creation of the People's Court. The court's primary function was to try treason and 'other important political cases'.¹²⁸ Between 1933 and 1945, German judges, both civilian and military, handed down an estimated 50,000 death sentences, most of which were carried out.¹²⁹

VI CONCLUSION

Attributed to French philosopher Jean-Pierre Faye is the horseshoe theory. The horseshoe theory is the idea that rather than being at opposite ends of a linear political spectrum, the far-left and far-right are more accurately displayed as either end of a horseshoe. What this means is that two (or more) seemingly polar-opposite ideas bend back around on this spectrum to be closer to each other than they are to the centre.

As Friedrich Hayek in *The Road to Serfdom* argued, National Socialism (and fascism generally) were not 'capitalist reactions against socialism' but were in fact remarkably similar doctrines as they both required economic planning and empowering the state over the individual.¹³⁰

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Beste above n 110.

¹³⁰ Friedrich Hayek, *The Road to Serfdom* (University of Chicago Press, 2007).

Marxism and National Socialism are indeed different beasts in a number of ways. However, as can be observed from arguments above, they are remarkably similar in terms of philosophical and political influences, and how their governments and court systems worked, which lends to the idea that Marxism and National Socialism fall upon this ‘horseshoe theory’ as famous examples.