

*Pashukanis:*

*Selected Writings  
on Marxism and Law*



FRONTISPIECE. E. B. Pashukanis (date unknown). Kindly supplied by Professor  
Dietrich A. Loeber of the University of Kiel.

***Pashukanis:***  
***Selected Writings***  
***on Marxism and Law***

*Edited and with an Introduction by*

PIERS BEIRNE  
*Department of Sociology,*  
*Political Science*  
*University of Connecticut,*  
*College,*  
*Storrs, Connecticut 06268, U.S.A.*  
*NY 12308, U.S.A.*

ROBERT SHARLET  
*Department of*  
*Union*  
*Schenectady,*

*Translated by*  
PETER B. MAGGS  
*University of Illinois*

*Foreword by*  
JOHN N. HAZARD  
*Columbia University*

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## *Preface*

Evgeny Pashukanis was the prodigious author of some two hundred pieces on questions of legal theory, legal history and public administration. We employed three specific criteria in the determination of the eleven translations from the original Russian which are incorporated in this volume, nearly all of which appear for the first time in English. These criteria were: (a) the relationship between the Marxism inherent in Pashukanis' work (which changed substantially between 1924 and 1937) and the theoretical status of Marx's own fragmented discourse on state and law; (b) the relationship between Pashukanis' writings and the concrete circumstances of that Soviet history of which he was part; (c) the status of the internal structure of Pashukanis' thought, i.e. the adequacy and consistency of the various sets of propositions which in combination became known as the commodity exchange theory of law. No editorial policies can be entirely innocent, but we feel that these criteria are likely to be the ones best suited to elucidate the relevance of Pashukanis' writings to our own era.

We have decided to delete certain sections of the original versions of Chapters 5-8 of this volume. These sections were omitted largely because we regarded them either as highly esoteric or as peculiar to a specific moment in Soviet history. The location of textual deletions is indicated by the customary convention. On the same grounds we have deleted a number of footnotes from the original Russian sources of most but not all of the chapters. We have supplemented many of Pashukanis' footnotes where deficient, and updated many of his textual sources and references. A key to abbreviations used in the notes may be found on p. 125. In addition, we have tried to exercise inter-linguistic consistency by translating Pashukanis' own Russian

versions of sources and texts that were available to him only in their original English, French and German editions.

Finally, the editors wish to express their appreciation to the institutions and individuals who, in different ways, facilitated the completion of this volume. In particular, these are the Union College Research Fund, the University of Connecticut Research Foundation and Maureen Cain.

Piers Beirne  
Robert Sharlet

*September 1979*

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*For Jocelyn and Jeffery,  
and Randy Garber*



## *Foreword*

Pashukanis was an imaginative Marxist, the most imaginative to appear among Soviet lawyers immediately after the October Revolution, or so Harvard's noted legal philosopher, Roscoe Pound, told me when I contemplated entering upon the study of Soviet law in 1934. Pound said he had been so impressed while reading a German translation of Pashukanis' principal work that he had undertaken to study Russian so as to read his works not yet translated.

Pound's verdict on Pashukanis' place among Marxist legal theorists was shared by others. Members of a group assembled to suggest what should be included in a volume on Soviet legal philosophy to be published by the Association of American Law Schools said the same thing in 1947. All of them put Pashukanis first among their choices.

Pashukanis' influence was profound within the U.S.S.R., as I found when I became a student in what was then called the Moscow Institute of Soviet Law. While he came to the Institute only rarely to lecture, its teachers were largely his disciples, devoted to his commodity exchange theory of law. His textbook was the key to the study of legal philosophy, and his attitude toward law's future shaped the curriculum. His expectation that civil law would wither away as market conditions became overshadowed by socialism caused the introduction of a new discipline called "Economic Law" to the very end of which were relegated a few lectures on civil law.

Stripped of its complexities, which can be appreciated only on reading the editors' comprehensive Introduction following this Foreword, Pashukanis' theory held that Soviet legislators and jurists were not creating a proletarian or socialist system of law, but were merely putting to their own use the bourgeois law that they had

inherited. Thus, there was no new legal form in process of creation, but only a transformation by degrees of content to meet the needs of those engaged in creating Soviet public order during the limited period required for the state and its handmaiden, the law, to wither away with the achievement of a classless society.

Pashukanis' influence reached beyond the domestic scene. He became interested in international public law as well, although this phase in his career did not fully begin until the mid-1920s. In this field he met resistance, for the noted Professor Evgeny Aleksandrovich Korovin, who had published his first treatise in 1924, had caught the attention not only of Soviet jurists but internationalists throughout the world. In his volume, entitled *The International Law of the Transition Period*, he had noted that Soviet diplomats, while rejecting general international public law as the creation of imperialist states, were finding it useful, and even necessary, to rely upon some of the norms of general law to protect their diplomatic status, establish their state's frontiers, and hold potential aggressors at bay. By so doing, the new diplomacy was helping to create a "new" law which Korovin identified as the law of the transitional period between capitalism and communism.

His theory of new law was in direct opposition to Pashukanis' denial that new law was in the making. Conflict was inevitable as Pashukanis turned his attention from municipal law to international law. In that conflict, Pashukanis revealed a personality which needs to be understood by those who can today see only his printed words. He was not a kindly figure, as one might suppose when the international public law term *doyen* of the profession is used to describe him. He was a revolutionary, brought up in the school of "hard knocks" where courtesies are unknown and where one attacks to survive.

Korovin appeared to Pashukanis to be his enemy. He had already cowed those who opposed him on municipal law, although he had some battles, recounted in the Introduction, but Korovin remained. Pashukanis showed his colours as a man: he was not content to argue. He was merciless in his personification of Korovin as politically disoriented, if not hostile toward the new Soviet system. He made his intellectual argument into a personal indictment, as so many other revolutionaries were to do in their attacks upon theoretical positions they opposed.

Korovin had learned to trim his sails to meet the wind of the moment during the stormy years of War Communism when the wind beat hard upon scholars coming from the former bourgeois intellectual stratum. He adapted quickly because he knew where power lay, and Pashukanis indubitably had power at this point. Nevertheless, he smarted under the attack, as I was to learn in the 1930s in my many associations with him at his home on visits to discuss his lectures at the Moscow Institute. It was on one of those discussion evenings when I saw what Pashukanis' attack meant to one who had felt it, for it was a few nights after Pashukanis was denounced in Pravda in early 1937 as an "enemy of the people". Pravda's columnist had singled out for attack Pashukanis' theory that Soviet law was not new in form, but only in content. Korovin turned to me and said, "Ivan Ivanovich, don't you think that I have been proven right?"

I had to agree that the Pravda criticism of Pashukanis seemed to imply that his major error was to have thought that Soviet socialism was not imparting a new form as well as a new content to law, and that this position when applied to international public law would seem to support Korovin's view that, as applied by Soviet diplomacy, it was in process of transition, or metamorphosis. It had become the new "law of the transitional period". Korovin felt himself vindicated, and I thought him right in thinking so, although no subsequent praise of Korovin as a pioneer ever appeared from any official pen. His reward was to be his survival at a time when Stalin was rolling many academic heads, and his maintenance of the chair of international public law at Moscow University until his sudden death from a heart attack years later.

On looking back to those turbulent times of 1934 to 1937 while I attended classes in Moscow, I have to admit that I came to dislike Pashukanis. Perhaps it was my upbringing in America which influenced my emotions. I turned against him not as a thinker, for at the time I was trying to wash all emotion and evaluation out of my mind as I tried to understand what Soviet Marxists were saying. I turned against him as a man. It was quite out of my experience that academic argument would become fortified by an imputation that an opponent was disloyal to his country and its cause. Nor had I experienced deans and department chairmen acting as dictators to their colleagues. Some had spoken with authority, but their direc-

tions were not dictates in the sense that I came to understand dictatorship under Stalin. To my mind American universities were priding themselves in presenting to their students ideas from many positions upon the political spectrum; no one pretended to have a patent on infallible truth.

To find myself in a Soviet law school where the teachers projected a theory said to be infallible, and where those who strayed from Pashukanis' line were castigated like Korovin or denied faculty appointments, promotions and salary raises was novel to me. I saw teachers compelled to conform not only to ideas of Marx but also to those of Pashukanis as his infallible interpreter. This was unsettling to my sense of justice, and more so since in my numerous conversations with Korovin in his apartment, I caught his sense of frustration. He was not a new boy who might be expected to reflect his professor's views, at least for a time until he developed his own. He was a world figure with views of his own on what Marxism meant, and he was being silenced and even threatened with one knew not what.

Korovin's plight extended even to his family. One spring evening his wife brought in the traditional tea at the end of the conversation. We had been discussing what Korovin thought he might say in evaluation of the Communist Manifesto on a forthcoming anniversary. His wife caught the end of the conversation, and blurted out, "But, Genia, that will only make more trouble for you. Why do you keep trying?" I sensed the problems Pashukanis had created for this one family whose integrity and faithfulness to the ideas of the October Revolution were unquestionable. Consequently, when it was learned that Pashukanis had been carried away by the police in early 1937, I doubt that many of the learned jurists mourned the loss to the law or thought that scholarship would suffer. Although no one among the scholars seemed to be happy with the purge style of Pashukanis' ouster, his removal was welcomed by those whose had experienced his authoritarian rule over Soviet legal scholars for more than a decade.

Little did I realize as Pashukanis' influence faded away and his disciples in the Law Institute were dismissed, and sometimes arrested as well, that within a year, Andrei Ia. Vyshinsky would mount the empty pedestal and proclaim a new doctrine of normativism, which was to bind his subordinates with bonds as strong as those

Pashukanis had used. An outsider like myself could not but meditate on the impact of the life of polemics which revolutionaries had lived since the founding of what became the Communist Party. There was no spirit of accommodation, of compromise, such as Anglo-Saxons usually favour. It was "we or they," or in the Russian revolutionary language *kto-kogo*.

Pashukanis as a physical being was a dominating figure. While memories fade over decades, those heavy black bushy eyebrows moving vigorously up and down above an animated face remain before my eyes. He was a large man, or at least gave the impression of being so, as he spoke behind a lectern or paced the floor of his office at *ulitsa* Frunze 10. His figure still haunts that same office even today, for it is the office of the current Director of what is now called the Institute of State and Law of the U.S.S.R. Academy of Sciences, and many visit there. On one occasion in 1936 the late Professor Samuel N. Harper of the University of Chicago took me along as an observer to an interview on the forthcoming Constitution. Pashukanis was at the time deputy chairman of the constitutional drafting committee and had been gathering comparative material from the constitutions of the states of the world to aid the experts. Harper's experience with Russia dated from the turn of the century when he had been a student in St. Petersburg. He had been brought close to death on the great square in front of the Winter Palace on "Bloody Sunday" in 1905 when the Cossacks charged the crowd, swinging their sabres from their lofty saddle seats. He was now trying to understand Stalin's Russia.

I have forgotten the substance of the interview, although I recall that it seemed to me but to repeat what I had already read in the numerous pamphlets being published about the new Constitution. I do, however, remember the dominating figure of Pashukanis in his large office, his desk like the top of a "T" across the end of a long green-covered table where we were invited to sit. He showed politeness to his foreign guest, but he spoke with supreme authority. Little did he know, or appear to know, that within a few months, his name would be branded as that of the enemy, and his theories expunged from the textbooks.

Pashukanis was rehabilitated posthumously after Stalin's death, as the Introduction following this Foreword chronicles. He was said to have been punished unjustly, like so many others rehabilitated at the

time. Memorial minutes were printed in what was the successor to the law review he had once edited, and finally his portrait was hung with those of other past Directors of the Institute. His ideas were not reinstated as acceptable, even for discussion, but the reading of them is no longer forbidden, and his books have been restored to the open shelves of the Lenin Library a few doors away towards the Kremlin.

For Westerners, Pashukanis' works have a fascination, not only because of their imaginative character, but because they trace the evolution of his thought as he tried to bring to bear his sense of what was needed pragmatically upon the doctrines as he understood them. He had to create a new legal system that would provide order, but at the same time prepare the way for a classless society in which he fervently believed. He worked for a difficult master, Joseph Stalin, whose word was law for most people. Pashukanis showed that he could modify his behaviour to survive but he was not prepared to be wholly subservient. He tried to save something of his theory. The essays in this volume indicate the tacks he took to make headway, and they will prove stimulating reading if they are approached not only as a progression of ideas like those of any other great thinker, but as the efforts of a man to remain true to what he thought Marxism meant while trimming himself enough to survive. It is an exercise in political juggling; unsuccessful in the end as he was snatched from the stage by his unappreciative master, but fascinating nevertheless.

The team assembled to produce this volume is unusually well equipped to select, translate and interpret Pashukanis' writings. Piers Beirne is an English sociologist currently Assistant Professor of Sociology at the University of Connecticut-Storrs. He has written broadly in the field of sociology of law with special attention to Marxist theory and legal philosophy. Together with Professor Sharlet, he has restyled and edited Professor Maggs' translations against the legal vocabulary and idiom of Marxism and Soviet jurisprudence during the formative period of Soviet history.

Robert Sharlet is a political scientist with long experience in Soviet law, having focused upon Pashukanis as a graduate student at Indiana University and having attended the Law Faculty of Moscow University on his way to chairmanship of the Department of Political Science in Union College, Schenectady, New York. His writings on Soviet law are numerous and widely read for their perceptive analysis of the politics of Soviet Law.

Peter Maggs, who assumed the primary responsibility for translation of Pashukanis' texts, began his study of Soviet law while a student at the Harvard Law School with Professor Harold J. Berman. He continued with a year as an exchange student in Leningrad University's Law Faculty, and returned to the U.S.S.R. only a short while ago as a Fulbright Lecturer on the law of the United States. He too has written extensively on Soviet law, and translated materials for use in teaching it in law schools of the United States. He is currently Professor of Law in the College of Law of the University of Illinois at Champaign.

As one who trudged through pages of Pashukanis in the original Russian and listened to his disciples on the Moscow lecture platform, I am prepared to testify that the English rendition of his works and their selection from an extensive bibliography do his ideas justice. As he tended to take pride in the attention he received from bourgeois jurists whom he despised as enemies in the class struggle, he would probably have relished the attention given him in this volume, although he would probably not have admitted that his vanity was titillated.

*September 1979*

John N. Hazard

## *Editors' Introduction*

Evgeny Bronislavovich Pashukanis (1891-1937) has been the only Soviet Marxist legal philosopher to have achieved significant scholarly recognition outside of the U.S.S.R.<sup>1</sup> The pre-eminent Soviet jurist of the 1920s and early 1930s, Pashukanis fell victim to the great purges of the late 1930s and was thereafter reviled as an "enemy of the people" until his posthumous legal rehabilitation in 1956.<sup>2</sup>

As a student at the University of St Petersburg before World War 1, Pashukanis had been active in the Russian revolutionary movement and, as a result of his involvement, found it necessary to complete his education abroad at the University of Munich where he specialized in law and political economy. The available details on his early life are sketchy, but it is known that he joined the Bolsheviks in 1918, briefly, served as a local and circuit judge in the Moscow region, and then for several years into the early 1920s worked as a legal adviser in the People's Commissariat of Foreign Affairs while,

<sup>1</sup> His major treatise was *Obshchaia teoriia prava i marksizm*, first published in Moscow in 1924 and subsequently translated into French, German, Japanese, Serbo-Croat and into English in its third edition of 1927 as *The General Theory of Law and Marxism*. In I. Hazard (ed.), *Soviet Legal Philosophy* (1951), Harvard University Press, Cambridge, translated by H. Babb, pp. 111-225.

<sup>2</sup> According to the official *spravka*, Pashukanis was legally rehabilitated by the Military Division of the RSFSR Supreme Court in March 1956. The editors wish to acknowledge the generosity of Professor Dietrich A. Loeber, of the University of Kiel, for sharing a copy of this document with them. The most recent evidence of Pashukanis' limited intellectual rehabilitation is contained in the Soviet collection of some of his early writings from the 1920s. These will appear under the entry E. B. Pashukanis, *Obshchaia teoriia prava i marksizm*, Nauka, Moscow.



simultaneously, he cultivated a blossoming career in juristic scholarship.<sup>3</sup>

In 1924 Pashukanis emerged from relative obscurity with the publication of his major theoretical work *The General Theory of Law and Marxism*,<sup>4</sup> which quickly placed him in the front ranks of the field of aspiring Soviet Marxist philosophers of law. He regarded this treatise primarily as an introduction to the problems of constructing a Marxist general theory of law and by no means as the definitive statement on the subject. In this spirit, he appropriately subtitled his monograph *An Experiment in the Criticism of Basic Juridical Concepts*, emphasizing that he had written the book primarily for "self-clarification" with the hope that it might serve as a "stimulus and material for further discussion".<sup>5</sup>

Pashukanis' *General Theory* was warmly received by the reviewers and went into a second edition in 1926 followed by a third edition in 1927 which eventually encompassed three printings.<sup>6</sup> The originality of Pashukanis' theory of law—which was largely outlined in the first Russian edition of *The General Theory of Law and Marxism* in 1924, and successively revised in a number of works after 1927—lies 'in the contraposition of three notions with what Pashukanis took to be the *modus operandi* of Marx's *Capital*. From Hegel Pashukanis borrows the familiar distinction between essence and appearance, and also the notion in *The Philosophy of Right* that the Roman *lex persona* was an insufficient basis for the universality of rights attached to individual agents under capitalist modes of production.<sup>7</sup> And from Pokrovsky, an Old Bolshevik and the leading Russian historian between 1910 and 1932, Pashukanis borrows the assertion that the development of

<sup>3</sup> The sources for this biographical information are Robert Sharlet's interview with the late L. Ia. Gintsburg in Moscow, 1974; and J. Hazard, *Settling Disputes in Soviet Society: The Formative Years of Legal Institutions* (1960), Columbia University Press, New York, pp. 17-18. The English reader should see generally E. Kamenka and A. Tay, "The Life and Afterlife of a Bolshevik Jurist", *Problems of Communism* (1970), vol. 19, no. 1.

<sup>4</sup> See pp. 37-131 of present volume for translation of the first Russian edition.

<sup>5</sup> E. B. Pashukanis, "Predislovie" to *Obshchaia teoriia prava i marksizm* (1926), Moscow, 2nd corrected and supplemented edition, p. 3.

<sup>6</sup> See R. Sharlet, "Pashukanis and the Rise of Soviet Marxist jurisprudence, 1924-1930", *Soviet Union* 1, 2 (1974), pp. 103-121, esp. pp. 103-112.

<sup>7</sup> For Pashukanis' own account of his Hegelian heritage, see E. B. Pashukanis, "Hegel on State and Law", *Sovetskoe gosudarstvo* (1931), pp. 1-32.

Russian capitalism must be understood in the context of the historical primacy of mercantile capital.<sup>8</sup>

Pashukanis saw that it was not accidental that Marx had begun his analysis of the inner dialectic of the capital-labour relationship (the production of surplus value) with a critique of the categories of bourgeois political economy. It was not simply that the categories of rent, interest, industrial profit etc. mystified the essential qualities of this relationship. Rather, in order to apprehend the historically specific form of the relationship of capitalist exploitation, one had first to pierce the veil of appearances/semblances/forms which the real relationship inherently produced, and on which it routinely depended for its reproduction.

Pashukanis therefore infers that had Marx actually written a coherent theory of state and law, as indeed he had twice promised,<sup>9</sup> then it would necessarily have proceeded along the same lines as his iconoclastic analysis of the categories of political economy and the social reality which they mysteriously yet inaccurately express and codify.

Pashukanis consistently argues that there is an homology between the logic of the commodity form and the logic of the legal form. Both are universal equivalents which in appearance equalize the manifestly unequal: respectively, different commodities and the labour which produced them, and different political citizens and the subjects of rights and obligations. The salience of this insight has only very recently been recovered by Marxists,<sup>10</sup> and there are now

<sup>8</sup> See M.N. Pokrovsky, *History of Russia from the Earliest Times to the Rise of Commercial Capitalism (1910-1912)*, translated and edited by J. D. Clarkson and M. R. M. Griffiths, Martin Lawrence, London, n.d. See further G. M. Enteen, *The Soviet Scholar-Bureaucrat: M. N. Pokrovskii and the Society of Marxist Historians (1978)*, Pennsylvania State University Press, Pennsylvania and London.

<sup>9</sup> See K. Marx, "Letter to Weydemeyer" (February 1 st, 1859), in *Marx and Engels: Selected Correspondence (1942)*, International Publishers, New York, p. 119; and K. Marx, *The Grundrisse (1857-1858)*, translated by M. Nicolaus (1973), Random House, New York, p. 108. <sup>10</sup> For example, see A. Fraser, "Legal Theory and Legal Practice", *Arena*, no. 44-45.

<sup>10</sup> For example, see A. Fraser, "Legal Theory and Legal Practice", *Arena*, No. 44-45 (1976), pp. 123-156; C. Arthur, "Towards a Materialist Theory of Law", *Critique*, 7 (1976-1977), pp. 31-46; I. Balbus, "Commodity Form and Legal Form: An Essay on the 'Relative Autonomy' of the Law", *Law and Society (1977)*, vol. 11, no. 3, pp. 571-588; J. Holloway and S. Picciotto, "Capital, Crisis and the State", *Capital and Class*, summer 1977, no. 2, pp. 76-101; C. Arthur, introduction to Evgeny B. Pashukanis, *Law and Marxism: A General Theory (1978)*, Ink Links, London, pp. 9-31, a translation from the German edition of *Allgemeine Rechtslehre*

some healthy indications that the sterile dichotomy between instrumentalist and formalist approaches to law is likely to be transcended. If Pashukanis' main argument is correct, then it obliges us to ask two crucial questions. First, the *specific* content of legal imperatives does not explain why the interests of dominant classes are embodied in the legal form. Why, for example, are these interests not embodied in the form on which they episodically depend, namely, naked coercion? Second, if under capitalism the struggle between competing commodity producers assumes legal form through the principle of equivalence, then it follows that the class struggle between proletariat and bourgeoisie must also typically appear in the medium of the legal form.<sup>11</sup> And how, then, are we able to transform legal reformism into a revolutionary political practice?

By the late 1920s, as a result of his scholarly reputation, Pashukanis had become the *doyen* of Soviet Marxist jurisprudence, eclipsing even his juridical mentor Piotr Stuchka. However, after 1928 Pashukanis' theory as a Marxist critique of bourgeois jurisprudence became increasingly incompatible with the new political and economic priorities of the first Five Year Plan, especially the necessity for a strong dictatorship of the proletariat and its ancillary, Soviet law which, after 1937, would become socialist law.

In the ensuing ideological struggle on the "legal front" of the Soviet social formation, Pashukanis made the first of his eventual three self-criticisms in late 1930.<sup>12</sup> After that experience his theory underwent substantial revision during the period of the first and second Five Year Plans (1928-1937), as Pashukanis became the principal spokesman for the Stalinist conception of the Soviet state, while simultaneously striving to maintain his political commitment to the Marxist concept of the withering away of law. However, as soon as Stalin's "revolution from above" subsided with the

*und Marxismus: Versuch einer Kritik der juristischen Grundbegriffe*; S. Redhead, "The Discrete Charm of Bourgeois Law: A Note on Pashukanis", *Critique*, 9 (1978), pp. 113-120.

<sup>11</sup> Other than in some of his early writings, such as *On the Jewish Question* (1843), Marx himself had very little to say on the importance of the legal form. But see F. Engels and K. Kautsky, "Juridical Socialism", *Politics and Society* (1977), vol. 7, no. 2, pp. 199-200, translated and introduced by P. Beirne.

<sup>12</sup> See E. B. Pashukanis, "The Situation on the Legal Theory Front" (1930), translated in J. Hazard (ed.), *Soviet Legal Philosophy* (1951), op cit. pp. 237-280. Pashukanis' second self-criticism appeared in 1934, his third-"State and Law under Socialism" (1936)-is fully translated in the present volume, pp. 346-61.

essential completion of collectivization and a new legal policy of stabilization was demanded, the intrinsic ambivalence of Pashukanis' dual commitment to the respective marxisms of Stalin and Marx became apparent. This contributed to his downfall in early 1937. Following Pashukanis' purge, his successor as legal *doyen*, Andrei Vyshinsky, began the almost immediate demolition of the considerable structure of his predecessor's influence and, concomitantly, the systematic reconstruction of the Soviet legal system. Vyshinsky ushered in the era of the "Soviet socialist state and law" which has prevailed to this day in Soviet jurisprudence and legal practice.

Finally, in the process of destalinization after Stalin's death in 1953, Pashukanis' name was "cleared" of the politico-criminal charges which were the cause of his demise, and since then his status as a legal philosopher has been partially rehabilitated in the Soviet Union. Ironically, in the U.S.S.R. today Pashukanis is posthumously honoured as one of the founders of the jurisprudence of Soviet socialist state and law, a formulation the full implications of which he had resisted almost to the eve of his arrest.

### **Marxism and Soviet jurisprudence from War Communism to the New Economic Policy**

The *General Theory of Law and Marxism* is a theory of the historical specificity of the legal form, and Pashukanis ostensibly introduces his argument with a critique of three trends in bourgeois jurisprudence dominant in the U.S.S.R. before 1921: Renner's social functionalism, Petrazhitzky's and Reisner's psychologism, and Kelsen's legal positivism. The reader quickly learns that the gist of this critique contains two observations directed against the consequences of economic reductionism. The first concerns the ontological nature of ideological categories in general, and in particular the nature of legal regulation as a specific form of ideological category. The second concerns those instrumental forms of economism which reduce law to the status of an epiphenomenon within the compass of the base/superstructure metaphor.

Pashukanis notes that within the sphere of political economy concepts such as commodity, value and exchange value are indeed ideological categories, but that this assignation by no means signifies

that they indicate *only* ideas and other subjective processes. They are ideological concepts principally because they obscure objective social relationships. Yet the ideological character of a concept does not nullify the material reality of the relationships that the concept expresses. Nor does the fact that they are ideological concepts excuse us from searching for the objective conditions which they express yet somehow wrap in mystery. What needs to be proved is not that juridic concepts can and do become integrated into the structure of ideological processes, but that these concepts have *more* than an ideological existence. Pashukanis therefore asserts that law is also a real form of social being, and in so doing he seems astutely to have avoided the troublesome charge that both social scientists *and* theorists of ideology, in the final reckoning, base their assertions on a positivist epistemology.

Pashukanis is equally concerned to rebut the view that law is capable of voluntaristic manipulation by dominant social classes. Stuchka, for example, one of the early RSFSR Commissars of justice and the author of *Decree No. 1 on the Soviet Court*, had misconstrued the nature of law in his *The Revolutionary Role of Law and State* as a "system of relationships which answers to the interests of the dominant class and which safeguards that class with organized force". Pashukanis retorts that such a definition<sup>13</sup> is useful both in disclosing the class content of legal forms and in asserting that law is a social relationship, but that it masks the real differences between the legal form and all other social relationships which involve regulative norms. Indeed, if law is seen simply as a form of social relationship, and if one asserts that law regulates social relationships, then one must engage the tautology that social relationships regulate themselves.

Pashukanis correctly avers that the social organization of collectivities as diverse as bees and primitive peoples require rules. But not all rules are legal rules: some rules are customary and traditional and may be based in moral, aesthetic or utilitarian considerations. Further, not all social relationships are legal relationships; under certain conditions the *regulation* of social relationships *assumes a legal charac-*

<sup>13</sup> This definition was officially adopted by the Commissariat of Justice in 1919, and incorporated into *RSFSR Laws* (1919). See also P. I. Stuchka, "Marksistskoe ponimanie prava", *Kommunisticheskaia revoliutsiia* (1922), no. 13-14, pp. 37-38; and "Zametki o klassovoi teorii prava", *Sovetskoe pravo* (1922), no. 3.

*ter.* (1924: see this volume, p. 58.) Marxist theory must investigate not merely the material content of legal regulation during definite historical periods, but must also provide a materialist explanation of legal regulation as a definite historical form. The crucial question therefore involves the elucidation of the social conditions in which the domination and regulation of social relationships assumes a legal character.

Pashukanis argues that the fundamental principle of legal regulation is the opposition of private interests. Human conduct can be regulated by the most complex rules, but the legal element in such regulation begins where the isolation and antithesis of interests begin. "A norm of law acquires its *differentia specifica* . . .", he says, "because it presupposes a person endowed with a right and actively asserting it." (1924: see p. 72.) Accordingly, and following some of Marx's Hegelian-inspired comments in *The Law on the Theft of Woods* (1842) and *On the Jewish Question* (1843), Pashukanis distinguishes between those rules which serve the universal interest and those which serve a particular interest. The former are technical rules and are based on unity of purpose, the latter are legal rules and are characterized by controversy. Thus, the technical rules of railroad movement presuppose a single purpose, for example the attainment of maximum haulage capacity, whereas the legal rules governing the responsibilities of railroads presuppose private claims and isolated interests. Again, the treatment of invalids presupposes a series of rules-both for the patient and for the medical personnel; but inasmuch as these rules are established to achieve a single purpose-the restoration of the patient's health-they are of a technical character. But when the patient and the physician are regarded as isolated, antagonistic subjects, each of whom is the bearer of his own private interests, they then become the subjects of rights and obligations, and the rules which unite them become legal rules.

Pashukanis asserts that Marx himself had pointed to the basic conditions of existence of the legal form. Thus, Marx had indicated that the basic and most deeply set stratum of the legal superstructure property relations-was "so closely contiguous to the foundation that they are the very same relationships of production expressed in juridic language". Law is some specific social relationship and can be understood in the same sense as that in which

Marx termed capital a social relationship. The search for the unique social relationship, whose inevitable reflection is the form of law, is to be located in the relationships between commodity owners. The logic of legal concepts corresponds with the logic of the social relationships of commodity production, and it is specifically in these relationships-not in the demands of domination, submission or naked power-that the origin of law is to be sought. We might add that Lenin himself had said, in relation to the law of inheritance, ". . . [it] presumes the existence of private property, and the latter arises only with the existence of exchange. Its basis is in the already incipient specialization of social labour and the alienation of products in the market."<sup>14</sup>

Pashukanis recalls that the ascendant bourgeoisie's central antagonism with feudal property resided not in its origin in violent seizure, but instead in its immobility in exchange and circulation. In particular, it was unable to become an object of mutual guarantees as it passed from one possessor to another in acquisition. Feudal property, or the property associated with the feudal order, violated the abstract and cardinal principle of capitalist societies-"the equal possibility of obtaining inequality." (1924: see p. 83.)

At a certain stage of development (with the appearance of cities and city communes, markets and fairs) the relationships of human beings are manifested in a form which is doubly mysterious: they appear as the relationships of objects which are also commodities, and as the volitional relationships of entities which are independent and equal *inter se*: juridic subjects. Law thus appears side by side with the mystical attributes of value and exchange value. Moreover, it is in the concrete personality of the egoistic, autonomous subject-the property owner and the bearer of private interests-that a juridic subject such as *persona* finds complete and adequate embodiment.<sup>15</sup>

The historically-specific object of a commodity, for Pashukanis, finds its pure form in capitalist economies. The authority which the

<sup>14</sup> V. I. Lenin, *what the "Friends of the People" Are and How They Fight the Social Democrats (1894)*, LCW, vol. 1, p. 153 (for abbreviations, see this volume, p. 125).

<sup>15</sup> The concept of *persona* in Roman jurisprudence originally derived from the function of an actor's stage mask. The mask enabled the actor to conceal his real identity and to conform to the role written for him. Transposed into the legal realm, as a permanent condition, man must assume a legal mask in order to engage in the activities regulated by legal rules. See further, O. Gierke, *Associations and Law (1977)*, translated and edited by G. Heiman, University of Toronto Press, Toronto.

capitalist enjoys, as the personification of capital in the process of direct production, is essentially different from the authority which accompanies production through slaves or serfs. Only capital stands in stark, unhierarchical contrast to the mass of direct producers. Capitalist societies are first and foremost societies of commodity owners. Commodities have a dual and a contradictory character. On the one hand a commodity is and represents a use-value. But commodities necessarily embody different use-values because the qualitatively distinct social 'needs which they fulfil, and the quality and quantity of labour expended in their production, are necessarily different and unequal. And, on the other hand, a commodity is and represents an exchange-value. One commodity may be exchanged for another commodity in a definite ratio. The values encountered in this exchange are expressed by and facilitated through the mediation of another commodity, money, as the form of universal economic equivalent.

The potential for commodity exchange assumes that qualitatively distinct commodities enter a formal relationship of equivalence, so that ultimately they appear as equal. The exchange of commodities thus obscures a double abstraction \*in which concrete labour and concrete commodities are equalized *inter se* and are reduced to abstract labour and abstract commodities. This abstraction in turn perpetuates the fetish that commodities themselves, including money, contain living powers: commodities thus dominate their very producers, human subjects.

Pashukanis illustrates how commodity fetishism complements legal fetishism. Exchange transactions based on the *vi et armis* principles of feudalism create a form of property which is too transient and too unstable for developed commodity exchange. *De facto* possession must be transformed into an absolute and constant right which adheres to a commodity during its circulatory process. Pashukanis notes that Marx had tersely stated, in *Capital I*, that "commodities cannot send themselves to a market and exchange themselves with one another. Accordingly we must turn to their custodian, to the commodity owner." (1924: see p. 75.)

The legal form itself is therefore cast as both an essential part and simultaneously as a consequence of the exchange of commodities under capitalism. At the very same time that the product of labour is assuming the quality of commodities and becoming the bearer of



value, man acquires the quality of a juridic subject and becomes the bearer of a right. In the development of legal categories, the capacity to perfect exchange relationships is merely one of the concrete manifestations of the general attribute of legal capacity and the capacity to act. Historically, however, it was specifically the exchange arrangement which furnished the notion of a subject as the abstract bearer of all possible legal claims. Nor does the juridic form of property contradict the factual expropriation of the property of many citizens; the attribute of being a subject of rights is a purely formal attribute, qualifying all persons alike as "deserving" of property but in no sense making them property owners.

It is only under developed commodity exchange that the capacity to have a right in general is distinguished from specific legal claims. Indeed, a characteristic feature of capitalist societies is that general interests are segregated from and opposed to private interests. The constant transfer of rights in the market creates the *notion of* an immobile bearer of rights, and the possibility therefore occurs of abstracting from the specific differences between subjects and of bringing them within one generic concept. Concrete man is relegated to an abstract man who incorporates egoism, freedom and the supreme value of personality; the capacity to be a subject of rights is finally disassociated from the specific living personality and becomes a purely social attribute. The legal subject is thus the abstract commodity owner elevated into the heavens (1924: see p. 81), and acquires his *alter ego* in the form of a representative while he himself becomes insignificant. The specific characteristics of each member of *Homo sapiens* are, therefore, dissolved in the abstract concept of man as a juridic subject.

In order for property to be exchanged and alienated there must be a contract or accord of independent wills. Contract is therefore one of the central concepts in law, and once it has arisen the notion of contract seeks to acquire universal significance. In contradistinction to theorists of public and constitutional law, such as Leon Duguit, Pashukanis holds that all law is necessarily private law in that it emanates from commodity exchange. The *distinction between* private law and public law is therefore a (false) ideological distinction and it reflects a real contradiction in capitalist societies between the individual and the social interest. This contradiction is embodied in "the real relationships of human subjects who can regard their own

private struggles as social struggles only in the incongruous and mystifying form of the value of commodities." (1924: see p. 109.)

Pashukanis argues that the political authority of the state appears to be disassociated from the economic domination and specific needs of the capitalist class in the market. He thus hypothesizes that the capitalist state is a *dual* state: a political state and a legal state. Thus he says that:

the state as an organization of class domination, and as an organization for the conduct of external wars, does not require legal interpretation and in essence does not allow it. This is where. the principle of naked expediency rules, (1924: see p. 92)

Class dominance, i.e. the dominance of the bourgeoisie, is expressed in the state's dependence upon banks and capitalist sectors, and in the dependence of each worker upon his employer. But it should not be forgotten that in the political class struggle most evidently, at its critical phases-the state is the authority for the organized violence of one class on another. The legal state, on the other hand, reflects the impersonal, abstract and equivalent form of commodity exchange. The legal state is the third party that embodies the mutual guarantees which commodity owners, *qua* owners, give to each other.

The *leitmotif* of early Soviet Marxist thought on law at the time of the October Revolution and immediately thereafter, was the imperative of implementing the Marxist concept of the withering away of law. This initial eliminationist approach to law was best exemplified by Stuchka, a Bolshevik revolutionary and a jurist, who in the days following the seizure of power was assigned the task of taking physical and political possession of the premises and institution of the highest court of imperial Russia. On arriving at the court building in what is now Leningrad, Stuchka found that the judges had fled the scene leaving behind only a number of frightened and bewildered clerks and messengers. To put this group at ease, Stuchka reassured them that although previously the judges had occupied the chambers while they themselves had waited in the antechambers, from that time on the clerks and messengers would sit in the judges' chairs and their former occupants would be relegated to the antechambers.<sup>16</sup>

<sup>16</sup> P. 1. Stuchka, "Na ministerstvom kresle", in P. 1. Stuchka, *13 let bor'by za revoliutsionno-marksistskuiu teoriiu prava (1931)*, Moscow.

The first Soviet attempt to implement the process of the withering away of law began less than a month after the October Revolution. The Bolsheviks' first legislation on the judiciary abolished the hierarchy of tsarist courts, which were soon after replaced by a much less complex dual system of local people's courts and revolutionary tribunals.<sup>17</sup> This initiated a process of simplification and popularization that in the immediate post-revolutionary days and months swept away most of the inherited tsarist legal system, including the procuracy, the bar, and all but those laws vital to the transitional period between capitalism and communism (e.g. *Decree Abolishing Classes and Civil Ranks*, Nov. 1917). Even the remaining legal minimum was subject to interpretation by a new type of judge, usually untrained in law. These new judges were encouraged to guide themselves by their "revolutionary consciousness" in applying the law. The Bolsheviks' objective was that even these remnants would ultimately become superfluous and wither away or disappear. Their vision was of a new social formation in which people would be able to settle their disputes "with simplicity, without elaborately organized tribunals, without legal representation, without complicated laws, and without a labyrinth of rules of procedure and evidence."<sup>18</sup> However, harsh reality quickly impinged upon this vision as civil war engulfed the country. Confronted with the exigencies of governance under the most difficult conditions, the Bolsheviks deferred this transformative process and, as early as 1918, as John Hazard has conclusively demonstrated, began the process of re-legalization, which culminated in a fully articulated legal system based largely on foreign bourgeois models and perfected in the first federal constitution (1924) during the early years of the New Economic Policy.

Pashukanis concludes his argument in *The General Theory of Law and Marxism* by opposing those who would wish to construct a *proletarian* system of law after the 1917 revolution. Marx himself, especially in *The Critique of the Gotha Programme*, had grasped the profound inner connection between the commodity form and the legal form, and had conceived of the transition to the higher level of communism not as a transition to new legal forms, but as the dying out of the legal form in general. If law has its real origin in

<sup>17</sup> See *Dekrety sovetskoi vlasti* (1957), Moscow, vol. 1, pp. 124-126.

<sup>18</sup> J. Hazard, *Settling Disputes in Soviet Society* (1960), *op. cit.*, p. vi.

commodity exchange, and if socialism is seen as the abolition of commodity exchange and the construction of production for use, then proletarian or socialist law was a conceptual, and therefore a practical, absurdity. While the market bond between individual enterprises (either capitalist or petty commodity production) and groups of enterprises (either capitalist or socialist) remained in force, then the legal form must also remain in force.

The purportedly proletarian system of law operative under NEP was, Pashukanis asserts, mere bourgeois law. Even the new system of criminal administration contained in the *RSFSR Criminal Code* (1922) was bourgeois law. Pashukanis notes that although the *Basic Principles of Criminal Legislation of the Soviet Union and Union Republics* had substituted the concept of "measures of social defence" for the concept of guilt, crime and punishment (1924: see p. 124), this was nevertheless a terminological change and not the abolition of the legal form. Law cannot assume the form of commodity exchange and be proletarian or "socialist" in content. Criminal law is a form of equivalence between egoistic and isolated subjects. Indeed, criminal law is the sphere where juridic intercourse attains its maximum intensity. As with the legal form in general, the actions of specific actors are dissolved into the actions of abstract parties-the state, as one party, imposes punishment according to the damage effected by the other party, the criminal.

Pashukanis points out that the Soviet Union of 1924 had two systems of economic regulation. On the one hand there were the administrative-technical rules which governed the general economic plan. On the other were the legal rules (civil and commercial codes, courts, arbitration tribunals etc.) which governed the commodity exchange that was the essential feature of NEP. The victory of the former type of regulation would signify the demise of the latter, and only then would Marx's description of human emancipation be realized. Five years later, in "Economics and Legal Regulation", Pashukanis still clung precariously yet tenaciously to his dictum that "the problem of the withering away of law is the yardstick by which we measure the degree of proximity of a jurist to Marxism" (1929: see p. 268).

It must be stressed that *The General Theory of Law and Marxism* was written during NEP at a critical juncture in Soviet development. Pashukanis argued that in certain respects NEP had preserved

market exchange and the form of value, and that this was a consequence of "proletarian state capitalism" (1924: see p. 89).<sup>19</sup> Lenin himself had fully appreciated the contradictory character of the different modes of production encouraged by NEP. The Supreme Economic Council, set up in 1917 with the explicit aim of introducing socialist methods of production into both industry and agriculture, had achieved such limited success that in May 1921 Lenin observed: "there is still hardly any evidence of the operation of an integrated state economic plan."<sup>20</sup> Arguing that there was much that could and must be learned from capitalist techniques (Taylorism), Lenin wrote in December 1921 that NEP marked "a retreat in order to make better preparations for a new offensive against capitalism."<sup>21</sup> The painful experiences of War Communism had indicated that socialism would not be attained overnight, and that unless the political domination of the proletariat was ensured, it would not be attained at all. The temporary solution was to allow the peasantry limited ownership of the agricultural means of production. But this was to be a regulated retreat:

The proletarian state may, without changing its own character, permit freedom to trade and the development of capitalism only within certain bounds, and only on the condition that the state regulates (supervises, controls, determines the form and methods of etc.) private trade and capitalism.<sup>22</sup>

The general feeling among the Bolsheviks, then, was that NEP was a temporary, necessary and regulated retreat: one step backward, and two steps forward. Lenin warned that "It will take us at least ten years to organize large-scale industry to produce a reserve and secure control of agriculture ... There will be a dictatorship of the proletariat. Then will come the classless society."<sup>23</sup> The seeds of this progression were already at hand, however, and in May 1921 he observed that: "the manufactured goods made by socialist factories

<sup>19</sup> In 1927 Pashukanis asserted that the term "proletarian state capitalism" was an error. See J. Hazard (ed.), *Soviet Legal Philosophy* (1951), op. cit. pp. 179C

<sup>20</sup> V. I. Lenin, "To Comrade Krzhizhanovsky: the Praesidium of the State Planning Commission" (May 1921), *LCW*, vol. 42, p. 371.

<sup>21</sup> V. I. Lenin, *Draft Theses on the Role and Function of the Trade Unions Under the New Economic Policy* (1922), *LCW*, vol. 33, p. 184,

<sup>22</sup> *ibid.* p. 185.

<sup>23</sup> V. I. Lenin, "Report on Party Unity and the Anarcho-Syndicalist Deviation" (March 16, 1921), *LCW*, vol. 32, p. 251.

and exchanged for the foodstuffs produced by the peasants are not commodities in the politico-economic sense of the word; at any rate, they are not only commodities, they are no longer commodities, they are ceasing to be commodities."<sup>24</sup>

Under NEP Pashukanis' theoretical achievements earned him more than just the praise of his contemporaries. During the years 1924-1930, he assumed a number of important positions in the Soviet academic hierarchy and was named to the editorial boards of the most influential law and social science journals. Through these strategic positions and key editorial posts, Pashukanis extended and strengthened the influence of the commodity exchange school of law on Marxist jurisprudence.<sup>25</sup>

When *The General Theory of Law and Marxism* appeared in 1924, Pashukanis was a member of Stuchka's Section of Law and State, and of the Institute of Soviet Construction, both of the Communist Academy which he subsequently described as "the centre of Marxist thought."<sup>1126</sup> Later, he was to become a member of the bureau or executive committee of the Institute and of the Section, as well as head of the latter's Subsection on the General Theory of Law and State.

During 1925, the Section of Law and State formally launched the "revolution of the law" with the publication of a collection of essays entitled *Revoliutsiia prava*. Pashukanis served as co-editor and contributed a major article on Lenin's understanding of law.

In 1926, the second edition of *General Theory* was published. During that year Pashukanis joined the law faculty of Moscow State University and the Institute of Red Professors, the graduate school of the Communist Academy. *Bol'shaia sovetskaia entsiklopediia* also -began publication in 1926, and Pashukanis was named chief editor for law shortly afterwards.

The third edition of *General Theory* was issued in 1927, the year *Revoliutsiia prava* was established as the official journal of the Section of Law and State with Pashukanis as a co-editor. Beginning that year, the Section's periodic reports reflected Pashukanis' increasing

<sup>24</sup>V. I. Lenin, "Instructions of the Council of Labour and Defence to Local Soviet Bodies" (May 1921), LCW, vol. 32, p. 384.

<sup>25</sup> See R. Sharlet, "Pashukanis and the Rise of Soviet Marxist jurisprudence", op. cit. pp. 112-115.

<sup>26</sup> Pashukanis' phrase in "Disput k voprosu ob izuchenii prestupnosti", *Revoliutsiia prava* (1929), no, 3, p. 67.

predominance. His annual intellectual output in books, articles, essays, *doklady*, reviews and reports was prodigious. Along with Stuchka, Pashukanis dominated the scholarly activity of the Section. As an indication of his growing impact on Soviet legal development, he was assigned the task of preparing a textbook on the general theory of law and state, and was chosen to represent the Communist Academy on the commission for drafting the fundamental principles of civil legislation, created by the U.S.S.R. Council of People's Commissars.

During this period Pashukanis began to assume additional positions and editorships. He became Deputy Chairman of the Presidium of the Communist Academy, and a co-editor of *Vestnik kommunisticheskoi akademii*, the major Marxist social science journal. He had previously been named a founding editor of the journal *Revoliutsiia i kul'tura*, a new publication designed to promote the cultural revolution. His co-editors on these publications were the most eminent Marxist social scientists, including Lunacharsky, Pokrovsky and Deborin.

In 1927, in "The Marxist Theory of Law and the Construction of Socialism,"<sup>27</sup> Pashukanis undertook two objectives. First, he once again warns of the political dangers 'involved in trying to erect proletarian or socialist legal forms, and he asserts that the dialectic of the withering away of law under socialism consists in "the contrast between the principle of socialist planning and the principle of equivalent exchange" (1927: see p. 193). Thus, he took issue with those such as Reisner<sup>28</sup> who saw *Decree No. 1 on the Court*, or the *RSFSR Civil Code*, as evidence that NEP utilized private property and commodity exchange to develop the forces of production. But this was to imply that in this context private property and commodity exchange had a "neutral" character. What was important, Pashukanis pointed out, was that one should understand the use of these forms not from the perspective of developing the forces of production, but from "the perspective of the victory of the socialist elements of our economy over the capitalist ones" (1927: see p. 192). Provided that remnants of the capitalist mode of production were in

<sup>27</sup> E. B. Pashukanis, "Marksistskaia teoriia prava i stroitel'stvo sotsializma", *Revoliutsiia prava* (1927), no. 3, pp. 3-12, translated in present volume on pp. 186-99.

<sup>28</sup> M. A. Reisner, *Pravo, nashe pravo, chuzhoe pravo, obshchee pravo* (1925), Moscow, translated in J. Hazard (ed.), *Soviet Legal Philosophy* (1951), *op. cit.*, pp. 83-109.

practice eliminated and that subsequent social rules in the U.S.S.R. were of a technical-administrative nature, then Pashukanis could argue prescriptively and, possibly, descriptively, that law would disappear *only* with the disappearance of capitalism.

This 1927 article contains some interesting emendations to his *General Theory of Law and Marxism*. The most important of these, 'in response to Stuchka's "State and Law in the Period of Socialist Construction",<sup>29</sup> is the admission of "the indisputable fact of the existence of feudal law" (Pashukanis, 1927: see p. 195). Pashukanis now indicates that we find "purchase and sale, with products and labour assuming the form of commodities, and with a general equivalent, i.e. money, throughout the entire feudal period" (1927: see p. 195). But although feudal and bourgeois law may have a common form, their content and class nature is essentially different. Feudal law is based on the will of the simple commodity owner, while bourgeois law is based on the will of the capitalist commodity owner. This is a most important concession because, although Pashukanis will not yet admit the primacy of *production* relations within historical materialism, it allows him to posit the existence of what he refers to as "Soviet law, corresponding to a lower level of development than that which Marx envisioned in *The Critique of the Gotha Programme* ... [and which] is fundamentally different from genuine bourgeois law" (1927: see p. 194).

In 1929, in "Economics and Legal Regulation", Pashukanis explicitly discusses the reflexive status of the legal form, a question that was only implicit in his analysis of ideological forms in *The General Theory of Law and Marxism*. He uses two arguments to refute the criticism of Preobrazhensky, Rubin and Böhm-Bawerk that economic regulation under conditions of socialism (in the U.S.S.R.) is similar, in certain respects, to the regulation exercised by capitalist states under conditions of monopoly capitalism and imperialism (chiefly in Germany and England).

Pashukanis argues, first, that these sorts of criticisms tend to be based on the false polarity of base and superstructural forms. "The social", he retorts, ". . . is the *alter ego* of the economic" (1929: see p. 241). He continues, significantly, "in every antagonistic society, class

<sup>29</sup> P. I. Stuchka, "Gosudarstvo i pravo, v period sotsialisticheskogo stroitel'stva", *Revoliutsiia prava* (1927), no. 2. See also the criticism in S. I. Raevick book review, *Sovetskoe pravo* (1928), no. 2 (32), p. 98.



relationships find continuation and concretization in the sphere of political struggle, the state structure and the legal order ... productive forces [are] decisive in the final analysis" (1929: see p. 244). Superstructural forms, in other words, are incomprehensible apart from those social relationships to which they initially owe their existence. This marks the crucial transition in Pashukanis' work. Even if he has as yet neither identified the proper place of the political within the complex of the social relationships of production, nor posited that the political has primacy in Marxist political economy, he has at the very least conceded that productive relationships are in some sense "determinant factors in the final analysis." Quite clearly, the origin of law could not now be explained by commodity exchange--primitive or generalized--and Pashukanis seems to have recognized the inferiority of his radical position in the debates with Stuchka that were contained within the Communist Academy and not made public until 1927.<sup>30</sup>

Pashukanis' second argument is a weak rebuttal of the assertion that, because NEP relationships in part conformed to the law of value, and also to the law of the proportional distribution of labour expenditures, therefore the primitive socialist economy contained capitalist contradictions. These notions, he replies, stem from a simplistic understanding of Engels' concern with the leap from the kingdom of necessity to the kingdom of freedom. To hold that the form of value exists in the U.S.S.R. is to miss, as did Preobrazhensky, the crucial point that the U.S.S.R. is a dynamic formation founded on "the economics of co-operation and collectivization" (Pashukanis, 1929: see p. 251), and "the union of the working class and the peasantry" (1929: see p. 254). What matters, concretely, is not where the U.S.S.R. is, but where it will *be*. The U.S.S.R. is in a necessary phase preparatory to Engels' quantum leap. Further, it is

<sup>30</sup> Indeed, it is most likely that "Economics and Legal Regulation" was an indirect response to Stuchka's *Vvedenie v teoriim grazhdanskogo prava* of 1927. Here Stuchka had reiterated that exchange must be subsumed within the concept of production because ". . . the distribution of the agents of production is itself only one of the aspects of production". See P. I. Stuchka, *Izbrannye proizvedeniia* (1964), Riga, p. 565, and R. Sharlet, "Pashukanis and the Commodity Exchange Theory of Law 1924-1930", unpub. Ph.D. diss., Indiana University, 1968, p. 210. The Communist Academy effected a compromise in 1929, in its first syllabus on the general theory of law. The concept of law was now rooted in the process of commodity production *and* exchange. See A. K. Stal'geovich, *Programma po obshchei teorii prava* (1929), Moscow, p. 11, and see R. Sharlet (1968), *op. cit.* p. 210.

trivial to claim that the law of the proportional distribution of labour expenditures is effective in the U.S.S.R. This law is effective in all social formations. What matters here is how it is determined, and in the U.S.S.R. it is determined by "the economic policy of the proletarian state" (1929: see p. 257).

The regulation of the national economy by the proletarian state under NEP, Pashukanis continues, is qualitatively distinct from the domestic economic intervention of capitalist states during the 1914-1918 War. In contradistinction to the latter's "57 varieties" of socialism represented by wartime state control, the proletarian state has three unique characteristics by which it will effectively realize the dialectical transformation of quantity into quality: the indissolubility of legislative and executive, extensive nationalization and the firm regulation of production in the universal rather than the particular interest. The more these characteristics are actualized, says Pashukanis,

the role of the purely legal superstructure, the role of law--declines, and from this can be derived the general rule that as [technical] regulation becomes more effective, the weaker and less significant the role of law and the legal superstructure in its pure form. (1929: see p. 271)

Pashukanis' responsibilities continued to multiply when he was appointed Prorector of the Institute of Red Professors, which was also known as the "theoretical staff of the Central Committee."<sup>31</sup> In 1929, the Institute started a journal for correspondence students with Pashukanis as chief editor. By this time, the influence of his commodity exchange theory of law on the syllabi for the Institute's law curriculum and correspondence courses was pronounced.

Finally, in 1929-1930, Pashukanis reached the apex of the Marxist school of jurisprudence and the Soviet legal profession. In a major reorganization, the Institute of Soviet Law was fully absorbed and its publication was abolished. All theoretical and practical work in the field of law was concentrated in the Communist Academy. In turn, the Section of Law and State and the Institute of Soviet Construction of the Communist Academy were merged, and the journal *Revoliutsiia prava* was reoriented and renamed. Pashukanis became director

<sup>31</sup> A. Avtorkhanov, *Stalin and the Soviet Communist Party* (1959), New York, p. 21.

of the new Institute of the State, Law and Soviet Construction (soon renamed the Institute of Soviet Construction and Law); chief editor of its new journal, *Sovetskoe gosudarstvo i revoliutsiia prava*; and a co-editor of *Sovetskoe stroitel'stvo*, the journal of the U.S.S.R. Central Executive Committee.

An indication of Pashukanis' influence on the Soviet legal profession was the gradual emergence of the commodity exchange orientation within the Marxist school of law. just a few years after the appearance of *The General Theory of Law and Marxism*, the group of Marxist jurists working with Pashukanis in the Communist Academy became known as the commodity exchange school of law. This group, led by Pashukanis, dominated Marxist jurisprudence and was strongest in the general theory of law and in the branches of criminal law and civil-economic law. As the commodity exchange theory of law became identified with *the* Marxist theory of law, Pashukanis gradually assumed the unofficial leadership of the Marxist school of law. By 1930, the Communist Academy was bringing all Soviet legal scholarship and education under its control, and Pashukanis, as the pre-eminent Marxist theorist of law, was soon being acknowledged as the leader of the Soviet legal profession.

As Pashukanis' prestige soared in the late 1920s, a critical accompaniment, at first low-keyed but later swelling in volume, began to be heard. From 1925 to 1930, Pashukanis was criticized for overextending the commodity exchange concept of law, confusing a methodological concept with a general theory of law, ignoring the law's ideological character, and even for being an antinormativist. Other critics disagreed with Pashukanis' positions on feudal law, public law and the readiness of the masses to participate in public administration. He was denounced by one critic as a "legal nihihst".

Nearly all of Pashukanis' critics were Marxists. Most were members of the Communist Academy. Within the Communist Academy, as the commodity exchange school of law became ascendant, it divided into two wings: the moderates and the radicals. All of Pashukanis' critics within the Communist Academy were associated with the moderate wing of the commodity exchange school. This group was led by Stuchka, and the radical wing was led by Pashukanis. Outside of the Communist Academy, A. A.

Piontkovsky, at that time a member of the rival Institute of Soviet Law, was Pashukanis' major critic.<sup>32</sup>

Stuchka's criticism, which began to appear publicly in 1927, was by far the greatest challenge to Pashukanis. Basically, Stuchka, as a leader of the moderate wing of the commodity exchange school, criticized Pashukanis' overextension of the commodity exchange concept of law from civil law to other branches of law. Specifically, he criticized Pashukanis for overextending the notion of equivalence, insufficiently emphasizing the class content of law, reducing public law to private law, and denying the existence of either feudal law or Soviet law.

Stuchka apparently had been criticizing Pashukanis within the Communist Academy before the first publication of his criticism in 1927. In his article "State and Law in the Period of Socialist Construction", Stuchka footnoted his criticism of Pashukanis to the effect that their mutual opponents, presumably those outside the Communist Academy's legal circles, had been exaggerating the extent of their differences. Stuchka conceded that differences existed between him and Pashukanis and that under the circumstances, it was best to bring them out into the open. In this article, however, he tended to minimize these differences.

Stuchka's contributions to building a Marxist theory of law were undisputed by his contemporaries. During the early 1920s, he had, first, argued for a materialist conception of law and for a class concept of law against prevailing idealist conceptions. Second, he was responsible for the conception of a revolutionary role for Soviet law during the transitional period from capitalism to communism.<sup>33</sup> Perhaps Stuchka's greatest contribution to the development of the Soviet legal system was his insistence, which grew in intensity throughout the 1920s, on the necessity for "Soviet" law during the transition period, although he had no illusions about this body of law becoming a permanent feature of the Soviet system. In an article in early 1919, Stuchka clearly stated that "We can only speak of proletarian law as the law of *the transition period*. . . ." He underscored the temporary nature of proletarian law by character

<sup>32</sup> On the two wings of the commodity exchange school see R. Scheslinger, *Soviet Legal Theory* (1945), Kegan Paul, London, pp. 153-156.

<sup>33</sup> A. Vyshinsky, "Stuchka", *Malaia sovetskaia entsiklopediia* (1930), vol. 8, pp. 514-515.

izing it as "a simplification, a popularization of our new social system."<sup>34</sup> At the end of the decade Stuchka summarized his recognition of the importance of law as an agent of socio-economic development by writing in the Foreword to his collected essays, "Revolution of the law is revolutionary legality in the service of furthering the socialist offensive and socialist construction."<sup>35</sup>

In this context, Stuchka criticized Pashukanis' theory of law for its

omissions, its one-sidedness insofar as it reduced all law to only the market, to only exchange as the instrumentalization of the relations of commodity producers—which means law in general is peculiar to bourgeois society.<sup>36</sup>

If Stuchka's criticism was sharp and constructive, then the criticism put forward by Piontkovsky was definitely hostile. Piontkovsky was a specialist in criminal law, an advocate of the development of a specifically Soviet legal system, and a member of the Institute of Soviet Law until its absorption by the Communist Academy. Piontkovsky's main and most effective criticism was that Pashukanis had mistaken an ideal-type concept, the commodity exchange concept, for a theory of law. He developed this in his book, *Marxism and Criminal Law*, which was published in two editions. Possibly because Piontkovsky was outside the legal circles of the Communist Academy, his criticism of Pashukanis' work was more explicit and much more blunt. He effectively incorporated into his own criticism the criticism of Pashukanis' colleagues, but without being subject to the restraints that they apparently imposed upon themselves in the interest of unity within the Communist Academy.

Piontkovsky valued Pashukanis' *General Theory of Law and Marxism*, but with definite reservations. He devoted a large part of his book to what he termed the "dangers" of Pashukanis' theory, while at the same time, in his second edition, he defended himself against counter-criticism from Pashukanis' followers. One of these had written that Piontkovsky's study had nothing in common

<sup>34</sup>P. I. Stuchka, "Proletarskoe pravo", in P. I. Stuchka, *13 let ...* (1931), *op. cit.* pp. 24, 34.

<sup>35</sup>P. I. Stuchka, "Foreword" to *13 let.* (1931), *op. cit.* p. 4.

<sup>36</sup>P. I. Stuchka, *Vvedenie v teoriuu grazhdanskogo prava* (1927), in P. I. Stuchka, *Izbrannyye proizvedeniia* (1964), *op. cit.* pp. 563-564.

with Marxism and by no means explained reality, to which Piontkovsky replied:

Of course, our point of view has nothing in common with that Marxism that is limited only to the explanation of reality, but has ... something in common with that Marxism ... which is a "guide" to action.<sup>37</sup>

By the end of the decade, the volume of criticism of Pashukanis' radical version of the commodity exchange theory of law had grown considerably. The two directions from which the criticism emanated, from both inside and outside the Communist Academy, could no longer be easily distinguished. Stuchka's and Piontkovsky's criticism began to converge as the criticism took on an increasingly political tone in 1930. One critic observed that Pashukanis had repaired to the "enemy's territory" and had lapsed into "bourgeois legal individualism". Another critic, in a similar tone, characterized Pashukanis' commodity exchange theory of law as a "collection of mechanistic and formalistic perversions".<sup>38</sup>

The most salient aspects of these debates involved the fundamental questions concerning the role of state and law in the lower phase of communism. These questions indicated a certain dissatisfaction and uneasiness with the type of thought characteristic of Marxist legal circles during the 1920s. Most fundamental was Stuchka's question of the relationship of dictatorship to law. As he wrote, "We know Lenin's definition of dictatorship as 'a power basing itself on coercion and not connected with any kind of laws.'" But then Stuchka goes on to ask, "What should be the relationship of the dictatorship of the proletariat to its law and to law in general as the means of administration?"<sup>39</sup>

The other important question, raised from outside the Communist Academy by Piontkovsky, involved the relationship of Pashukanis' general theory of law to the vital tasks of political and economic development in a social formation dominated by feudal social relationships. Piontkovsky pointed out that Pashukanis' theory of law

<sup>37</sup> A. Piontkovsky, *Marksizm i ugovnoe pravo: sbornik statei* (1929), 2nd ed., Moscow, pp. 32-33, 39. Quoted in E. B. Pashukanis, "The Situation on the Legal Theory Front" (1930), *op. cit.* pp. 253, 250.

<sup>39</sup> P. I. Stuchka, "Dvenadtsat' let revoliutsii gosudarstva i prava", in P. I. Stuchka, *13 let ...* (1931), *op. cit.* p. 189.

was "*not revolutionary*" in the sense that it was not designated for a voluntarist approach to social change.<sup>40</sup>

### **"Revolution from Above" and the Struggle on the Legal Front**

Despite growing criticism of Pashukanis' theory the impact of his commodity exchange school of law on the withering away process began to become apparent in the late 1920s. Pashukanis and his colleagues assiduously devoted themselves to bringing about the realization of his prediction that private law and the legal state would gradually begin to wither away upon the elimination of the institutions of private property and the market. From their point of view, the prevailing political and economic trends were favourable. The doctrine of "socialism in one country", signalling the forthcoming end of the strategic retreat of the New Economic Policy, was first officially expressed in 1925 at the XIVth Party Conference, Later in the same year, the XIVth Party Congress adopted the policy of industrialization, which meant that a substantial growth of the socialist sector of the economy could be anticipated For the commodity exchange school of law, the imminent end of the New Economic Policy and the subsequent growth of the state sector meant a significant weakening of the juridical superstructure. By 1927 the Keith Party Congress was calling for the construction of socialism, an objective that for Pashukanis and his colleagues required the gradual elimination of law. The growth of the socialist base, argued Estrin, meant "the simplification and contraction" of the "legal form"-in other words, a withering away of law.<sup>41</sup>

The revolutionaries of the law directed their main attacks against the NEP codes as the core of the real legal culture, and against the legal education system as the nexus between the real and ideal legal cultural patterns and the means by which they were transmitted and maintained. They reasoned that if the thicket of bourgeois laws could be gradually thinned out, the ground could eventually be cleared,

<sup>40</sup> A. Piontkovsky, *Marksizm i ugovnoe pravo* (1929), op. cit. pp 87.

<sup>41</sup> A. Ia. Estrin, "XVth Congress of the Party and Questions of Law", *Revoliutsiia prava* (1928), no. 2, p. 13. See also R. Shatter, "Pashukanis and the Withering Away of Law in the USSR", in S. Fitzpatrick (ed.), *Cultural Revolution in Russia, 1928-1931* (1978), Indiana University Press, Bloomington, pp. 169-188.

with the remaining legal structures becoming increasingly superfluous and falling into disuse towards that time when they would be razed. Tactically, this meant the necessity of initially replacing the NEP codes with shorter, simpler models which would compress (and hence eliminate) the finer distinctions of bourgeois justice. The longer-term thrust was towards radically reforming legal education for the purpose of preparing cadres who would be socialized into and trained to preside over the transition from the legal realities of NEP to a future without law.

Their primary target was the notion of equivalence, which they regarded as the unifying theme of bourgeois legal culture and the factor most responsible for its cohesion. Against the symmetry of economic-legal equivalence, they opposed the asymmetrical principle of political expediency in their radical efforts to recodify NEP law and reform legal education during the first and second Five Year Plans.

Expediency as a principle of codification meant that the draft codes of the transitional legal culture were characterized by flexibility and simplicity, in opposition to the stability and formality of the NEP codes based on equivalence. Although only a few of the draft codes of the Pashukanis school were actually adopted (in the emerging Central Asian republics), their re-codification efforts nevertheless had a subversive effect on the administration of civil and criminal justice during the first half of the 1930s. The draft codes were widely distributed in the legal profession, while their basic principles were constantly elaborated upon in the legal press and taught in the law schools. The revolution of the law appeared to be winning, creating what was subsequently called an atmosphere of legal nihilism.

In the legal transfer culture, criminal law became "criminal policy" (*ugolovnaia politika*), reflecting its extreme flexibility, while many of the procedural and substantive distinctions characteristic of bourgeois criminal jurisprudence were discarded in the interest of maximum simplicity. Similarly, the civil law of equivalent commodity exchange was supplanted by the new category of economic law, encompassing the economic relationships between production enterprises within the Five Year Plans, which were enforced as technical rules based on the criterion of planning expediency. All of this was taught in the law schools, where



the legal cadres were being prepared to preside over the gradual withering away of the law.<sup>42</sup>

Although the second Soviet attempt to carry out the withering away of law progressed well into the 1930s, Pashukanis and the commodity exchange school, as advocates of his theory, collided with the process of Soviet rapid industrialization at the XVIth Party Congress in June 1930. The conflict between industrialization and withering away, which had been implicit since 1925, now clearly emerged. Until 1928, this implied conflict had been largely academic while NEP and the policy of economic recovery were still in effect. However, once large-scale industrialization and forced collectivization were underway, a collision was inevitable as it became apparent that the intervention and active support of strong and stable legal and political systems would be necessary in the U.S.S.R. Consequently, the commodity exchange school of law began its rapid decline in the late 1920s, culminating in 1930 as Marxist jurisprudence was brought into line with the "socialist offensive along the whole front".

Stalin, as General Secretary, in his address before the Central Committee Plenum of April 1929, warned against promoting hostile and antagonistic attitudes towards law and state among the masses. He argued instead that the intensification of the class struggle by the kulaks required the strengthening, rather than the weakening, of the dictatorship of the proletariat.<sup>43</sup> This tendency culminated at the XVIth Party Congress in the rejection of the concept of the gradual withering away of law and state. On that occasion Stalin reconceptualized this process:

We are for the withering away of the state, while at the same time we stand for strengthening the dictatorship of the proletariat which represents the most potent and mighty authority of all the state authorities that have existed down to this time. The highest development of state authority to the end of making ready the conditions for the withering away of state authority: there you have the Marxist formula. Is this "contradictory"? Yes, it is "contradictory". But it is a living, vital contradiction and it completely reflects Marxist dialectics.<sup>44</sup>

<sup>42</sup> See R. Sharlet, "Stalinism and Soviet Legal Culture", in R. C. Tucker (ed.), *Stalinism* (1977), Norton, New York, pp. 161-162.

<sup>43</sup> J. Stalin, *Problems of Leninism* (1947), 11th ed., State Publishing House, Moscow, pp. 344-345.

<sup>44</sup> J. Stalin, "Political Report of the Central (Party) Committee to the XVIth Congress, 1930", in J. Hazard (ed.), *Soviet Legal Philosophy* (1951), *op. cit.* p. 234.

The Communist Party's rejection of the gradualist notion of withering away made it necessary, therefore, to redefine the transitional role of law and state and seriously undermined the theoretical foundations of the commodity exchange school of law.

In 1932, in his *Doctrine of State and Law*, Pashukanis recognized that he should not have equated law as an historical phenomenon with the equivalent exchange of commodities. In class societies every relationship of production has a specific form in which surplus labour is extracted from the direct producers, and he now argues that "the nature of the bond between the producer and the means of production is the key to understanding the specificity of socioeconomic formations" (1932). The factor that determines the typical features of a given legal system is therefore the form of exploitation. We might add that by now Pashukanis himself must seriously have wondered whether the primacy of the individual subject within his theory of law had its origins not in the legacies of Hegel, Marx and Pokrovsky, but rather in that subjectivist epistemology represented in bourgeois jurisprudence by Jhering, Laband, Jellinek and possibly Max Weber—all of whom he would undoubtedly have read during his studies at the University of Munich.

Sensitive to the political dangers which he detects in his own earlier work, in Stuchka, and in the Second International, Pashukanis raises the delicate question of whether social relationships which are not relationships of production or exchange can enter into the content of law. He asserts that law in bourgeois society does not serve only the facilitation of commodity exchange, and bourgeois property is not exhausted by the relationships between commodity owners. To argue that law is reducible simply to economic relationships is in the end to identify it with economic relationships, which in turn both excludes all but property and contract law, and denies the reflexive effect of the legal superstructure on economic relationships. And to hold to this latter argument would clearly be inappropriate in the context of the end of the first Five Year Plan and the beginning of the second. Pashukanis responds that law cannot be understood unless we consider it as the basic form of the policy of the ruling class. "A legal relationship is a form of production relationship", he continues, "because the active influence of the class organization of the ruling class transforms the factual relationship into a legal one, gives it a new quality, and thus includes it in the

construction of the legal superstructure" (Pashukanis, 1932: see p. 297).

Pashukanis accordingly now reformulates his definition of law provided in *The General Theory of Law and Marxism* as "the form of regulation and consolidation of production relationships and also of other social relationships of class society" (1932: see p. 287). He adds that this definition is incomplete without reference to a coercive apparatus (the state) which guarantees the functioning of the legal superstructure. But the dependence of law on the state does not signify that the state creates the legal superstructure. The state is itself "only a more or less complex reflection of the economic needs of the dominant class in production" (1932: see p. 291). To emphasize the primacy of the state would be to miss the distinction, so crucial for the working class in its struggle with capitalism, between the various forms of rule (democracy, dictatorship etc.)<sup>45</sup> and the class essence of all states. "Bourgeois theorists of the state", says Pashukanis, "conflate characteristics relating to the form of government and characteristics relating to the class nature of the state" (1932: see p. 280). Following Lenin, Pashukanis stresses that the techniques of legal domination are less important than the goals to which they are directed. Soviet law, in each of its stages, was naturally different from the law of capitalist states. Further:

. . . law in the conditions of the proletarian dictatorship has always had the goal of protecting the interest of the working majority, the suppression of class elements hostile to the proletariat, and the defence of socialist construction . . . As such it is radically different from bourgeois law despite the formal resemblance of individual statutes. (1932: see p. 293)

In the course of the "revolution from above" of forced collectivization and rapid industrialization, a politically chastened but still theoretically active Pashukanis tried unsuccessfully, as it transpired, to re-define his concept of the state during the transitional period. In effect, Pashukanis superimposed the Stalinist concept of the state in Soviet socio-economic development onto the remnants of his original theory of law. Then by simultaneously presiding over the theoretical articulation of the Stalinist state as well as the practical

<sup>45</sup> Marx himself had first appreciated the salience of this distinction in *The Eighteenth Brumaire of Louis Bonaparte* and *The Civil War in France*.

process of the withering away of criminal law, Pashukanis inevitably contributed to the growth of a jurisprudence of terror. As bourgeois criminal law and procedure were superseded in application by a simplistically vague and highly flexible "Soviet criminal policy"-shaped by Pashukanis and his associate Nikolai Krylenko through several proposed draft codes-legal forms were co-opted for extralegal purposes, judicial process was subordinated to political ends, and law itself was used to legitimate and rationalize terror. The jurisprudence of terror institutionalized and routinized political terror within the context of formal legalism. In effect, terror was legalized and the criminal process overtly politicized. Through the legalization of terror, the concomitant criminalization of a wide range of political (and even social) behaviour, and the politicization of the co-opted administration of justice, the Jurisprudence of terror became a highly effective instrument of Party policy. Speaking in late 1930, Pashukanis expressed the basic premise of the jurisprudence of terror which he seemed to recognize as an inevitable stage on the road to communism and the ultimate withering away of the law. Rejecting the notion of a stable system of law, he argued for "political elasticity" and the imperative that Soviet "legislation possess maximum elasticity" since "for us revolutionary legality is a problem which is 99 per cent political".<sup>46</sup>

The inherent contradiction between the ideas of a strong state and weak criminal law did not become fully evident until the waning of the revolution from above was embodied in the XVIIth Party Congress's (1934) policy emphasis on the need for greater legal formality and stability in Soviet jurisprudence as a means of consolidating the gains of the previous turbulent years. Paradoxically, it was Vyshinsky, the Procurator-General of the U.S.S.R. and soon to become prosecutor of the major purge victims, who became the spearhead of Stalinist criticism of the adverse effect of Pashukanis' and Krylenko's legal nihilism on the administration of ordinary ("non-political") criminal justice.<sup>47</sup>

Similarly, Pashukanis and another associate Leonid Gintsburg exercised an equally strong influence on civil jurisprudence through their concept of economic law. Hazard, then an American student

<sup>46</sup> E. B. Pashukanis, "The Situation on the Legal Theory Front" (1930), op. cit. pp. 278-280.

<sup>47</sup> See R. Sharlet, "Stalinism and Soviet Legal Culture", op. cit. f49 and pp. 172-173.

at Pashukanis' Moscow Institute of Soviet Law, subsequently reported:

Law, concerning the rights of the individuals was relegated to a few hours at the end of the course in economic-administrative law and given apologetically as an unwelcome necessity for a few years due to the fact that capitalist relationships and bourgeois psychology had not yet been wholly eliminated.<sup>48</sup>

The final two translations in the present volume illuminate how emasculated the brilliant insights of *The General Theory of Law and Marxism* had become after the XVIIth Party Congress and the introduction of the second Five Year Plan. It is at this point that we no longer need to speculate on whether the intellectual revisions to the main thrust of Pashukanis' work were induced by strictly political and opportunist pressures. In the *Course on Soviet Economic Law*, written with Gintsburg and published in 1935, Pashukanis offers a lengthy, simplistic and functionalist account of the nature of Soviet economic law under the transitional conditions of socialism. Conceived within the manifest constraints to conform with the Stalinist interpretation of Marx's and Engels' brief and unsatisfactory analyses of the period transitional between capitalism and the higher phase of communism, the *Course* defines Soviet economic law as "*a special (specific) form of the policy of the proletarian state in the area of the organization of socialist production and Soviet commerce*" (Pashukanis and Gintsburg, 1935: see p. 306).<sup>49</sup> Bourgeois law serves the interests of the capitalist class in capitalist production; Soviet law serves the interests of the proletariat organized as the ruling class under socialism. The special nature of the production policies (i.e. planning) of the proletarian state are revealed through the concept of socialist (revolutionary) legality. Bourgeois legality, according to Pashukanis and Gintsburg:

is the will of the ruling class ... directed at the support of the basic conditions of the capitalist mode of production. Socialist (revolutionary) legality expresses the will of the last

<sup>48</sup> J. Hazard, "Housecleaning in Soviet Law", *American Quarterly on the Soviet Union* (1938), vol. 1, no. 1, p. 15.

<sup>49</sup> To Pashukanis' credit he still refused to recognize the concept of "proletarian law", But even this incorporated somewhat of a major retreat, however, by his terminological nicety of the "class law of the proletariat" (1935: see. p. 307).

of the exploited classes, which has taken power, of the proletariat.(1935:see p.314)

just as criminal policy came to be regarded as counterproductive after the XVIIth Party Congress, so too economic law during the second Five Year Plan began to encounter muted criticism from the direction of a countervailing tendency toward the need to return to the concept of contract (albeit a *planned* contract) as a method of stabilizing and more effectively managing the planning process. Pashukanis, as the principal theoretical exponent of both criminal policy and economic law, became increasingly politically vulnerable in the mid-1930s.

In "State and Law under Socialism", published on the eve of the new Constitution of 1936, Pashukanis weakly confronts the most serious criticism that the commodity exchange theory of law had always explicitly invited-that it was a left communist, or perhaps anarchist, theory which, if implemented, would greatly impede the construction and reproduction of socialist relations of production in the U.S.S.R. Pashukanis apologetically quotes Lenin's *State and Revolution* to the effect that:

... we want a socialist revolution with people as they are now-with people who cannot do without subordination, without supervision, without "overseers and auditors" . . . it is inconceivable that people will immediately learn to work without any legal norms after the overthrow of capitalism. (1936: see p. 349)

### **Stalinism and Soviet Jurisprudence**

The demand for greater contractual discipline within the planned economy, the revival and strengthening of Soviet family law so long submerged within economic law, and, above all, the publication of the draft of a new constitution in June 1936, all clearly foreshadowed an impending major change in Soviet legal policy. The new constitutional right of ownership of personal property and the provisions for the first all-union civil and criminal codes implied the reinforcement rather than the withering of the law. Stalin's famous remark later that year that "stability of the laws is necessary for us now more than ever" signalled the new legal policy, and the promulgation of

the Stalin Constitution a few weeks later, in December 1936, formally opened the Stalinist era in the development of Soviet legal culture.<sup>50</sup>

As the symbol of the defeated revolution of the law Pashukanis was arrested and disappeared in January 1937. The purging of Pashukanis and his associates cleared the way for the re-articulation of the dormant Romanist legal ideals of stability, formality and professionalism. The process of rebuilding Soviet legal culture began immediately under the aegis of Vyshinsky, Pashukanis' successor as *doyen* of the legal profession. While Pashukanis had been the theorist of NEP legal culture, explaining its rise and predicting its demise, Vyshinsky, the practitioner, was its consolidator by reinforcing and converting it into the Soviet legal culture.<sup>51</sup>

Vyshinsky's critique of Pashukanis involves an intellectual contortionism replete with invective-laden and often self-contradictory statements.<sup>52</sup> Vyshinsky argues that law is neither a system of social relationships nor a form of production relationships. "Law," he stresses, "is the aggregate of rules of conduct--or norms; yet not of norms alone, but also of customs and rules of community living confirmed by state authority and coercively protected by that authority."<sup>53</sup>

Soviet socialist law, the argument continues, is radically unique in both form and content because:

it is the will of our people elevated to the rank of a statute. In capitalist society, allusions to the will of the people served as a screen which veiled the exploiting nature of the bourgeois state. In the conditions of our country, the matter is different in principle: there has been formulated among us, a single and indestructible will of the Soviet people--manifested in the unparalleled unanimity with which the people vote at the

<sup>50</sup> See R. Sharlet, "Stalinism and Soviet Legal Culture", *op. cit.* pp. 168-169.

<sup>51</sup> See R. Sharlet., "Stalinism and Soviet Legal Culture", *op. cit.* p. 169,

<sup>52</sup> This critique is largely contained in four sources. See A. Ia. Vyshinsky, "The Fundamental Tasks of the Science of Soviet Socialist Law" (1938), in J. Hazard (ed.), *Soviet Legal Philosophy* (1951), *op. cit.* pp. 303-341; "The Marxist Theory of State and Law", *Bolshevik* (1938); "The XV111th Congress of the CPSU and the Tasks of the Theory of Socialist Law", *Sovetskoe gosudarstvo* (1939), no. 3; J. Hazard (ed.), *The Law of the Soviet State* (1948), Macmillan, New York, translated by H. Babb.

<sup>53</sup> A. Vyshinsky, "Fundamental Tasks of the Science of Soviet Socialist Law" (1938), *op. cit.* p. 337.

elections to the Supreme Soviet of the U.S. S. R. and the Supreme Soviets of the union and autonomous republics ...<sup>54</sup> The specific mark of Soviet law ... is that it serves, in the true and actual sense of the word, the people-society-. . . In the U.S.S.R. for the first time in history the people-the toiling national masses themselves-are the masters of their fate, themselves ruling their state with no exploiters, no landlords, no capitalists.<sup>55</sup>

Law is now to be viewed as a set of normative prescriptions, enforced by the state (whose own character is unproblematic), in accord with Stalin's conception of the character and duration of the transitional phase. The conditions for the existence of Soviet socialist law are the necessity "to finish off the remnants of the dying classes and to organize defence against capitalist encirclement".<sup>56</sup> Soviet socialist law must incorporate and instill revolutionary legality and stability. "Why is stability of statutes essential? Because it reinforces the stability of the state order and of the state discipline, and multiples tenfold the powers of socialism ..."<sup>57</sup>

Ignoring the internal class contradictions of the new Soviet state, Vyshinsky applauds Stalin's teaching that "the withering away of the state will come not through a weakening of the state authority but through its maximum intensification. "<sup>58</sup> The process of withering away is of necessity postponed until:

all will learn to get along without special rules defining the conduct of people under the threat of punishment and with the aid of constraint; when people are so accustomed to observe the fundamental rules of community life that they will fulfil them without constraint of any sort.<sup>59</sup>

The legal culture of NEP along with the statutory legislation of the intervening years, so long castigated as bourgeois, was redefined as a socialist legal culture. The need to systematize the legal culture, so long obstructed as inconsistent with its withering away, became the new agenda for the legal profession. jurists, driven from the law schools, the research institutes, and the legal press by the

<sup>54</sup> *ibid.* p. 339.

<sup>55</sup> A. Vyshinsky, *The Law of the Soviet State (1948)*, op. cit., p. 75.

<sup>56</sup> *ibid.* p. 62.

<sup>57</sup> *ibid.* p. 51.

<sup>58</sup> *ibid.* p. 62.

<sup>59</sup> *ibid.* p. 52.



revolution of the law, reappeared as participants in the reconstruction of legal education and research. Disciplines banished from the law curriculum by the radical jurists were reintroduced beginning in the spring term of 1937. New course syllabi and textbooks for every branch of law, especially those eliminated or suppressed by the legal transfer culture, began to appear with great rapidity. New editions of earlier texts were purged of Pashukanis' influence and quickly re-issued. Carrying out the mandate of Article 14 of the Stalin Constitution, numerous jurists were mobilized to prepare drafts for the all-union civil and criminal codes. Finally, a vulgar neo-positivist jurisprudence, based on "class relations" and largely derived from the Stalin Constitution and even the *Short Course*, replaced the tradition of revolutionary legal theory epitomized by Pashukanis.<sup>60</sup>

By way, not of conclusion, but as preparation for future work, we must briefly outline the importance of a question confronted but unanswered in Pashukanis' project that is also unanswered, and unfortunately unaddressed, in our own time. How, precisely, are we to understand the historical configuration of state and law in social formations where capitalist property has been abolished but where communism has by no means yet been achieved? How are we to resolve the apparent paradox that the legal practices of most, if not all, social formations dominated by the political rule of the proletariat have included the form, and very often the content, of the legal rules typically associated with capitalist modes of production?

To explain this question, as did Stalinism, in terms of capitalist encirclement and the construction of socialism in one country, is to avoid the issue. This is so for at least two reasons. First, as Marx always and Lenin usually argued, under socialism the proletarian dictatorship has two features which radically demarcate it from all other state *dictatures*: the extent of its powers and the duration of its domination must be limited, and these must ultimately inhere in the consent of its citizens. These features are structural preconditions of socialism, and without wishing to lapse into utopianism or idealism, they seem necessary irrespective of the specific economic, political or ideological histories of a given social formation. This would there

<sup>60</sup> Published in November 1938, *The History of the Communist Party of the Soviet Union (Bolshevik): Short Course* almost immediately became the Stalinist forerunner of what, for China later, Mao's *Little Red Book* was the functional equivalent.

fore exclude that Common explanation of the intensity and longevity of the Soviet polity which pointed to the essential continuity of pre- and post-revolutionary political practices. Further, these qualities of the proletarian dictatorship—clearly discernible as the early Roman, and not the post-Reformation concept of dictatorship<sup>61</sup>—must dialectically contain the capacity for self-transformation. State and legal forms, even while they are actively utilized by the proletariat or by the party which truly represents it, must simultaneously be in the process of immanent transformation. As Lenin himself put it in 1919, "The communist organization of social labour, the first step towards which is socialism, rests, and win do so more and more as time goes on, on the free and conscious discipline of the working people themselves".<sup>62</sup> As such, we are convinced that only intellectual sophistry could assert that, at least since the late 1920s, the proletarian dictatorship in the U.S.S.R. is a *dictatorship* (in the classical sense) of the *proletariat*.

The second reason in part involves the absence of the conditions necessary to the truth of the first. If the historical development of the U.S.S.R. cannot be characterized as the development of the dictatorship of the proletariat, then how can it best be understood? If it is the case that capitalist property relationships have been abolished, and that they have been replaced by state property and collective farm property as the 1936 Constitution proclaimed, then one must inquire how it is that the agencies of the proletarian dictatorship have been used not only to prevent the external threats posed by capitalist encirclement, but much more so to repress what are perceived as internal dangers? This, to us, can only be explained by the endemic existence of class contradictions within the U.S.S.R. At the very least, therefore, we must reject the mechanistic identification of transformations in legal forms of capitalist property with the abolition of exploiting classes.<sup>63</sup> What is needed is a transformation in

<sup>61</sup> See particularly, V. I. Lenin, "A Great Beginning" (1919), *LCW*, vol. 29, p. 420. <sup>62</sup> *ibid.* p. 420.

<sup>63</sup> Any distinction between economic and legal property faces the logical difficulty that economic property is usually conceptualized in legal terms (ownership, use, possession etc.). This problem has recently been posed, unsatisfactorily, by several authors. See E. Balibar, *On the Dictatorship of the Proletariat* (1977), New Left Books, London, pp. 66-77; C. Bettelheim, *Class Struggles in the USSR 1917-1923* (1976), Monthly Review Press, New York, pp. 20-32; A. Glucksman, "The Althusserian Theatre", *New Left Review* (1972), p. 68; N. Poulantzas, *Political Power and Social Classes* (1973), New Left Books, London, p. 72. But, see the

social relationships themselves. We are left with an ironic twist to Lenin's dictum, when applied to the U.S.S.R. since his death, that the dictatorship of the proletariat is the continuation of the class struggle in new forms. This was the thrust of Pashukanis' own concern.

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Piers Beirne  
Robert Sharlet

interesting and important reformulations contained in G. A. Cohen, *Karl Marx's Theory of History: A Defence* (1978), Princeton University Press, Princeton; and P. Corrigan, H. Ramsay and D. Sayer, *Socialist Construction and Marxist Theory* (1978), Monthly Review Press, New York and London.

# 1. *The General Theory of Law and Marxism\**

## Introductory Note

Pashukanis' place in the history of legal philosophy and legal practice is secure primarily due to his treatise *The General Theory of Law and Marxism*. This small book, first published in 1924, has now been translated into several Western and Eastern languages, but the English translation of the first edition appears for the first time below.

When *General Theory* first appeared it is doubtful that anyone, least of all Pashukanis himself, could have foreseen its immediate success and the meteoric rise of its author within Marxist legal philosophy and the Soviet legal profession. Pashukanis was merely one of a dozen authors in the Soviet Union to publish on the Marxist theory of law and state during the years 1923 to 1925. In fact, he was one of the less well-known authors whose works appeared during this early flowering of Soviet legal philosophy. It was a crowded and distinguished field which included the Marxist philosopher Adoratsky; the pupil of Petrazhitzky, M. A. Reisner; the jurist and civil war hero Nikolai Krylenko; and of course Piotr Stuchka, an Old Bolshevik and the Soviet Russian founder of Marxist legal philosophy. Nonetheless, Pashukanis' *General Theory* was feted by the reviewers and quickly came out in successive editions which included several printings. Few other authors in this period had their books reprinted, let alone issued in a new edition.

No one was more forthcoming in his praise of the young Pashukanis than

\* *Obshchaia teoriia prava i marksizm: Opyt kritiki osnovnykh iuridicheskikh poniatii* (1924), sotsialisticheskoi akademii, Moscow, 1st edition.

Stuchka. Stuchka had pioneered the post-Marxian critique of bourgeois jurisprudence, postulating that law is a class concept with an empirical basis in social material interrelationships. With the publication of Pashukanis' critique of bourgeois jurisprudence, Pashukanis recognized him as a comrade-in-arms in the "revolution of the theory of law". Stuchka's praise thrust Pashukanis from academic obscurity to the forefront of the "revolution of the law". Stuchka readily conceded that Pashukanis' commodity exchange theory of law supplemented and generally superseded his own "incomplete and greatly inadequate general doctrine of law".

Nevertheless, in the first edition of *General Theory*, Pashukanis was critical of Stuchka's definition of law, arguing that the effect of Stuchka's perspective was that legal relationships were indistinguishable from social relationships in general. In the second edition of *General Theory*, published in 1926, Pashukanis reiterated this criticism, insisting that "the elements which chiefly provide the material for the development of the legal form can and should be segregated from the system of relationships which are responsive to the dominant class . . .".

Pashukanis had resolved the problem of Stuchka's definition by specifying that the fact of equivalence, based on commodity exchange, was the distinctive characteristic of the legal relationship and that it was this which distinguished law from all other social relationships. The second edition of *General Theory* was met by an equally positive reception. A reviewer in the newspaper *Izvestiia*, in particular, credited Pashukanis with the perfection of Stuchka's initial definition. *Pravda's* reviewer of the second edition essentially subscribed to Pashukanis' theory as well. These favourable reviews, among others, were particularly important, moreover, because they appeared in the political press and therefore implicitly signified formal and authoritative approval of Pashukanis' theory.

The second edition of *General Theory* appeared in a more attractive format reflecting the new prestige that the author and his book had acquired. This was a corrected and supplemented edition which entailed raising some material from footnotes to text, and which generally clarified certain parts of the text through brief emendations. For instance, on the state-an underdeveloped topic in the first edition-Pashukanis added:

Even if legal intercourse can be conceived in terms of pure theory as the reverse side of the exchange relationship, its practical realization nevertheless requires the presence of general patterns more or less firmly established, the elaborate formulation of rules as applied to particular cases, and finally a *special organization* [the state] which would apply these patterns to individual cases and guarantee that the carrying out of the decisions would be compelled.

Elsewhere in the second edition, Pashukanis refined and sharpened his statements on the relationship between law and feudalism declaring, for instance, "explanation of the contradiction between feudal property and bourgeois property must be sought in their different exchange relationships". The third edition of *General Theory* appeared in 1927. It entailed only marginal changes of the revised second edition, and served as the basis for the first translation into English of Pashukanis' *General Theory*. \*

The third edition of *General Theory* subsequently encompassed several printings, and eventually foreign translations, whereby its author and his commodity exchange ~theory of law entered and acquired their place in the history of legal philosophy.

\* See J. Hazard (ed.), *Soviet Legal Philosophy* (1951), Harvard University Press, Cambridge, translated by H. Babb, pp. 111-225.

# *The General Theory of Law and Marxism*

## INTRODUCTION

### **The Tasks of the General Theory of Law**

The general theory of law may be defined as the development of the basic, i.e. the most abstract juridic concepts. The latter include, for example, such definitions as "legal norm", "legal relation", "subject of law" etc. Because of their abstract nature, these concepts are equally applicable to any branch of law; their logical and systematic meaning remains the same irrespective of the specific content to which they are applied. No one would deny, for example, that the concepts of a subject of civil law and a subject of international law are subordinate to the more general concept of a subject of law as such and that, therefore, this category may be defined and developed independently of its specific concrete content. On the other hand, if we remain within the limits of any one branch of law, then we may say that these basic legal categories do not depend on the specific content of legal norms, in the sense that they retain their significance whatever the changes in the specific material content.<sup>1</sup>

We therefore conclude that developed juridic thought, whatever the material to which it is applied, cannot do without a certain number of highly abstract and general definitions.

Nor may our Soviet jurisprudence do without them if it is to remain jurisprudence, i.e. if it is to answer to its immediate practical tasks. The basic, i.e. formal, legal concepts continue to be in our codes and in the commentaries corresponding to them. The method of legal thought also remains in operation with its specific approaches.

But does this prove that the scientific theory of law must be occupied with the analysis of these abstractions? A rather widespread

view assigns a purely artificial and technical significance to the basic and most general legal concepts. Dogmatic jurisprudence, we are informed, uses these designations for the purpose of convenience and only for convenience. They have no other theoretico-cognitive significance. However, the fact that dogmatic jurisprudence is a practical, and in a certain sense a technical discipline, still does not provide grounds for the conclusion that its concepts may not enter into the structure of the corresponding theoretical discipline.<sup>2</sup> Political economy itself began its development with practical questions primarily of monetary circulation-it originally intended to show "the methods by which governments and nations acquire wealth". Nevertheless, in these technical suggestions we already find the bases of those concepts which, in deeper and in enriched form, entered the structure of a theoretical discipline political economy.

Is jurisprudence able to develop into a general theory of law without thereby transforming itself either into psychology or into sociology? Is it possible to analyse the basic definitions of the legal form in the way that political economy analyses the basic and most general definitions of the form of a commodity or of value? These are questions whose solution depends on the possibility of considering a general theory of law as an independent theoretical discipline.

Sociological and psychological theories (sic) of law are distinguished by the fact that they simply ignore this problem. From the very beginning, they operate with concepts of an extra-judicial nature, and if they also examine legal definitions, then it is only for the purpose of declaring them "fictions", "ideological fantasies", "projections" and so on. Upon first sight this naturalist or nihilist approach undoubtedly commands a certain sympathy, and particularly so if one contrasts it with the ideological theories of law which are saturated throughout with teleology and moralizing. After lofty phrases on "the eternal idea of law" or "the absolute significance of the individual", the reader seeking a materialist explanation of law turns with great interest to theories which treat law as the result of a struggle of interests, as a phenomenon of state coercion, or even as a process played out in the real human psyche. Many Marxist comrades have thought it sufficient to introduce the element of class struggle into these theories,



to obtain a truly materialist Marxist theory of law. As a result, however, we obtain a history of economic forms with a more or less weak legal colouring, or a history of institutions, but by no means a general theory of law.<sup>3</sup> Moreover, on the one hand bourgeois jurists, Gumpłowicz for example, in trying to present more or less materialist views, consider themselves obliged, so to speak, *ex professo*, to ponder the arsenal of basic legal concepts even if only to declare them artificial and conventional constructs. Marxist authors, on the other hand, as individuals with no responsibilities to jurisprudence, simply and silently have usually avoided formal definitions of the general theory of law, devoting all their attention to the concrete content of legal norms and the historical development of legal institutions.<sup>4</sup>

In refusing to analyse basic legal concepts, however, we obtain only a theory which explains the development of legal regulation by the material needs of society and, consequently, the correspondence of legal norms to the material interests of given social classes; but legal regulation itself, despite the wealth of historical content which we embed in it as a concept, remains analysed as a form. Instead of seeing the completeness of its internal parts and relationships, we will be forced to use poor and approximately observed characterizations of law--so approximate that the borders between the legal and other spheres are entirely erased.<sup>5</sup>

Such an approach can hardly be considered correct. The history of the economy may be described entirely without the finer points and details, say, of the theory of rent or wages. But what could we say about a history of economic forms in which the basic categories of economic theory--value, capital, profit, rent etc.--were diffused in a vague and undifferentiated concept of economy? We are not even speaking of how the attempt to present such history as a theory of political economy would be received. However, in the area of the Marxist theory of law, this is in fact the situation. It is of course possible to console oneself with the fact that even the jurists themselves are still seeking, and cannot find, definitions for their concept of law. However, if most of the textbooks on the general theory of law usually begin with a certain formula, well-defined and externally exact, in fact even this formula gives us merely a confused, approximate and undifferentiated concept of law in general. It may be affirmed as axiomatic that we understand law least of all from these definitions and that, on the contrary, the relevant scholar will

allow us a better understanding of the form of law the less attention he devotes to its definition.

The cause of this is entirely clear: such a complex concept as law cannot be exhausted by defining it according to the rules of the school of logic *per genus et differentia specifica*.

Unfortunately, even those few Marxists who have dealt with the theory of law have not avoided the temptations of scholastic wisdom. Renner, for example, grounds his definition of law in the concept of an imperative addressed by society (as a person) to the individual.<sup>6</sup> This simple construct seems entirely sufficient for him to investigate the past, present and future of legal institutions.

The basic flaw in formulae of this type is their inability to embrace the concept of law 'in its actual movement, revealing the plenitude of its internal parts and relationships. Instead of displaying the concept of law in its most final and exact form, and thereby showing the significance of this concept for a specific historical period, they present us with purely verbal general propositions about "external authoritarian regulation"-which apply equally well to all periods and stages of development of human societies. A complete analogy to this is provided by those attempts to give a definition of the concept of economy (in political economy) which would include all historical periods. If economic theory consisted in such fruitless scholastic generalizations, it would hardly deserve the title of a science.

Marx, as is well known, begins his research with the analysis of commodities and value, and not with opinions about economy in general. This is because economy, as a particular sphere of relations, is differentiated with the appearance of exchange. So long as the relationships of exchange-value are absent, economic activity may only with difficulty be separated from the remaining totality of life functions with which it constitutes a single synthetic whole. A purely natural economy may not be the object of political economy as an independent science. Only commodity-capitalist relationships comprise, for the first time, the object of political economy as a distinct theoretical discipline which uses its own specific concepts.<sup>7</sup>

Our observations here may be transferred to the general theory of law. The basic juridic abstractions, which are produced by the development of juridic thought, and which are the closest definitions of the legal form, in general reflect specific and very complex social

relationships. The attempt to find a definition of law which would correspond not only with these complex relationships, but also with "human nature" or "human relationships" in general, must inevitably lead to scholastic and purely verbal formulae.

When we have to move from these inanimate formulae to the analysis of the legal form-as we meet it in reality-we inevitably encounter a series of difficulties. These difficulties are only overcome by strategies which are obviously contrived. For example, having been given a general definition of law, we are usually taught that in fact there are two types of law: subjective and objective, *ius agendi* and *norma agendi*. Moreover, the possibility of such a dichotomy is not at all anticipated in the definition itself; it therefore becomes necessary either to deny one of the species, declaring it to be a fiction, a fantasy etc. or to establish a purely external link between the general concept of law and its two species. However, this duality in the nature of law-its dissolution into a norm and a power-has a significance no less essential than the dichotomy of a commodity into exchange-value and use-value.

Law as a form cannot be understood outside of its immediate definitions. It exists only in antitheses: objective law/subjective law, public law/private law etc. These basic limitations must, however, be attached mechanically to the basic formula if the latter is constructed with the intention of it embracing all periods and stages of social development, including those which did not even know such contrasts.

Only bourgeois-capitalist society creates all the conditions necessary for the legal element in social relationships to achieve its full realization. If one leaves aside the culture of primitive peoples where law can only with difficulty be segregated from the general mass of social phenomena of the normative order-then even in medieval Europe, legal forms were distinguished by their extreme underdevelopment. The aforementioned contrasts were combined into a single undifferentiated whole. There was no distinction between law as an objective norm and law as a power. A norm of a general nature was not distinguished from its specific applications; correspondingly, judicial and legislative activities were merged. The contrast between public and private law was entirely hidden both in the organization of the Mark and the organization of feudal power. There was no contradiction, so characteristic of the bourgeois

period, between man as a private person and man as a member of a political union. A long process of development was necessary in order for the boundaries of the legal form to crystallize with full distinctiveness. The main arena of this was the city.

The dialectical development of basic juridic concepts therefore gives us not only the form of law, in its most overt and elemental nature, but also reflects the real historical process of development. This is nothing other than the process of the development of bourgeois society.

Objections may be raised that the general theory of law, as we understand it, is a discipline which deals only with formal and contrived definitions and artificial concepts. No one doubts that political economy studies something which really exists, although Marx warned that such objects as value, capital, profit, rent etc. "cannot be discovered with the aid of a microscope and chemical analysis". The theory of law operates with abstractions which are no less "artificial"; the methods of research in the natural sciences cannot discover a "legal relation" or a "subject of law"; but very real social forces are hidden behind these abstractions.

From the perspective of a man living in a natural economic environment, the economics of value relationships would appear just as artificial a distortion of simple and natural objects as juridic reasoning appears to the good judgement of the "average" man.

To think that the basic concepts which express the meaning of the legal form are the product of arbitrary thought processes. is to fall into the same mistake which Marx noted among the teachers of the eighteenth century. As the latter, in Marx's words, were unable to account for the origin and development of the puzzling forms assumed by social relationships, so they sought to denude them of their strange appearance by ascribing them to a conventional origin.

It is impossible to deny that a significant proportion of juridic concepts in fact have a very transient and artificial nature. Such, for example, are most of the concepts of public law. We shall try to explain the causes of this phenomenon below. But now we shall confine ourselves to the observation that the form of value, under conditions of a developed commodity economy, becomes universal; it assumes, along with its original expressions, a series of derivative and ephemeral expressions which emerge as the selling price of objects which are not products of labour (land), and which are

completely unrelated to the process of production (e.g. military secrets bought from a spy). This does not prevent value, as an economic category, from being understood from the perspective of the socially necessary labour expenditures required for the production of one product or another. Likewise, the universality of the legal form must not prevent us from searching for the relationships which constitute its real foundation. We will show that those relations which are defined as public law are *not* this foundation.

Another objection to our conception of the tasks of the general theory of law consists in the argument that the abstractions which lie at the basis of the analysis are recognized as essential only to bourgeois law. Proletarian law, we are told, must find other generalizing concepts for itself, and indeed this search should constitute the task of the Marxist theory of law.

At first sight this appears as a serious objection; yet it rests on a misunderstanding. To demand its own new generalizing concepts for proletarian law appears to be a revolutionary direction *par excellence*. But this is to proclaim the immortality of the legal form since it tries to wrench this form away from those definite historical conditions which enable its full fruition, and to declare it capable of constant renewal. The withering away of the categories (but not the injunctions) of bourgeois law does not signify their replacement by new categories of proletarian law. Similarly, the withering away of the categories of value, capital, profit etc. during the transition to socialism, will not mean the appearance of new proletarian categories of value, capital, rent etc.

The withering away of the categories of bourgeois law will under these conditions signify the withering away of law in general, i.e. the gradual disappearance of the juridic element in human relationships.

As Marx pointed out in *The Critique of the Gotha Programme*, the transitional period is characterized by the fact that human relationships will for a time involuntarily be limited by the "narrow horizon of bourgeois law". It is interesting to analyse what, in Marx's opinion, constitutes this narrow horizon of bourgeois law. Marx assumes a social order in which the means of production belong to an society, and in which the producers do not exchange their products. He thus takes a stage which is higher than the New Economic Policy in which we live. The market relationship has already been completely replaced by an organizational relationship and, in accordance

with this, "the labour expended in products is not reflected in the form of value essential to those products, since here, in contrast to capitalist society, individual labour no longer exists in an indirect way but directly as a component part of collective labour".<sup>8</sup> But even with the elimination of the market and market exchange, the new communist society, in Marx's words, must for some time bear "in every respect, economically, morally and intellectually, the clear imprint of the old society from whose womb it appeared". This is reflected in the principle of distribution, whereby "the individual producer receives (after deductions have been made) from society exactly what he contributes to it". Marx stresses that despite the radical changes in content and form, "the same principle prevails as that which regulates the exchange of commodities: a definite amount of labour in one form is exchanged for the same amount of labour in another form". To the extent that the social relationships of the individual producer continue to preserve the form of equivalent exchange, so too they continue to preserve the form of law. "By its very nature, law is merely the application of an equal scale." But this ignores inherent differences in individual ability, and therefore "by its content this law, like every law, is a law of inequality". Marx says nothing about the necessity of state power which would forcefully ensure the fulfilment of these norms of "unequal" law preserving its "bourgeois limitations", but this is necessarily understood.<sup>9</sup> Once the form of the equivalent relationship exists, this means that the form of law exists, that the form of public, i.e. state authority exists, which therefore remains for a period even when classes no longer exist. The complete withering away of state and law will be accomplished, in Marx's opinion, only when "labour has ceased to be a means of life and has become life's prime want", when the productive forces have expanded with the all-round development of the individual, when everyone labours voluntarily in accordance with his own abilities, or, as Lenin says, "when the individual does not calculate with the heartlessness of a Shylock whether he has worked half an hour longer than anyone else", in a word, *when the form of equivalent relations will be finally overcome.*

Marx therefore envisioned the transition to developed communism, not as a transition to new forms of law, but as the withering away of the legal form in general, as the liberation from this

inheritance of the bourgeois age which the bourgeoisie was itself condemned to endure.

At the same time Marx indicates that the basic condition for the existence of the legal form is found in the economy, in the matrix of labour expenditures according to the principle of equivalent exchange, i.e. he revealed the innermost connection between the form of law and the form of commodities. Depending on the condition of its productive forces, a society which is compelled to preserve equivalent exchange between labour expenditure and compensation in a form even remotely resembling the exchange of commodity values, will *be compelled* also to preserve the form of law. Only proceeding on this basis is it possible to understand why a whole series of other social relationships assume a legal form. But therefore to conclude that courts or laws will always remain, or that even under maximum economic prosperity certain crimes against the person etc. will not disappear, is on the contrary to identify secondary and derivative elements as the main and basic. Indeed, even advanced bourgeois criminology has theoretically concluded that the struggle against crime may be seen as a medical-pedagogical task for whose solution the jurist-with his "categories of crime", codes, concepts of guilt, "full or diminished responsibility", with his fine distinctions between participation, abetting and inciting etc.-is perfectly unnecessary. And if this theoretical belief has not yet led to the elimination of criminal codes and judges, then this is because transcending the form of law is related not only to advancing beyond the horizons of bourgeois society, but also to the radical liberation from all remnants of the past.

In criticizing bourgeois jurisprudence, scientific socialism must model itself on the criticism of bourgeois political economy furnished by Marx. For this it must first repair to enemy territory. In other words it must not discard those generalizations and abstractions which were developed by bourgeois jurists who proceeded from the needs of their time and class, but must put them at the basis of its analysis to reveal their true significance, that is, the historical formation of the legal form.

Every ideology disappears with the social relations which produced it. But this final disappearance is preceded by a moment when an ideology, under the blows of criticism levelled at it, loses its ability to mask and surround the social relations from which it arose.

The expose of the roots of an ideology is a true sign of its imminent end. As Lassalle says, "the dawn of a new age always consists in the consciousness of what the previous reality actually was."<sup>10</sup>

## CHAPTER I

### **Methods of Constructing the Concrete in the Abstract Sciences**

Every generalizing science, in studying its subject matter, turns to one and the same reality. One observation, for example the observation of the movement of heavenly bodies across the meridian, may provide conclusions for both astronomy and psychology. And one fact, ground rent for example, may be the object of political economy or law. The difference between various sciences depends, therefore, essentially on their respective methodological and ontological approaches. Every science has its particular method, and by this method it seeks to reproduce reality. Moreover, each science constructs a concrete reality with all its wealth of forms, relations and dependencies, as the result of the combination of the most simple elements and abstractions. Psychology seeks to reduce consciousness to its simplest elements. Chemistry solves the same task with respect to substances. When in fact we cannot reduce reality into simpler elements, abstractions come to our aid. The role of abstractions is extremely important in the social sciences. The greater or lesser the perfection of abstraction is determined by the maturity of a given social science. Marx brilliantly explains this with the example of economic science.

It would seem entirely natural, says Marx, to begin research with the concrete totality, with the population living and producing in specific geographical conditions; but this population is but an empty abstraction without the classes which constitute it; in their turn, the latter are nothing without the conditions of their existence, conditions which are wages, profit and rent. The analysis of these assumes the simplest categories of price, value and, finally, commodities. Proceeding from these simplest definitions, the political economist reconstructs the concrete totality not as a chaotic, diffused whole, but as a unity replete with internal dependencies and relationships. Marx adds, moreover, that the historical development of



science regressed; the seventeenth-century economists began with the concrete-with the nation, state and population-in order to arrive at rent, profit, wages, price and value. However, that which was historically inevitable is by no means methodologically correct.<sup>11</sup>

These observations are most applicable to the general theory of law. In this case, too, the concrete totality of society, population and the state, must be the result and the final stage of our conclusions, but not their starting point. For in moving from the simple to the more complex, from a process in pure form to its more concrete forms, we can follow a methodologically well-defined-and therefore more correct-path, than when we hesitantly move with only the diffused and undissected form of the concrete whole before us.

The second methodological observation, which must be made here, concerns one peculiarity of the social sciences. More correctly, it concerns their concepts. If we take some natural science concepts, for example the concept of energy, then we may of course establish precisely the chronological moment when it appeared. However, this date is significant only for the history of science and culture. In natural science research, as such, the application of this concept is not associated with temporal limits. The law of the transformation of energy was in effect before the appearance of Man and will continue after the cessation of all life on earth. It is extra-temporal; it is an eternal law. It is possible to ask when was the law of the transformation of energy discovered, but it is futile to concern oneself with the question of establishing the moment when these relations were reflected in that law.

Let us now turn to the social sciences, or only to political economy, and take one of its basic concepts, such as value. The real history of value is at once glaringly obvious-historically, both in the concept as a component of our thought, and also of the history of the concept as it constitutes part of the history of economic theory. The development of social relationships, therefore, gradually transforms this concept into historical reality. We know exactly what material relationships were necessary in order for the "Ideal", "imaginary" quality of the object to assume "real" and therefore decisive significance. In comparison with the natural qualities which transform the product of labour from a natural phenomenon into a social phenomenon, we thus know the real historical substratum of

our cognitive abstractions. At the same time we are convinced that the limits within which the application of this abstraction makes sense, correspond with the limits of the real development of history and are determined by it. Another example, adduced by Marx, shows this most clearly. Labour, as the simplest relationship of man to nature, is encountered at all stages of development, but as an economic abstraction it appears relatively late (compare the succession of schools: mercantilist, physiocrat, classical). But the development of the concept corresponded to the real development of economic relationships, obfuscating the distinction between different types of human labour and substituting labour in general for it. So, conceptual development corresponds to the real dialectic of the historical process.<sup>12</sup> Let us take another example, external to political economy-the state. Here we can observe both how the concept of the state gradually obtains definitional rigour and finality, developing the full scope of its definitions, and also how in reality the state develops and how it is "abstracted" from patrimony and feudalism, and how it is converted into a self-sufficient force which "penetrates all social interstices".

Thus even law, most generally defined, exists as a form not just in the minds and theories of learned jurists. It parallels a real history which unfolds itself not as a system of thought, but as a special system of social relationships. People enter these relationships not because they have consciously chosen to do so, but because the conditions of production necessitate it. Man is transformed into a legal subject in the same way that a natural product is transformed into a commodity with its mysterious quality of value.

This is a natural necessity which is confined to the framework of bourgeois conditions of existence. Therefore, natural law doctrine consciously or unconsciously lies at the basis of bourgeois theories of law. The natural law school was not only the clearest expression of bourgeois ideology in the period when the bourgeoisie, acting as a revolutionary class, formulated its demands openly and consistently; it also provided a model for the most profound and distinct understanding of the legal form. It is no accident that the flourishing influence of the doctrine of natural law closely coincided with the appearance of the great classical writings of bourgeois political economy. Both schools set themselves the task of formulating, in the most general and therefore in the most abstract form, the basic

conditions of existence of bourgeois society. Bourgeois society appeared to them as the natural condition of existence of all societies.

Rather than dwelling in more detail on the changing schools of legal philosophy, we may note some evolutionary parallels between legal and economic thought. Thus, their historical direction may in both cases be regarded as a phenomenon of the feudal aristocracy, and partly also of the petit bourgeois reaction. When their revolutionary ardour was finally dissipated in the second half of the nineteenth century, the bourgeoisie ceased to be attracted by the purity and clarity of classical doctrines. Bourgeois society now sought stability and strong authority. The central focus of legal theory became not the analysis of the legal form, but the problem of justifying the coercive power of legal rules. A unique blend of historicism and legal positivism was created which led to the denial of all law other than law emanating from the state.

The psychological school of law may be categorized alongside the psychological school of political economy. Both try to transfer the object of analysis to the realm of the subjective conditions of consciousness ("evaluations", "imperative-attributive emotion"), failing to see that the corresponding abstract categories express social relationships in the regularity of their logical structure social relationships which are hidden from individuals and which extend beyond the limits of their consciousness.

Finally, the extreme formalism of the normative school (Kelsen) undoubtedly expresses the most recent general decadence of bourgeois scientific thought. This is accomplished by its exhaustion in the fruitless subtleties of method and formal logic, and the tendency to divorce itself from reality. In economic theory a similar position is occupied by representatives of the mathematical school.

The legal relationship is, in Marx's phrase, an abstract and one-sided relationship; but in this it appears not as the result of the product of the mind of a conscious subject, but as the product of social development.

"In any historical and social science, and also in the development of economic categories, it is always necessary to remember that in reality, and therefore in the mind, the subject is already given-here, bourgeois society. Categories therefore express only the forms of being and the characteristics of existence--often only of individual aspects of this specific society, this subject."<sup>13</sup>

What Marx says here about economic categories is fully applicable to legal categories. The latter, in their false universality, in fact express particular aspects of a specific historical subject--of bourgeois commodity production.

In the same Introduction, which we have repeatedly cited, we find still another profound methodological observation by Marx. This concerns the possibility of clarifying the meaning of preceding formations in terms of the analysis of subsequent and more developed formations. Marx explains that only having understood rent can we understand tribute, the tithe and the feudal corvée. The more developed form explains the previous stages in which it existed only embryonically. Evolution, as it were, reveals those intimations which were hidden in the distant past.

Bourgeois society is the most developed and perfected historical organization of production. The categories which reflect its relationships and its organizations, simultaneously enable comprehension of the structure of the production relationships of all obsolete social forms--from whose fragments and elements this society is erected, partly continuing to bear its legacy, which it has not succeeded in overcoming, and partly articulating, that which formally was there only by implication.<sup>14</sup>

Applying the above mentioned methodological consideration to the theory of law, we must begin with the analysis of the legal form in its most abstract and simple aspect, moving gradually by way of complexity to the historically concrete. In so doing we must not forget that the dialectical development of concepts corresponds to the dialectical development of the historical process itself. Historical evolution produces not only successive changes in the content of norms and legal institutions, but also the development of the legal form itself. The legal form appeared at a certain cultural level in a long embryonic stage, internally unstructured and barely distinguishable from neighbouring spheres, e.g. mores, religion. Then, gradually developing, it achieves maximum maturity, differentiation and precision. This higher stage of development corresponds to specific economic and social relationships. At the same time this stage is characterized by the appearance of a system of general concepts theoretically reflecting the legal system as a distinct whole.

Accordingly, we can achieve a clear and exhaustive definition only if we base our analysis on the fully developed legal form of law which interprets its antecedent forms as its embryos.

Only then can we perceive law, not as a characteristic of abstract human society, but as an historical category which responds to specific social *environs* and which is constructed on the contradictions of private interests.

## CHAPTER II

### Ideology and Law

In the recent polemic between Comrade Stuchka and Professor Reisner, an important role was played by the question of the ideological nature of law.\* Relying upon a handsome collection of citations, Reisner tried to show that Marx and Engels considered law as one of the "ideological forms", and that the same view was held by many other Marxist theorists. Of course it is not necessary to dispute these statements and citations. Likewise, it is impossible to deny the fact that law is experienced by people psychologically, in particular in the form of general principles of rules or norms. However, the task is by no means to recognize or deny the existence of legal ideology (or psychology), but rather to show that legal categories have no other significance than the ideological. Only in the latter case do we recognize Reisner's conclusion as "necessary", namely, "that a Marxist may study law only as one of the subtypes of the general type ideology". In this little word "only" lies the whole essence of the matter. We will explain this with an example from political economy. The categories of commodity, value and exchange-value are undoubtedly ideologically produced distortions, mystifying (in Marx's expression) forms of ideas, in which exchange society imagines a labour bond between individual producers. The ideological nature of these forms is proved by the fact that if one goes to other economic structures, the categories (of commodity, value etc.) lose all significance. Therefore, with complete justification we may speak of a commodity ideology, or as Marx called it, a

\* This debate is found in M. A. Reisner's critical review of P. I. Stuchka's *The Revolutionary Role of Law and State (1921)*; Stuchka's reply appeared in *Vestnik sotsialisticheskoi akademii*, no. 3, 1923 [eds.]

"commodity fetishism" and categorize it in the list of psychological phenomena. This by no means signifies that the categories of political economy have *exclusively* psychological significance, that they relate *only* to experiences, impressions and other subjective processes. We know very well that, for instance, the category of commodity, despite its clear ideological nature, reflects an objective social relationship. We know that whatever degree this relationship has developed, its greater or lesser universality, are material factors subject to inquiry as such, and that it exists not merely in the form of ideological-psychological processes. Thus, the general concepts of political economy are not only an element of ideology, but they are also a type of abstraction, from which we may scientifically, i.e. theoretically, construct objective economic reality. In Marx's words: "These are socially significant, and thus objective, forms of thought within the limits of the productive relationships of a specific, historically determined, social form of production--commodity production."<sup>15</sup>

We must, therefore, demonstrate both that general juridic concepts may enter and actually do enter into the structure of ideological processes and ideological systems--this is not subject to any dispute--and that in them, in these concepts, it is possible to discover social reality which has, in a certain way, become mystified. In other words, we must determine whether or not legal categories are such objective forms of thought (objective for an historically specific society) which correspond to objective social relationships. Consequently, our question is: *is it possible to understand law as a social relationship in the same sense in which Marx termed capital a social relationship?*

Such a statement of the question pre-empts reference to the ideological nature of law, and all our consideration is transferred to an entirely different level.

Recognition of the ideological nature of concepts by no means frees us from the work of searching for objectively existing reality, i.e. in the reality of the external world, and not simply in consciousness. In the opposite case we would be compelled to erase any boundary between the world beyond the grave--which also exists in the conceptions of some people--and, say, the state. Professor Reisner, incidentally, does just this. Relying on the well-known quotation from Engels concerning the state as the "primary ideologi-

cal force", dominating people, Reisner quickly equates the state with state ideology. "The psychological nature of the phenomena of authority is so obvious, and state authority itself--existing *only in the psyche of people* (our italics, E. P.)-is so deprived of material features, that it would seem no one considers state authority in any way other than as an idea. It is real only to the extent that people make it a principle of their action."<sup>16</sup> This means that finances, the military, and administration, are all entirely "deprived of material features", that all this exists "only in the psyche of the people". And what can be done, in the words of Professor Reisner himself with that "huge" mass of the population which lives "outside state consciousness"? It must obviously be excluded. These masses have no significance for "the real" existing state.

And what about the state from the perspective of economic unity? Or customs or the boundaries of custom, are these also ideological and psychological processes? Many such questions can be posed, but all with the same meaning. The state is an ideological form, but simultaneously it is a form of social existence. The ideological nature of a concept does not eliminate the reality and materiality which the concept reflects.

The formal completeness of the concepts of state, territory, population and authority, reflect not only a specific ideology but also the objective fact of the formation of a real sphere of domination, bound to one centre, and, accordingly, even more important, they reflect the creation of real administrative, financial and military organizations with corresponding human and material apparatuses. The state is nothing without methods of communication, without the possibility of giving orders and decrees, of moving armed forces etc. Does Professor Reisner think that the Roman military roads, or modern methods of communications, relate to phenomena of the human psyche? Or does he suppose that these material elements must be entirely ignored as a factor in the formation of the state? Then of course nothing else will remain for us but to equate the reality of the state with the reality of "literature, philosophy, and other spiritual productions of man". It is regrettable that the practice of political struggle, of the struggle for authority, radically contradicts this psychological concept of the state, for at each step we are confronted by objective and material factors.

However, one cannot but note that an inevitable result of the psychological perspective (on which Professor Reisner depends) is subjectivism and solipsism. "As the creation of as many psychologies as there are individuals, and of as many different types as there are groups and social classes, state authority will appear inherently different in the consciousness and conduct of a cabinet minister and that of a peasant who has not yet contemplated the idea of a state; in the psyche of a political activist and in the principles of an anarchist-in one word in the consciousness of people with very different social positions, professional activity, upbringing etc."<sup>17</sup> From this it is clearly obvious that if we remain on a psychological level we quite simply lose every basis to speak of the state as some objective unity. Only by considering the state as a real organization of class authority, i.e. taking into account all (including not only psychological but material) elements, and the latter first of all, do we obtain firm ground under our feet, i.e. we may study the state itself as it is in reality, and not just the innumerable and varied subjective forms in which it is reflected and experienced.

But if abstract definitions of the legal form indicate not simply certain psychological or ideological processes, but if they are concepts which express the very essence of an objective social relation, then in what sense do we say that law- regulates social relationships? Do we not want to say by this that social relationships therefore regulate themselves? Or when we say that a social relationship assumes a legal form, then does this not imply a simple tautology: law adopts the form of law?<sup>18</sup>

At first glance this objection is most convincing, and would seem to leave no other alternative than to recognize law as ideology and only ideology. However, let us try to disentangle these difficulties. In order to lighten our task let us again resort to comparison. Marxist political economy teaches, of course, that capital is a social relationship. It may not as Marx says, be discovered under a microscope, but nevertheless it by no means is exhausted by experiences, ideologies and other subjective processes which occur in the human psyche. It is an objective social relationship. Further, when we observe, for example, in the sphere of small-scale production, the gradual transition from working for a customer to labouring for a monopolist, we postulate that the corresponding relations have assumed a capitalist form. Does this mean that we have fallen into a tautology?



By no means; we have merely said that the social relation which is called capital began to colour or gave its form to another social relation. Thus we may consider all that occurred purely objectively, as a material process, entirely eliminating the psychology or ideology of its participants. Cannot this be done in exactly the same way with law? Being itself a social relationship, it is capable to a greater or a lesser extent, of colouring or giving its form to other social relationships. Of course, we may never approach a problem from this perspective if we are guided by a confused impression of law as a form in general-similar to the way in which vulgar political economy cannot glean the essence of capitalist relationships by beginning with the concept of capital as "accumulated labour in general".

Thus, we can escape from this apparent contradiction, if by way of analysis of the basic definitions of law, we succeed in showing that it is a mystified form of some *specific* social relationship. In this case it will not be meaningless to say that this relationship in one or another instance gives its form to another social relationship, or even to the totality of social relationships.

The situation is no different with the second apparent tautology: law regulates social relationships. For if we exclude a certain anthropomorphism inherent in this formula, then it is reduced to the following proposition: under certain conditions the *regulation* of social relationships *assumes a legal character*. Such a formulation is undoubtedly more correct and, most importantly, more historical. We may not deny that collective life exists even among animals, nor that life there is regulated in one way or another. But it never occurs to us to affirm that the relationships of bees or ants is regulated by *law*. If we turn to primitive tribes, then although we may observe the origins of law, nevertheless a significant part of the relationships are regulated by a means external to law, e.g. by the prescriptions of religion. Finally, even in bourgeois society such things as the organization of postal and railroad services, military affairs etc. may be assigned entirely to legal regulation only upon a very superficial view which allows itself to be deceived by the external form of laws, charters and decrees. A railroad schedule regulates the movement of trains in a very different sense than, say, the law on the liability of railroads regulates the relationship of the latter with freight shippers. Regulation of the first type is primarily technical; the second

primarily legal. The same relationship exists between the mobilization plan and the law on compulsory military service, between the instructions on the investigation of criminals and the Code of Criminal Procedure.

We will return to the difference between legal and technical norms later. For the moment we merely note that the regulation of social relationships assumes a legal nature correlative with the development of the specific and basic legal relationship.

The regulation of norms, or the creation of norms for social relationships are in principle homogeneous and thoroughly legal only upon a very superficial or purely formal view of the matter. Actually, there is an obvious difference in this regard between the various fields of human relationships. Gumplowicz sharply distinguishes between private law and state norms, and only agreed to recognize the former as the domain of jurisprudence. In fact the most consolidated nucleus of legal obscurity (if it is permissible to use such a phrase) lies precisely in this area of the relations of private law. It is here that the legal subject, "persona", finds a fully adequate embodiment in the concrete individuality of the subject engaged in egoistic economic activity, as an owner and bearer of private interests. It is in private law that legal thought moves most freely and confidently; its constructs assume the most finished and structured form. It is here that the classical shades of Aulus Agerius and Numerius Negidius—those personages of the Roman procedural formula—constantly soar above the jurists, and it is from them that the latter draw their inspiration. In private law the *a priori* assumptions of legal thought are clothed in the flesh and blood of two disputing parties, defending "their own rights", with *vindicta* in their hands. Here, the jurist's role as a theorist is directly merged with his practical social function. The dogma of private law is nothing more than an endless chain of arguments *pro* and *contra* imaginary claims and potential suits. Behind each paragraph of this systematic guide stands an unseen abstract client ready to use the relevant propositions as advice. The scholarly legal arguments on the significance of a mistake, or on the distribution of the burden of proof, do not differ from the same disputes before a judge. The difference here is no greater than that between knightly tournaments and feudal wars. The first, as is well known, were conducted sometimes with even greater fierceness, and demanded no less expenditure of energy

and sacrifice, than real skirmishes. Only the replacement of individual enterprise with planned social production and distribution will end this unproductive expenditure of the forces of the human mind.

The basic assumption of legal regulation is thus the opposition of private interests. At the same time the latter is the logical premise of the legal form and the real cause of the development of the legal superstructure. The conduct of people may be regulated by the most complex rules but the legal element in this regulation begins where the individualization and opposition of interests begins. "Controversy", says Gumpłowicz, "is the basic element of everything legal". Unity of purpose is, on the contrary, the premise of technical regulation. Therefore the legal norms concerning the liability of railroads presume private claims, private individualized interests; the technical norms of railroad movement suppose a single purpose, e.g. the achievement of maximum freight capacity. Let us take another example: the curing of a sick person presupposes a series of rules both for the sick person himself and for the medical personnel; but to the extent that these rules are established from the perspective of a single purpose, the restoration of the patient's health, they are of a technical nature. The application of these rules may be accompanied by coercion with respect to the patient. But so long as this coercion is considered from the perspective of the same single purpose (both for the rulers and the ruled), it remains solely a technically expedient act. Within these limits the content of the rules is established by medical science and is altered with its progress. There is nothing here for the lawyer to do. His role begins where we leave the basis of unity of purpose and move to the consideration of the perspective of individualized and antagonistic subjects, each of whom is the bearer of his own private interest. The physician and the patient are now transformed into subjects of rights and duties, and the rules which connect them are legal rules. At the same time, coercion is now considered not just from the perspective of expediency, but from the perspective of formal, i.e. legal, permissibility.

It is not difficult to see that the possibility of taking a legal perspective derives from the fact that the most diverse relationships in commodity-producing societies are organized on the model of relationships of commercial circulation, and inscribed in the form of law. Likewise, it is natural for bourgeois jurists to deduce the universality of the legal form from the external and absolute qualities

of human nature, or from the fact that the orders of the authorities may extend to any subject. It is not necessary to provide any particular proof of this. An article in Volume Ten obliged a husband "to love his wife as his very own body". However, even the most daring jurists would hardly try to construct a corresponding legal relationship involving the possibility of libidinization etc.

On the contrary, however artificial and unreal a specific juridic construct may seem, nevertheless, so long as it remains within the bounds of private law, and primarily property law, it has a firm basis. Otherwise, it would have been impossible to explain the fact that the basic lines of thought of Roman jurists retained their significance up to the present time as the *ratio scripta* of every type of commodity-producing society.

We have to a certain extent now anticipated the answer to the question posed at the outset: where shall we look for that unique social relationship whose inevitable expression is the form of law? We will try to show in more detail that this relationship is the relationship of possessors of commodities.<sup>19</sup> The usual analysis, which we find in any philosophy of law, identifies the legal relationship as a will relationship, as a voluntary relationship between people in general. The reasoning here proceeds from the "existing results of the process of development", from the "ongoing forms of thought", but it ignores their historical origin; whereas in reality, in proportion to the development of a commodity economy, the natural premises of exchange become the natural premises of every form of human relationship and stamp their imprint upon them; in the heads of philosophers, on the contrary, the circulation of commodities is represented as merely a partial instance of a general form which for them assumes an eternal nature.<sup>20</sup>

Comrade Stuchka, from our point of view, correctly identified the problem of law as a problem of a social relationship. But instead of beginning to search for the specific social objectivity of the relationship, he returned to the usual and formal definition-although a definition now influenced by class characteristics. In the general formula given by Stuchka, law figures not as a *specific* social relationship but, as with *all* relationships *in general*, as a *system of relations which corresponds to the interests of the ruling class and which protects it with organized force*. Accordingly, within these class boundaries, law as a relationship is indistinguishable from social relations in

general, and Comrade Stuchka is therefore not in a position to answer Professor Reisner's venomous question: how do social relationships become legal institutions, or how is law converted into itself?.

Stuchka's definition, perhaps because it emerged from the depths of the People's Commissariat of justice, was tuned to the needs of the practising lawyer. It shows the empirical limit which history always places upon legal logic, but it does not reveal the deep roots of this logic itself. This definition reveals the class content included in legal forms, but it does not explain to us why this content adopts such a form.

For the bourgeois philosophy of law, which considers relationships as an eternal and natural form of all human relationships, such a question does not arise in general. For Marxist theory, which tries to penetrate the secrets of social forms and to reduce "all social relationships to man himself", this task must occupy the first place.

### CHAPTER III

#### **Relationship and the Norm**

As the wealth of capitalist society assumes the form of an enormous accumulation of commodities, society presents itself as an endless chain of legal relationships.

The exchange of commodities assumes an atomized economy. A connection is maintained between private and isolated economies from transaction to transaction. The legal relationship between subjects is only the other side of the relation between the products of labour which have become commodities. The legal relationship is the primary cell of the legal tissue through which law accomplishes its only real movement. In contrast, law as a totality of norms is no more than a lifeless abstraction.

Nonetheless, the standard view posits objective law or a norm as the base of the legal relationship both logically and in reality. According to this conception, a legal relationship is *generated* by an objective norm:

The norm of the right to demand repayment of a debt does not exist because creditors usually demand repayment, but on the contrary creditors demand repayment because the norm

exists; law is not established inductively from observed instances, but by deduction from a rule established by someone.<sup>21</sup>

The expression, "the *norm generates the legal relationship*", can be understood both in the real and logical sense.

Let us turn to the first of these. Above all it should be noted that the totality of norms, written and unwritten, belongs *per se* more to the sphere of literary creativity, a situation acknowledged frequently among the jurists themselves.

This aggregate of norms obtains real significance only because of those relationships which are conceived -of as having arisen and, in fact, have arisen according to these rules. Even the most consistent advocate of the pure normative method, Hans Kelsen, had to recognize that somehow a slice of real life, i.e. of the actual conduct of people, had to be harmonized with the ideal normative order. In this sense, to consider the statutes of tsarist Russia as law currently in effect is possible only in an insane asylum. The formal juridical method, which is concerned only with norms which are "considered as law", can assert its independence only within very narrow limits, only so long-as the tension between fact and norm does not exceed a definite limit. In material reality a relationship has primacy over a norm. If not a single debtor repaid a debt, then the corresponding rule would have to be regarded as actually non-existent and if we wanted nevertheless to affirm its existence we would have to fetishize this norm in some way. Indeed a great many theories of law are concerned with such fetishism, justifying the preoccupation on very slender methodological grounds.

Law as an objective social phenomenon cannot be exhausted by a norm or a rule, whether written or unwritten. A norm as such, i.e. in its logical content, either is directly derived from existing relationships already or, if it is published as statutory law, then it presents itself only as a symptom by which one may assess, with some degree of probability, the likely emergence of the corresponding relationships in the near future. It is not sufficient to know the normative content of law in order to confirm its objective existence. It is necessary to know if this normative content is realized in practice, that is in social relationships. A common source of confusion is the dogmatic jurist's method of thought according to which the concept of operative law and operative norm does not conform to what the sociologist or historian understands as objectively substantive law.

When a dogmatic jurist decides the question of whether a given norm of law is operative or not, he usually does not have in mind the question of the presence or absence of a particular objective social phenomenon. Instead, he is concerned only with the presence or absence of a logical connection between the given normative provision and a more general normative premise.<sup>22</sup>

Thus, the norm is the only thing that exists for the dogmatic jurist who, confined to the narrow framework of his purely technical task, may serenely equate law and norm. In the case of customary law he must turn to reality regardless. But when statutory law is the jurist's only normative assumption (expressed in his technical language, the source of law), then the jurist's conclusions, and his dogma about "operative" law, are by no means obligatory for the historian who wants to study the law actually existing. Scientific, i.e. theoretical, study can deal only with facts. If certain relationships are actually formed this means that the corresponding law has been created. If a statute or decree was merely published, but the corresponding relationships did not in fact arise, this means there was an attempt to create law but the attempt failed.<sup>23</sup>

It is possible moreover to modify this thesis and make its cornerstone the objective social regulatory forces or, as jurists express it, the objective legal order, instead of norms.<sup>24</sup> But even in this new formulation, the thesis can be subjected to further criticism. If social regulatory forces are understood to be the same relationships in their regularity and constancy, then we have a simple tautology. If instead they are understood as a special, consciously organized order ensuring and guaranteeing the given relationships, then the logical error will be entirely clear. It is impossible to say that the relationship between creditor and debtor is generated by a coercive order which exists in a given state for recovering debts. This objectively existing order ensures, but certainly does not generate the relationship. This is not mere scholasticism—that is best shown by the fact that we can conceive of, as well as find, a tremendous variety of historical examples of the ideal functioning of this externally coercive and regulatory social apparatus, and consequently the most diverse degrees in which relationships are guaranteed. Moreover these relationships themselves do not undergo any structural changes. We can imagine so extreme a situation as when except for the two parties entering the relationship—no other third force exists capable

of establishing a norm and guaranteeing its observance (for instance some contract between the Varangians and the Greeks): the relationship remains even here. But one merely needs to imagine the disappearance of a party, i.e. of the subject as the bearer of a distinct autonomous interest, and the very possibility of a relationship also disappears.

In this respect one may argue that if one departs from the objective norm, then the very concepts of legal relationship and legal subject are in abeyance, lacking definition. In general, this objection reveals the very practical and empirical spirit of modern jurisprudence. It knows but one truth; that any lawsuit is lost if the party cannot rely on an appropriate paragraph of some statute. However, the belief that a legal subject and a legal relationship do not exist and are not definable external to an objective norm, are just as theoretically mistaken as the belief that value does not exist and is not definable outside the framework of supply and demand (because empirically it is reflected precisely in price fluctuations).

The prevalent style of legal thought which initially posits the norm as the authoritatively established rule or conduct, is distinguished by that same incisive empiricism which-also seen in economic theories-goes hand in hand with extreme and lifeless formalism.

Supply and demand can exist for any objects including those which are by no means the product of labour. The conclusion can be drawn from this that value may be defined without any reference to the socially necessary labour time required for the production of a specific commodity. The empirical fact of an individualized value serves as the basis for a formal-logical theory of marginal utility.

Similarly, norms issued by the state may deal with the most varied objects that have very different qualities. From this the inference can be made that the essence of law is exhausted by the form of command or order which proceeds from higher authority, and that the very substance of social relationships contains no elements which could generate the legal form. The empirical fact that relationships protected by the state are better secured is placed at the foundation of the formal-logical theory of legal positivism.

Our question, expressed in the Marxist terms of historical materialism, is reduced to the problem of the relationship between the legal and political superstructures. If a norm is recognized as the



dominant element in all relationships then, before seeking the legal superstructure, we must assume the presence of a norm-establishing authority, i.e. in other words a political organization. Thus we would have to conclude that the legal superstructure derives from the political superstructure.

However, Marx himself emphasizes the fact that the basic and most deeply set stratum of the legal superstructure- property relationships-is so closely contiguous with the base that they are "the same relationships of production expressed in legal language". The state, i.e. the organization of political class domination, develops from definite relationships of production and property. Production relationships, logically expressed, comprise what Marx, following Hegel, called civil society. The political superstructure, and in particular the state apparatus, is a secondary, derivative element.

The way in which Marx envisioned the relationship between civil society and the state is apparent from the following quotation:

The egoistic individual of bourgeois society may in his insular imagination, in his lifeless abstraction, depict himself as an atom, i.e. a coherent and self-sufficient being, without needs or embellishments. The harsh reality is that our sensory perceptions are not concerned with his fantasies. His feelings compel him to believe in the reality of the external world and also of other individuals; every day he is reminded that the external world is not empty, but that it is the external world which fills his stomach. Each of his natural activities, each of his qualities, and each incentive to give becomes a requirement, a need which transforms his egoism into a hunger for the objects and people of the external world. But since the need of one individual has no inherent meaning for another egoistic individual (who has the means for satisfying this need), and since accordingly the need is not directly linked with its satisfaction, then each individual is compelled to make this bond in order to become in his turn the intermediary between another's need and the object of that need. Thus, natural necessity is the characteristic of the human condition, However alien they may seem to one another, the members of civil society are united through self-interest. *Civil, not political life, this is the real bond.* It is not the state that binds the atoms of civil society, but the fact that they are atoms only in imagination and transcendental fantasy. In reality they are very unlike atoms-they are not divine egoists, but egoistic human beings. *Only political superstition forces us to believe that civil society is the creation of the state; on the contrary, the state is the creation of civil society.*<sup>25</sup>

Marx returns to the same question in another article, "Moralising Criticism and Critical Morality", where, in a polemic with the representative of true socialism, Heinzen, he writes:

If in general the bourgeoisie politically, i.e. with the help of state power, "supports unjust property relationships" [Marx puts Heinzen's words \*in quotation marks here], then *it does not create them*. "Unjust property relationships" aided by the modern division of labour, the modern forms of exchange, competition, concentration, etc., do not flow *from the political domination of the bourgeois class*, but, on the contrary, the political domination of the bourgeois class derives from these modern relationships of production-which bourgeois economists proclaim as inevitable and eternal laws.

Thus, the path from production relationships to legal or property relationships is shorter than imagined by so-called positivist jurisprudence, which cannot function without an intermediate link-state power and its norms. Man as a social producer is the assumption from which economic theory proceeds. The general theory of law must proceed from this same basic assumption. Thus, for instance, the economic relationship of exchange must be present for the legal relationship of the contract of purchase and sale to arise. In its real movement, the economic relationship becomes the source of the legal relationship, which first emerges at the moment of a controversy. A dispute, a conflict of interest, elicits the form of law, the legal superstructure. In a dispute, i.e. in a lawsuit, the parties engaged in economic activity already appear as parties, i.e. as participants in the legal superstructure; the court in its most primitive form-this is the legal superstructure *par excellence*. Through the judicial process the legal is abstracted from the economic, and appears as an independent element. Law historically emerged from controversy, i.e. from a claim, and only thereafter did it overlap with the earlier (purely economic or factual) relationship. From the very beginning it thus assumed a dual nature economic and legal. Dogmatic jurisprudence ignores this sequence and at once begins with the end result-with abstract norms through which the state, so to speak, juridicizes its actions and infuses all social spaces. The basic defining element (from the simplistic perspective of relationships of purchase and sale, credit, loans etc.) is not the actual material economic content of these relationships but the imperative directed to the

individual in the name of the state. This point of departure is useless to the legal practitioner both for the study and explanation of the concrete legal structure, and particularly for the analysis of the legal form in its most general definitions. State power injects clarity and stability into the legal structure but it does not create its preconditions which are rooted in the material relationships of production.

Gumplowicz, in his *Rechtsstaat und Sozialismus*, of course comes to the directly opposite conclusion proclaiming the primacy of the state, i.e. of political domination. Turning to the history of Roman law, he thinks that he has succeeded in proving that "all private law was once public law". In his opinion this was because all the most important institutes of Roman civil law, for example, emerged as privileges of the ruling class, as public law advantages in the hands of the victorious group for the purpose of consolidating its power.

It cannot be denied that this theory is convincing, to the extent that it emphasizes the element of class struggle and ends the idyllic view of the emergence of private property and power. But Gumplowicz makes two major errors. First, he gives coercion such a constructive role, and loses sight of the fact that every social order, including those which were formed on the basis of conquest, is determined by the specific conditions of the social forces of production. Second, in speaking of the state he erases any difference between primitive relations of domination and "public power" in the modern, i.e. bourgeois sense of the word. He therefore infers that private law is generated by public law. But from the fact that the most important institutes of the ancient Roman law *cavils* (ownership, the family, the procedure for inheritance) were created by the ruling class to support their domination, it is also possible to draw the diametrically opposed conclusion—that "all public law was once private law". This will be just as true, or rather just as false, because the antithesis between private and public law corresponds to much more developed relationships and loses its meaning and application in the primitive era. If the institutes of the *cavils* really were a mixture of features of public law and private law (using modern terminology), then they equally included religious and, in a broad sense, ritualistic elements. Consequently, at this level of development the purely

legal element was inseparable from its reflection in the general conceptual system.

The development of law as a system was evoked not by the requirements of the state, but by the necessary conditions for commercial relations between those tribes which were not under a single sphere of authority. This is recognized, incidentally, by Gumpłowicz himself Commercial relations with foreign tribes, with nomads, and plebeians, and in general with those not participant in the union of public law (in Gumpłowicz's terminology), ushered in the *ius gentium*, which was the prototype of the legal superstructure in its pure form. In contrast to the *ius civile*, with its undeviating and ponderous forms, the *ius gentium* discards all that is not connected with the goal-with the natural basis of the economic relation. Public law embodies the nature of this relationship and therefore appears as "natural" law; it strives to reduce this relationship to the minimal number of assumptions, and therefore develops easily into a logically structured system. Gumpłowicz undoubtedly is right when he equates legal logic with the logic of the civilian, but he is mistaken in thinking that the system of private law could have developed, so to speak, in a derivative fashion from public power. His train of thought is approximately as follows: because private disputes did not directly or materially touch upon the interests of authority, then the latter gave the corpus of jurists full freedom to refine their mental abilities in this sphere. In the field of public law, conversely, reality resisted the jurists' efforts, because authority tolerates no interference in its own affairs and does not recognize the omnipotence of juridic logic.

It is most obvious that the logic of juridic concepts corresponds with the logic of the social relationship of commodity production, and that the history of the system of private law should be sought in these relationships and not in the dispensation of the authorities. On the contrary, the logical relationships of domination and subordination are only partially included in the system of juridic concepts. Therefore, the juridic concept of the state may never become a theory but will always appear as an ideological distortion of the facts.

Wherever the first layer of the legal superstructure exists, we find that the legal relationship is generated directly by the existing material production relationships of people.

From this it follows that for the analysis of the legal relationship, in its simplest form, there is no need to proceed from the concept of a norm as an external authoritative command. It is sufficient to take as a basis a legal relationship "the content of which originates in the economic relation itself" (Marx), and to study the "legal" form of this juridic relationship as one of its partial aspects.

The question of whether a norm should be considered a prerequisite of a legal relationship in historical reality, led us to the problem of the relationship between the legal and political superstructures. On logical and systematic grounds, the problem seems to be the relation between objective and subjective law.

In his text on constitutional law, Duguit called attention to the fact that the word "droit" signified "things which are undoubtedly deeply intermingled, but which are extremely different from one another". Here, he means law in the objective and subjective senses. In fact we come here to one of the darkest and most disputed areas of the general theory of law. Before us is some sort of strange dual concept; although both aspects are located at different levels, they nevertheless undoubtedly condition each other. Law is simultaneously a form of external authoritative regulation and a form of subjective private autonomy. The basic and essential characteristic of the former is unconditional obligation and external coercion, while freedom is ensured and recognized within definite boundaries. Law appears both as the basis of social organization and as the means for individuals "to be disassociated, yet integrated in society". On the one hand, law completely merges with external authority, and on the other it completely opposes every external authority not recognized by it. The duality of law as the synonym of official state power, and as the slogan of revolutionary struggle, is the arena for unlimited controversy and the most impossible confusion.

Consciousness of this deep and hidden contradiction produced mighty efforts somehow to eliminate this troublesome conceptual dichotomy. For this purpose no small number of attempts were made to adopt one of the "meanings" at the sacrifice of the other. Thus, for instance, the same Duguit, who in his treatise declares the expressions-objective and subjective law-"successful, dear, and exact", in another of his works refines the proof that subjective law is "simply a misunderstanding, a *metaphysical conception untenable* in an era of realism and positivism such as ours".

The opposite trend, whose German representative is Bierling, and among us the psychologists headed by Petrazhitzky, are inclined to declare objective law "a fantasy", deprived of real significance "an emotional projection", a product of the objectification of internal i.e. psychological, processes etc.

Discarding for now the psychological school and trends related to it, let us consider the view whereby law should be understood exclusively as an objective norm. Proceeding from this concept we have, on the one hand, an authoritative prescription of the necessary (or the norm), and on the other the subjective obligation corresponding to, and generated by it.

Dualism is apparently uprooted, but this is merely a temporary victory, because as soon as we move to the practical application of this formula, immediate attempts are made by circuitous and indirect routes to introduce those contours necessary for the conceptual creation of subjective law. We now return to the same dichotomy, with the only difference that one part of it, subjective law, is artificially depicted as some species of ghost; no combination of imperatives and obligations can provide us with subjective law, in the independent and real sense in which any proprietor of bourgeois society embodies it. In fact, it suffices to exemplify property alone to be convinced of this. If the attempt to reduce the law of property to *prohibitions* directed to third parties is no more than a logical confusion, an ugly and inverted concept, then the depiction of the bourgeois law of property as a social obligation is also a mystification.<sup>26</sup>

Every owner and everyone around him, understands clearly that the *right belonging to him* as an owner has only this in common with an obligation: they are polar opposites. Subjective law has primacy for it is ultimately based on a material interest which exists independently of external, i.e. conscious, regulation of social life.

The subject as the bearer and addressee of all possible demands, and the chain of subjects bound by demands addressed to one another, is the basic juridic fabric corresponding to the economic fabric, i.e. to the social relations of production which depend on the division of labour and exchange.

Social organization, including the instruments of coercion, is the concrete totality to which we must turn, having previously understood the legal relationship in its pure and simplest form. Thus,

obligation as the result of an imperative or order, is now the actualizing and complicating element in the consideration of the legal form. In its most abstract and simple form, a legal obligation must be considered as an expression and correlation of a subjective legal claim. In the analysis of a legal relationship we clearly see that an obligation does not exhaust the logical content of the legal form. It is not even an independent element of it. An obligation always appears as an expression or correlation of an appropriate legal right. The obligation of one party is what is owed to and therefore what belongs to another. What appears as a right for the creditor appears as an obligation for the debtor. The category of legal right becomes logically complete only when it includes a bearer and an owner of rights, whose rights are neither more nor less than the obligations of others to him.

Thus, the legal relationship not only gives us law in its real movement, but also reveals the most characteristic peculiarities of law as a logical category. Conversely, the norm itself, as a prescription of what is required, constitutes the elements of morality, aesthetics and technology as much as of law.

The legal order is distinguished from every other social order in that it comprises isolated, private subjects. A norm of law' acquires its *differentia specifica*, distinguishing it from the general mass of regulatory rules-moral, aesthetic, utilitarian etc.-because it presupposes a person endowed with a right and actively asserting it.

The attempt to make the notion of external regulation the basic logical element in law leads to the equation of law with the authoritatively established social order. This current of legal thought truly reflects the spirit of that period when large-scale capitalist monopolies and imperialist policy replaced the Manchester School and free competition.

It is not difficult to show that the idea of unconditional obedience to an external norm-establishing authority has nothing in common with the legal form. It is sufficient to take examples which have been marked out with extreme rigour and which are therefore clearest examples of such a structure. One example could be the military unit, where the majority of persons are subordinated in their movements to general orders whose single, active and autonomous origin is the will of the commander. Another example is the Jesuit order. Here, all members blindly and uncomplainingly fulfil the will

of the leader. It is sufficient to think of these examples to conclude that the more consistently the basis of authoritarian regulation is applied, thereby excluding any suggestion of a separate and autonomous will, the less will be the opportunity for the application of the category of law. This is particularly sharply felt in the field of so-called public law. Here, legal philosophy faces the greatest difficulties. At the same time as civil law, operating at the primary legal level, broadly and confidently uses the concept of subjective rights, the application of this concept in the theory of public law steadily creates misunderstanding and contradictions. The system of civil law is therefore characterized by simplicity, clarity and completeness, while the theories of public law are replete with constructs that are rigid, artificial and grotesquely one-sided. The legal form, with its aspect of subjective legal authority, is born in a society consisting of atomized bearers of private, egoistic interest. When all economic life is constructed on the principle of accord between independent wills, then every social function, in one or another explicit way, assumes a legal nature, i.e. becomes not merely a social function but also the legal right of the person who fulfils this function. However, since private interests cannot inherently achieve such full development and overwhelming significance in the political organization as they can in the economy of bourgeois society, therefore even subjective public rights act as something ephemeral, deprived of real roots, and are constantly in doubt. At the same time the state is not a legal superstructure-it can merely be *imagined* as such.

Legal theory cannot equate "the rights of parliament", "the rights of executive authority" etc., for example, with the creditor's right to repayment of a debt. This would be to place a distinct private interest where bourgeois ideology presumes the authority of a general impersonal state interest. But at the same time every jurist knows that he cannot invest these rights with any other basic content without the legal form escaping him. Public law can exist only as the reflection of the form of private law in the sphere of political organization, or else it ceases to be law. Attempts to depict a social function as it really is, i.e. simply a social function, and a norm merely as an organizing rule, mean the extinction of the legal form. However, the real premise for the transcendence of the legal form and legal ideology is that



social condition in which the very conflict between individual social interests has become superfluous.

A characteristic feature of bourgeois society is the fact that general interests are alienated from private ones, and are opposed to them. But in this opposition they unwillingly adopt the form of private interests, i.e. the form of law. Thus, as should be expected, the legal elements of state organization are primarily those which harmonize with the system of antagonistic, isolated, private interests.

Thus, the very concept of public law may be developed only in that process in which, figuratively, it constantly diverges from private law, trying to define itself as the latter's antithesis, and then turns to it as if it were its centre of attraction.

The attempt to proceed in the reverse direction, i.e. to find the basic definitions of private law (which are nothing other than the definitions of law in general) by using a norm as the conceptual platform, can produce nothing except lifeless formal concepts, fraught with internal contradiction. Law as a function ceases to be law, and power without the private interests supporting it becomes elusive and abstract, easily becoming its antithesis, i.e. an obligation (every public right is at the same time an obligation). just as the legal "right" of the creditor to receive repayment is elementary, clear and "natural", so the legal "right" of parliament to approve the budget is tenuous and problematic. If, in civil law, scholastic arguments are conducted on the level of what Jhering called legal symptomatics, then the very basis of jurisprudence is placed in jeopardy. This is the source of methodological distortion and hesitation. It is this which threatens to turn jurisprudence into a hybrid of sociology and psychology.

## CHAPTER IV

### **Commodity and the Subject**

Every legal relation is a relationship between subjects. A subject is the atom of legal theory, the simplest and irreducible element. And with it we begin our analysis.

At the same time as idealist theories of law start with some general idea and develop the concept of the subject, i.e. in a purely speculative way, dogmatic jurisprudence uses this concept in a

formal manner. For it, the subject is nothing more than "a means for the legal qualification of phenomena from the perspective of their suitability or unsuitability for participation in legal relations". It therefore does not ask itself why man turned from an animal environment into a legal subject, since it proceeds from the legal relation as an antecedent form.

Marx's theory, on the contrary, considers every social form as historical, and therefore sets its task as the explanation of those historical, material conditions which make one category or another real. The material premises of legal relationships, or the relationships of legal subjects, are explained by Marx himself in the first volume of *Capital*. It is true that he did this obliquely, and in the form of the most general allusions. However, these allusions provide much more for the understanding of the legal element in the relationships between people than the multi-volume treatises on the general theory of law. For Marx the analysis of the form of the subject flows directly from the analysis of the form of commodities.

Capitalist society is above all a society of commodity owners. This means that in the process of production the social relationships of people assume an objectified form in the products of labour and are related to each other as values. Commodities are objects whose concrete multiplicity of useful qualities becomes merely a simple physical covering of the abstract quality of value, and which appears as the ability to be exchanged for other commodities in a definite ratio. This quality appears as something inherent in the objects themselves, by force of a type of natural law which acts behind people's backs entirely independent of their will.

But if a commodity acquires value independently of the will of the subject producing it, then the realization of value in the process of exchange assumes a conscious volitional act on the part of the owner of the commodity. Or, as Marx says, "commodities cannot send themselves to a market and exchange themselves with one another. Accordingly, we must turn to their custodian, to the commodity owner. Commodities are objects and therefore defenceless before man. If they do not go of their own will, he will use force, i.e., appropriate them".<sup>27</sup>

Thus, in the process of production, the social relationships of people realized in the products of labour and assuming the form of an elemental law, require for their realization a particular relationship

of people as managers of products, and subjects "whose will rules objects".

Therefore, simultaneously with the product of labour assuming the quality of a commodity and becoming the bearer of value, man assumes the quality of a legal subject and becomes the bearer of a legal right. "A person whose will is declared decisive is the subject of a legal right."<sup>28</sup>

Simultaneously, social life is reduced on the one hand to the totality of elemental objectified relationships in which people appear to us as objects (such are all economic relations: the level of prices, surplus value, profit etc.) and, on the other hand, those relationships which define man only by reference to an object, i.e. as a subject, or in legal relationships. These two basic forms are different in principle, but at the same time are very closely connected and mutually dependent. The social, productive relationship appears simultaneously in two incongruous forms: as the value of a commodity and as the ability of man to be the subject of rights.

In the same way that the natural multiplicity of the useful qualities of a product is in a commodity a simple mask of its value, while the concrete species of human labour are dissolved into abstract human labour as the creator of value so the concrete multiplicity of man's relationship to an object appears as the abstract will of the owner, while all the concrete peculiarities, which distinguish one representative of the species *Homo sapiens* from another, are dissolved into the abstraction of man in general as a legal subject.

If economically an object dominates man, since as a commodity it embodies in itself a social relationship not under the authority of man, then man legally dominates the object because as its possessor and owner he himself becomes merely the embodiment of the abstract, the impersonal subject of rights, the pure product of social relationships. Expressing this in the words of Marx, we say:

In order that these objects may relate to one another as commodities, their guardians must relate to one another, as persons whose will resides in those objects; and must behave in such a way that each does not appropriate the commodity of the other, and part with his own, except by means of an act

done by mutual consent. They must, therefore, mutually recognize in each other the rights of private proprietors.<sup>29</sup>

Having fallen into servile dependence upon economic relations surreptitiously created in the form of the laws of value, the economic subject-as if in compensation-receives a rare gift in his capacity as a legal subject: a legally presumed will, making him absolutely free and equal among other owners of commodities. "All must be free and no one may violate the freedom of another . . . each person possesses his own body as a free instrument of his own will."<sup>30</sup> This is the axiom from which the theory of natural law proceeds. And this idea of separation, the inherent proximity of human individuality, this "natural condition", from which "the infinite contradiction of freedom" flows, entirely corresponds to the method of commodity production in which the producers are formally independent of one another and are bound by nothing other than the artificially created legal order, by this very legal condition or, speaking in the words of the same author, "the joint existence of many free beings, where all must be free and the freedom of one must not prevent the freedom of another". This is nothing other than an ideologized philosophical abstraction transferred to heavenly heights, freed from its crude empiricism; independent producers meet in this market because, as another philosopher teaches us, "in the market transaction both parties do that which they want and do not claim greater freedom than they themselves grant the others".

The increasing division of labour, the expanding social relationships and the development of exchange deriving therefrom, make exchange-value an economic category, i.e. the embodiment of social production relationships which stand above the individual. For this it is necessary that separate and random acts of exchange turn into a broad systematic circulation of commodities. At this stage of development, value is torn from arbitrary assessment, loses its character as a phenomenon of the individual psyche and assumes an objective economic significance. Similarly, real conditions are necessary for man to be transformed from a zoological being into an abstract and impersonal subject of law, into a juridic person. These real conditions consist in the condensation of social relations and the growing power of social, i.e. class organization, which achieves its maximum intensity in the "well organized" bourgeois state. Here, the ability to be a subject of rights is finally torn from the living

concrete personality, ceases to be a function of its active conscious will, and becomes a purely social quality. Legal capacity is abstracted from the ability to have rights. The legal subject receives his *alter ego* in the form of a representative while he himself assumes the significance of a mathematical point, a centre in which a certain sum of rights is concentrated.

Accordingly, bourgeois capitalist property ceases to be a weak, unstable and purely factual possession, which at any moment may be disputed and must be defended *vi et armis*. It turns into an absolute, immovable right which follows the object everywhere that chance carried it and which from the time that bourgeois civilization affirmed its authority over the whole globe, is protected in its every corner by laws, police, courts.<sup>31</sup>

At this stage of development the so-called will theory of subjective rights begins to seem incongruent with reality. It is now preferable to define a right in the subjective sense as "the sum of benefits which the general will recognizes as belonging to a specific person". Moreover, this latter does not require a person to have the ability to will and to act. Of course, Dernburg's definition is better suited to that view of the modern jurist, which must deal with the legal capacity and rights of idiots, infants, juridic persons etc. In its extreme conclusions the will theory was equated with the exclusion of these categories from the subjects of rights. Dernburg is certainly nearer the truth in understanding the subject of rights as a purely social phenomenon. But on the other hand it is very clear to us why the element of will played such an essential role in the construction of the concept of the subject. Dernburg himself sees this in part when he affirms that:

rights in the subjective sense existed long before a conscious state order was created; they were based upon the personality of the individual man and upon the respect which he could win and compel with respect to himself and his property. Only gradually, by abstraction from the concept of existing subjective rights, was the concept of the legal order formed. The view that rights, in the subjective sense, are merely the result of objective law is ahistorical and untrue.<sup>32</sup>

"To win and to compel" is obviously possible only for someone who enjoys both the will and also a significant amount of power. On the other hand, Dernburg forgets that the concept of the subject

arose and developed from its contrast with an object or thing. A commodity is an object; a man is a subject who disposes of the commodity in acts of acquisition and alienation. It is 'in the exchange transaction that the subject first appears in the full totality of its definitions. A formally and perfected concept of the subject, which would simply be left with legal capacity, further diverts us from the living real historical sense of this legal category. This is why it is difficult for jurists completely to surrender the active, volitional element in the concepts of the subject and subjective legal right.

The sphere of domination, which has assumed the form of a subjective right, is a social phenomenon which is attributed to the individual on the same basis as which value, also a social phenomenon, is attributed to an object, to a product of labour. Commodity fetishism is complemented by legal fetishism.

Thus, at a certain stage of development, the relationships between people in the process of production assume a doubly perplexing form. On the one hand, they appear as a relation of objects-commodities, and on the other as will relationships of individuals independent and equal to one another-legal subjects. Along with the mystical quality of value something appears no less perplexing-a legal right. Simultaneously a single whole relationship assumes two basic abstract aspects-economic and legal.

In the development of legal categories, the ability to execute exchange transactions is only one of the concrete phenomena of the general quality of the capacity to have legal rights and to conduct transactions. However, it is historically mainly the exchange transaction which furnished the idea of a subject as the abstract bearer of all possible legal claims. Only in the conditions of a commodity economy is the abstract form of a right created, i.e. the capacity to have a right in general is separated from specific legal claims. Only the constant transfer of rights taking place in the market creates the idea of their immobile bearer. The person receiving an obligation in the market undertakes an obligation himself at the same time. The position of a creditor is transferred to that of a debtor. Thus, the possibility is created of abstracting from the concrete differences between these subjects of legal rights, and of putting them under one generic concept.<sup>33</sup>

Similar to the way in which the exchange transactions of developed commodity production were preceded by random exchange

acts and such forms of exchange as mutual gifts, the legal subject with the sphere of legal domination expanding around him was morphologically preceded by the armed individual or, more often, group of people, clan, horde, tribe, capable in a dispute or a battle of defending that which was the condition of their existence. This close morphological tie dearly unites the court with the duel, and the parties and the proceedings with the parties in armed struggle. With the growth of social regulatory forces, the subject proportionally loses his material tangibility. His personal energy is replaced by social power, i.e. class power, organization, which finds its highest expression in the state. This impersonal and abstract subject corresponds, as his expression, to the impersonal abstract state authority which acts in ideal equilibrium and continuity in space and time.

But before enjoying the services of the state mechanism, the subject relies upon the organic continuity of relationships. Similar to the way in which the regular repetition of acts of exchange constitutes value, as a general category raised above subjective evaluations and random exchange ratios, likewise a regular repetition of one and the same relationship-custom-gives a new meaning to the subjective sphere of domination, justifying its existence by an external norm.

Custom or tradition, as a higher basis than the individual for legal claims, corresponds to the feudal system with its limitations and stagnation. Tradition or custom is in essence something included in notoriously rather narrow geographic boundaries. Therefore, every right is thought of merely as an attribute of a specific concrete subject or of a group of subjects. In the feudal world, "each right was a privilege" (Marx). Each city, each estate, each guild lived according to its law which followed a man wherever he was. The idea of a formal legal status, common to all citizens, general for all people, was absent in this period. Corresponding to this in the economic field were self-sufficient closed economies, prohibitions of import and export etc.

"The content of individuality was not one and the same. The estate, property position, profession, belief, age, sex and physical strength led to deep inequality in legal capacity."<sup>34</sup> Equality between subjects was assumed only for closed relationships in a definite narrow sphere; thus, members of one and the same estate were equal to one another in the sphere of estate rights, members of one and the

same guild were equal in the sphere of guild rights etc. At this stage the legal subject, as the general abstract bearer of all conceivable claims to rights, appears only in the role of the possessor of specific privileges.

At this stage "legal consciousness sees that the same or equal rights were attributed to individual persons or collectives, but it does not conclude that these persons and collectives were one and the same in their attribute of having rights."<sup>35</sup>

To the extent that in the Middle Ages the abstract concept of a legal subject was absent, so also the idea of an objective norm, directed to an imprecise and broad circle of persons, was mixed and merged in the establishment of concrete privileges and "liberties". As late as the thirteenth century we find traces of some clear impressions of the difference between objective law and subjective legal rights or powers. In certificates of privileges and dues, which were given to cities by emperors and princes, the mixture of these two concepts is encountered at each step. The usual form of establishing some general rules or norms was the recognition of a definite territorial unit, or of the population in a collective sense as having specific legal qualities. Such a character was borne by even the famous formula *Stadtluft macht frei*. The abolition of judicial battles was conducted in the same form; along with these decrees, and as something entirely of the same type were included the rights of city dwellers, for instance in the use of the prince's or emperor's forest.

The same mixture of objective and subjective elements was at first: observed in municipal law itself. Municipal statutes were in part provisions with a general character and in part a list of individual rights or privileges which were enjoyed by some group of citizens.

Only with the full development of bourgeois relationships did law obtain an abstract character. Each man became a man in general, all labour was equated with socially useful labour in general, every subject became an abstract legal subject. Simultaneously, the norm also assumed the logically perfected form of the abstract general law.

Thus, the legal subject is the abstract commodity owner elevated to the heavens. His will-will understood in a legal sense-has its real basis in the wish to alienate in acquisition and to acquire in alienation. For this desire to be realized it is necessary that the desires of commodity owners be directed to one another. Legally, this



relationship is expressed as a contract or an agreement of independent wills. Therefore, contract is one of the central concepts of law. In haughty language, it becomes a component part in the idea of law. In the logical system of legal concepts the contract is only one of the forms of transaction in general, i.e. one of the methods of concrete expression of the will with whose aid the subject acts upon the legal sphere around him. Historically and in reality, on the contrary, the concept of transaction grew from contract. Outside contract, the very concepts of subject and will exist only as lifeless abstractions in the legal sense. In contract these concepts obtain their full movement, and simultaneously the legal form, in its simplest purest aspect, receives its material basis in the act of exchange. The act of exchange thus concentrates, in its focus, all the essential elements of political economy and law. In exchange, in Marx's words, "a volitional or legal relation is produced by economic relationships themselves". Once it has arisen, the idea of contract strives to assume universal significance. Before possessors of commodities "recognized" each other as owners, they were of course already such but in a different, organic and extra-juridical sense. "Mutual recognition" signifies nothing other than an attempt to interpret, with the help of the abstract formula of contract, those organic forms of appropriation which depend on labour, conquest etc., which a society of commodity producers finds ready at its inception. By itself the relationship of man to an object is deprived of all legal significance. This is felt by jurists when they try to make sense of the institution of private property as a relation between subjects, i.e. between people. But they construe this purely formally and negatively, as a universal prohibition which excludes everyone except the owner from the use and disposition of the object; this conception, while suitable for the practical purposes of dogmatic jurisprudence, is most unsuitable for theoretical analysis. In its abstract prohibitions the concept of property loses all actual meaning, and renounces its own pre-legal history.

But if the organic, "natural" relation of a man to an object, i.e. its appropriation, genetically constitutes the starting point of development, then the transformation of this relationship into a legal one took place under the influence of those requirements which were invoked by the circulation of boons, i.e. primarily purchases and sales. Hauriou calls attention to the fact that even maritime exchange

and caravan exchange did not initially create a requirement for the guarantee of property. The distance which separated those engaging in exchange gave a better guarantee against any claims whatsoever. The formation of a stable market invoked the necessity of regulating the question of the right to dispose of commodities, and accordingly, of the right of ownership.<sup>36</sup> The title of ownership in ancient Roman law, *mancipatio per aes et libram*, shows that it was born simultaneously with the phenomenon of internal exchange. Likewise, transfer by inheritance began to be fixed as a title of ownership only from the times when civil transactions showed an interest in this transmission.<sup>37</sup>

In exchange, speaking in Marx's words, "one commodity possessor only by the will of another ... may acquire for himself another's commodities, alienating them as his own", It is precisely this thought which representatives of the natural law school also strive to express, trying to base property on some initial contract. They were right, of course, not in the sense that such a contract ever occurred historically, but in that natural or organic forms of appropriation obtain a legal character and begin to display their legal "intelligence" in mutual acts of appropriation and alienation. Here it is necessary to look for explanations of the contradiction between feudal and bourgeois property. The greatest shortcoming of feudal property in the eyes of the bourgeois world, lies not in its origin (conquest, force) but in its immobility, in the fact that it is incapable of becoming an object of mutual guarantees, moving from one hand to another in acts of alienation and appropriation. Feudal or estate property violates the basic principle of bourgeois society- "the equal possibility of obtaining inequality". Hauriou, one of the keenest bourgeois jurists, correctly emphasizes mutuality as the most effective guarantee of property, and thus achievable with the least amount of external compulsion. Thus mutuality, insured by the laws of the market, assumes its own nature as an "eternal" institution. In contrast to this, a purely political guarantee, given by the apparatus of state compulsion, is simply for the defence of the specific proprietary group, i.e. it is an element which has no principled significance. Class struggle frequently led in history to a new distribution of property, to the expropriation of money lenders and owners of latifundia. But these upheavals, however unpleasant they were for the classes and groups that suffered, did not disturb the

basic foundations of private property-the economic fact of economic transactions by exchange. Those people who rose up against property, on the next day had to affirm it, meeting in the market place as independent producers. This is the path of all nonproletarian revolutions. Such is the logical conclusion from the ideal of anarchists who, discarding the external signs of bourgeois law-state compulsion and statutes-maintain its internal essence: free contract between independent producers.<sup>38</sup>

Thus, only the development of the market initially makes possible and necessary the transformation of man, who appropriates objects by means of labour (or theft), into a legal owner.

Karner offers another conception of property. According to his definition:

*de jure* property is nothing other than that the power of person A over object N, the simple relation of the individual to an object of nature, which involves no *other individual* (our italics, E. P.) and no other object; an object is a private object, the individual a private person; the right a private right. This is the way the matter is in fact in the period of simple commodity production.<sup>39</sup>

This whole citation is one broad misunderstanding. Karner reproduces here his favourite Robinson Crusoe world. But how meaningfully can the two Robinson Crusoes, neither of whom knows of the existence of the other, imagine legally their relationship to objects when that relationship is fully exhausted by the factual relation? This right of an isolated man deserves to be placed next to the famous value "of a glass of water in the desert". Both exchange-value and the law of property are generated by one and the same phenomenon: the circulation of products which have become commodities. Property in the legal sense appeared not because people decided to assign this legal quality, but because they could exchange commodities only having donned the personality of an owner. "Unlimited authority over a thing" is merely a reflection of the unlimited circulation of commodities.

Karner states "an owner decides to cultivate a legal relationship of property by way of alienation".<sup>40</sup> Does Karner not think that "the legal" begins from this "cultivation", and until its acquisition does not go beyond the bounds of the natural or organic?

Karner agrees that "purchase, sale, loan and rental existed earlier but with a minimal objective and subjective sphere of action". Yet these legal forms of the circulation of economic boons existed so much earlier that we find a clear formulation of the relationships of rental, loan and deposit before the very formula of property was developed. This alone already provides the key to the proper understanding of the legal nature of property.

On the contrary, it seems to Karner that people were independent owners before they pledged, bought and sold objects. These relationships seem to him merely "auxiliary and secondary institutions filling the gaps of petit bourgeois property". In other words, he proceeds from the idea of entirely isolated individuals who (it is unclear for what purpose) decided to create a "general will", and in the name of this general will to order each one to refrain from infringements upon an object belonging to another. Then considering that the owner could not be treated as a universalist, either in terms of his labour power or as a consumer, these isolated Robinson Crusoes decide to supplement ownership with the institutions of purchase and sale, loans, rental etc. This artificial scheme puts the true development of objects and concepts on its head.

The bond between a man and an object which he produced or won himself, or which figuratively (as arms, or decoration) constitutes part of his personality, undoubtedly emerges historically as one of the elements in the development of the institution of private property. It represents its initial crude and limited form. Private property obtains its perfected and universal character only with the transformation to a commodity or, rather, to a commodity-capitalist economy. It becomes indifferent to the object and severs all connection with any organic union of people (kinship-group, family, commune). It appears in the most general meaning as "an external sphere of freedom" (Hegel), i.e. as the practical realization of the abstract ability to be the subject of rights.

In this purely legal form, property has logically little in common with the organic or everyday principle of private appropriation, either as a result of personal efforts or as a condition of personal consumption and use. To the extent that the bond between man and the product of his labour, or, for instance, between man

and a parcel of land which he has cultivated with his personal labour, is in itself something elementary, accessible to the most primitive thinking;<sup>41</sup> to that extent the relationship of the owner to property is abstract, formal, artificial and rational from the time when all economic reality began to be reduced to the sphere of the market. If, morphologically, these two institutions-private appropriation, as the condition of unimpeded personal use, and private appropriation as the condition of subsequent alienation and acts of exchange-have a direct connection with one another, nevertheless logically these are two separate categories, and the word property which covers them both introduces more confusion than clarity. Capitalist ownership of land does not assume any organic connection between the land and its owner; on the contrary, it is possible only on the condition of full freedom of transfer of land from hand to hand, and freedom of transactions with land.

Capitalist property is essentially the freedom to transform capital from one form to another, and to move it from one sphere to another to receive the maximum unearned income. This freedom to dispose capitalist property is impossible with the presence of individuals deprived of property, i.e. of proletarians. The legal form of property does not contradict the fact of expropriation of property from a significant number of citizens. For the quality of being a subject of rights is a purely formal quality. It qualifies all persons as equally worthy of property, but by no means makes them property owners. The dialectic of capitalist property is marvellously depicted in Marx's *Capital*, both where it penetrates the "immobile" forms of law, and where it disrupts them by direct coercion (the period of primitive accumulation). In this sense Karner's study provides very little new in comparison with the first volume of *Capital*. When Karner tries to be independent he introduces confusion. We already noted this with respect to his attempts to abstract property from the element which legally constitutes it, i.e. from exchange. This purely formal concept entails another mistake. Having considered the transfer from petit bourgeois property to capitalist property, Karner states: "The institution of property achieved broad development, experienced full transformation, without having changed its legal nature", and in the same place he concludes "the social function of legal institutions changes but their legal nature does not change".<sup>42</sup> It may be asked: what institution does Karner have in mind? If he is

discussing the abstract formula of Roman law then of course nothing in it can change. But this formula regulated small-scale ownership only in the period of the development of bourgeois-capitalist relationships. If we turn to guild crafts or to peasant economy in the age of the attachment of peasants to land, then we find a whole series of norms limiting the right to property. Of course it may be objected that all these limitations have a public law character and do not affect the institution of property as such. But even in this instance the whole situation is that a certain abstract formula is equivalent to itself. On the other hand the feudal guilds, i.e. organic forms of property, had already revealed their functions the extraction of another's unpaid labour.<sup>43</sup> We can therefore come to a conclusion opposite to Karner, that "norms change and their social function remains unchanged".

In proportion to the development of the capitalist mode of production the owner is gradually freed from technical production functions, but at the same time he loses the totality of legal domination over capital. In a stock corporation the individual capitalist is merely the bearer of title to a certain share of the unearned income. His economic and legal activity, as owner, is limited exclusively to the sphere of non-productive consumption. The basic mass of capital becomes a fully impersonal class force. To the extent that they participate in market circulation, which supposes the autonomy of its separate parts, these parts appear as the property of legal persons. In fact the comparatively small circle of the largest capitalists can dispose of it acting through their hired representatives or agents. The legally distinct form of private property does not now reflect the actual position of objects, for with the assistance of methods of participation and control actual domination goes far beyond purely legal bounds. Here we come to the moment when capitalist society is already sufficiently mature to transform into its antithesis. The necessary political prerequisite for this is the class revolution of the proletariat.

However, as experience has shown, planned and organized production and distribution may not replace market circulation, and the market bond between individual economies on the day after the revolution. If this were possible, then the legal form of property would at that moment be historically finally exhausted. It would have completed the cycle of its development having returned to the

starting point, to objects of direct individual use, i.e. have become again an elementary living relationship. And with it the form of law in general would be condemned to death.<sup>44</sup> Until the task of the construction of a single planned economy is realized, so long as the market bond between individual enterprises and groups of enterprises remains, the form of law will also remain in force this long. We are not now speaking of the fact that the form of private property remains almost unchanged in the transitional period in the context of the means and instruments of production of the small-scale peasantry and crafts economy. But in the relationships of large nationalized industry, the application of the principle of economic accountability signifies the formation of autonomous units whose connection with other economies is established through the market.

To the extent that state enterprises are subordinated to the conditions of circulation, so the bond between them is shaped not in the form of technical subordination, but in the form of exchange. Thus, a purely legal, i.e. judicial procedure, for regulating relationships becomes possible and necessary; however, along with this there has been preserved, and with the passage of time undoubtedly will be strengthened, direct, i.e. administrative-technical management by the procedure of subordination to the general economic plan. Thus, on the one hand we have economic life flowing into natural categories, and the social bonds between production units represented in its rational, unmasked (non-commodity) form-to this corresponds the method of direct, i.e. technical-content instructions in the form of programmes, production and distribution plans etc., specific instructions constantly changing depending upon the change in conditions. On the other hand, we have the bond between economic units expressed in the form of the value of circulating commodities, and therefore in the legal form of exchange. To this, in its turn, corresponds the creation of more or less firm and constant formal boundaries and the rules of the legal relationships between autonomous subjects (civil and possibly also commercial codes), and of agencies implementing this commerce in practice by means of decisions of disputes (courts, arbitration commissions etc.). It is obvious that the first tendency does not include any possibility for the legal art to flourish. Its gradual victory will mean the gradual withering away of the legal form in general. It is possible, of course, to object that the production programme, for example, is also a

public legal norm since it proceeds from state authority, enjoys coercive force, creates rights and duties etc. Of course, until the time when the new society will be built from the elements of the old, i.e. by people who understand social relationships only as "a means for their private purposes", even the simple technically rational instructions will adopt the form of a power alienated from man and standing above him. Political man will still be, expressed in Marx's words, "an abstract artificial man". But the more radically the former relationships, and the earlier psychology in this sphere of production, are outgrown, the faster the hour of that final emancipation will strike, which Marx discusses in his article "On the Jewish Question".

Only when the real individual man will perceive in himself the abstract citizen, and as individual man shall become a universal being in his empirical life, in his individual work, in his individual relations, then when man recognizes and organizes *his forces propres* (personal efforts) as social forces, and therefore, when he no longer separates social forces in the form of political force from himself, only then *will* human emancipation be completed.<sup>45</sup>

Such are the perspectives of the unbounded future. With respect to our transitional period, the following should be noted. If, in the age of domination of impersonal finance capital, the real opposition of the interests of individual capitalist groups (disposing of their own and other's capital) continue to be preserved, nevertheless proletarian state capitalism eliminates the real opposition of interests with nationalized industry and preserves the separation of autonomy of individual economic organizations (similar to private business) only as a *method*. Thus, those quasi-private economic relationships which are formed between state and industry and the small labour economy, and also between individual enterprises and combinations of enterprises within state industry itself, are placed in strict bounds, which at any specific moment are defined by the successes achieved in the sphere of planned construction. Therefore during our transitional period the form of law as such does not conceal those unlimited possibilities which were opened up for it by bourgeois capitalist society at the dawn of its birth. On the contrary, it temporarily binds us to its narrow horizons. It exists only so as finally to exhaust itself



The task of Marxist theory consists in verifying this general conclusion, and researching it in concrete historical material. Development may not proceed equally in various areas of social life. Therefore, painstaking work of observation, comparison and analysis is necessary. But only then, when we study the tempo and forms of outmoded value relationships in economics and, together with it, the withering away of private law elements and the legal superstructure, and finally the gradual expulsion of the legal superstructure itself, only then can we say to ourselves that we have explained at least one aspect of the process of creating the classless culture of the future.

## CHAPTER V

### Law and the State

Legal relations by their "nature" do not assume a condition of peace just as exchange initially did not exclude armed robbery, but went hand in hand with it. Law and violence—apparently opposed concepts—in fact are connected with one another in the closest manner. This is true not only for the ancient ages of Roman law, but also for the later eras. Modern international law includes a very solid dose of self-help, repression, reprisals, war etc.). Even within the limits of the "developed" bourgeois state the realization of a right is conducted in the opinion of such a capable jurist as Hauriou, by each citizen "at his responsibility and risk". Marx expressed himself even more sharply: "club law is nevertheless law". In this there is nothing paradoxical because law, like exchange, is a method of relating atomized social elements. The degree of this separation may historically be more or less, but it is never equal to zero. Thus, for instance, the enterprises belonging to the Soviet state in fact fulfil one general task; but working by the methods of the market they each have their own distinct interest, oppose one another as buyers and sellers, act at their responsibility and risk, and therefore necessarily must be in a *legal relationship*. The final victory of the planned economy will place them exclusively in a technical-expediency relationship with one another which will destroy their "legal personality". Accordingly, if the legal relationship is depicted to us as an organized and ordered relationship—thus equating law with the legal order—then in so

doing it is forgotten that in fact the legal order is merely a tendency and a final result (and moreover far from perfected), but never the starting point and assumption of a legal relationship. The very condition of peace which appears universal and homogeneous to abstract legal thinking was far from this at the initial stages of legal development. Ancient German law knew various degrees of peace: peace under the roof of a house, peace within the boundaries of a fence, and the limits of a settlement etc. A greater or lesser degree of pacification found its expression in a greater or lesser harshness of punishment provided for the violation of peace.

A condition of peace becomes necessary where exchange assumes the nature of a regular phenomenon. In those cases when there were too few prerequisites for the preservation of peace, the parties engaging in exchange preferred not to meet with one another but to view the commodities in each other's absence. But, in general, exchange requires that not only commodities but also people meet. In the age of clan life, every outsider was considered as an enemy and was as defenceless as a wild beast. Only the custom of hospitality made possible relationships with other tribes. In feudal Europe the Church tried to limit the uninterrupted private wars, by proclaiming a so-called peace of god (for specific times). At the same time fairs and local markets began to enjoy special privileges in this respect. Tradesmen going to the market received special safe passage, their property was guaranteed from arbitrary appropriation; at the same time the performance of contracts was safeguarded by special judges. Thus, a special *ius mercatorum* or *ius fori* was created which then lay at the basis of city law.

Initially, the markets and fairs constituted a part of feudal holdings and were simply profitable, productive items. The gift of the peace of a fair somewhere had the purpose of filling the treasury of some feudal owner and accordingly was intended to effect the private interest of the latter. However, because feudal authority acted as the guarantor of the peace necessary for exchange transactions, it took on a new trait previously uncharacteristic of it, that of a public *nature*. The authority of a feudal or patriarch type knows borders between the private and the public. The public laws of the feudal lord, with respect to the villain were at the same time his rights as a private owner. On the contrary, his private rights could be interpreted upon desire as political, i.e. public rights. Thus, the *ius civile* of ancient

Rome was interpreted by many, for instance Gumplowicz, as public law since its basic source belonged to a clan organization. In fact, in this case we encounter a legal form being born which still had not developed the internally opposed and correlated definitions of private and public. Authority therefore, bearing the traces of patriarchal or feudal relationships, is characterized at the same time by the predomination of the technical element over the legal. The legal, i.e. rational interpretation of the phenomenon of authority, becomes possible only with the development of exchange and the money economy. These economic forms bring with them an antagonism which with time takes on the nature of something eternal and natural and becomes the basis of every legal teaching about authority.

The "modern" state (in the bourgeois sense) is born at that moment when the group or class organization of authority includes in its bounds a sufficiently broad market relationship. Thus in Rome exchange with foreigners, travellers and others required the recognition of civil legal capacity for persons not belonging to the kin-group union. This already supposed the differentiation between public and private law.

Factual exercise of authority obtains a clear legal nature of public authority when along with it, and independent of it, appear relationships connected with exchange acts, i.e. private relationships *par excellence*. Acting as a guarantor of these relationships, authority becomes social, public authority, authority pursuing the impersonal interest or order.

The state as an organization of class domination, and as an organization for the conduct of external wars, does not require legal interpretation and in essence does not allow it. This is where so-called *raison d'etat* (the principle of naked expediency) rules. On the contrary, authority as the guarantor of market exchange not only may be expressed in terms of law, but itself appears as law and only law, and is merged entirely with the abstract objective norm. Therefore, every juridic theory of the state which wishes to embrace all the functions of the latter, necessarily appears inadequate. It may be a true reflection of all facts of state life, but gives only an ideological, i.e. distorted reflection of reality.

Class domination, both in its organized and unorganized form, is much broader than the area which can be designated as the official authority of state power. The domination of the bourgeoisie is

expressed in the dependence of the government upon the banks and capitalist groupings, in the dependence of each individual worker upon his employer, and in the fact that the staff of the state apparatus is personally connected with the ruling class. All these facts, and the number of them may be multiplied without limit, do not have any official legal expression. But in a mysterious manner they correspond in their significance with the facts which find their official legal expression, and represent themselves as the subordination of the same workers to the laws of the bourgeois state, to the orders and decrees of its agencies, to the verdicts of its courts etc. Along with the direct and indirect class denomination, there grows an indirect reflected denomination in the form of official state authority as a special force separated from society. With this the problem of the state arises, which presents no fewer difficulties for analysis than the problem of commodities.

Engels considers the state as an expression of the fact that society is hopelessly enmeshed in class contradictions; "so that these opposed classes with antagonistic economic interests", he says, "did not devour one another and society in hopeless struggle, for this a power became necessary, a power seemingly standing above society, a power which moderated the conflict, and held it within the limits of 'order'. And this power arising from society but placing itself above it, and more and more alienating itself from it, is the state."<sup>46</sup> In this explanation there is one passage which is not entirely clear, and it is revealed later when Engels speaks of the fact that state power naturally evolves in the hands of the strongest class, "which, with the help of the state, becomes the politically dominant class". This phrase provides a reason for thinking that state power is generated not as class power, but as something standing above classes and saving society from dissolution, and that only after its emergence does state power become the object of usurpation. Of course, such an understanding would contradict the historical facts; we know that political apparatuses were created everywhere by the forces of the ruling class, and were the work of that class. We think that Engels himself also proposed such an interpretation, but however that may be his formula has remained unclear. The state arises because otherwise the classes would have mutually exterminated themselves in an intensified struggle, and thus society itself would have perished. Accordingly, the state arises when none of the struggling classes

can seize decisive victory. This means one of two things: either the state strengthens this relationship-then it is the force above classes, and this we cannot recognize-or it is a result of the victory of one class, but in this case the necessity for a state disappears from society since, with the decisive victory of a class, equilibrium is established and 'society is saved. Behind all these controversies one basic question is hidden: why does the dominance of a class not become that which it is, i.e. the actual subordination of one part of the population to another, but instead assumes the form of official state authority? Or, what is the same, why is the apparatus of state coercion created not as a private apparatus of the ruling class, but distinct from the latter in the form of an impersonal apparatus of public power distinct from society?<sup>47</sup> We cannot limit ourselves to a reference to the fact that for the ruling class it *is expedient* to employ an ideological mask and hide its class domination behind the screen of the state. Although this reference is entirely indisputable, nevertheless it does not explain why this ideology may be created, and, accordingly why a ruling class may use it. The conscious use of ideological forms is not the same as their origin, which usually does not depend upon the will of people. But if we wish to explain the roots of some ideology we must search out those actual relationships which it expresses. Here, incidently, we strike upon the fundamental difference between the theological and legal interpretation of state authority. To the extent that in the first instance-the deification of authority-we are dealing with unbridled fetishism and, accordingly, with corresponding impressions and concepts, we do not succeed in revealing anything other than the ideological duplication of reality, i.e. of those actual relationships of authority and subordination. To such an extent the legal conception is merely a biased conception, and its abstractions express one of the aspects of actually existing society, i.e. of commodity-producing society.

Opinion holds that the basis of the competition dominant in the bourgeois-capitalist world does not provide the possibility of connecting political power with the individual enterprise in the way that under feudalism this power was connected with large landholdings. "The freedom of competition, the freedom of private property, 'equality' in the market and the guarantee of existence for one class, create a new form of state power-democracy, which places in power the class as a collective."<sup>48</sup> Although it is most true that

I "equality" in the market creates a specific form of authority, however, this connection between these phenomena is not entirely how Comrade Podvolotsky sees it. First, authority may be unconnected with an individual enterprise but nevertheless remain the private affair of capitalist organizations. Associations of industrialists, with their war coffers, blacklists, boycotts and strike-breaking patrols, are undoubtedly agencies of authority existing along with the public, i.e. state authority. Second, authority within the enterprise remains the private affair of each individual capitalist. The establishment of the rules of internal order is an act of private legislation, i.e. a true piece of feudalism, however bourgeois jurists may have tried to clothe it in modern dress. Introducing the fiction of the so-called contract of adhesion (contrat d'adhesion for the extraordinary authorization which the capitalist owner receives, reportedly, from the agencies of public authority for the "successful fulfilment of the functions of the enterprise necessary and expedient from this social point of view".

However, the analogy with feudal relationships is not unconditionally exact here, for as Marx indicates:

the authority which the capitalist enjoys as the personification of capital in the direct process of production, and the social function with which he is invested as manager and master of production, are essentially different from the authority which emerges on the basis of slave, serf, etc. production. On the basis of capitalist production the mass of direct producers is confronted by the social nature of their production in the form of the strictest regulating authority, as the social mechanism of their labour process developed in a complete hierarchy; however, the bearers of this authority use it only as personification of the conditions of labour, in contrast to labour itself, and not as political or theocratic masters as happened in earlier forms of production.<sup>49</sup>

Thus, under the capitalist means of production, relationships of subordination and authority may exist unalienated from the concrete form in which they appear as the domination of the conditions of production over the producers. But the very fact that they do not act in masked form, as under slavery and serfdom, makes them elusive for the jurists.

The state apparatus actually realizes itself as an impersonal "general will", as "the authority of law" etc., to the extent that society appears as a market. In the market each seller and buyer is, as we saw,

a legal subject *par excellence*. For the categories of value and exchange-value to appear on the stage, the prerequisite is the autonomous will of those engaging in exchange. Exchange-value would cease to be exchange-value, and a commodity would cease to be a commodity, if the exchange ratio is determined by an authority situated above the inherent laws of the market. Coercion, as the command of one person directed to another and supported by force, contradicts the basic assumption of exchange between commodity owners. Therefore, in a society of commodity owners the function of coercion may not appear as a social function, because it is neither abstract nor impersonal. Subordination to the person as such, to man as a concrete individual, signifies for commodity-producing society subordination to arbitrary power, because it corresponds to the subordination of one commodity owner by another. Even coercion, therefore, cannot appear here in its unmasked form as an act of expediency. It must appear as coercion proceeding from some abstract, general person, as coercion exercised not in the interest of the individual from whom it proceeds—for each person in commodity society is an egoist—but in the interest of all the participants in legal transactions. The authority of one person over another is exercised as the authority of law itself, i.e. as the authority of an objective impartial norm.

Bourgeois thought, for which the framework of commodity production is the eternal and natural framework of all societies, therefore declares abstract state authority to be an attribute of every society.

This was more naively expressed by the theorists of natural law, who, basing their teaching on authority in the idea of intercourse between independent and equal personalities, proposed that it proceeds from the principles of social intercourse as such. In fact, they merely developed the different ways in which the idea of authority bound independent commodity owners to each other. This explains the basic features of the doctrine which appears clearly in Grotius. In the market the primary factors are commodity owners participating in exchange. The system of domination is something derivative, secondary, something imposed externally on the existing commodity owners. Therefore, the theorists of natural law consider authority not as a phenomenon which has arisen historically and which is connected with the forces active

in a given society, but as abstract and rational. In the exchange between commodity owners the necessity for authoritative coercion arises when the peace has been broken, or when a contract has not been performed voluntarily. Natural law doctrine therefore reduces the functions of authority to the maintenance of the peace, and declares the exclusive purpose of a state to be an instrument of the law. Finally, in the market place a man is a commodity owner by the will of other men, and all are commodity owners by their common will. The theory of natural law thus derives the state from the contract between individual and isolated personalities. This is the skeleton of the doctrine which admits many concrete variations, depending on the historical situation, political sympathies and dialectical abilities of one author or another. This theory admits republican and monarchical tendencies and diverse degrees of democratism and revolutionism.

In general and in its entirety, however, this theory was the revolutionary banner under which the bourgeoisie conducted its revolutionary battle with feudal society. And this determined the fate of the theory. From the time when the bourgeoisie became the ruling class the revolutionary past of natural law began to be troublesome for it, and as quickly as possible the ruling theories hastened to relegate the past to the archives of history. It goes without saying that the theory of natural law cannot stand the least historical or sociological criticism, for it gives an entirely inadequate picture of reality. But the main curiosity consists in the fact that the juridic theory of the state, which took its place in the name of positivism, distorts reality to no less a degree. It is forced to do this for every *juridic* theory of the state must necessarily proceed from the state as an independent force distinct from society. This is in what *its juridic* nature consists.

Therefore, although in fact the activity of the state organization occurs in the form of orders and decrees proceeding from individual persons, the juridic theory presumes in the first place that the state, not persons, gives orders and, second, that its orders are subordinates to general norms of law which also express the will of the state.

On this point natural law doctrine does not differ by one iota in its fiction than any of the most positivist of the juridic theories of the state. For the doctrine of natural law the basic argument was that along with all the types of real dependency of one man upon another



(this doctrine was exempt from such dependence), there was still one further type of dependence upon the impersonal general will, namely, the will of the state.

But it is just this construction which constitutes the basis of the juridic theory of the state as a person. The natural law elements in the juridic theories of the state lie much deeper than it seemed to the critics of natural law doctrine. They are rooted in the very concept of public authority, i.e. of authority placed above *all* and addressed to *all*. Adjusting itself to this concept, the juridic theory inevitably loses its connection with reality. The difference between the doctrine of natural law and the most recent legal positivism is merely that the former much more clearly felt the logical bond between abstract state authority and the abstract subject. It took these mystified relationships of a commodity-producing society, in their necessary context, and therefore produced a model of the classical clarity of constructs. On the contrary, so-called legal positivism does not even take account of its own logical premises.

The *Rechtsstaat* is a mirage, but a very useful mirage for the bourgeoisie because it replaces the disappearing religious ideology. It hides from the masses the fact of the rule of the bourgeoisie. The ideology of the *Rechtsstaat* is also more useful than religious ideology because, not reflecting the totality of objective reality, it nevertheless depends on it. Authority as "the general will", as "the authority of law", is realized in bourgeois society to the extent that the latter is a market. From this point of view even a police statute may appear to us as embodying Kant's ideas on a freedom which is limited by the freedom of another.

Free and equal commodity owners meeting in the market are free and equal only in the abstract relationship between buyer and seller. In actual life they are tied to each other by many relationships of dependence. These are the shopkeepers and the large wholesaler, the peasant and the estate owner, the ruined debtor and his creditor, the proletarian and the capitalist. These countless relations of real dependence constitute the true basis of state organization. However, for the juridic theory of the state it is as if they do not exist. Further, the life of the state is based upon the struggle between various political forces, i.e. of classes, parties and all possible groupings; here are hidden the real mainsprings of the state machinery; for juridic theory they are equally- inaccessible. Of course, a jurist may show a

greater or lesser flexibility in his adaptation to the facts, for example by taking into account written law in addition to those unwritten rules which have been formed in state practice, but this does not change his fundamental position in relation to reality. There is an inevitable divergence between legal proof and that proof which constitutes the goal of historical and social research. It is not merely that the dynamics of social life overturn the rigid legal form, and that therefore the jurist is condemned to be somewhat late in his analysis; even limiting himself to the very day of a fact, the jurist communicates his analysis differently than the sociologist. For the jurist, remaining a jurist, proceeds from the concept of the state as an independent force distinct from all other individual and social forces. From the historical and political points of view the decisions of an influential class, or party organization, have the same and sometimes even greater significance than the decisions of parliament or some other state institution. From the legal point of view, facts of the first type are seemingly non-existent. Conversely, in any decree of parliament, once the legal point of view is abandoned, it is possible to see not an act of the state, but a decision adopted by a particular group, a clique of persons moved by the same individual egoistic or class motives as any other collective. The extreme normativist Kelsen concludes from this that the state in general exists only as an imaginary object—a closed system of norms or obligations. But of course, such barrenness in the subject of the theory of state law must deter practising lawyers. For if not by intelligence, then by instinct, they feel the undoubted practical significance of their concepts in this sinful world and not merely in the kingdom of pure logic. The "state" of jurists, despite all this "ideologizing", relates to some objective reality much as the most fantastic dream nevertheless depends on reality.

This reality is pre-eminently the state apparatus itself, with its material and personal elements. Before creating completed theories, the bourgeoisie began to construct the state in practice. In Western Europe this process began in city communes. At a time when the feudal world knew no difference between the assets of the feudal lord and the assets of the political union, the public city treasury first appeared in cities, originally as a sporadic and then as a permanent institution; "the spirit of statism" received, so to speak, its material foundation.

The appearance of state forms makes possible the appearance of people who live off these forms, officials and bureaucrats. In the feudal age the functions of administration and the court were fulfilled by the servants of the feudal lord. In the city communes they appeared for the first time in public offices; in the full sense of the word, the public nature of authority found its material embodiment. The absolute monarchy had merely to adopt the public form which had taken shape in the cities and to realize it within a broader territory. All further improvements to the bourgeois state--which proceeded both by revolutionary explosions and by peaceful adaptation to monarchic-feudal elements--can be summed up in one principle: neither of two persons exchanging 'in the market may appear as an authoritative regulator of the exchange relationship; for this, some third person is required who embodies the mutual guarantee which the commodity owners as owners give to one another, and who is accordingly the personified rule of exchange between commodity owners.

The bourgeoisie put this juridic concept of the state at the basis of its theory, and attempted to realize it in practice. It certainly did the latter, guided by this elementary principle.<sup>50</sup>

For the sake of theoretical purity the bourgeoisie never forgot the other side of the matter, namely that class society is not only a market where independent commodity owners meet, but also an arena of intensified class war in which the state apparatus is one of the most powerful weapons. And in this arena the relationships formed are far from being in the spirit of the Kantian definition of law as the limitation of the freedom of the individual and the minimum limit necessary for common life. Here Gumplowicz is profoundly right when he asserts that "law of this type never existed, for the amount of freedom is determined only by the amount of authority of another, the norm of common existence is dictated not by the possibility of common existence but by the possibility of authority". The state as an element of force in internal and external policy--this is the correction which the bourgeoisie had to make in its theory and practice of the *Rechtsstaat*. The more unstable the authority of the bourgeoisie became, the more compromising its corrections became, the more the *Rechtsstaat* turned into an incorporeal shadow, until finally the extreme intensification of the class struggle forced the bourgeoisie completely to discard the mask of the

*Rechtsstaat* and to reveal the essence of authority as the organized force of one class against another.

## CHAPTER VI

### **Law and Morality**

People must relate to each other as independent and equal personalities in order for the products of human labour to be related to each other as values.

If one person is under the domination of another, i.e. is a slave, his labour ceases to be the creator and substance of value. The labour power of a slave, like the labour power of a domestic animal, merely transforms a definite part of the cost of its production, and reproduction, into a product.

On this basis Tugan-Baranovsky concludes that political economy can be understood by starting from the guiding ethical idea of absolute value and, therefore, of equivalence between human personalities. Marx, of course, arrives at the opposite conclusion, in that he connects the ethical idea of the equal value of human personalities with the form of a commodity, i.e. he derives it from the practical equivalence of all forms of human labour.

In fact, man as a moral subject, i.e. as an equal personality, is nothing more than a prerequisite of exchange according to the law of value. Man as the subject of rights is such a prerequisite, i.e. as a property owner. Finally, both these definitions are closely connected with a third-man as an egoistic economic subject.

All three definitions are not reducible to each other, and are even contradictory as it were. They reflect the totality of conditions necessary for the realization of the value relationship, i.e. a relationship in which the bonds between people in the labour process appear as the material nature of the products being exchanged.

If one abstracts these definitions from the real social relationships which they reflect, and attempts to develop them as independent categories, i.e. by pure reason, then as a result one obtains a tangle of contradictions and propositions which are mutually exclusive. But in the real relationship of exchange these contradictions are dialectically united in a totality.

The party to the exchange must be an egoist, i.e. be guided by naked economic calculation, otherwise the value relationship cannot appear as a socially necessary relationship. The exchanging party must be the bearer of a right, i.e. have the possibility of making an autonomous decision, for his will must "be embedded in objects". Finally, the exchanging party must embody the basic principle of the equality of all human personalities, because in exchange all types of labour are equalized and are reduced to abstract human labour.

Thus, these three elements (or, as it was earlier preferable to term them, three bases): egoism, freedom and the supreme value of the personality, are inextricably bound up with each other, appearing as a totality to be the rational expression of one and the same social relationship. The egoistic subject, the subject of a right and the moral personality are the three basic masks under which man appears in commodity production. The key to the understanding of legal and moral structures is provided by the economics of value relationships, not only in the sense of their real content but also in the sense of their form itself. The idea of the principle of value and the equality of the human personality has a long history: through Stoic philosophy it entered into the use of Roman jurists and into the teaching of the Christian Church, and then into the doctrine of natural law. But whatever clothed this idea one could discover nothing in it other than an expression of the fact that the different concrete types of socially useful labour were reduced to labour in general, insofar as the products of labour began to be exchanged as commodities. In all other relationships, social inequality (sexual, class etc.) is so conspicuous in history that one must wonder not at the abundance of arguments against the doctrine of the natural law of social equality, but that until Marx no one posed the question of the historical origins of this prejudice against natural law. If in the course of centuries human thought returned with such emphasis to the thesis of social equality, and developed it in a thousand ways, then it is clear that some objective relationship must be hidden behind this thesis. There is no doubt that the concept of the moral or equal personality is an ideological formation, and as such does not adequately describe reality. The egoistic, economic subject is no less an ideological distortion of reality. Nevertheless, both these definitions are adequate for only one specific social relationship, and reflect it only abstractly and therefore one-sidedly. We have already had occasion

to declare that the concept or word "ideology" must not restrain us from further analysis. To be satisfied with the fact that one man is equal to another is the offspring of an ideology intended to oversimplify the problem. "Down" and "up" are nothing more than concepts expressing our "earthly" ideology. However, the earth's gravity is their factual basis. When man understood the real reason which made him distinguish "down from up"-i.e. the force of gravity directed toward the centre of the earth-then he reached the limits of these definitions, and their inadequacy as applied to all cosmic reality. Thus, the discovery that these concepts were ideological was another aspect of the process of discovering that they were true.

If moral personality is nothing other than the subject of commodity production, then moral law must reveal itself as the rule of exchange between commodity owners. This inevitably produces a duality. On the one hand, this law must have a social character and, as such, stand above the individual personality. On the other hand, the commodity owner is inherently the bearer of freedom (freedom to appropriate and alienate), therefore the rule governing exchange between commodity owners must be stated in the spirit of each of them, and each must internalize this law. The Kantian categorical imperative synthesizes these contradictory requirements. It is above the individual because it has nothing in common with any natural desires-fear, sympathy, pity, feeling of solidarity etc. In Kant's terms, it does not frighten, does not convince, does not flatter. It is generally external to all empirical, i.e. purely human motives. At the same time it seems to be independent of all external pressures in the direct and crude sense of the word. It acts exclusively by virtue of realizing its universality. Kantian ethics are the typical ethics of a commodity-producing society, but at the same time they are a pure and perfected form of ethics in general. Kant gave a logically complete tenor to the form which atomized bourgeois society tried to embody in practice, liberating personality from the organic ties of the patriarchal and feudal periods.

The basic concepts of morality are meaningless if we abstract them from commodity production and try to apply them to some other social structure. The categorical imperative is not a social instinct. The basic purpose of the imperative is to act where no natural or organic supra-individual motivation is possible. When individuals

have close emotional ties which erase the boundary of the I, then the phenomenon of moral obligation may not occur. To understand this latter category it is necessary to proceed not from the organic connection which exists, for instance, between the cow and the calf, or between the tribe and each of its members, but from the condition of alienation. Moral existence is a necessary supplement to juridic life-both are methods of exchange between commodity producers. All the pathos of the Kantian categorical imperatives is reduced to the fact that man "freely", i.e. by voluntary persuasion, acts under the coercion of law. The very examples which Kant adduces for the illustration of his thoughts are typical. They are reduced entirely to the manifestation of bourgeois respectability. Heroism and exploits have no place within the Kantian categorical imperative. Personal sacrifice is not required because one demands no sacrifice from others. "Mindless" acts of penance and oblivion, in the name of fulfilling one's historical calling, or one's social functions, actions in which the most intense social instinct appear, lie outside ethics in the strict sense of the word.

Schopenhauer, and Vladimir Solov'ev after him, define law as an ethical minimum. It would be more accurate to define ethics as a certain social minimum. Intensified social enthusiasm is external to ethics and is inherited by modern man from the earlier periods of organic, and particularly tribal, existence.

Nevertheless, for a commodity-producing society, ethical reason is the highest possible achievement, and a higher cultural good of which one must speak only in the most exalted tone. It is necessary to remember Kant's well-known words:

two things fill the spirit with ever new and increasing amazement and satisfaction the more often and deeply we think of them: the starry sky above my head and the moral law within me.<sup>51</sup>

And moreover, when discussion turns to examples of the "voluntary" fulfilment of moral duty, upon the stage appears just the same immutable alms or a refusal to lie when it would have been possible to lie with impunity. Uniquely, ethical reason universally triumphs over powerful and irrational social instincts. It breaks with all the organic and inherently narrow limits (kin-group, tribe, nation) and strives for universality. In this sense it reflects definite social material

achievements, and transforms exchange into world exchange. "There is no Hellas, no Judaea"-this reflected the historical reality of the peoples united under the power of Rome. On the other hand, Kautsky apparently correctly notes that the rule "consider another as an end in himself", makes sense only when in practice one man may be subjected to another. Moral pathos is indissolubly bound to, and nurtured by, the immorality of social practice. Ethical doctrines pretended to change and correct the world when in fact they were but a distorted reflection of one aspect of it: namely, that in which human relationships were subordinated to the law of value. It must not be forgotten that moral personality is but one of the hypostatic forms of a triad. Man as an end in himself is only another aspect of the egoistic economic subject. An act which is the unique and real embodiment of the ethical principle in itself includes the latter's negation. The large-scale capitalist *bona fide* ruins the small capitalist, without for a moment encroaching upon the absolute value of his personality. The personality of a proletarian is "in principle equal" to the personality of a capitalist; this finds its expression in the fact of the "free" contract of employment. But for the proletarian this very "material freedom" means the possibility of quietly dying of starvation.

This ambiguity of the ethical form is not accidental, nor is it some external defect caused by the specific inadequacies of capitalism. On the contrary, this is an essential characteristic of the ethical form itself. To eliminate the ambiguity of the ethical form would mean to effect the transition to a planned social economy, and this would mean to realize a system in which people can think and construct their relationships using simple and clear concepts such as harm and benefit. To eliminate the ambiguity of the ethical form in the most essential area (in the area of material social existence) means to destroy this form altogether.

Pure utilitarianism, striving to disperse the metaphysical haze which surrounds ethical doctrines, leads to conceptualizing good and evil from the perspective of harm and benefit. Thereby, of course, it simply destroys ethics, or rather tries to destroy and transcend them. The transcendence of ethical fetishism in fact may be achieved only simultaneously with the transcendence of commodity and legal fetishism. People who are guided in their actions by clear and simple concepts of harm and benefit will require that their social relation-



ships be expressed either in terms of value or of law. Until this level of historical development is attained by mankind, i.e. until the legacy of the capitalist period is transcended, theoretical effort can merely proclaim this pending liberation but not implement it in practice. We must remember Marx's words on commodity fetishism:

The most recent scientific discovery that the products of labour, to the extent that they contain value, are merely a material reflection of the labour expended in their production, and that this constitutes a period in the historical development of mankind, by no means eliminates the material objectivity of the social nature of labour.

But it is objected that the class morality of the proletariat is already liberated from all fetishes. The morally necessary is that which is beneficial to the class. In such a form, morality includes nothing absolute because what is useful today may not be so tomorrow. It also includes nothing mystical or supernatural because the utilitarian principle is simple and rational.

There is no doubt that proletarian morality (or more accurately, that of its advanced strata) loses its particularly fetishist character, being liberated from religious elements. But morality, even entirely devoid of the mixture of religious elements, nevertheless remains moral, i.e. it is a form of social relationship in which not everything is yet reduced to man himself. If the conscious link to a class is in fact so powerful that the borders of the "I" are, so to speak, erased, and the advantage of the class actually merges with personal advantage, then there is no sense in speaking of the fulfilment of moral duty. In general, the phenomenon of morality is then absent. When such a merger has not occurred, then inevitably the abstract relationship of moral duty arises with all its attendant consequences. The rule: "act for the greatest advantage of one's class" sounds identical to Kant's formula: "act so that your conduct may serve the principle of universal legislation". The difference is that 'in the first case we introduce a concrete limitation, and erect class boundaries on ethical logic.<sup>52</sup> But within these boundaries it remains in full force. The class content of ethics by itself does not eliminate its forms. We have in mind not only the logical form, but also the form of the real phenomenon. Embedded in the proletariat (in the class collectivity) we observe formally the same methods of realizing the moral duty, which are comprised of two opposing elements. On the one hand,

the collective does not fail to use all possible means of putting pressure upon its fellow members to motivate them in their moral duty. On the other hand, the same collective qualifies conduct as moral only in the absence of externally motivating pressure. Therefore to study morality means, to a certain degree, to study falsehood. Morality, like law and state, is a form of bourgeois society. If the proletariat is compelled to use them, this by no means signifies the possibility of the further development of those forms in the direction of filling them with a socialist content. They are incapable of retaining this content, and must wither away in the course of their realization. Nevertheless, until the end of the present transitional period, the proletariat necessarily must use these forms inherited from bourgeois society in its class interest, and then exhaust them. For this, it must above all have a very dear understanding, free from ideology, of the historical origin of these forms. The proletariat must critically and soberly relate not only to the bourgeois state and to bourgeois morality, but even to its own state and to its own proletarian morality, i.e. it must recognize the historical necessity of their existence as well as of their disappearance.

In his criticism of Proudhon, Marx among other things notes that the abstract concept of justice is by no means an absolute and eternal criterion by which we might construct an ideal, i.e. a just exchange relationship. This would signify the attempt to measure an object by its own reflection. But the very concept of justice is drawn from the exchange relationship, and expresses nothing outside of it. Essentially speaking, the very concept of justice does not include anything new in comparison with the concept of social equality which we analysed above. Therefore, it is ridiculous to see any independent and absolute criteria in the idea of justice. It is true that in its artful usage it provides greater possibilities for interpreting inequality as equality, and therefore is particularly useful for obscuring the equivocal ethical form. On the other hand, justice is the step by which ethics descend to law. Moral conduct must be "free"; justice must be compelled. Compulsory moral conduct tends to deny its own existence; justice is openly "applied" to man; it allows external realization and an active egoistic interest in demanding justice. Here are found the main points of contiguity and divergence between the ethical and the legal forms.

Exchange, i.e. the circulation of commodities, assumes that the exchanging parties recognize one another as property owners. This

recognition, assuming the form of inner conviction or the categorical imperative, represents the conceivable maximum which a society of commodity producers may achieve. But besides this maximum there exists a certain minimum through which the circulation of commodities can nevertheless flow without hindrance. For the realization of this minimum, it is sufficient that the commodity owners conduct themselves *as if* they recognized each other as property owners. Moral conduct is opposed to legal conduct which is characterized as such irrespective of the motives which produce it. Whether a debt is repaid because "in any event I will be forced to pay it", or because the debtor considers it his moral obligation to do so, makes no difference from the juridic perspective. It is obvious that the idea of external coercion, both in its idea and organization, constitutes an essential aspect of the legal form. When no coercive mechanism has been organized, and it is not found within the jurisdiction of a special apparatus which stands above the parties, it appears in the form of so-called "inter-dependence". The principle of inter-dependence, under the conditions of balance of power, represents the single, and it can be said, the most unstable basis of international law.

On the other hand, a legal claim as distinct from a moral claim appears not in the form of an "inner voice", but as an external demand proceeding from a concrete subject who, as a rule, is at-the same time the bearer of a corresponding material interest. Therefore-, the fulfilment of a legal obligation takes on an external and almost material form of *satisfaction of demand* and is finally divorced from all subjective elements on the part of the obligee. The very concept of legal obligation therefore becomes most problematic. If we are fully consistent, it is necessary to say, as Binder does, that an obligation which corresponds to a right has nothing in common with "duty" (*Pflicht*), but exists juridically only as responsibility (*Haftung*); "obliged" means no more than "answers with his property (or in criminal law also with his person) by means of the judicial process and the compulsory execution of the verdict". Binder's conclusions are paradoxical for the majority of jurists, and are expressed in the short formula: *Das Recht verpflichtet rechtlich zu nichts* (law legally does not impose any duty). In fact this represents only the consequence of following the conceptual dichotomy already established by Kant. But it is precisely this clarity in the demarcation of the moral and legal spheres, which provides the source of the most

insoluble contradictions for the bourgeois philosophy of law. If legal obligation has nothing in common with an "inner" moral duty, then subordination to law cannot be distinguished from subordination to force per se. If, on the other hand, one accepts that an essential characteristic of law is the element of obligation, of even the weakest subjective kind, then the meaning of law as a socially necessary minimum slowly loses its meaning. Bourgeois philosophy of law exhausts itself in this basic contradiction, in this endless struggle with its own assumptions.

Moreover, it is interesting that one and the same contradiction essentially appears in two different forms, depending on whether one speaks of the relationship between law and morality or the relationship between the state and law. In the former case, when the independence of law was affirmed with respect to morality, law is merged with the state because of the increased emphasis upon the element of external authoritative coercion. In the latter case, when law is contrasted with the state, the element of obligation (in the sense of the German *gotten*, not *miissen*)-actual domination-inevitably appears on the scene, and we have before us, so to speak, a united front of morality and law.

Here, as always, the contradiction of the system reflects the contradiction of real life, i.e. that social environment which created within itself the forms of morality and law. The contradiction between the individual and the social, between the part and the whole can never be reconciled by the bourgeois philosophy of law. This contradiction constitutes the conscious basis of bourgeois society as a society of commodity producers. This is embodied in the real relationships of human subjects who can regard their own private struggles as social struggles only in the incongruous and mystifying form of the value of commodities.

## CHAPTER VII

### **Law and Violation of Law**

Russkaya Pravda-that most ancient historical monument of the Kievan period of our history-consists of 43 articles (the so-called academic register). Only two articles do not relate to violations of criminal or civil law. The remaining articles either determine a

sanction, or else contain the procedural rules applicable when a law has been violated. Accordingly, deviation from a norm always constitutes their premise. The same picture is presented by the so-called barbarian laws of German tribes. For example, in the Salic Law only 65 of 408 articles do not have a punitive nature. The oldest monument of Roman law-the laws of the Twelve Tables-begins with rules defining the procedure for initiating litigation: "*Si in ius vocat, ni it, antestamino. Igitur im capito*". (If a man is called to court and he does not go, this should be attested, and he should be taken there.)

According to the observation of the well-known legal historian Maine, "it is necessary to recognize as a rule that the more ancient the code, the fuller and more detailed will be its statement of the criminal section".<sup>53</sup>

Non-observance of a norm, or violation of it, the disruption of normal intercourse and ensuing conflict: this is the starting point of the most important content of ancient legislation. Conversely, what is normal is not fixed in the beginning as such-it merely exists. The requirement that the scope and content of mutual rights and obligations be fixed and exactly established, appears when calm and peaceful existence is violated. From this perspective Bentham is right when he asserts that a statute creates rights as it creates crimes. Historically, the legal relationship assumes its specific character pre-eminently in the facts of violations of law. The concept of theft was defined earlier than the concept of private property. The relationships attending a loan were fixed when the borrower did not want to repay it: "if one tries to recover a debt and the debtor refuses etc." (*Russkaya Pravda*, Academic Register, Art. 14). The original significance of the word *pactum* was not that of contract, but *pax*, peace, i.e. an amicable conclusion to hostility, "peaceful" (*Vertrag*) supposes the end of "unpeaceful" (*Unvertraglichkeit*).

Thus, if private law directly reflects the most general conditions of existence of the legal form as such, then criminal law is the sphere where the legal relationship achieves its maximum intensity. Here, above all and most clearly the legal element is isolated from everyday life and obtains full independence. The transformation of the actions of the concrete person into the action of a party, i.e. into a legal subject, takes place particularly clearly in the judicial process. In order to emphasize the difference between everyday activities and

expressions of will on the one hand, and juridic expressions of will on the other, ancient law used special ceremonial formulae and rituals. The drama of the judicial process noticeably created a separate juridic life contiguous with the real world.

Of all types of law it is criminal law that has the ability, by its own direct and crude manner, to assume a separate personality. This law has always, therefore, attracted the most ardent and practical interest, and punishments for its violation are usually closely associated with each other—thus, criminal law, so to speak, assumes the role of the representative of law in general. It is the part which replaces the whole.

The origin of criminal law is historically linked with the custom of the blood feud. It is certain that these phenomena are genetically close to one another but a feud becomes fully *a feud* only when fines and punishment follow it, i.e. even these later stages of development, as is often observed in the history of mankind, explain the intimations included in the preceding forms. If one approaches the same phenomena from the opposite direction, we see nothing but a struggle for existence, i.e. a truly biological fact. For the theorists of criminal law viewing the later period, blood feud corresponds with *ius talionis*, i.e. with the basis of equal retribution, under which the avenging of an insult by the insulted (or by his tribe) eliminated the possibility of further feuding. In fact, as Kovalevsky correctly points out, the most ancient blood feuds did not have this nature. Internecine wars are transmitted from generation to generation. An insult, although committed in retribution, itself becomes the basis for a new feud. The insulted and his relatives become—insultors—and so on from one generation to another, sometimes until the entire struggling kin-groups are liquidated.<sup>54</sup>

Feud begins to be regulated by custom and is turned into retribution by the Talic rule "an eye for an eye and a tooth for a tooth". Only then does a system of composition or a monetary fine begin to be established alongside it. The notion of equivalence, this first purely juridic idea, always has its source in the form of a commodity. A crime may be considered as a particular aspect of exchange, in which the exchange (contractual relationship) is established post factum, that is, after the intentional act of one of the parties. The ratio between the crime and the punishment is reduced to an exchange ratio. Therefore Aristotle, in discussing equivalent.

exchange as a type of justice, divides it into two aspects: equivalence in voluntary and in involuntary actions. Economic relationships such as purchase and sale, loan etc. are classified as voluntary actions; these include various types of crime invoking punishment as an equivalent. The definition of crime as a contract concluded against one's will, also belongs to Aristotle. Punishment emerges as an equivalent mediating the harm done to the victim.

This notion was adopted, as is well known, by Hugo Grotius. However naive these constructs may seem at first glance, they latently contain much more sensitivity to the form of law than do the eclectic theories of modern jurists.

In the example of blood feud and punishment we can observe, with extraordinary clarity, the imperceptible stages through which the organic or biological is connected with the legal. This merger is intensified by the fact that man is not capable of renouncing that to which he is accustomed, i.e. the legal (or ethical) interpretation of this phenomenon of animal life. He involuntarily finds in the actions of animals that which is placed in them, factually speaking, by later development, i.e. by the historical development of man.

In fact the act of self-defence is one of the most natural phenomena of animal life. It makes no difference whether we encounter it as the individual reaction of a particular animal or as a collective exercise in self-defence. According to the testimony of scholars who observe the life of bees, if a bee tries to penetrate a strange hive to steal honey, then the bees protecting the entrance at once attack it and begin to sacrifice it; if it actually penetrates the hive then they kill it immediately. There are similar cases in the animal world when the reaction is separated by a certain interval of time from the circumstance which instigated it. The animal does not respond to the attack immediately, but puts it off to a more suitable time. Self-defence here becomes a feud in the true sense of the word. Since for modern man feud is inseparably tied to the idea of equal retribution, it is not surprising that Ferri, for example, is ready to recognize the presence of the "juridic instinct" among animals.<sup>55</sup>

In fact the juridic idea, i.e. the idea of an equivalent, becomes fully clarified and objectified only at that stage of economic development when it becomes the standard form of equivalent exchange, i.e. not in the world of animals but in human society. For this it is by no means necessary that feud was entirely forced out by blood money.

And even when blood money is refused as something shameful-and such a view was dominant for a long time among primitive peoples-the realization of a personal feud was recognized as a sacred obligation. The very act of feud assumed a new form which it did not have when there was not yet an alternative. Specifically, it now included an image of the only adequate method: retribution. The refusal of blood-money in monetary form emphasized that bloodmoney was the only equivalent for blood spilled earlier. The feud is transformed from a purely biological phenomenon into a legal institution to the extent that it is linked with the form of equivalent exchange, with exchange-value.

The criminal law of antiquity emphasizes this bond with particular clarity and immediacy, because damage to property and personal injury are directly equated with a naivety that later eras abandoned in shame. From the perspective of ancient Roman law there was nothing surprising in the fact that an insolvent debtor paid with parts of his body (in *partes secare*), and one guilty of mutilation answered with his property. The idea of equivalent exchange appears here in all its starkness-uncomplicated and not obscured by any related circumstances. Accordingly, criminal procedure also assumes the character of a commercial transaction. "We must", says Jhering, "imagine a market in which too much money is asked by one side and too little is offered by the other, until a bargain is reached. An expression of this was *pacere*, and for the price agreement itself-pactum." "The duty of an intermediary selected by both parties", adds Jhering, "finds its beginning here. In ancient Scandinavian law an intermediary determined the amount to be paid for reconciliation (*arbiter* in the original Roman sense)."<sup>56</sup>

With regard to so-called public punishments, there is no doubt that they were originally introduced mainly for fiscal reasons, and that they served as a means of filling the treasury of the representatives of authority. "The state", says Henry Maine, "has not taken a fine from the defendant for the harm which he is supposed to have done to the state, but has commanded for itself only a certain share of the compensation made to the plaintiff in the form of just retribution for the loss of his time and peace."<sup>57</sup> From Russian history we know that "Just retribution for loss of time" was so eagerly collected by princes that, according to chronicled testimony, "the Russian land was impoverished by fines and sales". Moreover, this phenomenon



of judicial theft was observed not only in ancient Russia, but also in the empire of Charlemagne. In the eyes of the ancient Russian princes, judicial revenues were no different from other patronage bestowed on their servants etc. It was possible to buy one's way out of a prince's court by paying a certain sum (the barbarian *wer* or fine of *Russkaya Pravda*).

However, in addition to public punishment as a source of income, punishment appeared rather early as a method of ensuring discipline and as a major safeguard of the authority of priestly and military power. It is well known that in ancient Rome the majority of serious crimes were at the same time crimes against the gods. For instance, one of the most important violations, for the landowner, was the wilful moving of boundary markers. From ancient times this was considered a religious crime, and the head of the guilty party was condemned to the gods. The priestly caste, acting as the guardians of order, pursued not some ideal but a most essential material interest, because the property of the guilty party was confiscated for its use. On the other hand, the punishment which the priestly organization inflicted on those who tried to appropriate its incomes-in the form of deviations from established ceremonies and gifts, attempts to introduce new religious teachings etc.-bore the same public character.

The influence of the priestly organization (i.e. the Church) on criminal law was felt in the fact that although punishment preserved its nature of equivalence or *retribution*, this retribution was neither directly linked with harm to the injured party nor based upon the latter's claim. Indeed, punishment attained a higher abstract meaning as godly punishment. The Church thus tried to combine the material element of compensation or harm with the ideological motive of expiation and cleansing (*expiatio*). It thus tried to construct a more appropriate mechanism for maintaining social discipline (i.e. class domination) than that provided by a criminal law based on private vengeance. Indicative of this were the solicitations of the Byzantine clergy with respect to the introduction of capital punishment in Kievan Russia.

The same goal of maintaining discipline determines the nature of the punitive activity of a military commander. The latter renders justice and reprisal, both over subjugated peoples and over his own troops who had planned a mutiny, treason, or who were simply

disobedient. The notorious story about Ludwig—who with his own hands decapitated a disobedient soldier—shows the primitive nature of this reprisal in the formative period of the German barbarian states. In earlier times the task of maintaining military discipline had been conducted by a popular assembly; with the consolidation and expansion of monarchical authority this function naturally adhered to the monarchs and was naturally identified with the protection of their own privileges. As far as general criminal offences were concerned, the kings of the German tribes (and also the princes of Kievan Russia) for a long time showed only a fiscal interest toward them.

This state of affairs changed with the development and consolidation of class and estate boundaries. A spiritual and temporal hierarchy valued the protection of its privileges, in the struggle with the lower and oppressed classes of the population, as its first priority. The decomposition of the natural economy and the concomitant increase in the exploitation of the peasantry, the development of commerce and the organization of a class state,

ave different tasks to criminal justice. In this period criminal justice became less a method of raising income for the authorities and more a method of merciless and harsh reprisal against "evil people", i.e. primarily against peasants who had fled from unbearable exploitation by landlords and the landlords' state, and against the pauperized population, vagrants, mendicants etc. The police and the investigative apparatus had to play the main role. Punishment became a method of physical elimination or of instilling terror. This was the era of ordeals, corporal punishment and cruel methods of capital punishment.

Gradually, therefore, that complex amalgam was prepared which now constitutes modern criminal law. We can easily discern the composition of its historical strata. In essence (that is, from a purely sociological point of view) bourgeois society supports its class state by its system of criminal law and thereby holds the exploited class in obedience. In this respect, its judges and its private "voluntary" organizations of strike-breakers pursue one and the same goal.

The criminal jurisdiction of the bourgeois state is organized class terror. This differs only in degree from the so-called extraordinary measures applied at times of civil war. Spencer indicated

the *full* analogy and even the identity between the defensive reaction directed against external attacks (war), and the reaction directed against violators of the internal order (legal or judicial defence).<sup>58</sup> Measures of the first type (i.e. criminal punishment) are applied primarily against declassé social elements, and measures of the second type primarily against active proponents of a new class rebelling against authority. This fact does not change the essence of the matter, nor does the greater or lesser correctness and complexity of the procedure applied. An understanding of the true meaning of the punitive activity of the class state is possible only by perceiving its antagonistic nature. So-called theories of criminal law which derive the principle of punitive policy from the interest of society as a whole are occupied with the conscious or unconscious distortion of reality. "Society as a whole" exists only in the imagination of these jurists. In fact, we are faced with classes with contradictory, conflicting interests. Every historical system of punitive policy bears the imprint of the class interest of that class which realized it. The feudal lord executed disobedient peasants and city dwellers who rose against his power. The unified cities hanged the robber-knights and destroyed their castles. In the Middle Ages, a man was considered a lawbreaker if he wanted to engage in a trade without joining a guild; the capitalist bourgeoisie, which had barely succeeded in emerging, declared that the desire of workers to join unions was criminal.

Thus, class interest places the imprint of historical concreteness on each given system of punitive policy. Only the *full* disappearance of classes enables the construction of a system of punitive policy in which every element of antagonism will be excluded. But the question remains of whether a punitive system is still necessary in these conditions.

If by its content and nature authoritative punitive activity is a weapon for the maintenance of class domination, then in its form it acts as an element of the legal superstructure, and is included in the legal system as one of its branches. We showed above that the naked struggle for existence adopts a legal form through the introduction of the principle of equivalence. The act of self-defence ceases to be merely an act of self-defence, and becomes a form of exchange, a type of intercourse which takes its place alongside "normal" commercial exchange. Crime and punishment become such (i.e. assume their legal nature) on the basis of the redemption transaction. As long

as this form exists, so too will the class struggle be conducted through law. Conversely, the very term criminal will lose all meaning to the extent that the element of the relation of equivalence disappears from it.<sup>59</sup>

Considering the nature of bourgeois society as a society of commodity owners, we would have to suppose a priori that its criminal law was the most juridic in the sense we established above. However, we at once encounter certain difficulties here. The first difficulty is the fact that modern criminal law does not proceed primarily from the harm done to the victim but from the violation of the norm established by the state. Once the victim and his claim recedes to the background then, it is asked, where is the form of equivalence? But in the first place, no matter how far the victim recedes to the background he nevertheless does not disappear, but continues to constitute the setting in which the criminal law action is played out. The abstraction of a violated public interest rests on the fully real figure of the victim, who participates in the process-personally or through representatives-and who gives this process a living significance. Moreover, even when the concrete victim in fact does not exist, when "merely a statute" is assailed, this abstraction implies its real embodiment in the person of the public prosecutor. This division, in which a state authority appears both in the role of a party (the prosecutor) and in the role of a judge, shows that .as a legal form the criminal process is indivisible from the figure of the victim demanding "retribution". It is therefore indistinguishable from the more general form of agreement. The prosecutor, as is expected of a "party", asks a "high price", i.e. a strict punishment; the criminal seeks leniency, a "discount", the judge decrees "according to justice". Discard this form of agreement, and you will deprive the criminal process of its "Juridic spirit". Imagine for a minute that the court is actually occupied only with the consideration of how to change the conditions of life of a given person--in order to influence him in the sense of correction, or in order to protect society from him-and the very meaning of the term punishment evaporates. This does not mean that every criminal court and punitive procedure is entirely deprived of the simple and comprehensible elements mentioned above. But we wish to show that there is a peculiarity in this

procedure which is not covered by the clear and simple considerations of social purpose. This is an element that is irrational, mystifying and incoherent, and it is the specifically legal element.

Further difficulty lies in the following fact. Ancient criminal law knew only the concept of harm. Crime and guilt, occupying such an eminent place in modern criminal law, were absent at this stage of development. Conscious, careless and accidental actions were evaluated exclusively by their consequences. The customs of the Salic Franks and the modern Ossetians stand at the same stage of development in this respect. The latter made no distinction between death resulting from a blow with a knife, and death proceeding from the fact that a rock was knocked off a hill kicked by the hoof of another's bull.

From this, as we see, it does not follow that the concept of responsibility was in itself alien to ancient law. It was merely determined by another method. In modern criminal law-in accordance with the radical individualism of bourgeois society-we have the concept of strict personal responsibility. But ancient law was penetrated by the principle of collective responsibility: children were punished for the sins of their parents, and the kin-group answered for each of its members. Bourgeois society dissolves all earlier primitive and organic ties between individuals. It proclaims as its basis: every man for himself, and it implements this most consistently in all areas, including criminal law. In the second place, modern criminal law introduced the psychological element into the concept of responsibility and thus gave it a greater flexibility. It divided it into degrees: responsibility for a result which was foreseen (intent), and responsibility for a result which was unforeseen but which could have been foreseeable (negligence). Finally it constructed the concept of non-imputability, i.e. the complete absence of responsibility. However, this new element, the degree of guilt, by no means excludes the principle of equivalent exchange, but derives from it and creates a new basis for its application. What does this division signify other than a clarification of the conditions of the bourgeois judicial transaction! The gradation of liability is the basis for the gradation of punishment-a new, if you wish, ideal or psychological element, which is combined with the material element (the injury) and the objective element (the act)-in order to provide a joint basis for determining the ratio of punishment. Responsibility is

heaviest for an action committed with intent and accordingly, *ceteris paribus*, entails a heavier punishment; if an action is committed negligently the responsibility is less heavy: *ceteris paribus*, the punishment is reduced; finally, if responsibility is absent (criminal intent is non-imputable), there is no punishment. If we replace punishment with *Behandlung* ("method of influence"), i.e. a legally neutral, medical-pedagogical concept, we reach very different results. This is so because primarily we will be interested *not in the proportionality*, but in the *correspondence* of the measures taken to the goals which are placed before it, i.e. to the goals of protecting society from the criminal etc. From this point of view the relationship may appear as the opposite; that is, in the case of the least responsibility the most intensive and long-lasting measures of influence may seem necessary.

The idea of responsibility is necessary if punishment is to appear as a method of payment. The criminal answers for the crime with his freedom, and he answers with an amount of his freedom which is *proportional* to the gravity of what he has done. This idea of responsibility is unnecessary when punishment is liberated from the character of equivalence; and when no remnant of this remains, punishment ceases to be punishment in the legal sense of the word.

The juridic idea of responsibility is not scientific because it leads directly to the contradictions of indeterminism. From the viewpoint of the causal chain which leads to an event, there is not the slightest basis for preferring one link to the others. The actions of a man who is psychologically abnormal (irresponsible) are just as conditioned by a series of causes, i.e. inheritance, conditions of life, environment etc., as are the actions of a normal (responsible) man. It is interesting to note that punishment applied as a pedagogical measure (i.e. outside the legal idea of equivalence) is entirely unconnected with considerations of imputability, freedom of choice etc., and does not require these ideas. The expediency of punishment in pedagogy—we speak here of course of expediency in the most general sense, independent of the selection of forms, leniency, strictness of punishment etc.—is determined exclusively by the presence of the sufficiently developed ability to understand the connection between one's action and its unpleasant consequences, and the retention of this connection in one's mind. Even persons whom the criminal law does not hold responsible for their actions—children of a very young age,

and the psychologically abnormal-are considered responsible in this sense, i.e. they are subject to influence in a definite direction.

Punishment proportionate to guilt chiefly represents the same form as revenge related to damage. Above all, it is characterized by the numerical, mathematical expression for "severity" of the sentence: the number of days, months etc., of deprivation of freedom, the amount of monetary fine, deprivation of various rights.

Deprivation of freedom-for a definite term previously indicated in the judgement of a court-is the specific form in which modern, that is, bourgeois capitalist criminal law, realizes the basis of equivalent retribution. This method is deeply, but unconsciously connected with the concept of the abstract man and of abstract human labour time. It is not accidental that this form of punishment grew strong and eventually seemed natural and expected, in the nineteenth century, i.e. when bourgeois society was fully developed and had consolidated all its particular features. Prisons and dungeons, of course, existed even in ancient times and in the Middle Ages, alongside other means of physical coercion. But at that time prisoners were usually confined until their death or until the payment of a ransom.

A necessary condition for the appearance of the notion that payment for a crime should be by a previously determined amount of abstract freedom, was that all concrete forms of social wealth had to be reduced to the simplest and most abstract form-to human labour time. Here we undoubtedly observe yet another case affirming the mutual protection of the various aspects of culture. Industrial capitalism, the Declaration of the Rights of Man and the Citizen, Ricardo's political economy, and the system of terms of incarceration in prison-these are phenomena of the same historical period.

Equivalence of punishment-in its crude and overtly material form as the causing of physical harm or the exacting of monetary compensation--specifically because of this crudeness preserves a simple meaning accessible to everyone. But it loses this meaning in its abstract form of the deprivation of freedom for a definite term, although we continue to speak of a measure of punishment proportional to the gravity of the act.

Therefore, it is natural for many criminal law theorists (primarily those who consider themselves the most advanced) to attempt to

remove this element of equivalence because it has clearly become inconvenient, and to concentrate attention on the rational goals of punishment. The mistake of these progressive criminologists is that in criticizing so-called absolute theories of punishment, they suppose that they are confronted only by false views and confused thoughts which can be dissolved simply by theoretical criticism. In fact, the inconvenient form of equivalence does not derive from the confusion of individual criminologists, but from the material relationships of commodity production, and it is nurtured by them. The contradiction between the rational goal of the protection of society---or the re-education of the criminal---and the principle of the equivalence of punishment, exists not in books and theories but in life itself in judicial practice, in the social structure itself. Similarly, the contradiction between the fact of the bond of social labour as such, and the inconvenient form of expression of this fact in the value of commodities, exists not in theory, and not in books, but in social practice itself.

Sufficient proof of this is found in various elements. If, in social life, punishment was considered as an *objective*, then the keenest interest would be aroused in the implementation of punishment and, above all, by its result. However, who would deny that the centre of gravity of criminal procedure for the overwhelming majority---is the court room and the moment of pronouncing the verdict and sentence?

The interest which is shown towards enduring methods of influencing the criminal is utterly negligible in comparison with the interest which is aroused in the effective moment of pronouncing the verdict and sentence, and in the determination of the "measure of punishment". Questions of prison reform are a live issue only for a small group of specialists; broadly, the correspondence of the sentence to the gravity of the act occupies the centre of attention. If, according to common sentiment, the equivalence is properly determined by the court, then the matter will be concluded here, and the subsequent fate of the criminal is of no interest. "A study of the execution of punishment," complains Krohne, one of the leading specialists in this area, "is the sore point of the science of criminal law." In other words it is relatively neglected. "And moreover", he continues, "if you have better laws, better judges, and better sentences, and the civil servants carrying out these sentences, are



worthless, then you may freely throw laws into the rubbish bin and burn your sentences."<sup>60</sup> But the authority of the principle of retributive equivalence is not only discovered in the distribution of social interest. It appears no less clearly in judicial practice itself. In fact, what other bases are there for those sentences which Aschaffenburg cites in his book *Crimes and the Struggle against Them*? Here are just two examples of a long series: a recidivist, convicted 22 times for forgery, theft, extortion etc., was sentenced for the Byrd time to 24 days in prison for slandering an official. Another, who had in all spent 13 years in prison and the penitentiary (*Zuchthaus*), having been convicted 16 times for extortion, theft etc., was sentenced (the 17th time) for extortion to 4 months in prison.<sup>61</sup> In these instances one obviously does not discuss the protective or corrective function of punishment. Here the formal principle of equivalence triumphs: for equal guilt-an equal measure of punishment. And in fact what else could the judge do? He could not hope to correct a confirmed recidivist by 3 weeks' detention, but he also could not isolate the prisoner for life because of the mere slander of a civil servant. Nothing is left to him but to have the criminal pay in small change (a certain number of weeks of deprivation of freedom) for a minor crime. For the rest, bourgeois jurisprudence ensures that the transaction with the criminal is in accordance with all rules of the art, i. e. that each may be convinced, and may verify that the payment is justly set (public judicial proceedings), that the criminal may bargain freely (adversary process), and that in so doing he may use the services of an experienced judicial expert (admission of the defence) etc. Briefly, the state conducts its relationship to the criminal within the framework of a *bona fide* commercial transaction in which there are, ostensibly, guarantees of criminal procedure.

The criminal must know beforehand why he owes something and *what* is expected of him: *nullum crimen, nulla poene sine lege*. What does this mean? Does it require that each potential criminal be exactly informed of the methods of correction which will be applied to him? No, the matter is much cruder and simpler-he must know how much freedom he will forgo as a result of the judicial transaction. He must know beforehand those conditions under which payment will be demanded of him. Here lies the meaning of criminal codes and criminal procedure codes.

One must not imagine that in the beginning false theories of retribution held sway in criminal law, and then later the correct point

of view of social defence triumphed. It is wrong to consider development as having taken place only on the level of ideas. In fact, both before and after the appearance of the sociological and anthropological trends in criminology, punitive policy included a social or, rather, a class element of defence. However, along with this it included, and still includes, elements which do not derive from this *technical* goal and therefore do not permit the punitive procedure itself to be expressed *wholly and with nothing remaining* as a rational, non-mystifying form of socio-technical rules. These elements whose origins must be sought not in punitive policy itself but much deeper-give real meaning to the legal abstractions of crime. and punishment, and ensure their full practical significance regardless of all the forces of theoretical criticism.

We remember Van Hamel's exclamation at the Hamburg congress of criminologists in 1905: the main obstacle for modern criminology are the three concepts "guilt, crime and punishment"; "when we free ourselves from them", he added, "all will be better." We may now reply that the forms of bourgeois consciousness will not be eliminated merely by ideological criticism, because they constitute a unity with those material relationships which they reflect. The transcendence of these relationships in practice-i.e. the revolutionary struggle of the proletariat and the realization of socialism-this is the only way to dispel those mirages which have become reality.

To proclaim that fault and guilt are prejudiced concepts in practice suffices for the transition to a punitive policy which would render them unnecessary. Until the time when the commodity form, and the derivative legal form, cease to place their imprint upon society, the essentially incoherent (from the non-judicial perspective) notion that the severity of each crime can be weighed on a scale and expressed in months or years of imprisonment, will continue to preserve its force and its real significance in judicial practice.

It is possible, of course, to refrain from expressing this notion in such a shockingly crude formulation. But this by no means signifies that therefore we are finally free from its influence in practice. What is the general part of every criminal code (including even ours) with its concepts of abetting, participation, contempt, preparation etc., if it is not a means to define guilt more exactly? What is the distinction between intent and negligence if not a distinction of a degree of guilt? What meaning has the concept of irresponsibility if the concept of

guilt does not exist? Finally, why is the special part of the code needed if the matter is merely about measures of social (class) defence?

In fact the consistent execution of the principle of social defence would not require the fixing of individual *sets of elements of crime* (with which *measures of punishment* are largely linked and defined by statute or by the courts). It would require however, a clear description of *symptoms* characterizing a socially dangerous condition and the development of those *methods* which must necessarily be applied in each given case for social defence.

The matter is obviously not only that, as some persons think, a measure of social defence is connected in its application with subjective moments (form and degree of social danger), while punishment rests on an objective moment, i.e. the concrete set of elements of a crime established by the special part of the code. The importance lies in the character of this association. It is difficult to separate punishment from an objective basis, because it cannot discard the form of equivalence without losing its basic character. However, only the concrete structure of a crime provides something like a measurable amount, and accordingly something like an equivalent. One can make a man pay for an action, but it is senseless to make him pay for the fact that society has recognized him (i.e. the given subject) to be dangerous. Therefore, punishment presupposes an exactly fixed set of elements in a crime. A measure of social defence has no need for this. Payment by coercion is legal coercion directed towards a subject placed in the formal framework of a trial, a sentence and its execution. Coercion, as a measure of defence, is an act of pure expediency and as such may be regulated by technical rules. These rules may be more or less complex depending upon whether the purpose is the mechanical elimination of a dangerous member of society, or his correction; but in any event these rules reflect clearly and simply the objective which society has set itself. Conversely, this social objective appears in masked form in the legal forms determining punishment for certain crimes. A person subjected to coercion is placed in the position of a debtor paying a debt. This is reflected in the term "serving a sentence". A criminal who has served his sentence returns to his starting point, to an isolated social existence, to the "freedom" to undertake obligations and commit crimes.

Criminal law, like law in general, is a form of the relationships between egoistic and isolated subjects, bearing autonomous private interests as commodity owners. The concepts of crime and punishment-as is clear from the aforesaid-are the necessary definitions of the legal form. Liberation from them will only occur when the general withering away of the legal superstructure begins. And to the extent that in fact, and not merely in declarations, we begin to transcend these concepts and to do without them-this will be the best symptom of the fact that for us, finally, the narrow horizons of bourgeois law are disappearing.

### Notes

#### *Abbreviations*

- LCW*            *V. I. Lenin: Collected Works (1960-70)*, Foreign Languages Publishing House, Moscow, 45 volumes.
- MESW*           *K. Marx and F. Engels: Selected Works (1970)*, Progress Publishers, Moscow, 3 volumes.
- Sochinenii*     *Vladimir Il'ich Lenin, Sobranie Sochinenii (1920-1926)*, Moscow, 20 volumes in 26 books.

The complete footnotes to the *General Theory* have been translated in J. Hazard (ed.), *Soviet Legal Philosophy (1951)*, Harvard University Press, Cambridge, translated by H. Babb, pp. 111-225 [ed.].

1. Of course these most general and simplest juridic concepts are the result of the logical treatment of the norms of positive law. They represent the latest and highest product of conscious creativity in comparison with the randomly formed legal relationships and the norms which express them.
2. One may agree with Karner [the pseudonym used by Karl Renner-eds. I that the science of law begins where jurisprudence ends. But it does not follow from this that the science of law must simply discard those basic abstractions which reflect the basic essence of the legal form.
3. Even Comrade Stuchka's *The Revolutionary Role of Law and State (1921, Moscow)*, which deals with a series of problems of the general theory of law, does not treat these concepts systematically. His discussion accentuates the class content of the historical development of legal regulation in comparison with the logical and dialectical development of the form itself
4. It should be noted that in discussing juridic concepts Marxist authors commonly and primarily refer to the concrete content of legal regula-

tion inherent in a specific period, i. e. that which people at a specific stage of development consider to be law. However, it is undoubtedly true that Marxist theory must study not only the material content of legal regulation in various historical periods, but that it must also provide a materialist interpretation of legal regulation *per se* as a definite historical form.

5. An example of how richness of historical exposition can co-exist with the most incomplete outline of the legal form is found in M. Pokrovsky, *Essays on the History of Russian Culture* (1923), Moscow, 2nd edition, vol. 1, p. 16.

6. Law is also defined as coercive norms issued by state authority in Bukharin's *Historical Materialism* . . . . All these definitions stress the connection between the concrete content of legal regulation and economics. At the same time, however, they attempt to exhaust the legal form by defining it as state-organized coercion. In essence, this goes no deeper than the crude empirical applications of the most pragmatic or dogmatic jurisprudence-whose defeat must constitute the task of Marxism.

7. "Political economy begins with *commodities*, begins from the moment when products are exchanged for one another-whether by individuals or by primitive communities." F. Engels, "Review of Marx's *Contribution to the Critique of Political Economy*" (1859), *MES W*, vol. 1, p. 514.

8. K. Marx, *Critique of the Gotha Programme* (1875), *MES W*, vol. 3, p. 19.

9. Lenin concludes in *State and Revolution*: "With respect to the distribution of products for *consumption*, bourgeois law of course inevitably presupposes a *bourgeois state*, because bourgeois law is nothing without a *coercive* apparatus capable of *enforcing* adherence to the norms of law. It follows that for a certain time bourgeois law is effective under communism, but that so also is the bourgeois state without the bourgeoisie!" V. I. Lenin, *State and Revolution* (1917), *LCW*, vol. 25, p. 471.

10. F. Lassalle, *The System of Acquired Rights* (1861), Leipzig.

11. See K. Marx, *Introduction to the Critique of Political Economy* (1857), in *The Grundrisse* (1973), translation and foreword by M. Nicolaus, Random House, New York, p. 100.

12. *ibid.* pp. 104-105.

13. *ibid.* p. 106.

14. *ibid.* p. 105.

15. K. Marx, *Capital* (1867), International Publishers, New York, 1967, vol. 1, p. 76.

16. M. Reisner, *The State* (1911), Moscow, 2nd edition, vol. 1, p. xxxv.

17. *ibid.*

18. See the review of Stuchka's *The Revolutionary Role of Law and State* (1921), by Professor Reisner, *Herald of the Socialist Academy*, no. 1, p. 176.

19. cf. V. V. Adoratsky, *On the State* (1923), Moscow, p. 41: "The tremendous influence of legal ideology on the entire system of thinking of law-abiding members of bourgeois society is explained by the

significant role of ideology in the life of this society .... A person living in bourgeois society is constantly regarded as a subject of rights and obligations. Every day he effects an endless number of legal actions involving the most diverse legal consequences. No society has such a need, therefore, of the idea of law (in its practical, everyday use), nor develops this idea in such detail, nor transforms it into such an essential instrument of daily exchange, as does bourgeois society."

20. K. Marx, *Capital* (1867), *op. cit.* vol. 1, p. 81.

21. G. Shershenevich, *The General Theory of Law* (1910), Moscow, p. 274.

22. The Russian language, incidentally, derives the designations "law in effect" and "law in force" from the same root. In German, the logical distinction is facilitated by the use of two very different verbs: *wirken* (in the sense of in effect, or being realized) and *gelten* (in the sense of being significant, i.e. logically related to a more general normative proposition).

23. The point of view expressed here by no means signifies a denial of class will as a factor of development, an abjuration of planned interference in the course of social development, "economism", fatalism and other terrible things. A revolutionary political action may accomplish a great deal; it can realize for tomorrow that which does not exist today, but it can not cause that which did not in fact exist in the past. On the other hand, if we affirm that the intention to construct a building--and even the plan of the building--is still not the actual building, then it does not follow from this that neither the intention nor the plan are essential for the construction of the building. But when the matter has gone no further than the plan we cannot affirm that the building has been constructed.

24. However, it is necessary to declare that social-regulatory activity can operate without previously fixed norms. The fact of so-called judicial lawmaking convinces us of this. Its significance is particularly clear in those periods when the centralized enactment of laws was generally unknown. For the ancient German judges, therefore, the concept of a norm given externally was entirely alien. Collections of rules of every type were, for the *Schoffengericht*, not binding laws, but were a heuristic device by which they formed their own opinion. See J. Stintzing, *Geschichte der Deutschen Rechtswissenschaft* (1880), vol. I, p. 39.

25. K. Marx and F. Engels, *The Holy Family, or a Critique of Critical Criticism* (1844), in *Marx and Engels Collected Works* (1975), Progress Publishers, Moscow, vol. 4, pp. 120-121.

26. In his commentary on the Civil Code of the RSFSR, Goikhbarg stresses that advanced bourgeois jurists still refuse to consider private property as arbitrary subjective law, but that they see it both as rights accruing to the individual and as positive obligations with respect to the whole. In particular, Goikhbarg relies upon Duguit. Duguit affirms that an owner of capital must be defended by the law only because and to the extent that he fulfils a socially useful function in providing a correct application for his capital.

Duguit's statement-that an owner will be protected only when he fulfils a social obligation-is meaningless in such a general form. For the bourgeois state it is hypocritical; for the proletarian state it is a concealment of the facts. For if the proletarian state could directly assign to each owner his social function, it would have done so, taking from the owner the right to dispose of his property. And once it cannot do this *economically*, this means it is compelled to protect private interests as such, -and that it can only set certain quantitative limits to them. It would be illusory to affirm that every X who has accumulated a certain quantity of money is protected by our laws and courts simply because he provided, or will provide, a socially useful application for money accumulated. But Comrade Goikhbarg forgets about capitalist property in this, its most abstract (i.e. monetary) form, and he argues as if capital only exists in the concrete material form of productive capital. The anti-social aspects of private property may be paralysed only *de facto*, i.e. by the development of a socialist planned economy at the expense of the market. But no formula, even though derived from the most advanced Western jurists, can transform all transactions concluded on the basis of our Civil Code into socially useful ones, and every owner into a person fulfilling social functions. Such a verbal transcendence of the private economy and private law will only obscure the conditions for their real transcendence.

27. K. Marx, *Capital* (1867), *op. cit.* vol. 1, p. 84.

28. Man is a commodity (i.e. a slave) only when he adopts the role of a distributor of commodities--of objects-and when in becoming a fellow participant in exchange he attains the effective status of a subject. On the rights of slaves to conduct transactions under Roman law, see I. A. Pokrovsky, *History of Roman Law* (1915), Petrograd, vol. 2, p. 294. Conversely, when a free man (i.e. a proletarian) seeks a market for the sale of his labour power in modern society, he is treated as an object and falls under the law on emigration with the same prohibitions, quotas etc., as other commodities transported across the state border.

29. K. Marx, *Capital* (1867), *op. cit.* vol. 1, p. 84.

30. J. Fichte, *Rechtslehre* (1812), Leipzig, p. 10.

31. The development of the law of war is nothing other than the gradual consolidation of the principle of the inviolability of bourgeois property. Until the era of the French Revolution the population was robbed without hindrance or restriction, both by its own soldiers and by the enemy. Benjamin Franklin first proclaimed (1785) as a political principle that in future wars "peasants, craftsmen and merchants must peacefully continue their occupations under the protection of both warring parties". Rousseau, in his *Social Contract*, asserts the rule that war is conducted between states but not between people. The legislation of Covenant strictly punished thefts by, soldiers both in their own and in an enemy's country. Only at the Hague, in 1899, were the principles of the French Revolution elevated to the rank of international

law. Moreover, justice requires that it be noted that Napoleon, in declaring a continental blockade, felt a certain embarrassment and considered it necessary, in his address to the Senate, to justify this measure "affecting the interests of private people because of a dispute between states" and "recalling the barbarity of olden times"; in the last world war the bourgeois states, without any embarrassment, violated the property rights of the citizens of the warring countries.

32. H. Dernburg, *Pandekten (1906), Moscow, vol. 1, p. 39.*

33. In Germany this occurred only when Roman law was received, which is proved, *inter alia*, by the absence of a German word for the expression of the concepts of "person" (*persona*) and "subject of rights". See O. Gierke, *Geschichte des deutschen Körperschaftsbegriffs (1873)*, Berlin, p. 30.

34. *ibid.* p. 35.

35. *ibid.* p. 34.

36. A. Hauriou, *Principes du droit public (1910)*, Paris, p. 286.

37. *ibid.* p. 287.

38. For example, Proudhon declares: "I want a contract and no laws. For me to be free we must reconstruct the whole social order on the basis of mutual contract." However, he adds later: "The norms by which the contract must be fulfilled will not depend exclusively on justice, but also on the common will of people who participate in life together, a will which must compel the fulfilment of the contract even with coercion." See P. J. Proudhon, *Wes generales de la (1851)*, Paris, X, pp. 138, 293.

39. K. Renner, *The Institutions of Private Law and their Social Functions (1949)*, Routledge and Kegan Paul, London, pp. 266-267.

40. *ibid.* p. 268.

41. The defenders of private property therefore eagerly appeal to this elementary relationship because they know that its ideological power exceeds many times its economic significance for modern society.

42. K. Renner (1949), *op. cit.* p. 252.

43. Property under simple commodity production, which Karner contrasts with the capitalist form of property, is just as pure an abstraction as simple commodity production itself. The transformation of even part of the products into commodities, and the appearance of money, constitute a sufficient condition for the appearance of usurer's capital-in Marx's expression, that "antediluvian form of capital" which, together with its twin (mercantile capital), "long precedes the capitalist mode of production and can be observed in various socio-economic formations". See K. Marx, *Capital (1967), op. cit. vol. 3, op. cit.*

44. The intensification of the transcendence of the legal form would be reduced to the gradual transition from the equivalent method of distribution-definite quantities of products for definite quantities of labour-to the realization of the formula of developed communism: "from each according to his abilities, to each according to his needs".



45. K. Marx, "On the Jewish Question" (1843), in *Karl Marx: Early Writings* (1975), introduced by L. Colletti, Penguin and New Left Review, p. 234.
46. F. Engels, *The Origin of the Family, Private Property and the State* (1884), MESW, vol. 3, p. 327.
47. In our time of intensified revolutionary struggle we can observe how the official apparatus of the bourgeois state recedes into the background in comparison with the "voluntary guards" of the fascists and their ilk. This once more shows that when social equilibrium is disrupted it then "seeks salvation", not by creation of "an authority standing above classes", but by the maximum pressure of the forces of the struggling classes.
48. I. Podvolotsky, *The Marxist Theory of Law* (1923), Moscow, p. 33.
49. K. Marx, *Capital* (1867), *op. cit.* vol. 3, p. 881.
50. The English bourgeoisie, which earlier than others won for itself the domination of world markets, and which felt invulnerable because of its insular position, could go further than others in the practice of the *Rechtsstaat*. The most consistent actions based on law in the mutual relationships between authority and the isolated subject, and the most effective guarantee that the bearers of authority did not transgress their role as the personification of an objective norm, was the subordination of state agencies to the jurisdiction of an independent (not of the bourgeoisie, of course) court. The Anglo-Saxon system is, in its own way, the apotheosis of bourgeois democracy. But, so to speak, if worse comes to worse in other historical conditions, the bourgeoisie will make peace with a system which could be baptised as a system of "separation of property from the state", or a system of Caesarism. In this case the ruling clique, by its unlimited despotic arbitrariness (having two directions: internal, against the proletariat, and external, expressed in an imperialist policy), creates the background for the "free self-determination of the individual" in civil exchange.
51. I. Kant, *Kritik der praktischen Vernunft* (1914), German edition, p. 96.
52. It goes without saying that in a society torn by class struggle, classless ethics may exist only in the imagination, but by no means in practice. A worker, having decided to take part in a strike-despite those deprivations with which this participation is associated for him-may formulate this decision as a moral duty to subordinate his personal interests to the general interests. But it is dear that this concept of general interests may not also include the interests of the capitalist *against* whom the struggle is waged.
53. H. Maine, *Ancient Law* (1873), Russian edition translated by N. Belozersky, p. 288.
54. cf. M. Kovalevsky, *Modern Custom and Ancient Law* (1886), Petersburg and Moscow, pp. 37-38.
55. E. Ferri, *Criminal Sociology* (1900), Russian edition translated and with a preface by Dril', vol. 2, p. 37.

56. R. Jhering, *The Spirit of Roman Law* (1875), Russian edition, vol. 1, p. 118.
57. H. Maine, *Ancient Law* (1873), *op. cit.* p. 269.
58. H. Spencer, *Principles of Sociology* (1883), Russian edition, p. 659.
59. Thus, criminal law is a constituent part of the legal superstructure to the extent that it embodies one of the varieties of that basic form to which modern society is subordinated: the form of equivalent exchange with all the consequences which derive from it. The realization of this relationship in criminal law is one of the aspects of the *Rechtsstaat* as an ideal form of relationship between independent and equal commodity producers who meet in the market. But since social relationships are not limited to the abstract relationships between abstract commodity owners, the criminal court is therefore not only the embodiment of the abstract legal form, but it is also a weapon of direct class struggle. The sharper and more intense this struggle, the more difficult it is for a class to realize its domination through the legal form. In this case, the "impartial" court-with its guarantees-is replaced by an organization of direct class violence, and its actions are guided only by considerations of political expediency.
60. Quoted from G. Aschaffenburg, *Das Verbrechen und seine Bekämpfung* (1905), Heidelberg, p. 200.
61. *ibid.* pp. 205-206.

## 2      *"Lenin and Problems of Law"\**

### Introductory Note

The following essay was Pashukanis' earliest attempt to seek anticipatory support for the serious implications of *The General Theory of Law and Marxism*, in Lenin's voluminous yet fragmented writings on law. It was written in the context of two unresolved questions in the indecisive period after Lenin's death in 1924. What form ought to be attached to the content of Party rules and directives? What ought to be the attitude of the Party and the Soviet proletariat towards the demand for the right of nations to self-determination? And, of course, within the framework of the debates between Bukharin, Trotsky and Stalin concerning centralization and the doctrine of socialism in one country, these questions were not entirely unrelated. Pashukanis argues that a revolutionary Party must follow a course which avoids the dangers both of the complete rejection of legal struggle and of the fetishism attached to legal rules. Legality is not an "empty sack" that can be filled with a new class content immediately after the revolution, and under the New Economic Policy the legal form must be used as a weapon in a programme of cultural re-education. Pashukanis' response to these questions appeared in a special collection entitled *Revolution of the Law*, which was edited by Stuchka and included such distinguished theorists as Bukharin, Adoratsky and Razurnovsky. This collection was intended as the first systematic expression of the Marxist jurists.

\* "Lenin i voprosy prava", *Revoliutsiia prava: Sbornik 1* (1925), Kommunisticheskaia akedemiia Moscow.

## *"Lenin and Problems of Law"*

### I

Lenin, although a jurist by education, never devoted special attention to problems of law. From this, one could draw the rather hasty conclusion that such a category should receive no attention at all in the systematic study of his immense ideological legacy. However, this would be incorrect. To begin with, a series of isolated observations and thoughts relating to law are scattered throughout his work. They merely need to be extracted, sorted and systematized. Lenin's contribution to this subject, insufficiently developed by Marxists, can only be evaluated after this task is accomplished. In addition, not all of what Vladimir Ilich wrote in the Soviet period, not directly intended for publication, has yet been published, i.e. his writings relating to the practical problems of constructing the Soviet state which have been preserved in the form of numerous directive notes and letters to individual comrades, as well as every possible type of order, instruction etc. Only when all of this material is systematized and published will we be able to conceive a truly comprehensive idea of what Leninism means for the problems of law.

In the present article, naturally, we do not expect to achieve the exceptional results of work which would require substantial and, probably, collective efforts. But one point should be made at this juncture. One can obtain a much more correct Marxist and dialectical approach to the problems of law from Lenin, who did not write especially on law, than from other Marxists who especially dedicated themselves to these questions. To prove my point, I will give one example. The problem concerns one of the basic legal institutions: the institution of private property. Certain Marxists, following Renner's example, present the dialectic of this institution in an entirely simplistic manner:

In the age of isolated and closed natural economy, the right of ownership of things could actually be considered as the factor distinguishing different groups of people from each other. outsiders had no relationships with these owners.

Exchange relationships between groups or their representatives, exchange of surpluses of the natural economy, contractual relationships connected with this exchange; in fact, these can be the only elements linking individuals with one another.<sup>1</sup>

It would seem that nothing could be simpler: the less that exchange is developed and the less the role of the market, the more private property atomizes people, the more it is a relationship "between a man and a thing", and the more it is the law of things. On the other hand, the same author concludes, "capitalist private property ... does not 'atomize' people, but strongly 'unites' them, and enchains the workers if not to an individual capitalist, then at least to capitalists as a group". From this he concludes that "the difference between the law of things and the law of obligations, in particular in the form which bourgeois jurisprudence gives it, corresponds not to the capitalist system, but to the structure of the simple natural economy". This is an example of an extremely simplistic analysis-reputedly attributed to Marx, but in fact made by Renner.

Goikhbarg entirely fails to realize the dialectical possibility that in atomizing people, private property makes its appearance by uniting them through exchange, through the market, according to the extent of the disappearance of the natural economy and its replacement with a commodity-money economy. However, in one of Lenin's earliest works, we find not only a clear understanding of the dialectic of private property, but also a correspondingly sharp formulation of it. Objecting to Mikhailovsky on the question of the nature of the right of inheritance, Lenin writes:

In fact, the institution of inheritance already presupposes private property and the latter arises *only with the appearance of exchange* [our italics, E. P. I The source of this was the specific nature of social labour and the alienation of commodities on the market which were already appearing. So long, however, as all the members of the primitive American Indian tribe jointly produced all their necessary products, private property was impossible. When the division of labour penetrated the tribe, and its members individually began to engage in the production of an article and to sell it on the market, then the institution of private

property appeared *as the expression of this material individualization of commodity producers*" [our italics, E. P.].<sup>2</sup>

The matter is therefore by no means so simple. The materialist nature of private property "isolating people" appears on the scene only when instead of the simple relation "between a man and a thing" (natural economy), a contractual relation among people emerges, a relation of exchange (commodity-money economy). The contradiction between the law of things and the law of obligations turns out to be, according to the dialectic, contained in the single shell in which they jointly developed, which to a certain extent appears as nothing other than the contradiction between "the social nature of means of production and the private nature of appropriation" translated into legal language.

If the strictly materialist character of property "isolating" people was an attribute of the closed natural economy, it would follow from this that, for example, feudal ownership of land must have been more exclusive (excluding others, strangers) than bourgeois ownership. But, alas, this flatly contradicts historical facts. Listen to what one eminent historian of the civil legislation of the French Revolution says in this respect. This is how Sagnac characterizes the land relationships of pre-revolutionary France:

A right of ownership does not belong to only one person, as in the Roman Empire; the different rights of which it consists, instead of being collected in one bundle, are separated. On the one hand, the right of direct possession remains in the grantor; on the other hand, after the right of use has passed to the person to whom this land is granted, then, because of centuries of evolution, it is considered not as *a* simple right of use but *as* a right of ownerships

Thus, relationships that were semi-natural corresponded, so to speak, to the absence of a clearly distinct right to an object "gathered in one bundle". But this is still not all. In the same Sagnac we read further:

If land belonged both to the lessee and lessor, in fact or in theory, then it also belonged in the general sense to all people ... as soon as the harvest was collected the land became common to all. Poor people could go there, collect the fallen ears which they used for cows' litter, for the roofing of homes or for heating the hearth ... afterwards each could pasture his cow and sheep on

the unfenced lands; this was a free pasture. Certain customs allow owners to enclose only a small part of their estate so as to give the poor the possibility of pasturing their cows or goats.<sup>4</sup>

These facts were not of course first discovered by Sagnac. They were long known and characterized, among others, even by Marxists, as survivals of tribal property which were preserved in fact by the natural form of the economy. On the contrary, enclosure-the symbol of an exclusive material right-was intensified by the development of a commodity-money economy, and by the transition from feudal to capitalist exploitation. just consider the chapter in *Das Kapital* on primitive accumulation. The French Revolution effected a decree punishing the mere proposal of an agrarian (reform) law (i.e. division of the land) with death. At the same time strict decrees were adopted on the protection of land boundaries. Thus, the development of the market-the development of commodity-capitalist relations-leads precisely to the situation whereby private property more and more clearly reflects its exclusive nature as a relationship "between man and an object". This is despite, or more accurately because of, the fact that the natural diversity of objects gives way to their impersonal expression in the form of a universal monetary equivalent. Property obtains a more perfect materialist character, then, with the freedom of appropriation and alienation. Land ownership obtains a fully materialist character when the land becomes "immobile", i.e. an object of exchange which is distinct from other objects-an object only by the fact that it cannot be transferred from place to place. In other words, the material character of property corresponds not to natural-economic relationships but in fact to the relationships of commodity-capitalist society. And accordingly, contrasting the law of things with the law of obligations, it in no way loses its meaning in the transition from the natural economy to the commodity-money economy. But, on the contrary, for the first time it obtains its full meaning.

The same must also be said about the relationship between the exploited and the exploiter. Here also, the process of development is not as simple and one-sided as Goikhbarg depicts it. Precisely because the feudal economy was basically a natural one, feudal ownership of land could not adopt the perfected form of an exclusive right to an object. The existence of peasant

allotments-which destroyed this exclusivity-was also in fact an instrument of exploitation:

in order to obtain an income (i.e. surplus product) the serf-owning landlord must have on his land a peasant who possesses an allotment, implements and livestock. A landless, horseless, non-farming peasant is useless as an object of feudal exploitation.<sup>5</sup>

But it was indeed from this that the enserfment of the peasant derived:

the peasant who was allotted land must be personally dependent upon the landlord, because, having land, he will not perform labour for his lord except by coercion. The economic system here engenders non-economic coercion, serfdom, legal dependence, lack of full rights etc.<sup>6</sup>

Thus, we see that property in a semi-natural economy not only "isolates", as Goikhbarg thinks, but also very strongly binds-"attaches"-people, in the given case peasants, not only to the class of estate owners, but also to each individual estate owner. "On the contrary, 'ideal' capitalism is the full freedom to contract in the free market-for the owner and proletarian."<sup>7</sup> The power of money appears most clearly in the contradiction between the legal freedom of the parties in the market and the actual power of capital, and it forms the structure of the bourgeois state in contrast to the feudal state.

Of course, one may object that all this is nothing new, just the ABCs of Marxism. In particular, the difference between the forms of feudal and capitalist exploitation, and the difference between the derivative forms of state, are sufficiently elucidated by Marx himself in the second part of Volume III of *Das Kapital*. Lenin's formulation on this particular point merely repeats Marx. But it is all the more unforgivable to disregard these truths when they are elementary and have been well-known for a long time. This is especially so if, in the light of these truths, a picture of the development of law emerges which is much more complex than the one presented to us as the latest conclusions of Marxism.

From this small example we can see that it is in fact much easier to "criticize this [i.e. legal, E. P. I mythology than to explain it from the economic relationships which engender it".<sup>8</sup>



## II

Lenin's incomparable dialectic nowhere appears with such force, perhaps, as in problems of law. It is particularly striking, since one is compelled to compare it with the wretched formalism and fruitless scholasticism which usually flourishes here. We have in mind not only the theoretical analysis of the legal superstructure, in which Lenin appears as a true follower of Marx, but also Vladimir Ilich's practical position in this area. Here we also encounter striking examples of the purely Leninist dialectic. It is sufficient to observe 'in several specific cases the role that Lenin attributed to the legal form. He always did this by taking full account of the concrete historical situation, the relationship between the forces of the struggling classes etc. to realize that both the fetishism of the legal form and its complete opposite the failure to grasp the real significance that one or another legal form may have at a given stage were equally foreign to Vladimir Ilich.

The struggle to overthrow and unmask the legalistic fetish of the system, against which the revolutionary struggle is conducted, is a quality of every revolutionary. This is obvious. Without this quality, the revolutionary is not a revolutionary. But, for the petit bourgeois revolutionary the very denial of legality is turned into a kind of fetish, obedience to which supplants both the sober calculation of the forces and conditions of struggle and the ability to use and strengthen even the most inconsequential victories in preparing for the next assault. The revolutionary nature of Leninist tactics never degenerated into the fetishist denial of legality; this was never a revolutionary phrase. On the contrary, at given historical stages, he firmly appealed to use those "legal opportunities" which the enemy, who was merely broken but not fully defeated, was forced to provide. Lenin knew not only how mercilessly to expose tsarist, bourgeois etc. legality, but also how to use it, where it was necessary and when it was necessary. He taught how to prepare the overthrow of the autocracy by using the very electoral law promulgated by the autocracy itself, and how to defend the first positions won by the world revolution of the proletariat, i.e. our victory in October 1917, by concluding a treaty with one of the imperialist states (the Peace of Brest). His incomparable political instinct unerringly guided him to an understanding of the limits within which it was fully possible to

use the legal form imposed by the course of the struggle. Lenin brilliantly took into consideration the fact that the legality which our enemy imposes upon us is re-imposed on him by the logic of events. The Stolypin regime, however much it wanted, could not confine the class struggle in Russia inside those limits within which it was conducted before the 1905 revolution; the German imperialists, whatever their subjective dislike of the Soviet revolution, were compelled by the force of the general international situation to conclude a treaty with the Soviet government.

Lenin frequently characterized this use of legality as dirty, thankless work (his comparison of the tsarist Duma with "dirty bread" is famous), but it was necessary to know how to do this work in a certain type of situation, and to put aside the kind of revolutionary fastidiousness which acknowledged only the "dramatic" methods of struggle.

During the years of reaction (1907-1910), the Bolsheviks, compared with other defeated opposition and revolutionary parties, "conducted the most orderly retreat with the least damage to their army", "with the nucleus of their party best preserved, with the fewest and least harmful divisions, and with the least demoralization" etc. Lenin explained this primarily by the fact that the Bolsheviks "ruthlessly exposed and drove out the revolutionary phrasemongers who refused to understand that it was necessary to retreat, that it was necessary to learn how to work legally in the most reactionary parliaments, in the most reactionary professional, cooperative and similar organizations".<sup>9</sup>

Such major examples of Leninist strategy as the use of "legal opportunities", or the Brest Peace, are sufficiently well known and have been more or less studied from the perspective of the political lessons which they contain. But until now little attention has been paid to the fact that both cases demonstrate recognition of the real significance of a type of legal form which is used in a specific situation, and as a well-known and very necessary method of struggle.

And Lenin attacked those revolutionaries who, consoling themselves with a revolutionary phrase, showed a lack of willingness or lack of ability to learn how to apply this method of struggle 'in practice.

It is remarkable that this tendency is observed in Lenin, not just on a large scale and in the major political struggles which he conducted,

but also in minor conflicts of an everyday character with which he happened to be involved. Always remaining deeply committed to principle, Lenin nevertheless did not refuse to apply those concrete methods of struggle which at a given point happened to be the only possible way to achieve a desired result—even though the method was, for example, an appeal to a tsarist court.

Here one must recall an episode from Lenin's life told by Elizarov soon after the death of Vladimir Ilich. The situation was that Vladimir Ilich, who at the time was still living in Samara, wanted to teach a lesson to a high-handed profiteer, a purveyor of transportation, who arbitrarily detained passengers who used the services of boatmen to cross the river rather than his ferry. He submitted a complaint, despite all the efforts of the head of the former district council (on behalf of the profiteer, naturally) to exhaust the indefatigable complainant by dragging out the hearing of the case; finally, a guilty verdict was obtained.

In this episode it is not only important for us that Lenin displayed in a minor matter the same stubbornness, iron will and firmness for which he was known in major matters. It was important that he knew, when he wanted to and when he found it necessary, how to set into motion even this method of struggle—he appealed to the tsarist court to teach the petty tyrant a lesson in that particular matter and to protect the interests of the poor boatmen. This would not have been surprising if Lenin had belonged to that type of "social activist", an outstanding representative of which was, for instance, V. G. Korolenko. For them, such a struggle with the semi-serf Asiatic arbitrariness of the estate-owner state "in the name of legality" and strictly by legal means—was a sort of banner. No one mocked these people more caustically than Lenin. But this indeed proves that Lenin was a master of this type of struggle if he could not get the result he sought by, so to speak, taking a partisan position at the head of the struggle which he was conducting against autocratic arbitrariness and capitalist exploitation. Why, probably 99% of our good revolutionaries would have simply wrung their hands in this particular case and said, "It is not worth being involved". And, of course, in so doing this would have reflected not their commitment to principle as revolutionaries, but simply a lack of knowledge of what had to be done and that it was necessary to act as a lawyer; and also, a lack of willingness because they were fastidious. What could be more

favourable for a revolutionary than to go to court and, moreover, to appear before the head of local government. But Lenin was not an idle dreamer; he knew how to do dirty work where it was necessary. It is true in this case that it was also possible to construct an argument for the expediency of the route undertaken by Vladimir Ilich. Was it worthwhile, in fact, to have spent time and energy going to court with some individual profiteer? But this is another example where what is debatable is not the question of expediency, but the question of principle: should a revolutionary seek the support of the Crown's court? A certain individual who managed the Knowledge Publishing House committed a violation and was, therefore, subject to the threat of a law-suit. In Lenin's correspondence with Gorky the question is considered, what practical steps should be taken? Should one appeal to the tsarist court; was this permissible? Obviously--the orthodox intellectual outlook, the fear of dirtying the clean clothing of the revolutionary by turning to the tsarist court, the fastidious-anarchist relationship to courts in general, and, most of all, the usual legal impotence, the lack of knowledge of "how this is done"-all these are arrayed against such a means of action. Lenin energetically criticized this combination of visible and hidden motives: "With respect to P., I am for the court. There is no reason to stand upon ceremony. Sentimentality would be unforgivable. Socialists are by no means against the Crown's court. We are for the use of legality. Marx and Bebel turned to the Crown's court even against their socialist opponents. It is necessary to know how to do this, and it is necessary to do it."

And not being satisfied with this avalanche, Vladimir Ilich again 46 presses" energetically: "P. *must be sued and with no holds barred*. If you are criticized for this--spit in the faces of the critics. To criticize would be hypocritical."<sup>10</sup>

It is not known what happened to this P., and it seems that this case did not go to court. But it appears that were the matter up to Vladimir Ilich, P. would have been sued "without reservation".

Indeed it is this aspect of Vladimir Ilich which must be compared with this firm appeal--already another matter, in the situation of the Soviet state--to struggle against the violation of discipline, omissions, corruption and outrages; to struggle firmly, bringing it inevitably to an end, to court, to punishment. "How are officials penalized who have favored local conditions to the detriment of the centre

and in violation of orders from the centre? What are the names of those penalized? Is the frequency of these violations diminishing? Have the penalties been increased, and if so to what?"<sup>11</sup> And further: "We must reorganize the Workers' and Peasants' Inspectorate by calling non-Party members to account both through this Inspectorate and also outside it through *judicial prosecution* [our italics, E. P.]."<sup>12</sup> And also from the same order: "On measures of struggle with thieves: are they being held criminally accountable? The administration? The factory and plant committees (for insufficient struggle with theft)?"<sup>13</sup>

At the same time Lenin teaches anyone who points out a shortcoming of the Soviet mechanism that they must contribute to the struggle with all the methods provided by Soviet legality. Once a case is begun, bring it to an end, using all Soviet and Party channels. Do not be dissuaded by the fact that you have suffered failure at first, do not be dissuaded by the fact that you do not know where to turn. Everyone is obliged to know where and how to complain about an improper decision, and everyone is obliged to become a legally literate Soviet citizen.

The knowledge of how to conduct a struggle on "legal ground", which in the pre-revolutionary situation did not and could not have broad significance, in principle has a very different meaning after the October period. Under autocracy and under capitalism it was impossible to struggle with the legal impotence and juridic illiteracy of the masses, without conducting a revolutionary struggle against autocracy and against capital: this impotence is but a partial phenomenon of the general subjugation for whose maintenance tsarist and bourgeois legality existed. But after the conquest of power by the proletariat, this struggle has the highest priority as one of the tasks of cultural re-education, as a precondition for the construction of socialism. Therefore, Lenin's works from the Soviet period are simultaneously "anti-legal propaganda", i.e. a campaign against bourgeois legal ideology, and an appeal to struggle and to eliminate legal illiteracy and impotence:

To the extent that the basic task of power becomes not military subjugation but rule the typical feature of subjugation and coercion will become not instant execution, but the court. And in this respect, after October 25, 1917, the revolutionary masses set forth on the correct path, and they have shown the viability

of the revolution by beginning to set up the workers' and peasants' courts even before any decrees were issued on the dissolution of the bourgeois-democratic judicial apparatus, But our people's and revolutionary courts are exceptionally and unbelievably weak. -)ne senses that the popular feeling that these courts are governmental and alien-an attitude inherited from the yoke of the estate owners and bourgeoisie has still not yet been finally destroyed. There is not a sufficient awareness of the fact that the court is an *agency* of the power of the proletariat and of the poorest peasant, and that the court is an *educational weapon* for discipline.<sup>14</sup>

### III

The petit bourgeois revolutionary, rejecting the use of the legal method of struggle, may consider himself an arch-leftist, as for example the extreme left Social Revolutionaries considered themselves when they disregarded the example of the Bolsheviks and called for a boycott of the Third State Duma. In fact they were simply paying their respects to a revolutionary phrase. But these gentlemen did not simply reject the outdated legality of the old regime: they adopted revolutionary struggle exclusively as a struggle for a new legality. Thus, formal legality still remains a fetish for them. They proceed not from the interest of the victorious class but from abstract principles; they cannot imagine that the policy of the proletariat (which has taken power and held on to it through a cruel civil war) is only the form of the establishment of a new type of legality which rests upon a correspondingly codified law. It is well known that the left Social Revolutionary jurists, on the day after they entered into the structure of the Soviet government, were busy drafting "a criminal code of the Revolution".

No one knew how to castigate the musty and reactionary formal juridic approach to questions of the revolutionary class struggle as well as Lenin. The words of Bebel were not in vain: "the jurists are the most reactionary people on earth"-this was the favourite expression used by Vladimir Ilich. It is sufficient to remember how he attacked Kautsky when the latter (with respect to the Soviet Constitution depriving the exploiters of the right to vote) posed the deep question: "Who is a capitalist in the legal sense?" It is sufficient to remember his rebuke to Kautsky over the question concerning the

"illegal" expulsion of Social Revolutionaries and Mensheviks from the All-Union Central Executive Committee, a rebuke revealing all the idiocy of legal formalism in the face of the harsh facts of class struggle:

We, the Russian Bolsheviks, had first to promise the inviolability of Savinkovs and Co., the Lieberdants and Potresovs ("the activists"); then draw up a criminal code declaring "punishable" any participation in the Czechoslovakian counter-revolutionary war, or any alliance with the German imperialists against the workers of one's own country in the Ukraine or in Georgia; and *only then*, on the basis of the criminal code, would we have had the right according to "pure democracy" to exclude "certain persons" from the soviets.<sup>15</sup>

What after all, in the final analysis, is the Leninist theory of dictatorship if it is not a doctrine of revolutionary power which rejects formal legality? "The scientific concept of dictatorship means nothing less than power unlimited by anything, by any laws, unconstricted by absolute rules, and depending directly upon force."<sup>16</sup> And in another place: "The revolutionary dictatorship of the proletariat is power won and maintained by the coercion of the bourgeoisie by the proletariat."<sup>17</sup> But does not this power, confined by neither rules nor laws, signify the absence of all organizational power? For the ingrained bourgeois jurist there is no doubt that this is the case, because he does not see, and does not want to see, that bourgeois legality is the consistent practice of class domination formed over decades and centuries. This standard "legal" form of domination can be destroyed or shaken by extraordinary events, but this still by no means signifies the necessary elimination of the organizational domination of the bourgeoisie itself. In accordance with an extraordinary situation it may adopt the form of an extraordinary and extra-legal dictatorship. And if, as we know, bourgeois legality developed gradually—because of the work of a whole legion of parliamentarians, scholars, jurists, judges and civil servants—then it would be absurd to demand the same legal perfection and legality from proletarian power born yesterday and having to defend its very existence with weapons. Legality is not an empty sack that can be filled with a new class content. But it is indeed in this way that Kautsky imagines the matter. "This 'serious scholar' allows the English bourgeoisie centuries to construct and

develop a new (for the Middle Ages) bourgeois constitution, but this representative of lackey science does not give us, the workers and peasants of Russia, enough time. From us he demands a constitution worked out to the letter in a few months."<sup>18</sup> The revolutionary and Marxist approach to problems of law requires, above all, an evaluation of the basic class tendencies of the upheaval taking place. But Kautsky is not at all interested in this. He is disturbed by the fact that, in depriving capitalists of the right to vote, our constitution therefore allows "arbitrariness". Here is Lenin's truly crushing answer to these pearls of formal-legal blockheadedness:

when in the course of centuries or decades all the bourgeois and the majority of the reactionary jurists of the capitalist countries developed detailed rules-wrote dozens and hundreds of volumes of laws and explanations of laws; oppressed the workers; enchained the poor; and placed thousands of cavils and obstructions in the path of any simple worker-then Mr. Kautsky and the bourgeois liberals do not detect "arbitrariness" here! Here, there is "order" and "legality" . . . but when for the first time in history the working and exploited classes ... created their own soviets, called to the task of political construction those classes that the bourgeoisie had subjugated, beaten and deadened; and began themselves to build a new proletarian state, standing amidst the dust of wild battle and in the fire of civil war, to outline the basic principles of a state without exploiters-then all the scoundrels of the bourgeoisie, the whole band of vampires, with their echo, Kautsky, began to shout about "arbitrariness".<sup>19</sup>

The bourgeois revolutionaries-the Jacobins-in clearing the way for capitalism also knew how to use the weapon of dictatorship mercilessly, but they could interpret their historical actions only in the false ideological form of struggling for the eternal bases of freedom and equality. They acted as daring revolutionary politicians, but they were thinking like jurists and moralists. They decided, for the sake of saving the bourgeois-democratic Jacobin revolution, to trample upon formal legality, but they did this in the name of freedom, in the name of the absolute rights of man and the, citizen.

For Lenin, as a follower of Marx, no social ideals existed that could not be explained in terms of the material conditions of existence, and which in class society did not have a class character. The idea of freedom and equality, the idea of the eternal and inalienable rights of



man is the natural law ideal. This is the lone source of support for the bourgeois jurist who is compelled, in a revolutionary period and in the name of his class interest, to abandon the ground of formal legality. This ideal arises in connection with a specific material social content which is rooted in the conditions of production.

In one of his first works, Lenin reminds our populists of this: "Marx repeatedly points out", he writes, "how at the foundation of civil equality, freedom of contract, and similar principles of the *Rechtsstaat*, there lie the *relationships between commodity producers*."<sup>20</sup> Lenin begins his theses on the national and colonial question with the same materialist criticism of the ideology of equality.

Bourgeois democracy is by its very nature characterized by an abstract or formal statement of the question of equality in general, including that of national equality. Under the appearance of the universal equality of the human personality, bourgeois democracy proclaims the formal or legal equality of the owner and the proletarian, of the exploiter and the exploited, thereby leading the subjugated classes into the greatest deception. The idea of equality itself, *being a reflection of the relationships of commodity production* [our italics, E. P. I is transformed by the bourgeoisie into a weapon of struggle to oppose the liquidation of classes, under the pretext of the supposedly absolute equality of human personalities. The real meaning of the demand for equality consists only in the demand for the elimination of classes.<sup>21</sup>

There is no harm here in recalling that these elementary propositions of Marxist criticism were by no means so generally accepted among the individuals who thought they were Marx's successors, as might seem at first glance. For certain representatives of the Menshevik camp "the absolute value of the legal principles of democracy" was not subject to any doubt even at the time when they seriously considered themselves representatives of revolutionary Marxism. Why, even at the Second Congress, the delegate Egorov "hissed" Plekhanov, when the latter asserted that the situation is hypothetically imaginable when we, Social Democrats, might express ourselves against the universal right to vote. And it is interesting that Martov, although not aligned with the champions of "absolute principles", nevertheless later (at the Congress of the League of Social Democrats Abroad) considered it necessary to offer a reservation on just this point; that Plekhanov "could avoid the dissatisfac-

tion of some of the delegates, if he were to add that of course one must not imagine such a tragic state of affairs as that in which the proletariat, in order to secure its victory, would be forced to trample upon such political rights as the freedom of the press". The whole essence of Menshevism lies in this reservation. On the one hand, being Marxist, it is inconvenient to come forward as a champion of eternal and classless principles of formal democracy; on the other hand, the real petit bourgeois nature of Menshevism in fact moves along these "classless" lines: the result is a truly tragic dissension in which they attempt to save themselves from this contradiction in the fond hope that "of course, one cannot imagine such a tragic state of affairs". But what can be done if this "tragic state of affairs", despite the Menshevik hopes, nevertheless becomes an historical reality? We already have the answer to this question; it is provided by the consistent political practice of Menshevism, which was nothing other than subservience to the fetish of bourgeois democracy and an intensified struggle against the dictatorship of the proletariat.

#### IV

Marxist theory relegates legal forms to a secondary and even tertiary place in social development. Economic relations develop on the basis of the specific condition of the social productive forces and are decisive in the final analysis; the direct lever pushing forward the march of history is the class, i.e. political struggle, which itself is nothing other than "the concentrated expression of economics"; as far as the legal formulation of economic relations and political facts is concerned, this plays a secondary and subservient role. Marxist theory, generally speaking, has therefore given the problems of law comparatively little attention. On the contrary, bourgeois scholarship has developed this external formal side of social relationships with particular enthusiasm, for, in addition to other reasons, this gives its theorists the possibility of completely avoiding consideration of the problems of economic inequality (these are troubling because of their "materialism"). jurisprudence is therefore a safe haven. This aspect of the matter is pointed out, incidentally, by Vladimir Ilich in his article with respect to the last (pre-war) scholarly work of Peter Struve. "The modern bourgeoisie", he

wrote, "are so frightened by this step [which political economy has made in the person of Marx-E. P. ], are so disturbed by the 'laws' of contemporary economic evolution, which are so obvious and imposing, that they and their ideologists are ready to discard all the classics and every kind of law if only to place . . . all of them ... in the archive of jurisprudence ... along with . . . social inequality."<sup>22</sup> In another place, characterizing this tendency of bourgeois scholarship, Vladimir Rich formulates the secret wishes of the bourgeois theorists: "Let political economy be occupied with truisms, with scholasticism and with the senseless struggle for facts, and let the question of 'social inequalities' recede to the safer area of socio-legal discussions; where it is easier 'to escape' from these troubling questions."<sup>23</sup>

However, the correct Marxist analysis of the legal form as a superstructure dependent upon the base may, in certain circumstances, be turned into a caricature of Marxism, into a lifeless and determinist view. Here, the superstructure emerges "by itself" upon a given base, and form appears "by itself" at a certain level of development of the given material content. Increasing emphasis upon the regularity of social development is imperceptibly transformed into the assertion of a certain social automatism, or, as expressed in our militant political jargon, into "tailism". Lenin, being a fierce opponent of every sort of tailism, could not of course fail to combat these types of views and theories, and to expose them as deviations from Marxism. The first type of fatalist distortion of Marxism was made, as is well known, by the "economists". All class struggle, they affirmed, is political struggle, and so they concluded that the political potential of working class struggle is an automatic process. The Marxist doctrine that political forms, and even forms of political struggle are inevitably engendered by their economic content, is turned by the "economists" into justifying and glorifying every sort of backwardness in the workers' movement. The Mensheviks formally repeated the same mistake, beginning with the propagation of tailism or organizational problems. "Content," they announced, "(i.e. the content of the political struggle) is more important than form; programme and tactics are more important than organization." Here the dispute is transferred, so to speak, to a level which interests us. The form about which they are speaking is the legal or constitutional formulation of the Party, in which the latter appears not only as the totality of like-minded political thinkers, but

also as a formally unified whole, i.e. an aggregate of organizations. The external expression of unity is the hierarchy of Party institutions and the Party Charter. The struggle which Lenin led at the Second Congress, and to which his *Steps* was dedicated, was also the *struggle for the necessity of a legally formulated party organization*.

Here it is appropriate to note that Vladimir Ilich had available all the necessary data, not only for theorizing on law, but also for feeling himself fully assured about where law appears in its Practic

function as a formal intermediary of a particular kind of social relationship.<sup>24</sup> These data, in the first place, were interpreted by the iron logic of thought characteristic of Vladimir Ilich. Being an incomparable dialectician and understanding the subordinate position of formal logic, Vladimir Ilich nevertheless gave it its deserved place. The dialectic was never turned into fogginess and confusion by him. On the contrary, he did not propose anything diffuse, undefined or confused. Each of his formulations was always thought out to the end; there is nothing excessive in it, nothing which reveals a lack of theoretical clarity that in such situations tries to shelter behind verbosity. A well-developed mind such as his is a necessary and a sufficient condition for being an extraordinary jurist. We recommend that anyone who doubts this read carefully, for example, Lenin's criticism of Martov's draft of the Party Charter in *Steps*.<sup>25</sup> The mastery with which Lenin exposes typical intellectual slovenliness, with respect to precise "legal" definitions, combined with lack of content, verbosity, pointless formalism and endless repetitions, speaks sufficiently for itself. In particular, this is a clear example of the fact that Lenin's criticism is directed against form; for by his very act of publishing Martov's draft, his purpose was to show that a particular nuance of substance (in the sense of the negative relationship to centralism)-contrary to the affirmations of Martov-was not revealed in his draft of the charter written before the Congress.

The struggle at the Second Congress and after it, the debates on the first paragraph of the charter on centralism etc.... all this had of course a certain political significance and political meaning, to be sure, revealed in full only later. But from the logical point of view the argument flowed on the level of a different approach to the nature of the charter or, in a broad sense, the legal formulation of our Party. The opponents of Lenin simply denied the possibility of a formulation under which the Party would have presented itself as

something better defined than the totality of persons *considering* themselves, at any given moment, members of the Party. No rules, for instance, Axelrod said, can forbid circles of revolutionary youth and individual persons from calling themselves Social Democrats and even considering themselves part of the Party. Lenin easily revealed the absurdity of this argument:

to forbid one to call himself a Social Democrat is impossible and *pointless*, for this word expresses *directly* only a system of thoughts and not defined organizational relationships. To forbid certain circles and persons "to consider themselves part of the Party" is possible and necessary when these circles and persons are dangerous for the affairs of the Party, corrupt it and disorganize it. It would be comical to speak of the *Party* as a whole as a political quantity, if it could not "forbid by decree" a circle "to consider itself part" of the whole! And why then define the procedures and conditions for expulsion from the Party?<sup>26</sup>

To Lenin himself it appeared very early-and he emphasizes this in many places in his Steps-that the organizational opportunism of Axelrod, Martov and others is only the inheritance of the previous (not yet outlived) age of circlism, of the age when the Party grew from a "family circle", without a formal character, without the subordination of the minority to the majority, without the subordination of the part to the whole. Lenin, more than anyone, understood the tremendous significance of revolutionary circlism, i.e. the close ideological and comradely welding of revolutionaries based upon unconditional faith in one another. Many of the best pages in his *What is to be Done?* are devoted to the clarification of this significance. But Lenin also understood that when the Party moves out into the broad arena of political struggle, it must supplement ideological unity with the character of external unity, it must put Party institutions in the place of the circle. Lenin understood that a party which was arrested in its development at the stage of the circle would not be in a position to fulfil those tasks designated in its programme. The circle connection, informal, without a charter, while it had great advantages, also had shortcomings that in the future would necessarily become unbearable. Customs that grew up at this period became an impediment to further growth. Lenin wrote:

To those who are accustomed to the loose dressing-gown and slippers of the Oblomov circle household, formal rules seem narrow, restrictive, irksome, petty and bureaucratic, a bond of serfdom and a fetter on the free process of the ideological struggle. Aristocratic anarchism cannot understand that formal rules are needed precisely in order to replace the narrow ties of the circle with the broad tie of the Party. It was unnecessary and impossible to formulate the internal tie of a circle or the ties between circles, for these ties rested on friendship or on a confidence for which no reason or motive had to be given. The Party bond cannot and must not rest on either of these; it must be founded on formal, bureaucratically worded rules (bureaucratic from the standpoint of the undisciplined intellectual), strict adherence to which can alone safeguard us from the wilfulness and caprice characteristic of the circles, and from the circle methods of in-fighting that go by the name of the "free process of the ideological struggle".<sup>27</sup>

The sharp attacks of Lenin, as always, were explained by the fact that he clearly saw the next and the most necessary step that at any given moment must be made by the Party, and he violently attacked those who pushed the Party backward.

In answer to the announcement of the editorial board of the new *Iskra* that "trust is a delicate thing which cannot be hammered into the heart and the head", Lenin noted:

When I was a member only of a circle ... I had the right to rely only upon undefined faith ... and when I became a member of the Party I did not have the right to rely only upon an undefined lack of faith . . . I was obliged to motivate my "trust or mistrust" by a formal conclusion, i.e. by reference to one or another formally established procedures of our programme, tactics or rules; I was obliged to follow *a formally prescribed* path for the expression of distrust, for the conduct of those views or those desires which flowed from this distrust.<sup>28</sup>

*One Step Forward, Two Steps Back*, is a book that, in addition to all else, has profound educational significance. It teaches a serious responsible relationship to Party affairs and to Party organizations; it teaches not to confuse the political discussion which precedes the adoption of a specific decision with endless and futile intellectual discussions; the consideration of candidates at elections of officials of the Party with ordinary family considerations of how not to annoy someone; the Party with a group of friends. This book emphasizes

the strict, formal, external side of a matter to which many of the revolutionaries of that time related carelessly. But Vladimir Ilich knew that "in its struggle for power the proletariat has no other weapon but organization ... that the proletariat can become and inevitably will become an invincible force only when its ideological unification, by the principles of Marxism, is consolidated by the material unity of an organization which will weld millions of toilers into an army of the working class",<sup>29</sup> that "the objective-maximal ability of the proletariat to unite into a class will be realized by living people, will be realized in other ways than in definite forms of organization",<sup>30</sup> that, accordingly, the founding and formalization (including the external-character aspect of this organization) is an important step forward in the history of the workers' movement.

When, after the Second Congress, Lenin's opponents had conducted a struggle against "bureaucratic formalism", they constructed their argument on a deeper and, it seemed, more Marxist understanding of the course of historical development. Lenin, of course, did not think of concealing the fact that his organizational plan had a most definite political significance: to protect the Party from opportunism. Against this, his opponents from the Menshevik camp put forth the following weighty objection. "Opportunism", they said, "is created by more complex, and defined by deeper causes than some paragraph of a charter." (Trotsky)

"The problem is not", Lenin replied, "that the paragraphs of the charter may create opportunism, but to forge with their help a more or less sharp instrument against opportunism." The formulae proposed by Lenin, Trotsky further asserted, must be rejected, for historical definitions must correspond with the factual relationships. "Trotsky speaks again as an opportunist", Lenin responded. "Actual relations are not dead, but live and are developing. Legal definitions may correspond to the progressive development of these relations but may also (if these definitions are bad) 'correspond' to regression or stagnancy." "The latter", added Vladimir Rich, "is the case with Martov."<sup>31</sup>

Opportunism on the question of organization was logically expressed in defending the primacy of "content" over form and in the placing of the programme and tactics before adoption of the charter, of "actual development" over "legal definitions". Lenin reveals the full metaphysical nature of this contrast which fails to account for

concrete historical conditions. That which is appropriate and correct in one stage of development becomes a crude mistake at another. Martov, speaking in defence of the old circle approach, tried to rely upon citations from the earlier works of Lenin, where he discussed "ideological influence" and the "struggle for influence", and contrasted them with the "bureaucratic method of influencing with help of the Rules", and the tendency to rely on authority which, purportedly, Lenin developed after the Second Congress. "Naive persons!" Lenin exclaims in this respect, "they have forgotten that *formerly* our Party was not a formally organized whole, but only the sum of separate groups, and therefore, no other relations except those of ideological influence were possible between these groups. Now we have become an organized Party and this implies the establishment of authority, the transformation of the power of ideas into the power of authority [and] the subordination of lower Party bodies to higher Party bodies. Why, it even makes one uncomfortable", Lenin concludes, "to have to masticate such rudimentary ideas for the benefit of one's old comrades."<sup>32</sup> In this emphatic "now" is concentrated all the wisdom of the Leninist dialectic. He, so to speak, says to his opponents: you may, good gentlemen, affirm as much as you wish that content defines form, that tactical correctness is a necessary condition of organizational solidarity, that discipline in the Party depends in the final analysis on the authority of ideas etc., but now the time has come when it is necessary to make a step further, when it is necessary to act on the premises created for ideological struggle, when it is necessary to understand the content of political struggle at the next stage, moving into the new juridically finalized form of Party organization,

"The work of *Iskra*", wrote Vladimir Ilich, "and the whole matter of Party organization, the whole matter of the *actual* reconstruction of the Party, could not be considered finished without recognition by the whole Party and also of the formal confirmation of definite organizational ideas. The organizational character of the Party also had to fulfil this task."<sup>33</sup>

With respect to the comments of the Menshevik *Iskra*, Lenin venomously notes at another place:

Content is more important than form, and programme and tactics are more important than organization. Great and profound truths. A programme is indeed more important than



tactics, tactics are more important than organizations. The alphabet is more important than etymology, etymology is more important than syntax-but what can be said of people, who having failed the examination in syntax, now put on airs and pride themselves that they have been held back in a lower class for another year?<sup>34</sup>

Lenin understands a formal and centralized organization as something real, and he is not willing to dissolve it into some sort of symbolism satisfying "spiritual unity". "The adoption of a programme", stated the Menshevik *Iskra*, "contributes more to the centralization of work than the adoption of rules." "How this banality-palmed off as philosophy--smacks", Lenin reacts, "of the spirit of the radical intelligentsia, and it is much closer to bourgeois decadence than to Social Democracy. Indeed in this famous phrase the word 'centralization' is understood in a sense which is very symbolic."<sup>35</sup> It is characteristic that a fetishist relationship to the basis of formal democracy, which by that time was innate to Menshevism, did not prevent Martov and his adherents within the Party from placing their opinion (and the will of their circle) above the formal decision of the majority of the Congress. Martov even cast doubt on the procedures of elections as expressions of the will of the Party: "only by replacing the question of the social consciousness of the members of the Party and the socialist content of their work with the question of the 'reliability' of centres invested with strong power, may we reach the point of seeing in the act of the elections a specific expression of the will of Party."<sup>36</sup> Lenin, in the opinion of the four editors of the old *Iskra*, "gives prominence, not to internal union, but to external, formal unity exercised and protected by purely mechanical methods, by the systematic subjugation of individual initiative and independent social action." Mocking the worth of this document-which in fact recalls more a pre-revolutionary district council speech on reforms ("independent social action"), than a resolution on internal Party questions-Lenin continues: "What external, formal unity were they talking about here, our Party members who had just returned from a Party Congress, whose decisions they had solemnly proclaimed to be valid? Do they happen to know of any method of achieving unity in a Party organized on any lasting basis, except by a Party Congress?"<sup>37</sup> Lenin mercilessly dismantles the accusations of bureaucratic formalism and shows

behind them are hidden only "an anarchist phrase and intellectual instability". "You are a bureaucrat", states Vladimir Ilich ironically, "because you were appointed by the Congress against my wishes; you are a formalist because you rely upon the formal decisions of the Congress, and not on my consent; you are acting in a grossly mechanical way because you cite the 'mechanical' majority at the Party Congress and disregard my wish to be co-opted; you are an autocrat, because you refuse to hand over the power to the snug little old band who insist on their 'continuity' as a circle-all the more because they do not like the explicit disapproval of this circle by the Congress."<sup>38</sup>

Lenin firmly led the Party to a new stage, to the organizational "instrumentalization" of its political life, fighting its way free from those who pushed it back to the bygone stage of ideological struggle and demarcation. "Unity on questions of programme and tactics is an essential, but still insufficient condition, for Party unity and for the centralization of Party work", explained Vladimir Ilich to his new-*Iskra* opponents. At once, in parentheses, he exclaims with weariness: "For heaven's sake, what rudimentaries have to be repeated nowadays, when all concepts have been confused!" "This latter", he continues, "requires, in addition, a unity of organization which, in a Party that has grown to be anything more than a mere family circle, is inconceivable without formal rules, without the subordination of the minority to the majority, of the part to the whole. As long as there was no unity on the fundamental questions of programme and tactics, we bluntly admitted that we were living in a period of disunity and the circle spirit; we bluntly declared that lines of demarcation must be drawn before we could unite; we did not even talk of the forms of a joint organization, but exclusively discussed the new (at that time they really were new) questions of how to fight opportunism on programme and tactics. When, as we all agreed, this fight had already ensured a sufficient degree of unity-as formulated in the Party's resolution on tactics-we had to take the next step, and by common consent, we did take it, working out the forms of a united organization that would merge all the circles together. But now these forms have been half-destroyed and we have regressed to anarchist conduct, to anarchist phrasemongering, and to the revival of a circle in place of a Party

editorial board. And this regression is justified on the grounds that the alphabet is more helpful to literate speech than a knowledge of syntax!"<sup>39</sup>

But for opponents from the new *Iskra* the Leninist "syntax" was unachievable, and they continued to regress towards the "alphabet". "Discipline", wrote Trotsky, "is sensible only up to the point when it assures the possibility of struggling for that which you consider right, and in the name of that for which you impose discipline upon yourself. But when attention is called in a certain way to the perspective 'of denial of a right', i.e. *denial of the right to struggle* for ideological influence, then the question of its existence is, for him, transformed from a *Rechtsfrage* (question of law) into a *Machtfrage* (question of force)." How can one fail to compare Trotsky's abstract opinions after the Second Congress—on the theme of the inevitability of dissidence—with his concrete statement in 1908-1914 for "unity" with those liquidators who had placed themselves both ideologically and organizationally outside the Party? To popularize the harmfulness of formal unity, after *Iskra* had laid the basis in a 3-year struggle for both programmatic and tactical unity, and to raise a cry against dissidence and dissent when a whole political chasm had opened between the parties and the liquidators—this is a rare and, one may say, classical example of the complete absence of a dialectical approach to the question.

## V

The mistake of the "economists" and the Mensheviks was, as we saw, the same. It consisted in the failure to understand the concrete forms of implementing the proletarian class struggle. Moreover, in both situations, their distortion of Marxism was presented as an alleged deepening of Marxist analysis, as the transfer of attention from the "external" (from "form") to the very "essence". Much later Vladimir Ilich had to fight with the same kind of mistake at the time of the discussion of the "right to self-determination".

His opponents, including the Polish comrades, having cast doubt on this point of our programme, similarly tried to bypass the specific requirement of a political and legal nature, the requirement put forth by the very course of the liberation struggle of the proletariat, under

the pretext that "in essence" no "self-determination" could exist under capitalism, and that under socialism it was not necessary. The analogy between this line of argument and the arguments of the "economists" was noted by Vladimir Ilich himself. In his answer to the argument that "socialism eliminates all national subjugation just as it eliminates the class interest which produced it", Lenin notes: "Why is there this discussion of the economic premises of the elimination of oppression? They have been known for a long time and are indisputable. The dispute is related to one of the forms of political oppression, namely, the forceful domination of one nation by the state of another nation. This is simply an attempt to avoid political questions."<sup>40</sup> And further: "indeed our opponents have even attempted to avoid whatever is debatable ... They wish to think neither about borders, nor in general about the state. This is a sort of 'imperialist' economism, similar to the old 'economism' of 1894-1902 which argued that capitalism is victorious, *therefore there* is no point in political questions."<sup>41</sup> Such a political theory is fundamentally hostile to Marxism.

Returning again to this analogy, Lenin writes that "the old economists" have turned Marxism into a caricature and have taught the workers that only "economics" is important for Marxists. The new "economists" "think", it seems, either that the democratic state of victorious socialism will exist without borders (like a complex of "sensations" without matter), or that the borders will be defined only by the needs of production. In fact these borders will be determined democratically, i.e. according to the will and "sympathies of the population".<sup>42</sup> On the other hand, arguments that the right of nations to self-determination is unrealizable under capitalism and that, *therefore*, one must give it up, are, as Lenin shows, a concession to reformism. "*Objectively* their [i.e. the Polish comrades'] phrases on impossibility are opportunist, for they silently assume [that self-determination] is impossible without a series of revolutions, as unrealizable under imperialism as under democracy."<sup>43</sup>

Lenin's political acumen in this dispute was frequently explained and commented upon in later Marxist literature. But no one, so far as we know, has noted the fact that logically the position of Rosa Luxemburg—and those holding views like hers (among whom spoke out even clear opportunists such as Semkovsky and the

Bundist Liebman)-may be, incidentally, characterized as the complete rejection of the legal form and the complete lack of understanding of its specific features. Begin with the fact that Comrade Lenin had constantly and firmly to explain to his opponents the difference between "the right to secession" and secession itself Rosa Luxemburg, and indeed others, suppose that recognition of the "right of secession" signifies obligatory support of every concrete demand for secession, and that it inherently includes "the encouragement of separatism". Lenin had to explain this lack of understanding with the elementary example of the "right to divorce". "To blame the champions of self-determination (i.e. of the freedom of secession, of encouraging separatism), is just as stupid and just as hypocritical as to blame the champions of freedom of divorce for encouraging the destruction of family ties."<sup>44</sup>

It was absolutely incomprehensible to the opponents of Lenin that the struggle against national oppression should find its most direct and appropriate expression in the interest of the proletariat in the demand for the legal freedom of secession, i.e. in technical language, in the struggle for the recognition of the corresponding "subjective right". The discussion relates precisely to the recognition that each nation has the "subjective right" to form an independent state. Lenin explains this by comparing it with the slogan demanding a federal or autonomous state structure:

It is not hard to see that under the right to national self-determination it is impossible for the Social Democrat to understand either federation or autonomy. Abstractly speaking, both are subsumed by self-determination. The right to federation is completely meaningless, because federation is a bilateral contract. It goes without saying that Marxists cannot defend federalism in general in their programme. With respect to autonomy, Marxists defend not the "right to autonomy", but autonomy *itself* as a universal principle of democratic states which have a mixed national composition and sharp differences in geographical and other factors. Therefore, to recognize "the right to national autonomy" would be just as meaningless as to recognize "the right of nations to federation".<sup>45</sup>

Such a statement of the question (recognition of the right to self-determination without obligatory support of each concrete demand for secession) was definitely not mastered by Lenin's opponents. It seemed "metaphysical" to them, deprived of concrete

political content, and without practical indications for daily policy. The Bundist Liebman simply declared the right to self-determination "a fashionable expression" whose meaning was surrounded by a haze.

The thought that this essentially bourgeois-democratic (and therefore inevitably formal and abstract) slogan could be both a battle cry of the proletariat against the semi-feudal and bourgeois materialist reaction, but could also play a positive role even after the victory of socialism, absolutely failed to find a place \*in the consciousness of people sincerely presenting themselves as consistent Marxists. It seemed to them that the empty legal abstraction of equality of right definitely had to be replaced by something real and practical. Lenin splendidly exposed their mistake:

To demand an answer "yes or no" to the question of secession in the case of every nation may seem a requirement that is very "practical". But in reality it is absurd, theoretically metaphysical, and in practice leaves the proletariat subordinate to the policy of the bourgeoisie ...

It is theoretically impossible to guarantee in advance whether the secession of a given nation, or its equal legal position with another nation, will culminate in a bourgeois-democratic revolution. It is important in both cases to ensure the development of the proletariat; the bourgeoisie impede this development and give precedence to "national" development. Therefore, the proletariat is limited to the "negative" demand for the recognition of the right to self-determination, which is not guaranteed to any one nation. The whole task of the proletariat on the national question "is not practical for the national bourgeoisie of each nation, because the proletariat demands an 'abstract' equal right, an absence in principle of even the slightest privilege, because it is opposed to all nationalism".<sup>46</sup>

Lenin understood what his opponents failed to understand: that the "abstract", "negative" demand of formal equal rights was, in a given historical conjuncture, simultaneously a revolutionary and revolutionizing slogan, and also the best method of strengthening the class solidarity of the proletariat and of protecting it from infection by bourgeois-national egoism. In fact, in the concrete conjuncture in which the argument occurred (i.e. on the eve of the Imperialist War and at its height, and thus on the eve of the Russian 'Revolution), to deny the right to self-determination by proceeding from the fact that this was just a slogan of formal democracy-and

that Marxists are obliged to expose this formal democracy in every way-would have been. "to play into the hands not only of the bourgeoisie but of feudal and absolutist national oppression". Lenin understood that at any stage of development, the demand for the abstract formal equality of right is a revolutionary demand which destroys the semi-feudal monarchy and in the first instance, Russian absolutism.

But then 1920 arrived. In Russia the October Revolution had already occurred and Soviet power was confirmed; the next task was to struggle for the dictatorship of the proletariat on a world scale. The imperialist bourgeoisie and its minions firmly tried to mask their policy of oppression and robbery of conquered and colonial countries by empty "Wilsonian" phrases on the equality of peoples, on the equal rights of nations etc. Under these conditions a simple repetition of the old slogans would have been meaningless. The basic task became a struggle against bourgeois democracy, and the exposure of its lies and falsehoods. Lenin wrote his famous theses on the national question for the Second Congress of the Comintern, and they begin with the above-cited exposure of the bourgeois democratic idea of formal legal equality. The theses emphasized that "the Communist Party, as the conscious expression of the struggle of the proletariat for the overthrow of the yoke of the bourgeoisie, must not place *abstract and formal* principles at the apex of the national question: compare with the declaration reproduced above that the proletariat demands abstract equal rights" [our italics, E. P. I First, it must consider the historical, concrete, and (above all) economic situation; second, the exact difference between the 'interests of the oppressed, exploited working classes and the general concept of the national interest, which signifies the interests of the ruling class; third, the clear distinction between nations that are oppressed, dependent and lacking in equal rights, and nations that are oppressors and exploiters. These distinctions must be counterweights to the bourgeois democratic lie that masks the enslavement of the great mass of the population of the earth by an insignificant minority of the rich advanced capitalist countries, an enslavement which is characteristic of the period of finance capital and imperialism.<sup>47</sup>

Bourgeois democratic slogans on the national question have lost their revolutionary quality. The defence of the "abstract" equality of rights was a halfway house.

In the area of internal state relations the national policy of the Comintern cannot be limited to the naked, formal and purely declarative recognition of the equal right of nations to which the bourgeois democrats limit themselves-it makes no difference whether they recognize themselves openly as such, or mask themselves in the guise of socialism.<sup>48</sup>

In turn a new task is created:

the task of transforming the dictatorship of the proletariat from a national dictatorship (i.e. existing in one country and incapable of determining world politics) into an international dictatorship (i.e. a dictatorship of the proletariat of at least several advanced countries 'capable of having a decisive influence on world politics). Petit bourgeois nationalism declares internationalism to be the recognition of the equal rights of nations, and it only preserves (not speaking of the purely verbal character of such a recognition) inviolable national egoism. However, proletarian nationalism demands, first, the subordination of the interest of the proletarian struggle in any one country to the interest of the struggle on the whole world scale; second, it demands the ability and readiness on the part of those nations which have achieved victory over the bourgeoisie, to undertake great national sacrifices for the destruction of international capital.<sup>49</sup>

This was a new stage, a new situation, a new and higher level of struggle. And new priorities corresponded to it. The bourgeois-democratic stage had passed, and with it the formal legal demand for national self-determination-characteristic of this stage-lost its former significance. The slogan "overthrow the rule of the bourgeoisie on a world scale and set up the international dictatorship of the proletariat" became the immediate practical slogan.

Does this mean that national self-determination lost all significance; that it could be replaced with the "self-determination of the proletariat"?' Certainly not. This would have been to ignore the presence of backward countries which had not passed through the stage of bourgeois-democratic national revolutions. The communist proletariat of advanced countries had to support these movements; with all its strength it had to struggle so that the accumulation of centuries of ill will and the distrust by backward people of the dominant nations-and of the proletariat of these nations-was overcome as quickly as possible. It was impossible to achieve this goal without proclaiming and conducting in practice the right of national self-determination. Moreover, even for a socialist society moving



towards the elimination of classes the question of national self-determination still remains a real one, since although based on economics, socialism by no means consists solely of economics:

For the elimination of national subjugation, a necessary foundation is socialist production, but it is also necessary to have a democratic organization of the state, a democratic army etc., erected on this base. By transforming capitalism into socialism the proletariat creates the possibility of eliminating national subjugation. This possibility is transformed into reality -only"--only upon the full establishment of democracy in all areas, the determination of borders according to "the sympathies of the population", and the full freedom of secession. On this base, in its turn, the absolute elimination of the least national frictions and distrust develops *in practice*. The accelerated movement towards the integration of nations will be completed when the state *withers away*.<sup>50</sup>

We hope that in these few examples we have shown what rich material for the study of the revolutionary dialectical approach to questions of law is contained in the theoretical and political works of Lenin. We will consider our task fulfilled if we succeed in attracting the attention of comrades to this little-studied area.

### Notes

1. A. G. Goikhbarg, *Fundamentals of the Law of Private Property* (1924), Moscow, p. 68.
2. V. I. Lenin, *What the "Friends of the People" Are and How They Fight the Social Democrats* (1894), *LCW*, vol. 1, p. 153.
3. P. Sagnac, *La legislation civile de la Revolution francaise 1789-1804* (1898), Libraire Hachette, Paris, vol. I, p. 2.
4. *ibid.* V. I. Lenin, "The Agrarian Question in Russia at the End of the Nineteenth Century" (1918), *LCW*, vol. 15, p. 84.
6. *ibid.* pp. 84-85.
7. *ibid.* p. 85.
8. A. G. Goikhbarg (1924), *op. cit.* p. 23.
9. V. I. Lenin, *Left-Wing Communism: An Infantile Disorder* (1920), *LCW*, vol. 31, pp. 35-36.
10. V. I. Lenin, *Sochinenii*, vol. 1, p. 135.
11. V. I. Lenin, "Instructions of the Council of Labour and Defence to Local Soviet Bodies" (1921), *LCW*, vol. 32, p. 387.
12. *ibid.* p. 389.

13. *ibid.* p. 394.
14. V. I. Lenin, *Sochinenii*, vol. 25, pp. 215-216.
15. V. I. Lenin, *The Proletarian Revolution and the Renegade Kautsky* (1918), *LCW*, vol. 28, pp. 276-277.
16. V. I. Lenin, "A Contribution to the History of the Question of Dictatorship" (1920), *LCW*, vol. 31, p. 353.
17. V. I. Lenin, *The Proletarian Revolution and the Renegade Kautsky* (1918), *op. cit.* p. 236.
18. *ibid.* p. 274.
19. *ibid.* pp. 274-275.
20. V. I. Lenin, *What the "Friends of the People" Are and How They Fight the Social Democrats* (1894), *op. cit.* pp. 149-150.
21. V. I. Lenin, "Preliminary Draft Theses on the National and Colonial Questions" (1920), *LCW*, vol. 31, p. 145.
22. V. I. Lenin, *Sochinenii*, vol. 12, pt. 2, p. 388.
23. *ibid.*
24. We make the reservation here, of course, that the formal-organizational problems of Party building may be classified as legal problems only in a conditional and relative sense. First, however, the charter operates just as formally as an intermediary for the political content of the activity of the Party, as law in the narrow and exact sense of the word operates as an intermediary for relations of production. Second, our Party charter-and no one can deny this-is now one of the elements in the state structure of the Union of Soviet Republics. From the additional perspective of its functional importance, it therefore merits classification as one of the subjects treated by jurisprudence.
25. V. I. Lenin, *One Step Forward, Two Steps Back* (1904), *LCW*, vol. 7, pp. 241-249.
26. *ibid.* p. 272.
27. *ibid.* pp. 392-393.
28. *ibid.* pp. 393-394.
29. *ibid.* p. 415.
30. V. I. Lenin, *Sochinenii*, vol. 8, p. 479.
31. V. I. Lenin, *One Step Forward, Two Steps Back* (1904), *op. cit.* p. 275.
32. *ibid.* p. 367.
33. *ibid.* p. 336.
34. *ibid.* p. 386.
35. *ibid.* p. 387.
36. L. Martov, "A State of Siege" (1903), cf. *LCW*, vol. 7, p. 360.
37. V. I. Lenin, *One Step Forward, Two Steps Back* (1904), *op. cit.* p. 362.
38. *ibid.* p. 363.
39. *ibid.* pp. 387-388.
40. V. I. Lenin, "The Discussion on Self-Determination Summed-Up" (1916), *LCW*, vol. 22, p. 321.
41. *ibid.* p. 322.
42. *ibid.* p. 324.

43. *ibid.* p. 327.
44. V. I. Lenin, "The Right of Nations to Self-Determination" (1914), *LCW*, vol. 20, p. 422.
45. *ibid.* p. 441.
46. *ibid.* p. 410.
47. V. I. Lenin, "Preliminary Draft Theses on the National and Colonial Questions" *op. cit.* p. 145.
48. *ibid.* p. 147.
49. *ibid.* p. 149.
50. V. I. Lenin, "The Discussion on Self-Determination Summed Up" (1916), *op. cit.* p. 325.

### 3      *Selections from the Encyclopaedia of State and Law*

#### Introductory Note

The three-volume *Encyclopaedia of State and Law* was published between 1925 and 1927 by the Communist Academy. Under the general editorship of Stuchka, the *Encyclopaedia* represented the first systematic attempt by the Marxist jurists to extend their critical perspective to all of the major concepts of law and politics. The list of authors of this impressive work included nearly all of the principal Marxist jurists then in the U.S.S.R. Stuchka, still the dominant figure in the Marxist school of juridic criticism, contributed most of the sections on the theory of law. Pashukanis himself served the *Encyclopaedia* as editor and main author for international law, and in addition he was occasionally assigned topics of a more abstract nature.

The editors of this volume have selected as representative of this phase of Pashukanis' work his lengthy essay on "International Law",\* and his shorter contributions on "Leon Duguit"† and the concept "Object of Law".‡

\* "Mezhdunarodnoe pravo", *Entsiklopediia gosudarstva i prava (1925-1926)*, lzd.

† *Kommunisticheskoi akademii*, Moscow, vol. 2, pp. 858-874. "Leon Diugi", *Entsiklopediia gosudarstva i prava (1925-1926)*, Moscow, vol. 1, pp. 1064-1068.

‡ "Ob'ekt prava", *Entsiklopediia gosudarstva i prava (1925-1927)*, Moscow, vol. 3, pp. 102-103.

## *Encyclopaedia of State and Law*

### **"Leon Duguit"**

*Leon Duguit [is]* a respected French jurist, dean of the law school at Bordeaux, and author of a series of works which criticize traditional juridic opinions and ideas. The first work in which he began to develop the basis of his doctrine (*L'etat, le droit objectif et la loi positive*) was written as a response to *The System of Subjective Public Laws* by the noted German jurist George Jellinek. In this and in later works<sup>2</sup> Duguit criticizes the juridic conception of the state; he also criticizes the very notion of subjective law, rejecting it as an "individualist, metaphysical construction" inherited from Roman jurists and medieval scholastics and received through the French Revolution. This construction is outdated, according to Duguit, and is incapable of incorporating the complex and diverse relationships currently existing between individuals and collectivities. Subjective law leads only to fruitless and endless arguments. Having distinguished between subjective law and the realm of jurisprudence, Duguit identifies the only undisputed norms of objective law as those positive and negative obligations which are imposed on people who belong to the same social group. Duguit follows the views of the French sociologist Emile Durkheim and considers that norms of objective law are based on a law of social solidarity. Social solidarity occurs when people have common needs which can be satisfied jointly, and when people have different needs and different abilities which can be satisfied through the exchange of mutual services. Proceeding from these propositions, Duguit, *à la* Kant, tries to replace laws with obligations: "There is no law other than the law to fulfil one's duty". Even private property-the most characteristic institution of individualist, bourgeois society-is presented as a social function by Duguit: "The law of property should be under

stood only as the power of individuals who are in a specific economic position to fulfil the obligation of the social purpose required of their social status."

Rejecting the notion of the state and the juridic doctrine of sovereignty as a special trait of "state will", Duguit considers the state as the person or group of persons who actually possess power (the rulers):

The state is simply the product of the natural differentiation of people who belong to the same social group ... the will of the rulers has no more juridic value than the will of the ruled ... In every human society, to a greater or lesser extent, one can say that a state exists when one group of people has coercive power.

Duguit does not object to the figurative assertion that the state is "the executioner's axe and the gendarme's sabre". But having exposed the state as naked power, and having tarnished its mystical cloak of sovereignty, Duguit quickly opens the doors of juridic ideology. This ideology appears in the form of "self-imposed legal norms", predicated by the state and standing above the state. Both the rulers and the ruled are in the same degree under the command of a supreme legal norm produced by social solidarity.

Only that which is lawful (and legal), in the relationships between the rulers and the ruled, corresponds with this supreme norm.

The rulers possess the most power in any given society; consequently, the legal norm requires them to use their power for the attainment of social solidarity.

Duguit proceeds with the idea that solidarity occurs through the division of labour and that it assigns each person a social obligation. He thus welcomes all types of corporations, associations, professional syndicates, various business organizations, clerical and mercantile unions etc., and sees in them the phenomenon of "social integration": this is how the amorphous mass of the nation acquires a "definite juridic structure", which is composed of people united by their common needs and professional interests. Duguit even dreamed of a special professional representation which would supplement and counterbalance a parliamentary representation that only reflects the power of political parties.

Duguit repeatedly declared himself to be an opponent of socialism but, nevertheless, his theories have often been classified as socialist. After the October Revolution even our jurists attempted to depict Duguit's doctrine as a practico-juridic basis for socialist revolution.<sup>3</sup> Duguit's sympathies for corporate and estate representation convinced some of his opponents that the practical conclusion of his conception was the system of soviets. In this respect, of course, Duguit subjectively exhibits great hatred and utter incomprehension for the October Revolution and the Soviet Republic as he demonstrates in the second edition of his Constitutional Law. Objectively, also, his theories are an attempt to conceal and disguise the contradictions of capitalism. He depicts capitalism, driven by the craving for profit and the vicious class struggle, as a collectivity founded on the basis of social solidarity. He presents capitalist property as the fulfilment of a social function, and the imperialist and militarist state as an institution that is transformed from an authoritarian power to a participant group. Duguit's scholarship is a sure sign, on the one hand, that individualist doctrines have lost their ideological pathos and yet are still incapable of fascinating anyone. And this is despite their dogmatic advantages: the dogmas of law and "sovereignty" and "subjective law" remain fashionable notions, and criticism here would not produce any radical change. On the other hand, Duguit incarnates the period of finance capital this has made free private property a problematic notion, and it is overtly apparent on the political scene in the form of the real power of large capitalist corporations. These corporations collaborate with opportunist union leaders, when the need arises, and ignore the outdated fiction of classless state sovereignty.

Duguit's most noted French disciple is Professor Jaise; in England his ideas are shared by the young political theorist Harold Laski,

### **"International Law"**

International law (*ius gentium, droit des gens, Völkerrecht*) is usually defined as the totality of norms regulating the relationships between states. Here is a typical definition: "International law is the totality of norms defining the rights and duties of states in their mutual relations with one another".<sup>4</sup> We find the same definition in the

Germans Hareis, Holtendorf, Bulmering, Liszt and Ulman; in the Belgian Rivie; in the Englishmen Westlake and Oppenheim; in the American Lawrence etc.

But absent from this formal, technical definition, of course, is any indication of the historical, i.e. the class character of international law. It is extremely clear that bourgeois jurisprudence consciously or unconsciously strives to conceal this element of class. The historical examples adduced in any textbook of international law loudly proclaim that *modern international law is the legal form of the struggle of the capitalist states among themselves for domination over the rest of the world*. However, bourgeois jurists try, as much as possible, to silence this basic fact of intensified competitive struggle, and to affirm that the task of international law is "to make possible for each state what none could do in isolation, by means of co-operation between many states".<sup>5</sup>

Nor did the theorists of the Second International move far from these bourgeois jurists. Abandoning the class conception of the state, they were naturally compelled to discover in international law an instrument, standing outside and above classes, for the co-ordination of the interests of individual states and for the achievement of peace.

It was from this perspective that the well-known Bernstein,<sup>6</sup> and the equally-famous Renner,<sup>7</sup> approached international law. With great assiduity, both of these gentlemen stressed the "peaceful functions of international law", but in so doing they forgot that the better part of its norms refer to naval and land warfare, i.e. that it directly assumes a condition of open and armed struggle. But even the remaining part contains a significant share of norms and institutions which, although they refer to a condition of peace, in fact regulate the same struggle, albeit in another concealed form. Every struggle, including the struggle between imperialist states, must include an exchange as one of its components. And if exchanges are concluded then forms must also exist for their conclusion.

But the presence of these forms does not of course alter the real historical content hidden behind them. At a given stage of social development this content remains the struggle of capitalist states among themselves. Under the conditions of this struggle, every exchange is the continuation of one armed conflict and the prelude to the next. Here lies the basic trait of imperialism.

Capitalists [wrote Lenin] divide the world, not out of any particular malice, but because the degree of concentration which



has been reached forces them to adopt this method in order to receive profit. And they divide it "in proportion to capital", "in proportion to strength", because there cannot be any other method of division under commodity production and capitalism. But strength varies with the level of economic and political development. In order to know what is taking place, it is necessary to know what questions are decided by the changes in strength. The question of whether these changes are "purely" economic or extra-economic (military, for example) is secondary . . . To substitute the question of the content of the struggle and agreements (today peaceful, tomorrow warlike, the next day peaceful again), is to descend to sophistry.<sup>8</sup>

When Renner depicts the development of international law as the growth of institutions which ensure the general interest of all states, and when he tries to show that this development has been retarded by the larcenous and selfish policy of only one of the states, Great Britain, then he too descends to sophistry. He must, moreover, be 'in the service of Austro-German imperialism (Renner's book was published before the Central Powers were defeated by the *Entente*). Conversely, we can see that even those agreements between capitalist states which appear to be directed to the general interest are, in fact, for each of the participants a means for jealously protecting their particular interests, preventing the expansion of their rivals' influence, thwarting unilateral conquest, i.e. in another form continuing the same struggle which will exist for as long as capitalist competition exists. One may instantiate any international organization, even the international commissions for the supervision of navigation on the erstwhile "treaty rivers" (the Rhine, the Danube, and after Versailles, the Elbe and the Oder). Let us begin with the fact that the very composition of these commissions perfectly reflects specific relations of forces, and is usually the result of war. After the World War, therefore, Germany and Russia were ousted from the European Commission on the Danube. At the same time the Commission on the Rhine was transferred to Strasbourg and fell into French hands. Under the Treaty of Versailles, the very transformation of German rivers into treaty rivers, which were controlled by international commissions, was an act which divided the spoils among the victors. The International Administration of Tangiers, a port in Morocco where the interests of France, England and Spain intersect, is the same type of organization for joint exploitation and

supervision. A final and typical example is the International Organization for the Extortion of Reparations from Germany (q.v.): the reparation commission and all types of supervisory agencies envisioned by the expert's plan. As soon as some power feels strong enough to take the plunder into its exclusive possession, it starts to combat internationalization (q.v.). Thus, at the 1883 London Conference, Tsarist Russia succeeded in placing the Kiliisky branch of the Danube outside the control of the European Commission provided for by the international treaty of 1889. The Commission for the Supervision of the Neutralization of the Suez Canal could not be constituted at all: it was eliminated by a separate agreement between England and France, whereby the first bought itself freedom of action in Egypt in exchange for the latter's taking of Morocco (English-French Convention of April 8th, 1904). The struggle among imperialist states for domination of the rest of the world is thus a basic factor in defining the nature and fate of the corresponding international organizations.

There remain the comparatively few and narrowly-specialized interstate agreements. These have a technical character and correspond to purposeful combines or so-called international administrative unions, for example the International Postal Union. These organizations do not serve primarily as an arena for the struggle between administrative groupings, but they occupy a secondary and subordinate position. The origin of most of these organizations was in the 1870s and 1880s, i.e. in the period when capitalism (q.v.) had still not fully developed its monopoly and imperialist -traits. The intensified struggle for the division of the world has moved forward to such an extent since that time, that the actual ability of capitalist states to serve general economic and cultural needs has diminished rather than expanded. In this respect a very clear regression was marked by the World War in that it caused the downfall of a whole series of cultural (in particular) and, for example, scientific links.

The bourgeois jurists are not entirely mistaken, however, in considering international law as a function of some ideal cultural community which mutually connects individual states. But they do not see, or do not want to see, that this community reflects (conditionally and relatively, of course) the common interests of the commanding and ruling classes of different states which have identical class structures. The spread and development of inter-

national law occurred on the basis of the spread and development of the capitalist mode of production. However, in the feudal period the knights of every European country had their codes of military honour and, accordingly, their class law, which they applied in wars with one another; but they did not apply them in inter-class wars, for example in the suppression of burghers and the peasantry. The victory of the bourgeoisie, in all the European countries, had to lead to the establishment of new rules and new institutions of international law which protected the general and basic interests of the bourgeoisie, i.e. bourgeois property. Here is the key to the modern law of war.

While in feudal Europe the class structure was reflected in the religious notion of a community of all Christians, the capitalist world created its -concept of "civilization" for the same purposes. The division of states into civilized and "semi-civilized", integrated and "semi-integrated" to the international community, explicitly reveals the second peculiarity of modern international law as the class law of the bourgeoisie. It appears to us as the totality of forms which the capitalist, bourgeois states apply in their relations with each other, while the remainder of the, world is considered as a simple object of their completed transactions. Liszt, for example, teaches that "the struggle with states and peoples who are outside the international community must not be judged according to the law of war, but according to the bases of the love for mankind and Christianity". To assess the piquancy of this assertion recall that, at the time of the colonial wars, the representatives of these lofty principles, e.g. the French in Madagascar and the Germans in Southwest Africa, liquidated the local population without regard for age and sex.

The real historical content of international law, therefore, is the struggle between capitalist states. International law owes its existence to the fact that the bourgeoisie exercises its domination over the proletariat and over the colonial countries. The latter are organized into a number of separate state-political trusts in competition with one another. With the emergence of Soviet states in the historical arena, international law assumes a different significance. It becomes the form of a temporary compromise between two antagonistic class systems. This compromise is effected for that period when one system (the bourgeois) is *already* unable to ensure its exclusive

domination, and the other (proletarian and socialist) has not *yet* won it. It is in this sense that it seems possible, to us, to speak of international law in the transitional period. The significance of this transitional period consists in the fact that open struggle for destruction (intervention, blockade, non-recognition) is replaced by struggle within the limits of normal diplomatic relations and contractual exchange. International law becomes *inter-class* law, and its adaptation to this new function inevitably occurs in the form of a series of conflicts and crises. The concept of international law during the transitional period was first put forth, in Soviet literature, by E. Korovin.<sup>9</sup>

Finally, international law assumes an entirely different meaning as the inter-state law of the Soviet states. It now ceases to be a form of temporary compromise behind which an intensified struggle for existence is hidden. Because of this the very opposition between international law and the state, so characteristic of the preceding period, disappears. The proletarian states, not having merged formally into one federation or union, must present in their mutual relationships an image of such a close economic, political and military unity, that the measure of "modern" international law becomes inapplicable to them.

Turning now to consider the legal form of international law, we will first note that orthodox theory considers the subject of international legal relations to be the state as a whole, and only the state. "Only states are subjects of international law, the bearers of international legal obligations and powers."<sup>10</sup> The real historical premise for this viewpoint is the formation of a system of independent states which have, within their boundaries, a sufficiently strong central power to enable each of them to act as a single whole. "The sovereignty of the state, i.e. its independence from any authority standing above it-this is the basis of international law."<sup>11</sup>

These premises were historically realized in Europe only at the end of the Middle Ages, in the period of the formation of absolute monarchies which consolidated their independence, with respect to Papal authority, and which severed internal resistance by the feudal lords. The economic basis of this was the development of mercantile capital. The emergence of standing armies, the prohibition of private wars, the instigation of state enterprises, customs and colonial policy-these are the real facts which lie at the heart of the theory of

the state as the sole subject of the international legal community. The Catholic Church, which had claimed the position of supreme leader of all the Christian states, was delivered a decisive blow by the Reformation. The Treaty of Westphalia, which in 1648 proclaimed the basis of equality between the Catholic and the "heretical" (Protestant) states, is considered the basic fact in the historical development of modern (i.e. bourgeois) international law.

The revolutions of the seventeenth and eighteenth centuries made further strides along the same road. They completed the process of separating state rule from private rule, and transformed political power into a special force and the state into a special subject. The legal relations of the state flowed independently, and they were not to be confused with those persons who at any given moment were the bearers of state authority. Having subordinated itself to the state machine, the bourgeoisie brought the principle of the public nature of authority to its clearest expression. It may be said that the state only fully becomes the subject of international law as the bourgeois state. The victory of the bourgeois perspective over the feudal-patrimonial perspective was expressed, among other things, in the denial of the binding force of dynastic treaties for the state. Thus, in 1790 the National Assembly of France rejected the obligations which flowed from the family treaty of the house of Bourbon (1761), on the grounds that Louis XV had acted as a representative of the dynasty and not as a representative of France.

It is typical that at the same time as French authors (Bonfils, for example) consider this rejection to be proper, German monarcho-reactionary professors (Heffken) find that the National Assembly violated international law in this action.

The Roman Papacy is a curious vestige of the Middle Ages. After the Church entered the constituency of Italy in 1870, the Pope continued extra territorially to enjoy the right to send and receive ambassadors, i.e. he had certain essential attributes of sovereign authority. When bourgeois Jurists are forced to explain a phenomenon which contradicts their doctrine, they usually argue that the Papal throne occupies a quasi international status and that it is not in the strict sense a subject of international law.

In fact, of course, the influence of the leader of the Catholic Church is no less in international affairs than that of the League of Nations (q.v.). All authors classify the latter as an exception to the

independent subjects of international law along with individual states. As a separate force which set itself off from society, the state only finally emerged in the modern bourgeois capitalist period. But it by no means follows from this that the contemporary forms of international legal intercourse, and the individual institutions of international law, only arose in the most recent times. On the contrary, they trace their history to the most ancient periods of class and even pre-class society. To the extent that exchange was not initially made between individuals, but among tribes and communities, it may be affirmed that the institutions of international law are the most ancient of legal institutions in general. Collisions between tribes, territorial disputes, disputes over borders-and agreements as one of the elements in these disputes-are found in the very earliest stages of human history. The tribal pre-state life of the Iroquois, and of the ancient Germans, saw the conclusion of alliances between tribes. The development of class society and the appearance of state authority make contracts and agreements among authorities possible. The treaty between Pharaoh Rameses II and the King of the Hittites is one of the oldest surviving documents of this type. Other forms of relationships are equally universal: the inviolability of ambassadors; the custom of exchanging hostages; one might also point to the ransoming of prisoners, the neutrality of certain areas, and the right to asylum. All these practices were known and used by the peoples of the distant past. Ancient Rome observed various forms for the declaration of war (*ius fetiale*), concluded treaties, received and sent ambassadors. The ambassadors of foreign countries enjoyed inviolability etc. A special college of herald-priests dealt with these rules in Rome, and the majority of legal rules were protected by the gods at that time. The sanction of religion did not, however, prevent the fact that they were sometimes violated in the grossest manner.

On the other hand, a series of rules were formed which related to international intercourse. These were necessary both for regulating conflicts among tribes and peoples, and also for ensuring commercial exchange between individuals who belonged to different clans and tribes. Later, these rules were extended to include state organizations. In this way so-called private international law developed (q.v.).

For example, during the period when Athens was flourishing, there were no less than 45 000 foreign inhabitants. They enjoyed all civil rights and were protected by a representative elected from their [Translation editor's note: due to a typographical error, the following words were omitted the bottom of page 175 in the published English translation: "midst (embryos of consular representation). The protec-"]

tion of foreigners thus applied to merchants who were temporary residents. We see the same phenomenon in ancient Rome where the special office of praetor *peregrinus* was instituted for the hearing of foreigners' judicial cases. Moreover, the so-called *actiones fictitiae* aided in overcoming those strict requirements of Roman procedure which gave the foreigner no possibility of defending his rights.

In the understanding of the Roman jurists, the law of nations (*ius gentium*) embraced equally that which is now termed public international law, and also that which is inaccurately termed private international law. Thus, for example, we read in the Digests: "By this law of nations (*ius gentium*), wars are waged, nations are divided, kingdoms are founded, property is distributed, fields are enclosed, buildings are erected, trade, purchases, sales, loans and obligations are established-with the exception of certain transactions that are conducted in civil law."<sup>12</sup> From this list it seems that the essential characteristic of international law was deemed to be not merely that it regulated relations (borders, war, peace etc.) among states but, and in contrast to the *ius civile*, that it established the basis of a legal community devoid of local peculiarities and free from tribal and national colouration. These universal rules could be nothing other than a reflection of the general conditions of exchange transactions, i.e. they were reduced to the bases of the equal rights of owners, the inviolability of ownership and the consequent compensations for damages and freedom of contract. The bond between the *ius gentium*-in the sense of laws inherent in all nations-and norms regulating the mutual relations of states, was consciously strengthened by the first theorist of international law, Hugo Grotius (1583-1684). His whole system depends on the fact that he considers relations between states to be relations between the owners of private property; he declares that the necessary conditions for the execution of exchange, i.e. equivalent exchange between private owners, are the conditions for legal interaction between states. Sovereign states co-exist and are counterposed to one another in exactly the same way as are individual property owners with equal rights. Each state may "freely" dispose of its own property, but it can gain access to another state's property only by means of a contract on the basis of compensation: *do ut des*.

The feudal-patrimonial structure greatly aided the theory of territorial rule in acquiring a clearly civilist hue. Suzerains or

"Landesherren" considered themselves as the owners of those holdings over which their authority extended; the holdings were thought of as their private right, a subject of alienation by the owner. Entering into relations with one another, they disposed of their holdings as owners dispose of their objects, and alienated them according to the system of private (Roman) law. From the very beginning, therefore, many of the institutions of international law had a private law foundation-including the theory of *modi aequirendi dominii* in international relations. Other methods were also recognized: inheritance, dowry, gift, purchase and sale, exchange, occupation, prescription.

On the basis of natural law doctrine, Grotius's ideas continued to be developed by subsequent theorists: Puffendorf (1632-1694), Tomasius (1655-1728), Wolff (1679-1754), Vattel (1714-1767) and Burlamaki (1694-1748). These theorists laid the foundation for an abstract or philosophical theory of law. In contrast to this school, which had given preference to abstract concepts, there began the collection and systematization of actual international customs and treaties and the study of international practice. The forefather of this positive, historico-pragmatic school is considered to be Zouch (1590-1669), an Oxford professor and Admiralty judge; the Dutchman Binkerskuch (1673-1743), and Martens (1756-1821) were later representatives. The doctrine of natural law ceased to enjoy the recognition of most jurists in the second half of the nineteenth century. However, even in our day Grotius's formulae continue to exist in international law textbooks, under the guise of so-called "basic or absolute rights" of the state. For example, Hareis in *Institutionen des Volkerrechts* (1888), lists four such "basic rights": the right to self-preservation; the right to independence; the right to international exchange; and the right to respect.

We read exactly the same in Liszt: "From this basic idea (international legal intercourse] directly follows a whole series of legal norms, by which are defined the mutual rights and obligations of states and do not require any special treaty recognition in order to have obligatory force.

They comprise a firm (!) basis for all the unwritten legal rules of international law, and are its oldest, most important and holiest content."<sup>13</sup> It is most obvious that we are dealing here with ideas drawn from the sphere of civil law relationships with a basis in equality between the parties.



To a certain degree the analogy may be extended. Bourgeois private law assumes that subjects are formally equal yet simultaneously permits real inequality in property, while bourgeois international law in principle recognizes that states have equal rights yet in reality they are unequal in their significance and their power. For instance, each state is formally free to select the means which it deems necessary to apply in the case of infringements of its right: "however, when a major state lets it be known that it will meet injury with the threat of, or the direct use of force, a small state merely offers passive resistance or is compelled to concede."<sup>14</sup> These dubious benefits of formal equality are not enjoyed at all by those nations which have not developed capitalist civilization and which engage in international intercourse not as subjects, but as objects of the imperialist states' colonial policy.

In civil law transactions, however, the relationships between the parties assume legal form not only because they derive from the logic of objects (from the logic of the exchange act, more accurately), but also because this form finds real support and defence in the apparatus of judicial and state authority. Legal existence is materialized in a special sphere, partitioned off from the intrusion of naked fact. In his language the lawyer expresses this by asserting that every subjective right depends upon an objective norm, and that private legal relationships arose because of the public legal order. Moreover, in international law the subjects of legal relationships are the states themselves as the bearers of sovereign authority. A series of logical contradictions follows from this. For the existence of international law it is necessary that states be sovereign (for sovereignty in any given case is equated with legal capacity). If there are no sovereign states then there are no subjects of the international law relationship, and there is no international law. But, on the other hand, if there are sovereign states, then does this mean that the norms of international law are not legal norms? For in the opposite case, they must possess an external power which constrains the state, i.e. limits its sovereignty. Conclusion: for international law to exist it is necessary that states not be sovereign. Bourgeois jurisprudence has devoted a great amount of fruitless effort in solving this contradiction. For instance, Pruess—the author of the present German (Weimar) Constitution tended to the position of sacrificing the concept of sovereignty for the sake of international law. Conversely, writers such as Zorn and,

most recently, Wendel, are more ready to abandon supra-state international law. However, these dogmatic arguments change nothing in reality. No matter how eloquently the existence of international law is proved, the fact of the absence of an organizational force, which could coerce a state with the same ease as a state coerces an individual person, remains a fact. The only real guarantee that the relationships between bourgeois states (and in the transitional period with states of another class type) will remain on the basis of equivalent exchange, i.e. on a legal basis (on the basis of the mutual recognition of subjects), is the real balance of forces. Within the limits set by a given balance of forces, separate questions may be decided by compromises and by exchange, i.e. on the basis of law. Even then there is the qualification that each government calls upon law when its interests demand it, and in every way will try to avoid fulfilling some norm if it is profitable for it.<sup>15</sup> In critical periods, when the balance of forces has fluctuated seriously, when "vital interests" or even the very existence of a state are on the agenda, the fate of the norms of international law becomes extremely problematic.

This particularly relates to the imperialist period, with its unprecedented intensification of the competitive struggle which derives from the monopolistic tendencies of finance capital, and from the fact that after the whole globe has already been divided then further expansion can only occur at the expense of robbing one's neighbour.

The best illustration of this is afforded by the last war, of 1914-1918, during which both sides continuously violated international law. With international law in such a lamentable condition, bourgeois jurists can be consoled only with the hope that, however deeply the balance was disturbed, it will nevertheless be reestablished: the most violent of wars must sometime be ended with peace, the political passions raised by it must gradually be reconciled, the governments will return to objectivity and compromise, and the norms of international law will once again find their force. However, in addition to this hope the fact is adduced, as an argument in favour of the positive nature of international law, that every state in violating international law also tries to depict the matter as if there had been no violation whatsoever. We find in Ulman, for example, this curious reference to state hypocrisy as proof of the positive nature of international law. Another group of jurists simply deny the very existence of international law. Among them is the founder of

the English school of positivist jurisprudence, Austin. Defining "law in the proper sense", as an order emanating from a definite authority and strengthened by a threat in the case of disobedience, he finds that international law is *contradictio in adjecto*. "To the extent that it is law, it is not international; to the extent that it is truly international, it is not law." Gumplowicz holds the same opinion: "In a definite sense international law is not law inasmuch as state law also is not law."<sup>16</sup> Lasson says: "The norms of international law are but rules of state wisdom which the state follows having in mind its own welfare, and from which it can deviate as soon as its vital interests so demand."<sup>17</sup>

But the perspective of Austin, Lasson, Gumplowicz and others is not shared by the majority of bourgeois jurists. The open denial of international law is politically unprofitable for the bourgeoisie since it exposes them to the masses and thus hinders preparations for new wars. It is much more profitable for the imperialists to act in the guise of pacifism and as the champions of international law.

Therefore, for example, the English writer Walker<sup>18</sup> censures the terminological cavils of Austin, who did not want to define international law as law in the proper sense, and who exclaims "it is better to permit peace and passivity to reign without correct terminology, than to permit accuracy of language to exist with the spirit of lawlessness!"

jurists who preach the cult of force in international relations are both useless to the bourgeoisie (it needs not preaching, but real force), and also dangerous because they conceal the irreconcilability of the contradictions of capitalist society, and because they compromise peace and tranquility needed even by a thief when he has had his fill and is digesting his spoils.

From the Marxist perspective this nihilist criticism of international law is in error since, while exposing fetishism in one area, it does so at the cost of consolidating it in others. The precarious, unstable and relative nature of international law is illustrated in comparison with the largely firm, steady and absolute nature of other types of law. In fact, we have here a difference in degree. For only in the imagination of jurists are all the legal relationships within a state dominated one hundred per cent by a single state "will". In fact, a major portion of civil law relationships are exercised under influence of pressures limited to the activities of subjects themselves. Furthermore, only by taking the viewpoint of legal fetishism is it possible to think that the

legal form of a relationship changes or destroys its real and material essence. This essence, on the contrary, is always decisive. The formalization of our relationship with bourgeois states, by way of treaties, is part of our foreign policy, and is its continuation in a special form. A treaty obligation is nothing other than a special form of the concretization of economic and political relationships. But once the appropriate degree of concretization is reached, it may then be taken into consideration and, within certain limits, studied as a special subject. The reality of this object is no less than the reality of any constitution-both may be overturned by the intrusion of a revolutionary squall.

It is commonplace to distinguish a general and a special component in relation to the systematization of international law. The first contains the theory of the state as the subject of international law. Here lies the theory of sovereignty, the various forms of limiting sovereignty, the theory of international law and legal capacity etc. Starting from the traditional division of the state into three elements-authority, territory and population-most treatises include within this general component the regulation of territorial questions (borders, territorial waters, methods of territorial acquisition etc.), and population questions (citizenship, preference, etc.). The special component considers the organization and forms of international legal relationships-here he diplomatic and consular representation, international courts and other international organizations, the theory of international treaties etc. Further conceptual areas are usually delineated as regulatory international legal agreements (transportation, commerce, navigation, post and telegraphy, the battle with epidemics, the protection of property etc.). Finally comes the part dedicated to the law of war. This is usually prefaced with a consideration of the peaceful means of settling conflicts (arbitration decisions). The law of war may be divided into the law of military war, the law of naval warfare and the theory of the rights and obligations of neutral states.

### *Sources of international law*

To the extent that states have no external authority above them which could establish their norms of conduct, then in the technical legal sense the sources of international law are custom and treaty. In

Liszt's opinion both of these sources may be reduced to one--this is the "general legal ideology of states", which is expressed partly in the form of legal practice, and partly in the form of the direct and overt establishment of law by way of agreement. But since (a) it is not always easy to decide which ideology is general and which ideology is "legal", and (b) the practice of the different states at any one time, and the practice of any one state at different times, are far from the same--in fact, therefore, the source of the norms of even customary international law is drawn from the opinions of "writers", or scholars, who usually differ decisively with each other on every question. Common, therefore, are citations to the "majority" or to the "overwhelming" majority of authorities. If one further notes that each of these authorities consciously or unconsciously defends those positions which are or seem beneficial to his own state, then one can imagine how hopeless will be the application of customary international law to the decision of any serious dispute.

The norms of written international law, which are fixed in treaties and agreements, are of course distinguished by comparatively greater precision. But there are rather few such treaties which could establish general rules or, expressed in technical language, which could create objective international law. The most important of these are: the acts of the Congress of Vienna (1815); the Paris Declaration on the Law of Naval Warfare (1856); the Geneva Conventions (1856 and 1906); the General Acts of the Hague Peace Conference (1899 and 1907); the London Declaration on the Law of Naval Warfare (1909); the League of Nations Treaty (1919); and certain declarations of the Washington Conference (1921) etc. However, parts of these treaties were not concluded by all states--just by some of them--and therefore the norms created by these agreements may not, strictly speaking, assume the significance of norms of general international law. There are only particular international laws effective within the circle of states which signed them or which later adhered to them. There are, accordingly, few generally recognized written norms of international law.

Finally, the decisions of international tribunals, arbitration panels and other international organizations are usually adduced as sources of international law. Anglo-Saxon jurists add the judicial practice

of national courts, especially so in prize cases and in internal legislation dealing with questions of international significance.

### **"The Object of Law"**

*The Object of Law* is one of the basic systematic concepts of jurisprudence, and is closely linked with the concept of a legal relationship and a legal subject. "Every real law is a law of some thing." (Korkunov) The object of law, as an abstract and general concept, is not related to any one branch of law. Nevertheless, and in a similar way to the majority of juridic categories, it has the clearest and most specific meaning in civil law and, particularly, in property relationships. It is relatively easy to see what the object of law is in property or the law of mortgage, or inheritance law. But jurists have had great debates concerning the nature of this concept in franchise qualifications, for example, or in citizenship. These difficulties have convinced some of the existence of non-objective law (Becker).

The abstract notion of the object of law was virtually absent for

Roman jurists-with their pragmatic and non-philosophical minds. It was replaced by the more concrete category of the "thing" (*res*), and even human slaves were regarded as this. The power of the head of household over his wife and children (*patria potestas*) was closely linked to the law of things according to their formal juridic basis. For a concrete understanding of the object of law, the absence of an abstract notion of subjective law among the Romans fully corresponds with the precise form of action--*actio*. Hence, Roman authors established systematic subunits of persons (*personae*), things (*res*) and actions (*actiones*).

Roman jurists displayed some talent for generalization by subdividing things, as objects of law, into the corporeal (*corporalia*) and the non-corporeal (*incorporalia*). This distinction applied, for example, to the rights of inheritance and the exercise of the right to agricultural produce.

The development of exchange relationships advanced the actions of the responsible person as a special legal concept. The law of things and the law of obligation were combined into the general notion of property.

The doctrine of the object of law assumed an abstract character with the development of the abstract doctrine of subjective law-representing the universal capacities of the persona-in the bourgeois jurisprudence of the eighteenth and nineteenth centuries. At this stage in the development of juridic thought, a whole series of problems arose that were difficult to resolve. First, attempts were made to depict objects as so-called public subjective rights; and second, there was a desire to construct a legal system based on the idea of norms (understood as imperatives). But if the basis of law is an imperative and the obligation which arises from that imperative, then, for example, the object of the right of property does not logically represent the thing itself with its specific use and exchange-value, but something negative: the restraining actions of all other people which hinder the owner in the possession, use and disposal of his property.

Such dogmatic formal constructions-juridic categories devoid of economic meaning-are typical of the present time when the dominant role in bourgeois jurisprudence, particularly, in the elaboration of general questions, has passed from the civilists to the publicists.

### Notes

1. L. Duguit, *L'etat: droit objectif et droit positif* (1901), Paris.
2. L. Duguit, *L'etat, les gouvernants et les agents* (1903), Paris; *Les transformations du droit prive* (1912), Paris; *Traite de droit constitutionnel* (1922-1923, 2nd edition), 5 vols.-the first edition was translated into Russian.
3. See A. G. Goikhbarg's introduction to the translation of Duguit's *Transformations*, and various places in his *A Course on the Economic Law of the RSFSR*.
4. H. Bonfils, *Traite de droit international public* (1894), Rousseau, Paris, p. 1.
5. J. Louter, *Le droit international public positif* (1920), Oxford, p. 17.
6. E. Bernstein, *Volkerrecht und Volkerpolitik* (1919).
7. K. Renner, *Marxismus, Krieg und Internationale* (1918), Vienna.
8. V. I. Lenin, *Imperialism, the Highest Stage of Capitalism* (1917), *LC W*, vol. 22, p. 253.
9. E. Korovin, *International Law of the Transitional Period* (1924), Moscow. 10. F. Liszt, *Das Volkerrecht* (1925), Fleischmann, Berlin, sec. 5.
11. Loening, *Die Gerichtsbarkeit uber fremde Souverane* (1903), sec. 83. 12. 1, 5 *Digests*, 1, 1.

13. F. Liszt, *International Law* (1913), Russian translation from the 6th edition, edited by V. E. Grabar, p. 81.
14. V. E. Grabar, *The Basis of Equality between States in Modern International Law* (1912), Publishing House of the Ministry of Foreign Affairs, book. 1.
15. L. Oppenheim, *International Law: A Treatise* (1905), Longmans, Green & Co., vol. 1, p. 65.
16. L. Gumplowicz, *Allgemeines Staatsrecht* (1907), sec. 415.
17. G. Lasson, *Prinzip und Zukunft des Volkerrechts* (1871), p. 49.
18. T. A. Walker, *A History of the Law of Nations*, n.d., p. 19.



## 4 *"The Marxist Theory of Law and the Construction of Socialism"\**

### **Introductory Note**

By 1927 Pashukanis was rapidly moving into the dominant position within Marxist legal philosophy and the Soviet legal profession. Simultaneously, he was partly instrumental in launching the journal *The Revolution of the Law* which appeared under the auspices of the Communist Academy. But this same period, which contained both the approaching end of the New Economic Policy and the apex of the intra-Party debates on collectivization and industrialization, also witnessed the first serious criticism of his commodity exchange theory of law. The gist of this criticism-which did not yet assault the theory as a whole, but only certain of its essential parts-was that Pashukanis had overextended the concept of commodity exchange as -the basis of the legal form. Leading the criticism was Stuchka himself, the principal Marxist theorist of civil law-the very source of Pashukanis' theory. In a constructive manner Stuchka expressed part of his criticism in the second issue of *The Revolution of the Law*, in an essay entitled "State and Law in the Period of Socialist Construction". Pashukanis' essay "The Marxist Theory of Law and the Construction of Socialism" appeared in the subsequent issue, and was directed as a reply both to Stuchka and to the swelling criticism of his own followers in the Communist Academy. In this particular essay Pashukanis seems successfully to have accommodated himself to the fact that the legal form was embryonically present in

\* "Marksistskaia teoriia prava i stroitel'stvo sotsializma", *Revoliutsiia prava* (1927), no. 3, pp. 3-12.

pre-capitalist modes of production. In a later article ("The Situation on the Legal Theory Front", *Sovetskoe gosudarstvo i revoliutsiia prava*, 1930, no. 11-12, pp. 16-49) he more bluntly admitted that the basic defect of *The General Theory of Law and Marxism* was that ". . . the problem of the transition from one socio-economic formation to another-and particularly the transition from feudalism to capitalism ... was not posed therein with historical concreteness". But in both cases Pashukanis combines a sensitivity to the pragmatic aspects of socialist construction with a resolute denial that the legal form can be socialist in either form or content.

## *"The Marxist Theory of Law and the Construction of Socialism"*

A Marxist analysis of the problems of a general theory of law is by no means merely an academic matter. A revolutionary epoch is differentiated from periods of peaceful, evolutionary development by the fact that it becomes necessary to formulate all problems in the broadest possible form. Neither piecemeal concepts nor even a correct approach to one or another particular problem is sufficient for revolutionary action; instead, a general orientation is required, a correct general approach which makes possible the solution of a problem in all of its aspects.

When we were confronted with the necessity of smashing the old judicial machine immediately after the October Revolution, this basically practical matter necessitated an immediate solution of the general theoretical problems of the relationship between statutory law and law in general. For it was obvious that the revolution could neither leave the mass of old tsarist laws and the laws of the Provisional Government intact, nor immediately replace all the rules superseded and destroyed by the revolution with new rules. Consequently, the question arose as to how these courts would exercise justice and upon what this justice would be based. The doubts which arose as how to answer this question contributed to some indecision. As Comrade Stuchka reports, the implementation of *Decree No. 1 on the Court* encountered certain difficulties. \*

In order to extricate ourselves from this dilemma and solve the problem posed above, some type of general conception of law was needed and one was proposed; unfortunately, it was

\* See P. I. Stuchka, "State and Law in the Period of Socialist Construction", *Revoliutsiia prava* (1927), no. 2; and P. I. Stuchka, "The Old and the New Court", *Pravda*, January 3-5, 1918 [eds.]

the psychological theory of intuitive law borrowed from Petrazhitsky rather than a Marxist conception of law.

Thus, a paradox occurred; a revolutionary and politically correct step was based on a theory which could neither be called correct nor Marxist. This divergence between theory and practice could not of course be ignored. The idea of law as the sum of "imperativeattributive experiences" was not adopted as official Soviet doctrine. Reisner's attempt to elaborate and develop this conception of law in his later writings led to conclusions which were clearly unacceptable. It is not possible simultaneously to regard the [Party's] policy on the movement towards socialism within the context of the New Economic Policy seriously, and to maintain that in the field of law, "We are in transition to a certain compromise and to the re-establishment of particular institutions of the class law of the enemy as a constituent part of the legal order".<sup>1</sup> It is impossible to accept the Leninist teaching on the dictatorship of the proletariat and simultaneously to declare that "like the bourgeois state, our Soviet state also contains both a general legal order and also proletarian, peasant and bourgeois law".<sup>2</sup> However, such assertions logically follow from the view of law not as a real system of relationships subordinated to the political will of the ruling class, but as "an ideology which is based in our consciousness primarily on the concept of right, justice, and equality",<sup>3</sup> "an ideology striving for compromise with reality or appearance", an ideology which "as a result leads to the reconciliation and weakening of contradictions since it bears within itself a desire not only for general peace, but also for general law."<sup>4</sup>

Clearly with such an approach the role of law in contemporary Soviet reality can be evaluated any way one wishes except from the perspective of the movement towards socialism because, according to Reisner, law is obviously an unsuitable instrument for this purpose.

The process of compiling the Civil Code of the RSFSR was another decisive turning point at which some type of general conception of law became urgently necessary. The impact of bourgeois restorationist tendencies-as reflected by the legal practitioners-led to the search for formulations which would protect Soviet civil law from infiltration by the bourgeois principles of individualism. The most explicit and basic expression of this restorationist tendency could be found in the question of subjective legal

capacity. The most serious practical threat [however] was presented by attempts to remove -from the Code every mention of the "commanding heights" in the hands of the proletarian state, and also the attempt to foreclose the possibility of extensive [judicial] interpretation. In order to counteract these latter dangers, it was insufficient to insert the appropriate concrete provisions both in the Code itself and also in the enabling statute. But in regard to the question of subjective legal capacity it was necessary to introduce a new and general idea. This idea found its expression in Arts. 1 and 4 of the Civil Code.\* However, unfortunately once again a line which was completely correct and indisputable from the political perspective was expressed in an inadequate theoretical form which moreover was borrowed from bourgeois jurists.

The negative intention included 'in these articles is beyond dispute: *we do not recognize any kind of absolute legal capacity or any inalienable and subjective private rights*. For such inalienability is the inalienability of capitalist exploitation. But our October Revolution eliminated this exploitation (nationalization of land, banks, heavy industry, transportation, foreign trade etc.), and left in its wake the task of the final elimination of capitalism. The law of the state that sets itself this task cannot recognize absolute and inalienable private rights; there can be no doubts on this matter.

However, the positive interpretation of subjective legal capacity which is given by the above-mentioned articles of the Civil Code, and in particular by various commentators on these articles, is much more doubtful.

We have deprived and are depriving the capitalists of their existing private rights, but does it follow from this that we, i.e. the proletarian state, "grant" these private rights to the small producer, i.e. first of all to the peasant? Is declaring this the equivalent of asserting that the proletarian state has *created* small peasant farms with their atomization and their inability to relate to the external world other than through the market and market exchange?

Instead of constructing a Marxist critique of one of the basic legal concepts by grasping its economic roots, we have remained in the present instance under the influence of dogmatic legal positivism which resembles the dogmatism of natural law.

\* See Z. L. Zile, *Ideas and Forces in Soviet Legal History* (1970), College Printing and Publishing Co., Madison\_ Wis., p. 84, 2nd edition, [eds.].

Civil legal rights, as Art. 1 states, are protected by law with the exception of those instances when these rights are exercised in contradiction to their "socio-economic purpose". But what is the "socio-economic purpose" of a civil legal right? The answer to this question can be found in Art. 4 where the granting of civil legal capacity is justified by the purpose of developing the forces of production. The idea lying at the basis of both formulations is clear and simple. The proletarian state allows private property and private exchange, but for the exclusive purpose of developing the forces of production. This is nothing other than an attempt to translate into the language of legal definitions the idea which lay at the basis of the New Economic Policy.

However, in so doing, two entirely unforeseen misconceptions arose. The first consists of the fact that the reservation with respect to socio-economic purpose as a condition of the protection of civil-law rights, is clearly aimed at private ownership of the means of production (this is the spirit of the conventional commentary on Art. 1); then it becomes entirely permissible to consider "socio-economic purpose" as the development of the forces of production. But, it may be asked, what relation to the development of the forces of production has the right to compensation for harm, say for injury, or the right to support payments for a member of the family who is unable to work? Can the development of the forces of production serve as the criterion for the determination of whether or not this right is subject to legal protection?

It is not difficult to adduce a series of legal requirements of this type whose satisfaction (and accordingly, the protection of the given right) cannot be considered from the point of view of the development of the forces of production, but which can be considered quite naturally and must be considered by the court from the point of view of justice or fair exchange. But we conclude from this, that in granting and protecting civil-law rights, the proletarian state by no means intended to develop the forces of production in all instances. At times there was simply no alternative to this method of protecting civil-law rights due to the insufficient development of the planned economy and the fact that the tasks of social security and social insurance were not yet fully completed.

This is one side of the problem. But on the other hand, the criterion of [what constitutes] development of the forces of produc-

tion, having been established by the [bourgeois] jurists, immediately took on a certain absolute character. Zealous commentators on our Civil Code eagerly attributed to the concept of the development of the forces of production a neutral character with respect to class and policy. A kind of fusion of our Soviet law with the tendencies of the verbal conventions of capitalism as reflected in foreign legislation followed. This easy method of converting private property into a "social function" has nothing in common with our situation, which was defined at the time of introduction of NEP by two circumstances: a desire to meet the economic needs of the peasantry (a free disposition of the surpluses as well as the "co-operative plan"), and readiness to "pay for science" (concessions, rent and other forms of state capitalism).

In the time which has passed since 1921, our "movement toward socialism in the context of NEP", has made a significant step forward and it has already long since become time for Soviet jurists to make the supreme criterion of their dogmatic and politico-legal purpose *not the development of the forces of production for themselves, but the perspective of the victory of the socialist elements of our economy over the capitalist ones.*

We will deal only with these two points. However, one could adduce an endless number of instances related to other branches of law which just as sharply posed problems of a general character, that required not only a clear understanding of the social class goal and political problem, but a no less deep understanding of the particular features of the legal form. To separate one from the other becomes more and more dangerous. The practice of our Soviet administrative agencies, which consists in the fact that the executive personnel of these institutions have employed in the role of "legal commissars", special legal advisers-in 99 cases out of 100 old specialists-cannot but lead to the saddest results. An ordinary question with which they turn to the legal adviser, "Can something or other be done from the legal point of view?" proceeds from the naïve presumption that everything consists of searching out the appropriate decree or the appropriate article in the Code. In fact of course, the conclusion required is by no means the consequence of a *deus ex machina*. In 75 cases out of 100 a conscientious legal adviser must pose the question in reply, "But what do you think, can this or that be done from the

political perspective?" For every serious question of administration is connected with legal form not just by its external appearance but by its very essence. He who does not understand the class nature of the matter will either be helpless to give anything other than a miserable hackwork analysis of it from the legal point of view, or will simply pervert its nature. Extreme disregard for legal form-it still exists among many [jurists]-takes vengeance on us and takes vengeance in the most dialectical manner by the development of senseless formalism and bureaucratism. But until the time when legal formulation is considered as an integral part of the political and socio-economic nature of the activity of the state, a matter which cannot be left 'in "strange hands"', until then an abundance of empty lifeless formalism is inescapable for us.

Accordingly, the task consists in connecting the study of legal form and its practical application with the economic and social-class factors which are the bases of this form itself, of its individual aspects and, finally, of individual legal institutions.

The *categories* most characteristic of bourgeois law-the subject of a right, ownership, contract etc., primarily and most clearly reveal their material basis in the phenomenon of exchange. The category of the legal subject corresponds to the category of the value of labour. The impersonal and general quality of commodities is enhanced by the formal qualities of equality and freedom which owners of commodities confer upon one another. This is the starting point of Marx's criticism of abstract legal categories.

In my essay *The General Theory of Law and Marxism*, I tried consistently to apply this point of view to different branches of law and different legal categories. It seemed to me that, as a result, a more or less structured concept was achieved, which also incidentally agreed with those brief remarks that are found in Marx concerning the law of the transitional period to socialism. In this approach, the contrast between the principle of socialist planning and the principle of equivalent [exchange] or between the technical and social division of labour, achieves a decisive significance for the explanation of a whole series of incompletely formulated problems of a theory of law. The best proof of the utility of my point of view is the fact that many comrades have used it successfully for both critical and constructive purposes in the various branches of law.

At the same time, a further critical verification of the proposed



hypothesis is, of course, necessary. Criticisms of substance are always useful. It is wrong, however, to resort to a simplistic outcry against legal ideology *in general*. The merit of the Section of Law of the Communist Academy consists, among other things, in the fact that it has avoided this seductive path.

In his article "State and Law in the Period of Socialist Construction", 5 Stuchka has formulated a series of points with respect to my conception, which for brevity, following Stuchka, we will term the "labour theory". This requires certain clarification and correction.

First, I readily agree that [my] above-mentioned essay in many respects needs further development and perhaps reworking. A whole series of problems could not be covered in the book and indeed, at that time simply did not come within the author's field of vision. Such for example, is the problem of the law of the transitional period, or Soviet law, fully posed by Stuchka, which is among his outstanding contributions to the theory of law.

Of course, I did not view the process of the withering away of law as a "direct transition from bourgeois law to non-law". If one could get such an impression, then this is because I directed my main attention to commenting on the well-known place in Marx's "Critique of the Gotha Programme", which refers to the "narrow horizon of bourgeois law". Of course, this "bourgeois law without the bourgeoisie" (Marx refers to the stage when classes are already destroyed and only the principle of distribution in proportion to labour time is retained) is as far away as heaven is from earth from bourgeois law without quotes, which is a facilitating element of the process of exploitation. The class functionality of this law and not only of this, but also of our current Soviet law, corresponding to a lower level of development than that which Marx envisaged in the "Critique of the Gotha Programme", is fundamentally different from genuine bourgeois law. Only "bourgeois law" in quotes-which is not genuine bourgeois law-can wither away. The law of the bourgeois state, protected by the force of the latter, can only be destroyed by the proletarian revolution.

I repeat that the great service of Comrade Stuchka is his continuous emphasis upon the particular nature of Soviet law which flows from its revolutionary origin, in contradistinction to every attempt to consider our Soviet law as a fuller realization of certain "social" tendencies observed in the bourgeois legal order.

Similarly [to Stuchka's credit is due the recognition of] the

indisputable fact of the existence of feudal law, which had as its specific class-functional significance a whole series of particular features derived primarily from a specific form of exploitation. Can there be discussion of the question form of exploitation? Can there be discussion of the question if the specific features of feudal law, and its particular form are related to the absence of the development of a commodity and money economy and to the primacy of relations 'in kind? I think that Comrade Stuchka will not deny this relationship. On the contrary, in his writings he repeatedly emphasizes the notion that, for example, ownership of land loses its feudal character at the same time that land becomes a commodity like other commodities, and its owner a commodity owner. Thus, the transition from the feudal law of sovereignty over land (and over people) to the bourgeois law of private ownership of land (from which political authority was distinguished as a special force)<sup>6</sup> can be considered not only from the perspective of a revolution of the functional-class character of law, but also from the point of view of a reversal of its form. It is indeed because of this that the bourgeoisie not only substitute their new law for feudal law but give such an all encompassing significance to the legal element in social life and ideology.

It should also not be forgotten that the division of labour, and the exchange connected with it, are the essence of a phenomenon that appears earlier than the feudal system. Although feudalism, compared with the later stages of development, is characterized by the preponderance of relationships in kind, we however meet with purchase and sale, with products and labour assuming the form of commodities, and with a universal equivalent, i.e. money, throughout the entire feudal period.

Thus, the premises are already present for the construction of economic relations as relations of exchange. The appearance of private property, which likewise precedes feudalism, is the result of the division of labour. Private property first appears as movable property.<sup>7</sup>

At the time when the large landholdings of the ecclesiastical and secular aristocracy began to develop in place of family and tribal ownership of land, feudalism matured as a result and movable property and certain rudiments of the law of obligations were already in existence. In particular one must agree with this [position] if one accepts the point of view of one of the most contemporary

historians of early feudalism, Alphonse Dopsh, who has denied the catastrophic nature of the destruction of Roman culture by the German tribes. However, for our purposes it suffices to accept the incontrovertible evidence concerning the presence of a developed form of value contained in the so-called barbarian laws in the era of early feudalism. Merely recall that *wergeld*\* was always calculated in monetary units.

It follows from this, incidently, that private property, which is based on the fact of the social division of labour and upon exchange, not only succeeded the feudal law of things as the sole and universal form of property, but co-existed with and even preceded it.

In considering the law of feudal society, we can, similarly, establish a relationship between the particular features of the content and class function of the law of a given period on the one hand, and its particularities of form on the other. For this we need neither deny the existence of feudal law nor convert it into bourgeois law. The tithe and the cropshare should not be confused with the surplus value of capitalist society. However, having completely understood this latter category, we can also, as Marx further indicated, additionally explain the significance of the feudal forms of exploitation. In the same manner, criticism of the most abstract and perfected definitions of bourgeois law can be useful in explaining the preceding forms, although in many respects they embody completely contradictory characteristics.

The relationship between two commodity owners, as a real basis for the whole wealth of legal constructions, is itself a rather empty abstraction. Much is hidden behind the will of the commodity owner: the will of the capitalist, the will of the small producer of commodities and the will of the worker selling his only commodity-labour power. The formal character of the legal transaction says nothing of its economic and social class content.

On this point Comrade Stuchka quite correctly appeals to us "to confine ourselves to the abstract world of simple commodity producers for no longer than is necessary to reveal the secrets of the abstractions of bourgeois law. Once this is done, back to

\* In ancient Teutonic and Old English law *wergeld* was the monetary equivalent calculated to release an offender from further liability for homicide and certain other crimes [*eds.*].

reality, to class society. "

One can hardly object to this appeal. The interpretation of the meaning of formal categories of law does not deprive them of their formal character and consequently does not eliminate the danger of reverting to a legal ideology veiled in protective Marxist coloration. Comrade Stuchka is certainly right to raise his voice in warning against this tendency.

Especially beyond question is Stuchka's statement that the will of the commodity owner under simple commodity production, and the will of the capitalist commodity owner, are qualitatively different wills, although in transactions of purchase and sale they project an identical formal appearance. The direction of will in one case is expressed by the economic formula C-M-C, and in the other case by the formula M-C-M-i. The central importance of this distinction is very clearly revealed for us in connection with the recent intra-Party discussion when we had to struggle against the uncritical usage of the term "private enterprise" and demonstrate the necessity for a strict distinction between capitalist production on the one hand and simple commodity production, i.e. peasant farming, on the other.

In conclusion, a few remarks are in order with regard to the relationship between state and law. On this point Comrade Stuchka warns against economism and observes a certain lack of understanding in my positions in this connection. I cannot agree that my work contains any lack of understanding in the sense of a concession to economism or to a fatalistic distortion of the Marxist teaching on social development. I was making two points. In the first place, I warned against confusing the real possibilities of state power and the results actually achieved by it, with what is contained in the laws issued by the state. 'For revolutionary periods in particular, it is important to distinguish two different things mentioned by none other than Stuchka himself, laws which "work" and those which "do not work". Further, I asserted that the social division of labour and, accordingly, the appearance of economic subjects as participants in this exchange, are facts that are not connected in their origin with state imperatives. This is also a proposition which would seem to be beyond question. However, these facts contain the basic and principal prerequisite for a legal relationship. It goes without saying that the concrete means of a given system of legal relationships are a matter of state power and the laws issued by it. It would be

absurd to deny this, but it would be even more absurd if, in the course of analysing legal regulation as an historical phenomenon, we reduced everything to an objective norm, to a rule as such, if we "abolished" subjective rights without making an effort to give some thought to the real economic facts which are concealed by this category. Therefore, those jurists who are inextricably the prisoners of legal ideology (or of the concept of public power as the source of objective norms, itself a thoroughly legal concept) make a humorous impression when claiming they are making some sort of step forward and leading us away from "individualistic and metaphysical constructions". In fact they are continually going round and round in the circle of their discredited definitions, arriving only at a complete misunderstanding of what they themselves are discussing.

I tried in my work to show that for the Marxist it is not necessary to follow this example, i.e. to explain law through a juridicized state [i.e. a legal state]. From such a "positivist" theory of law, I called for a return to Marx who shows how "the creation of a political state and the division of civil society into independent individuals ... is accomplished by one and the same action".

By concentrating attention on the omnipotent state in the sphere of the creation and support of the legal form (generally obligatory laws, the force of judicial decision, the strict execution of sentences etc.), the positivist jurists consciously or unconsciously conceal the far more important extra-legal, extra-statutory [and] extrajudicial power of the state which is directed towards the defence of class sovereignty by every means, all of which are outside the legal form.

Comrade Stuchka is absolutely right in emphasizing the significance of state power in the process of accelerating the transition from one mode of production to another. But this was not the subject of discussion in my study.

The problem posed by Stuchka is much broader and we are not in disagreement with it. My task was much more modest; to show the internal connection between the social division of labour expressed in the form of a commodity, and the basic concepts of so-called private and public law.

I am convinced that only through this approach can Marxist

criticism overcome all regression into absolutist juridical dogmatism which, as experience has shown, are inevitably transformed into a reversion to bourgeois legal ideology.

### Notes

1. M. Reisner, *Law, Our Law, Foreign Law, General Law* (1925), Leningrad-Moscow, p. 209.
2. *ibid.* p. 198.
3. *ibid.* p. 24.
4. *ibid.* p. 119.
5. See *Revolution of the Law* (1927), no. 2, pp. 3-26.
6. "Through the emancipation of private property from the community, the State has become a separate entity, beside and outside civil society; but it is nothing more than the form of organization which the bourgeoisie necessarily adopt both for internal and external purposes, for the mutual guarantee of their property and interests". K. Marx and F. Engels, "Feuerbach: Opposition of the Materialistic and Idealistic Outlook" (1845-1846), *MESW*, vol. 1, p. 77.
7. "Real private property began with the ancients, as with modern nations, with movable property." *ibid.* p. 77.

## 5 *"Revolutionary Elements in the History of the English State and Law"\**

### **Introductory Note**

By now the commodity exchange school had become the primary focus of legal scholarship within the U.S.S.R. The so-called commodity exchange jurists were represented in several of the important disciplines of law and were in various stages of applying and extending Pashukanis' theory to their respective specialities. Pashukanis urged his colleagues to undertake research on legal history, that is, on the history of the legal form, and he stimulated studies on the French Revolution, on feudal law and on the history of political and legal thought.

The article "Revolutionary Elements in the History of the English State and Law" was perhaps Pashukanis' most extensive inquiry into substantive legal history. In this work his primary method is to analyse specific class struggles, and in so doing he rejects both crude historicism and also the tendency of bourgeois legal historians, such as Maitland, Kareev and Morley, to view essentially radical-democratic demands as utopian. It is quite clear that Pashukanis chose to concentrate his analysis on the Cromwellian period in English history because he regarded populist movements, such as the English Levellers and Diggers and the French Jacobins, as primitive precursors of Bolshevism. These movements were primitive because they articulated their demands chiefly in terms of

\*"O revoliutsionnykh momentakh v istorii angliiskogo gosudarstva i angliiskogo prava", *Revoliutsiia prava* (1927), no. 1, pp. 112-174.

bourgeois notions of distributive justice, yet they were also precursors of Bolshevism because they attacked existing property relations and recognized the necessity of forging political alliances with the urban workers and rank and file soldiers. In praising the informal nature of the Levellers' demands, and the democratic nature of their organizations, Pashukanis is drawing an explicit parallel between the Levellers' organization and the structure of the Soviets of Soldiers' and Workers' Deputies of 1917. The Levellers' failure lay in the fact that they were betrayed by the upper strata of the peasantry, and that they were insufficiently prepared to resist the authoritarian opportunism of Cromwell and his generals. The reader is invited to draw the conclusion that Pashukanis viewed these latter as discrete references to certain tendencies within Bolshevism.



## ***"Revolutionary Elements in the History of the English State and Law"***

For the Marxist there can be no doubt that the real nature of organizations and legal institutions is most clearly revealed when an old social order is destroyed and replaced by a new one. Consequently, one of the tasks of the Section of Law of the Communist Academy is the study of the most important revolutionary eras. It is impossible, however, to say that this task is in any way enlightened by those special studies of the history of law which bourgeois science has until now provided.

In these works-unlike general historical literature revolutionary periods occupy a relatively modest place. In all likelihood this is explicable because the elements of acute class struggle not only reveal the real social character of state law, but also reveal the complete unsuitability of the historico-dogmatic and the historico-revolutionary methods which are used almost exclusively by bourgeois legal science.

However that may be, one of the leading historians who dedicated his work to the legislation of the great French Revolution, was forced to remark, in relation to previous writings in this area, that for the majority of jurists the appearance of the new bourgeois legal order was described entirely by the history of the Napoleonic Code, i.e. they calmly bypassed the period when the bourgeois revolution was in fact destroying feudal relationships, and particularly ignored those years when the most revolutionary party of the petit bourgeoisie (the Jacobins) rigorously attempted to disencumber the nation of all feudal remnants. These historians of law are entirely uninterested in the legislative creation of Covenant, concentrating their attention exclusively on the Napoleonic Code which, as is well known, was in many respects a product of a regressive movement.<sup>1</sup>

If this is the situation with the great French Revolution, then even less happy in this respect is the English Revolution of the seventeenth century which executed Charles I. Bourgeois historians of law may also conveniently ignore this because it was not accompanied by the social destruction which took place in France half a century later. The contrast between the social nature of the French Revolution and the purely political nature of the English revolutionary movement of the seventeenth century became a general feature of bourgeois historiography. Here is how this point of view is formulated by one of the most important historians of the Puritan revolution, Gardiner:

Neither the taking of the Bastille nor the execution of Louis XVI, but the night of August 4, when feudal privileges were thrown to the winds, was the central fact of the French Revolution. It was of the essence of the movement that there should cease to be privileged orders. It was a secondary consequence that the King's authority was restricted or his person misused. In the English Revolution, on the other hand, the essence of the movement was that the authority of the King should be restricted. The Kingship had done too much service in the recent past, and might do much service again, to be absolutely abolished, and there was no widespread desire for any social improvements. The abolition of the House of Lords and the sweeping away of Episcopacy were secondary consequences of the movement.<sup>2</sup>

Gardiner's conclusions are repeated by the Russian researcher Savin:

The revolution could not make such a deep furrow in England as in France half a century later. It changed the state and the church more than the social organization of labour. "The old order", which extended even to the other side of the revolutionary boundary, did not disappear but merely suffered changes in appearance.<sup>3</sup>

The conclusion, therefore, is that the Puritan revolution of the seventeenth century must be considered exclusively from the point of view of subsequent English political development. However, if we follow this advice, then in this case the special literature devoted, for instance, to the history of English state institutions and the English Constitution, would be of little use to us,

For the majority of legal historians, the English Revolution, having overthrown Charles Stuart, was a fruitless event even at the political level. In their presentation this was not even a revolution, but a "great rebellion", which did not have any "legal consequences". It is not by accident that the statutes of the Long Parliament beginning from the moment of the Civil War, and all Acts of the era of the Republic and the Protectorate are excluded from the official collection of Parliamentary Acts because they are seen as void. To what limits the haughty contempt of the jurists may extend towards such a fact as the temporary overthrow of the monarchy in England, is exemplified by one of the most recent textbooks on constitutional history, belonging to the pen of one of the most outstanding specialists in this area, Maitland. The author does not for a moment allow any doubt of the fact that "when Charles I was murdered, he was immediately succeeded by his son Charles II". "I put the matter in this way", explains our historian, "because even now it is the legal view of the matter, and we must not allow our sympathies or antipathies to interfere with our statement of the law."<sup>4</sup>

Thus now in the twentieth century Maitland fully shares the doctrine of the Restoration according to which the reign of Charles II began, not in 1660 (when he returned to England), but 11 years earlier. The Civil War, the Republic and the Protectorate are simply deleted from English constitutional history

The matter however is not limited by this denial of formal "recognition" of the English Revolution. Often it is essentially evaluated by bourgeois historians as an event which has little effect on the subsequent history of the state institutions of England. "The period of the Republic", we read in Gneist, "took place entirely removed from the internal life of the state or society. One cannot show even one institution, community office or leading place in local self government, which derived its origin from the era of the republic."<sup>5</sup>

In his own way, Gneist, of course, is right. But at the same time this citation is a model of the superficial conclusions which legal historians often flaunt. The significance of the most important social events, such as revolutions, is not restricted to the form of new institutions and new offices. We know now that even reforms of old institutions are often only collateral products of revolutions. Revolutions are junction points in social development which are determined

centuries earlier. Revolutions are, in Marx's well-known expression, the driving forces of history, and their momentum is more significant the deeper the popular masses participate in them. Bourgeois thought typically holds the opposite point of view. The more a given movement embraces all social strata, the greater the striving of bourgeois ideologists to depict it as a blind and worthless rebellion which destroys but creates nothing; the more intensely they strive to isolate the period and depict it as a period of "Irrationality", which is organically unconnected with subsequent development.

When history moves with the speed of a cart-this is itself rationality and itself regularity. When the popular masses themselves, with all their virgin primitiveness, their simple crude decisiveness, begin to make history, to bring to life directly and immediately "principles and theories", then the bourgeoisie feels fear. and cries out that "rationality is receding to the background". (Lenin, VII, p. 130)

This approach pursues a clearly defined goal, namely, to kill every revolutionary tradition in embryo, to erase from the consciousness of the popular masses every recollection of the period when new forms of social relationship and new forms of authority were created under the direct pressure of these masses themselves.

As applied to the first English Revolution, this method found its classical expression in the contrast between the "Great Rebellion" of the 1740s and the "Glorious Revolution" of 1688, \*in Morley's interpretation a true revolution which finally confirmed the oligarchy of Lords and Commons in the place of the Stuart monarchy. The Bill of Rights of 1689 and the "Act of Settlement" of 1701 consolidated the position towards which the Long Parliament strived when it began its struggle with Charles I. Thus, the years of the greatest ascent of revolution somehow fall by themselves from the viewpoint of the bourgeois historians of English law and the English Constitution. These events are presented as some annoying violation of a consistent and uninterrupted line of development. However, it is obvious that it was precisely in these years, most clearly, widely and sharply, that the basic question of the liquidation of the remnants of feudalism and of the transition to bourgeois social relationships was defined as the question of property and the question of authority. From this point of view the meanderings of Parliament's struggle with royal authority must, of course, yield to the explanation of *the*

process by which the order was destroyed and of those class forces which could most radically effect this task. The central significance here is taken, on the one hand, by the agrarian question and the general role of the peasantry and, on the other, by the attempts contemplated in the revolutionary movement of the 1740s to create bodies of revolutionary-democratic dictatorship.

## I

The first English Revolution was not, of course, a purely political movement. As early as 1848 Marx had written, comparing the English and French revolutions:

... the *victory of the bourgeoisie* was at that time the *victory of a new social order*, the victory of bourgeois property over feudal property, of nationality over provincialism, of competition over the guild, of the partition of estates over primogeniture, of the owner's mastery of the land over the land's mastery of its owner, of enlightenment over superstition, of the family over the family name, of industry over heroic laziness, of civil law over privileges of medieval origin.<sup>6</sup>

However, it is certainly true that feudal relations were not delivered one concentrated blow. Feudalism [in England---eds. ] was destroyed but disappeared only gradually. This process extended over many centuries during which certain aspects of the feudal order displayed surprising adaptability and vitality. It is not instructive, even in a brief outline, to follow the basic stages of this process so as to be convinced once more that the path of slow progress and gradual reforms, called forth by the inexorable march of economic development, is expensive for the popular masses.

For example, beginning with the fourteenth century in England, there was the process of the dissolution of the feudal corvee economy, the change from the corvee into a money grant (commutation), and the gradual elimination of the serfs personal dependence. It is characteristic that the withering away of serf relations, in practice facilitating economic development, was not accompanied by corresponding legal changes. The old feudal law did not die out entirely, but was only subdued, and moreover any trauma could once again resurrect it. This is indeed what happened after the Black

Death (in the middle of the fourteenth century), when high wages and the acute shortage of labour forced the lords to revive their feudal rights and to make an attempt to return again to the *corvée*. This feudal reaction was all the more burdensome for the peasantry because it happened under conditions of a developing monetary economy, and was the main cause of the uprising of the English peasants in 1381 (the Watt Tyler Rebellion). Although this rebellion was suppressed and all promises and liberties given earlier were retracted it was, nevertheless, a good lesson for the feudal lords, and served as an extra lever towards the elimination of the crudest forms of personal dependence and forced labour. Moreover, the usual affirmation that serfdom in England had disappeared by the end of the fourteenth century, suffers, as most recent researchers have shown, from a certain inaccuracy. Personal serfdom ceased to be a widespread phenomenon, but serfs (villeins or bondsmen) were identified in historical sources even at the end of the sixteenth century. Savin, in his study *The English Village in the Age of the Tudors*, adduces a series of examples of how the lords at this time tried to exercise their right to the personality and property of the villeins, even when these villeins were persons of some substance and had a public position (for instance the owner of 60 estates or the mayor of the city of Bristol). In this regard the researcher correctly notes: "it is important that even persons with [such] social positions could be subject to such a danger. In this, but only in this, lies the exceptional nature of these cases. In the fifteenth and sixteenth century persons less rich and influential were often sought out as villeins . . ." "The status of villeins in the fifteenth and sixteenth century", we read further, "was far from always a harmless fiction and a half-forgotten survival."<sup>7</sup>

There were characteristic ways by which the legal abolition of personal serf dependency was effected in England. The general and basic cause of this phenomenon—the development of a money economy and bourgeois-capitalist relations—acted with elementary force in the most varied directions. However, the political and legal formulation of the new economic relations could come about from various directions which, from the point of view of the classes participating in them, were far from being of equal value. One method was the revolutionary elimination, at one blow, of all former relations of dependence; this was the method attempted by the

English peasantry in the civil war of 1381. For the popular masses this was the fastest and least painful method for arriving at the new, i.e. bourgeois, order of social relationships. For the class of feudal lords, this meant the full and immediate loss of all their positions and privileges. The other method, of gradually eliminating serfdom, is a long and most painful way for the popular masses but, however, ensures the representatives of feudal land ownership the possibility of adaptation, of "growth" into capitalism with the preservation of a significant measure of their feudal privileges.

While the first method is unthinkable without a political revolution, without the elimination of the old political superstructure, the second presupposes its preservation; in this case we have a series of legal changes, a series of accumulated precedents, a series of reforms conducted by the forces and methods of the same old political superstructure. Concrete examples from this area are extremely rare.

Thus, one of the most important sources of the private legal capacity of the villein was transactions, primarily credit transactions.

The stability of exchange required the recognition of the villein as an independent subject of rights and duties, not for his own sake, but to ensure the interests of third parties. If the villein has a debtor and the lord enjoys by his rights the written obligation, then the lord may exact money under this obligation only \*in the name of the villein; if the villein gives up his right to the debt, the lord is bound by this refusal. In exactly the same way, the villein even had the right of suit against the lord if he was executor of a will, and the lord a debtor of the testator, for here the villein appeared with a suit on behalf of the third party<sup>8</sup>

. . . . .

## II

The peasant uprising of 1381 did not have a clear political programme although its social class nature came out unusually clearly. The English peasants at the end of the fourteenth century acted in the same way as their French brethren in 1789. They energetically burned local archives, all the protocols of manorial courts, the customaries and rentals of civil and spiritual lords, and

also various other documents defining the rights of lords to their labour and the products of their labour.<sup>9</sup> The movement, as is well known, embraced not only the countryside but also the urban poor. Of 289 executed leaders of the revolt, 151 were residents of London. Thus, in terms of its class composition, this movement presented the same picture of the combination of a peasant revolution with an uprising of the urban petit bourgeoisie, semi-proletarian and proletarian elements which we observed at the time of the peasant war in Germany, and at the time of the great French Revolution. Before us are indeed those forces which would be capable of dealing with the feudal order in a plebeian way. However, the movement did not embrace a political programme. The revolting mass was promonarchical, was convinced that in dealing with its hated servants and judges, it was punishing "traitors to the king". Therefore despite the military successes the whole movement fell victim to the most dastardly deception on the part of royal authority.

The peasant uprisings of the sixteenth century in Devonshire and Norfolk (the Robert Keat uprising) bore the same social character. They were permeated with the same implacable hatred toward the landowners.<sup>10</sup> But also here we mainly meet complaints against individual abuses of feudal rights, against increases of rent, the taking of common lands (fencing), the expulsion of peasants from their strips. A struggle against personal serf dependency did not yet play a primary role although the demands presented by Robert Keat in 1549 included a point on the freeing of bondmen (serfs). In general, and as a whole, these uprisings did not offer a clear and broad political programme.

Between the peasant war of 1381 and the revolution of the seventeenth century more than two-and-a-half centuries passed. During this time many changes took place in the socio-economic structure of England, changes which could not fail to influence the position of the social classes, the nature of their demands, the nature of their struggle. During this time we see the final decline of a manorial economy and the development of private farming. Within the peasantry the process of stratification advances and it separates, on one level, the rich farming stratum and, on another, the smallholders and landless peasants, the semi-landless farm labourers and the landless farm labourers; the system of cultivating common land with unfenced fields and compulsory sowing falls into disuse; the



common lands were seized and enclosed by the estate owners; later the rich elements of the peasantry began to take part in this division of common land. An increase in manufacturing occurs in the cities; new industrial centres arise; maritime exchange develops; monopolistic trading companies are formed. On the basis of the development of mercantile capital the centralized bureaucratic apparatus of the absolute monarchy was founded.

In the sixteenth century the Reformation dealt a serious blow to the greatest ideological force of feudal society-the Catholic Church. If for England the Reformation signified primarily the strengthening of absolute royal power which now received for its disposition the apparatus of the Church and the property of the monasteries, then later the ideological weapon which the Reformation gave was used by all social classes and strata ushered in by the new methods of production. Contemporaneously with theology, and forcing it into the background, there began to develop a rationalist natural law ideology-this is the most typical ideology of bourgeois society in the era of its conception. Those prominent in the first English Revolution had already mastered its syllogisms and put them to play in their political arguments. A study of the first draft of the "Popular Agreement" and "Basic Propositions" in the camp of Cromwell's Army in Putney (October 1647) shows us how convenient, for the political activists of that time, were the ideas whose systematic statement we find in the works of Grotius and Hobbes.

Generally, the dissolution of the bases of the feudal order in these two and a half centuries was a great step forward; the contours of the new social relationships appeared much more clearly, and the anti-feudal ideology assumed mature forms. Therefore, in the seventeenth century at the extreme left wing of the revolutionary movement we now find a party (the Levellers) which developed a broad and consistent programme of a bourgeois-democratic nature; the elimination of royal authority and the Upper House, the universal right to vote, the separation of church from state (the abolition of the tithes), the elimination of estate-corporate privileges, freedom of trade, direct income tax, the cessation of the plunder of common lands, and the abolition of all remnants of serfdom in land relations including even copyhold.<sup>11</sup>

It is particularly important to note the demands of the Levellers concerning the radical restructuring both of judicial establishments

and of court procedure. The age of mercantile capital, and the absolutism corresponding to it at the political level, was distinguished in the judicial area by the rule of casuistry, procrastination, bribe-taking and arbitrariness. Mercantile capital, developing on the basis of shackling forms of exploitation, is not only congenial to serf and police arbitrariness but is directly involved in it, for it facilitates the exploitation of the small commodity producers. The major monopolistic trading companies are much more interested in having good ties with the throne than in a fast, impartial and scrupulous court, the more so since in their internal affairs they enjoy broad, and even judicial, autonomy. On the contrary, the Levellers-by virtue of the fact that they acted as champions of the most general conditions of development of bourgeois-capitalist relations-had to turn their attention again to judicial reform. John Lilburne in his work, *The Fundamental Laws and Liberties*, incidentally formulates two classical principles of the bourgeois doctrine of criminal law: no one may be convicted other than on the basis of a law existing at the moment of commission of the act, and the punishment must correspond to the crime according to the principle an eye for an eye and a tooth for a tooth. Lilburne himself was of course the first man in England to succeed in being served with an indictment.<sup>12</sup>

The Levellers found their support among the peasants, small rentiers, craftsmen and workers. It is enough to recall the influence which they enjoyed in the London suburbs, in particular in Southwark, which was populated by weavers. However, their main support was the army. Here we encounter a fact imposing a characteristic imprint on the whole course of the first English Revolution: it was not accompanied by any significant agrarian movement. Proceeding from the Levellers, the attempt to transform the political structure of England of that day into a consistent bourgeois democratic condition was never supported by a massive peasant uprising.

For this of course there were fully sufficient reasons. In the first place, by that time serf dependence no longer existed in England. Almost everywhere the corvée had been replaced by money rent. The cause of the greatest discontent had therefore been eliminated. In the second place, the class divisions of the English peasantry, about which we spoke above, had gone rather far by the time of the Great Revolution. A rich upper stratum, separated from the general mass,

tried to improve its farming at the expense of the less wealthy strata. Winstanley, the leader and ideologist of the "Diggers", who attempted to realize something like agrarian communism, thus draws this contradiction between the rich freeholders and the poor: "they (the freeholders) exhaust the common pastures, put an excessive number of sheep and draft animals on them, and as a result the small renter and peasant farmer hardly manage to feed their cows on the grazing ground." The rich upper strata of the country took an active part in the destruction of the old common system, in particular the enclosure of the common lands. In this instance, it united with the landowners against the rural poor. Here we see, *mutatis mutandis*, the same alignment of class forces which Stolypin tried to realize among us with the help of his agrarian legislation. It is clear that this destroyed the political power of the peasant movement against the landowners.<sup>13</sup>

It seems to us undoubtedly true that this conjecture predetermined the failure of every radical-democratic movement. In fact, to realize any consistent democratic forms, while leaving the land intact in the ownership of landed estates, was clearly an insoluble task. Similar examples are furnished by the abolition of the tithe, without compromising the rights of the landlord to receive rent, and by the democratization of the court and simplification of laws if these confused feudal laws and judicial delays served as the best means of struggle for the landlords and the best means of profit for the semi-feudal estate of lawyers. But the Short or Barebones Parliament lost out precisely because of these contradictions. In order to be finished with all the remnants of feudalism, it was necessary to be finished with the class which embodied these remnants in itself. And only a victorious peasant revolution would have been capable of this. For the bourgeois historians of the English Revolution, who did not stand above the class point of view, such a conclusion was of course entirely unacceptable and unthinkable.

They preferred to consider this aspect of the English Revolution, i.e. the relative passivity of the peasantry, entirely in another context. The characteristic example in this respect is our eminent historian Kareev. In his recently published monograph *Two English Revolutions of the Seventeenth Century*,<sup>14</sup> he touches upon this question with just one swift phrase and, moreover, at the very place where he also speaks with respect of the "restraining principles" which were in effect in

the Civil War between the Cavaliers and Roundheads. Having explained that such a basis for the Royalists was a feeling "of honour", and for the Puritans, "conscience", our historian immediately adds: "It is interesting that the popular masses themselves were hardly affected by this struggle between the ruling classes and that indeed in this era in England there were no popular uprisings with slaughter, with blood." Thus, the participation of the popular masses in the revolution is evaluated not from the point of view of the socio-political scope of the latter but from the point of view of slaughter and blood-letting. But from such a point of view-and it typifies, I repeat, the majority of bourgeois historians-it becomes very difficult to explain the failure of the Levellers' movement. On the one hand, it must be proven that the demands of the Levellers in their radical democratic programme were far from reality and appeared utopian. Gardiner, for example, speaking about the petition presented by the Levellers to the Long Parliament in March 1647, and which contained the routine bourgeois democratic demands, states that "this was a programme more for three centuries than for just one parliament".<sup>15</sup> Even with respect to Ireton's "Heads of the Proposals", which do not suffer from radicalism, retaining the royal authority, the Upper House, the Episcopalian Church etc., Gardiner notes: "It contained too much that was new, too much in advance of the general intelligence of the times, to obtain that popular support without which the best constitutions are but castles in the air."<sup>16</sup>

Thus, the radical-democratic demands put forth at the time of the great English Revolution are depicted by bourgeois historians as utopian. Morley indeed writes, with respect to the first draft of the "Agreement of the People", that this was the "beatific" dream of mankind tortured and subjugated by labour, a dream which "was and will be the same at all times and among all peoples".<sup>17</sup> But if the demands of the Levellers are a fantasy, a dream and a utopia, then how can we reconcile this with the fact that the principles of the Levellers were soon to be the basis of the socio-political structure of the American states? It signifies that for its historical period the programme of a radical break with all the remnants of feudalism was by no means utopian. This obvious inconsistency requires a special explanation. However, in the majority of cases it is just this explanation that we do not find. On the contrary, the absence in

North America of semi-feudal institutions is reported as a fact in itself. Thus, Walsh, who was cited by us describing the history of the development of copyhold from the villein's holdings, ends his statement with one short phrase: "Copyhold, for obvious reasons, never existed in the United States."<sup>18</sup> Most clearly, all this helpless historical analysis flows from the absence of the class position and may be found in the same Kareev in his earlier work, *The History of Western Europe in the Modern Period*. Speaking of the fate of the first English Revolution, he states three consecutive facts: "(1) the weakness of the communist and anarchist movement in England in the 1740s [by "communist and anarchist movement" Kareev means peasant uprisings in the spirit of the German peasant war]; (2) the more serious character of the purely political movement of the Levellers, which, however, suffered failure; and (3) the fact that the democratic principle of the Levellers lay at the basis of the political life of the future United States."<sup>19</sup> Kareev establishes no connection between these three facts, and obviously sees none. However, it strikes one in the eye. The democratic movement of the Levellers; could be victorious only in connection with a peasant war, i.e. with the same "communist and anarchist" movements whose weakness in England was the basic cause of the preservation of all possible feudal remnants. The socio-political ideals of the Levellers by no means were a utopia from the point of view, say, of comparing them with the level of development of productive forces at that time; but they could only serve as the basis of a state and social order beyond the ocean where there was no basic impediment, where there was no class in whose interest it was to preserve as many feudal privileges as possible. We find this latter conclusion, admittedly in a somewhat unusual form, in Savin. Dealing with the question of why "the successes of democratization in the English-speaking world are much clearer in New South Wales than in the Hampshire countryside or even on the streets of Manchester", he finds the main explanation in the power of accumulated traditions, inherited relationships and old institutions, which would have to be overcome in the metropolis and which did not exist in the colonies. "In the old society it was necessary to eliminate something pleasant and profitable for a certain social group to be innovative."<sup>20</sup> In other words, outdated institutions, legal institutions and whole classes do not leave the historical scene, but defend the "pleasant and profitable" upon

which the course of social development infringes, and defend it by all possible means. Therefore, the task of truly materialist Marxist research must be to explain by which classes and by which methods the struggle was conducted. Mere references to the inevitable course of historical development are entirely insufficient.

In this instance to eliminate the old "pleasant and profitable" meant to destroy the estate landholding. But the landed class was sufficiently strong, and the peasant movement too weak, and as a result the development of capitalist relations and landholding went along the path which Lenin (speaking of the Stolypin agrarian policy) defined as "the rewarding of the plunder of the common lands by the rich peasants", as "the destruction of old land relations for the benefit of a handful of rich landlords, at the price of the swift destruction of the mass", and as "a landlord's purge of the land for capitalism". Politically this signified the retardation of bourgeois democracy in England for whole centuries, the rule of parliamentary oligarchy during the whole of the eighteenth and the first third of the nineteenth centuries, and the preservation of such institutions as the monarchy, the Episcopalian Church and the House of Lords.

Thus, the contrast between the Levellers and those movements which sought social revolution and attacked the existing property relations was, so to speak, confirmed. But this was only the case if we are to be satisfied by the consideration of ideological formulae and not the objective meaning of the given revolutionary movement. The ideology of the Levellers was typical bourgeois ideology; and the overwhelming majority of the Levellers acted as defenders of the principle of private property and this by no means contradicts the fact that the victory of the Levellers' movement should have objectively led to the most decisive infringement on the right of feudal property. Moreover, this success and this victory could not have found its expression other than in the elimination of feudal ownership. Therefore, when the opponents of the Levellers accused them of attacking property, and of favouring communism, this was not merely slander. It was a statement of uncontested fact that for the privileged feudal owners the radical democratic transformation for which the Levellers strove would have presented a most real threat. The affirmations of the leaders of the Levellers, concerning their

adherence to the principle of private property, were a very weak consolation. And, on the contrary, the preaching of the communality of ownership and the clouded communist ideology of the extreme left leaders of the German peasant war, was in fact less of a threat to embryonic capitalist social relationships, but was instead the banner of the implacable, most consistent opponents of feudal ownership and all serf and semi-serf relationships. It is here that it seems possible for us to find a series of elements which bring the two movements closer together even though they are so different in their ideological bases.

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Let us return now to the Levellers of the 1740s. Their radical democratic programme threatened, as it were, the most privileged types of property against which the German peasants went to war in 1522-1525, i.e. feudal landholding, privileged city corporations, trade monopolies. From an abstract ideological point of view, they expressed their thought in natural law and refused to stand on the terrain of historical law which, in their opinion, was forced upon the English people by the Norman conquerors. Incidentally, in this they were like the "communist" Diggers who also demanded the elimination of the "repulsive institutions introduced by William the Conqueror".<sup>21</sup> Ireton, defending the moderate programme of the Independents, tried to show that the Levellers, in denying historical rights and such institutions as the monarchy and the House of Lords, and in demanding the universal right to vote, inevitably reach the elimination of property. "If we eliminate this basic part of the civil constitution (Ireton has in mind the system of representation at that time), we come directly to the point of eliminating all property and all rights which man may have whether this is the right to inherit land or the right to possession or any other right."<sup>22</sup> Ireton is undoubtedly right to the extent that he refers to property which rests on feudal titles, corporate privileges and monopoly rights. But his opponents have in view something entirely different, namely pure bourgeois freedom and primarily petty ownership which, in their opinion, derives from "natural law" and requires no other basis than the divine commandment "thou shalt not steal". Therefore Rainborough, one of the left wing, and an ardent champion of universal suffrage, affirms that he by no means wants anarchy and that he

recognizes the right of ownership which "God established by law: thou shalt not steal". At the time, therefore, when Ireton sanctimoniously declares that if God eliminates the king, the lords and ownership, then he, Ireton, will be reconciled to this, the Leveller Petty assuages him: "I hope that we see the authority of the king and lords overthrown and ownership protected."<sup>23</sup> With respect to universal suffrage, it, in the opinion of the same speaker, is not at all a means of eliminating ownership: "I believe, on the contrary, that it is the sole means of guaranteeing all ownership."<sup>24</sup> It is clear that in speaking of ownership the disputants do not have the same thing in mind.

The Levellers undoubtedly were a purely bourgeois party and to the extent that commodity-money and bourgeois-capitalist relationships, at that time (i.e. in the 1640s) extended rather deeply into the English countryside, to such an extent demands could not enter into their programme for a general division of land, "an agrarian law" etc.<sup>25</sup> But this did not mean that in practice in the case of victory for Levellers the relationships of land ownership would have remained the same. The makers of the great French Revolution were no less attached to the principle of private property. However, this did not prevent them from at first confiscating church property, then the royal lands and, finally, the lands of emigre noblemen. In England the secularization of monastic holdings happened long before the revolution, in the reign of Henry VIII. These lands were sold cheaply by the Crown and simply plundered by influential people;<sup>26</sup> moreover, this mobilization of land ownership was accompanied, as a rule, by a worsening in the position of the peasants living off the land. All this confiscation of monastic holdings was in general, and as a whole, a step on the road to victory of bourgeois relationships over feudal ones. However, in this case it was at the expense of the destruction of one of the pillars of feudal society while the position of another part of it was strengthened. The landlords, rounding out their holdings by robbing the monasteries, simultaneously retained their feudal privileges with respect to the peasants. As was shown above, they used their feudal privileges to direct the further progress of the development of capitalist relations in the country for the maximum profit for themselves and for the maximum loss for the basic mass of peasantry.



Further, the enclosure and general destruction of the old common land system was also a violent revolutionary measure. This was also the overthrow, or rather a series of overthrows, with respect to property. Characteristically, and Savin notes this in his research, the pamphlets, i.e. the fighting political literature of the time, are directed exclusively against major enclosures connected with the concentration of holdings and the appropriation of land from the peasants. The struggle of the small peasant to free himself from the constraints of common land is the subject of almost no discussion. On the contrary, in one pamphlet, which contains the fiercest accusations against major enclosures, the just division of common lands is even welcomed.<sup>27</sup> Elimination of the system of open fields and compulsory sowing was a necessary condition of agricultural progress. However, this progress could have been seen entirely differently from a class position. Political, i.e. class, struggle was by no means unilinear progress and regression, but also stasis: either theft of common land by estate owners and the rich upper strata of the peasantry, or "just" division of this land. It is clear that a solution to the question of the latter case would be possible only in the case of a victorious peasant revolution, i.e. if all estate land went together in the division or, at least, a significant part of it. If the peasantry, particularly its poorest stratum, continued to hold to the common land, this is because they saw in it some guarantee against rent increases and payments for access, from which the isolated smallholder was even less protected than the large commune. The dissolution of the common land under conditions when major estate landholdings remained intact, and when a significant element of feudal privileges were retained, would have meant for the majority of peasants, and in particular for the poorest stratum, the gloomiest condition. It is not surprising that they, with all their powers, opposed the destruction of the common land, bringing upon themselves the wrath of the advanced agronomists who were convinced of the advantages of an economy of farmers. Savin adduces a number of curious citations from this type of author. One of them, Tusser, having drawn a picture of chaos in the system of common land, disclaims irritably against the poor peasants who particularly clung to it: "The poor peasants do not want to hear about enclosures for they are convinced that in the divisions they would be directly hurt. As if it is impossible to make a just division!"<sup>28</sup> Tusser here did what

is called taking the bull by the horns. "A just division of lands"-if this is translated into political language it is a peasant revolution and the elimination of the state landholdings-means an entirely different type of development of capitalist relationships, a type which Lenin called the American way.<sup>29</sup>

The destruction of the relations of land ownership, which began in the form of the enclosure and the confiscation of monastic holdings, continued during the first revolution. The Long Parliament abolished the Episcopate and instituted a committee for conducting the sale of confiscated church lands. The officers and soldiers of the revolutionary army were later given the right to obtain land parcels from this fund, in exchange for their unpaid salary and at half price. The Civil War between Parliament and the Crown thus had as a result the mass transfer of property (which was partly annulled upon the Restoration). Not less than half of all the movable property and half of the lands, rents and incomes of the noblemen who fought on the side of the Crown fell under sequestration. In order to raise the sequestration it was necessary to pay a composition in the amount of approximately one-fifth of the total value. Such an operation was conducted in 1644 on not less than 3000 "gentlemen". The direct profit from this measure was received by the Presbyterian party which then held sway in Parliament, a party whose members became rich buying land cheaply, squeezing out the Royalists who had fallen under sequestration, with money at usurious interest, and finally, releasing sequestration for a bribe. The corruption which developed gave one of the major trump cards to the Independents and their struggle against the parliamentary majority. In the interest of justice it should be noted that after this, when Cromwell's army triumphed over Parliament, the Independent majority of the "Rump" began to engage in the same dirty business.

However, there was here an instance of partial appropriation of agrarian property and partial destruction of the feudal estate landholding which was an accidental result of political struggle. To the extent that authority nevertheless remained in the hands of the privileged, propertied classes, in the hands of gentlemen, to this extent this redistribution served as a natural weapon for the cliques. The victory of radical-democratic elements, i.e. of the Levellers, undoubtedly would have given this process of the destruction of estate property a more fundamental character. This alone would

have already followed from the intensification of the political struggle. The victory of the Levellers would have meant that the Presbyterians and gentlemen of the Independent camp would have shared the fate of the Royalists. On the other hand, the victory of the democratic elements would have forcibly placed upon the agenda the demand which was raised with respect to the common lands, and then in the course of revolution with respect to the confiscated church lands, namely the demand for a "Just division". The purely political programme of the Levellers, in the event of their success, undoubtedly would have revealed the social content hidden in it. For them, in the area of agricultural relationships, there could have been only a greater or less total authority of free petty land ownership.

### III

In his lectures on the history of the English revolution, Savin notes an insufficiency in the study of the socio-economic basis of the movement. The clash of religious and political doctrines, a study of political parties, the external events of the Civil War, all this occupies first place in the works of historians of this period.

"In the historiography of the English Revolution", he complains, "there is still an aristocratic and spiritual overlay. The farm labourer, apprentice, tramp, even the yeoman and master still rarely appear on the pages of general or specialized works. Insufficient attention is still given to the common field and the enclosed farm which violated the unity of the common system, to the roadside tavern, where suspicious people gathered at dusk, to the humble home of the urban craftsman and the still more humble structures for students, the shop of the buyer giving out work to these artisans, the simple shed of the young manufacturer, to the London docks which attracted everything else that was made in the troubled land."<sup>30</sup>

But even within the limits of purely political struggle, the attention of the majority of historians has least of all been concentrated on those facts which from the revolutionary position present the greatest interest. *We have in mind the activity of the popular masses, the creation by them of their own organizations which were the agencies of revolutionary struggle and, accordingly, which formed agencies of revolutionary authority.* These facts, as Lenin pointed out, characterized in

the first place specific methods of historical creativity which were natural to revolutionary ages. Moreover, the success of a revolution, as Lenin had repeatedly pointed out in analysing the lessons of 1905, was more closely connected with the transformation of these initially separated, accidental and therefore powerless organizations into coherent, planned and rigorous agencies of revolution. For us, the English Revolution provides a unique and particularly interesting example, in this respect, in the Soldiers' Councils which arose in Cromwell's army in the spring of 1647.

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Not having in mind the repetition of what has already been said in the above-named works, I will I linger only on those aspects of the soldiers' movements of 1647-1649 which have not received special clarification in our literature. They are nevertheless striking, particularly if one compares them with the experience of our revolution. It is possible to affirm with full certitude that the practical experience of our three revolutions gives entirely new insights into such facts as seemed to have long been studied and even to have been put into a system. Take the dispute with the Mensheviks-still linked with the period of the first revolution-on the nature of the soviets: [were they] organizations of revolutionary self-government or organizations of revolutionary authority? Does not this argument, in which the Bolsheviks were victorious both in theory and in practice, cast new light on the organization which was created in April 1647 in Fairfax's army, and is it not possible to expect that in 1898 Bernstein, when he had already matured as a future herald of opportunism, arrived at this perspective on the advice of English socialism? He, of course, calls them only "a profoundly democratic institution".<sup>31</sup> About the fact that in all its characteristics this organization should be considered as an embryonic stage of revolutionary dictatorship, there is of course no mention by Bernstein. He, of course, gives their due to the Levellers who, in the understanding of the necessary political measures, often went further than Cromwell; he is ready to agree "that the Levellers were the first among the people and the simple soldier agitators in the army to understand the necessity of energetic opposition for the counter-revolutionary elements of Parliament."<sup>32</sup> But he has not made the effort to select the facts in a careful way, and there are no small number of them, showing that

the advanced elements of soldiers not only understood the necessity of such measures *but also carried them through against the resistance and wavering of the officer corps, enforced them by way of the creation of improvised agencies, assumed the functions of authority and openly destroyed the old legality.* The totality of these facts also forces us to come to the conclusion that before us is an embryonic government of a revolutionary dictatorship. It is characterized by the fact that it is created exclusively by revolutionary strata of the population outside any laws and norms whatsoever, purely by order of proclamation, taking on the functions of authority, applying coercion with respect to the representatives of the old state apparatus. However, these facts somehow slip from the attention of Bernstein, and when he meets them he does it purely randomly without generalization or conclusions. These facts hold certainly no less, if not more, historical significance than the attempts to formulate democratic demands which we find in the "Agreement of the People" and other declarative calls and pamphlets of the Levellers. That another point of view was entirely unachievable for Bernstein derives from his general conception of the English Revolution, which did not proceed very far from the views of liberal historians. Evaluating the struggle of the Levellers with Cromwell, Bernstein comes to the following conclusion, pessimistic for left movements: "As long as the revolution struggled with outmoded forces, the Levellers with luck could show it the path and more than once did this. But at the moment when the outmoded forces were beaten and the newly born ones began to reconstruct life, the Levellers had to recede to the background. The time for those classes which they represented had still to come."<sup>33</sup> Moreover, and we can say this now emphatically, one need not of course expect, from the Menshevik conception of the bourgeoisdemocratic revolution, that our historian would have shown any interest with respect to the weak embryonic stages of revolutionarydemocratic dictatorship noted in that far-off age when, for him, the very thought of such a dictatorship had to appear to be an unthinkable heresy against Marxism.

Thus, neither Cromwell nor other Independent generals thought of open struggle with Parliament at the time when the latter prepared to render the decisive blow against the left elements by disbanding

the army. On the contrary there are indications that Cromwell at that period (Spring 1647) even meant to leave England entirely and travel to the Continent in order to participate in a struggle for the Protestant cause. Until the last moment Cromwell remained a loyal member of Parliament. He left London only on June 3rd when he realized that he was threatened with the danger of arrest, and went to the army. But the decisive events were already then being played out; on May 25th and 27th both Houses adopted resolutions to discharge the army and to send part of the troops to Ireland. An attempt was made to put this decision into practice, and if it had succeeded, the Presbyterian party could have enjoyed victory; but this attempt was unsuccessful because of the decisive resistance of the mass of soldiers led by agitators. Had it not been for this resistance the subsequent course of events would have been very different.

One can have doubts about the degree to which Cromwell and the other leaders of the Independents truly wished to remain loyal to the Presbyterian majority in Parliament. But there is no doubt that the soldiers' organizations never entered into their calculations for the purpose of their struggle with Parliament. It is one thing to put pressure on Parliament by relying upon a disciplined armed force subordinate to oneself, but entirely another thing to create an illegal organization embracing the mass of soldiers and awakening their independent activity, an organization which immediately and inevitably had to bring forth socio-political demands extending far beyond the ideas of the moderate Independents.

In general, deciding political questions by the use of armed force, and by disregarding legality, does not exhaust the concepts of revolution even at the purely political level. Here it is necessary to remember the difference which Lenin emphasized: either a revolution is conducted by the popular masses, who unite in the very process of the struggle bringing forth from the bottom their self-created agencies of revolt-this is a popular revolution; or, this revolution remains the affair of a minority, a minority constituting part of the privileged propertied classes that used an existing organization, for instance the army. The popular mass does not play an active independent role in this situation. It is dominated in advance by the disposition of the leading upper stratum and condemned to the role of a blind weapon. Lenin instantiated such a non-popular revolution, the Young Turks revolt. Pokrovsky notes

the same outlines in the movement of the Decembrists, to the extent that the leaders of the latter (this particularly relates to the Northern Society) avoided allowing soldiers in on their plans and even directed more propaganda at them.

In the English revolutionary movement of the seventeenth century we observed the struggle of these two movements, a struggle the more fierce because of the high degree of consciousness and political activity among the soldiers of Cromwell's army. To transform them into submissive weapons of his moderate gentry-bourgeois policy was not an easy task. It is necessary to add still another fact to this. The officer corps of Cromwell's army included a certain number of democratic elements (Pride, a former horse-cab driver; Rainborough, barge captain; Colonel Joyce, a former tailor etc.); moreover, many of them were convinced supporters of the extreme left movements. On the one hand, the presence of allies among the officers helped the soldiers in their debates, but on the other hand it also helped Cromwell's task. Between the mass of soldiers and the generals there was thus created a bridge; the faith of the soldiers was not finally destroyed even in the hardest moments. Therefore Cromwell-relying at the same time on his prestige as a military leader, on his services in the period of the Civil War with Charles I, when owing to his energy the conciliation of the Presbyterian leaders was paralysed, and the war was brought to an end by the destruction of the Royalist forces-could affect the soldiers not only by strength but also by guile, not only by repression but also by persuasion and promises.

In any case it is possible to say with full confidence: creation of the institution of soldiers' deputies or agitators happened on the elemental initiative of the mass of ordinary soldiers themselves, combined with a very reserved relationship with the officers. At the meeting of May 15th and 16th, 1647, when the demands of the army were considered, we find a protest by one of the officers, Colonel Sheffield, against the presence of ordinary soldiers. "If the soldiers wish to come themselves", he stated, "then it is not useful for us to be present and to give the opinion of the troops."<sup>34</sup> The officer corps thus tried to consider itself as a natural representative of the ordinary soldiers. However, this protest did not have any results, and primarily because by that time the entire mass of the ordinary troops of Cromwell's army was already organized. Between the 8th

and 10th of April, cavalry regiments had elected two representatives each for the drafting and transmission of the soldiers' petition. This petition was first considered by the regiments and then at a meeting of delegates. After Parliamentary commissioners had visited the army, at Saffron Walden, the same type of organization arose in the infantry regiments. The infantry regiments elected two representatives from each company and sent them to confer with the deputies of the cavalry troops. Moreover, according to a report by Reshford, which Professor Fers cites, the infantry conducted a collection of money for organizational expenses: "Every soldier gave fourpence to cover the expenses of holding the meeting."<sup>35</sup> The agitators in the cavalry regiments led the movements. They sent letters to other organizations, established a connection with the Northern Army which was under the command of the Presbyterian General Poyntz, convincing it to join the New Model Army. In these letters the agitators state the material demands of the soldiers, draw a picture of how Parliament on the basis of unverified information declared the petitioners to be enemies of the state, underline the legality of the demands and of the ways which they have selected for their defence.<sup>36</sup> This work was not without result: Poyntz's Northern Army, upon which the Presbyterian party naturally could count, remained dispersed at the decisive moment. Poyntz was arrested on July 8th by his own soldiers, but the agitators of his regiment returned with a letter to Fairfax stating their desire to be under his command.<sup>37</sup>

The agitators had good communications with London, receiving all the political news from there. Each decision adopted by Parliament immediately became known to the agitators who adopted the necessary counter-manoevres. This organization was created upon the basis of defending the purely economic demands of the mass of soldiers. The first petition says enough about this, the petition in which the soldiers demand payment for time served, security for widows and orphans, discharge grants and *indemnity*. However, from the very beginning the leaders of the movements clearly recognized the political significance and political purposes of the struggle and tried to prepare the organizational premises for it.

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The open disobedience of the army and the capture of the King destroyed all the plans of the Presbyterians. Their attempts to rely



upon the London militia quickly ended in a sad collapse. In August, the army entered London and became master of the situation. However, even earlier Parliament had to drink deep from the cup of humility. Under the influence of the frightening news of the approach of the army to London, the respected members of the House of Commons began to feel the terror of self-preservation; they retracted their resolution of March 30th which at that time so upset the army, issued decrees about removing the tax on bread and meat, and-shamelessly-adopted a resolution in which they decreed that none of the members of Parliament should in the future profit from his office, accept gifts, or gain wealth from sequestration, i.e. they proposed to their own members not to take bribes in the future. Under the pressure of external force the Presbyterian majority began to melt and dissipate. Parliamentary decisions took on an accidental and often contradictory nature. It is these moments which Hallam decries as the most shameful age in the history of the English Parliament, and which are clear evidence of a lack of political courage.<sup>38</sup> All the later blows which the Long Parliament had to suffer-the exclusion of 11 members, Pride's purge in 1649 and the final dispersal by Cromwell-were predetermined by this fall: the ruling clique was compelled under the influence of the armed popular mass openly to recognize its humble position; the institution which until this time had formally led the revolution, revealed itself as a collection of people occupied with the theft of the common wealth of the state.

A most important event of an organizational nature was the moment when the army openly opposed Parliament. The political representation of the army was assigned to the General Council of the Army, which included the agitators, the representatives of the officers and the whole general staff Lukin in his study correctly emphasizes the significance of this merger, evoking the parallel which must be drawn with the political soviets of soldiers' deputies of 1917:

In this organization, which we now call "the Soviet of soldiers and officers deputies", the *higher* officer corps was overrepresented. In fact the soldiers were represented equally with the young officers, while the high command was represented in full. Thus, in the era of the English Revolution there was the same sort of attempt to create a council of soldiers and officers deputies as among us in 1917; but among us this project was not realized because the mass of soldiers by class instinct felt the danger which would have been created as a result of joining the

officer corps, a majority of which had come from among the bourgeoisie, and the bourgeois intelligentsia. Therefore, they emanated hostility to the socio-political demands of the workers and peasants dressed in soldiers' greatcoats. Being in a minority, the officer corps tried to group the most backward elements around it from among the soldiers' deputies. The soldiers in Cromwell's army did not consider this a danger and went into the "General Council of the Army".<sup>39</sup>

The creation of the Council of the Army, where the agitators sat next to the officers and the generals, was realized on Cromwell's insistence.

. . . . .

The soldiers' dissatisfaction with Cromwell's talks with the Crown took on the form of deep political disagreements, as soon as the army made the attempts to develop its political programme.

The appearance of two platforms-the moderate, which was set forth in Ireton's "Heads of the Proposals", and the radical, formulated in the two documents "Case for Truly Standing Army" and "Agreement of the People"-and thereafter the consideration of these platforms at the sessions of the Council of the Army in Putney between October-November 1647, marked the culmination point of this struggle between the two factions. The nature of both platforms and the essence of the Putney debates have been stated in insufficient detail, so it is especially necessary to dwell again on this.

I would like to emphasize two characteristic elements of this stage of the English Revolution. The first is the renewal of the composition of the soldiers' deputies which in fact took place before the crisis in the army matured. A number of agitators elected in the spring were deprived of their authority and, instead of them, more decisive and firm Levellers were sent to the Council. At the session of the Council of the Army of November 1st 1647, it was reported that two cavalry agitators of General Lambert's regiment had persuaded these soldiers to send new agitators based upon the fact that the officers had violated the conditions of the agreement.<sup>40</sup> Such a re-election was conducted in five regiments during October 1647. In one of these documents coming from the soldiers we find a curious statement of the motives of this recall: "Since according to various reports it seems that our prior elected representatives are

more worried about their own career than about social matters, we were compelled, around October 19th, to elect the new agitators from the regiment."<sup>41</sup> This new, purely Leveller composition of agitators worked out both the above-mentioned appeals, the "Case of the Army" and the "Agreement of the People". This episode with all its seeming insignificance is full of deep meaning, if one looks at it from the point of view of our modern revolutionary experience. The soldiers of Cromwell's army in the seventeenth century applied in practice the same system of representation\* which found its theoretical basis in the age of the first proletarian revolution. It embodied the accountability of the deputy for the voters and the right of the latter to recall him and replace him at any time.

The second thing which must be noted is participation in the Council of the Army by "civilians", i.e. of representatives of the London Levellers-Wildman and Petty. This is the first and, to be honest, the most timid step toward the transformation of the army council into a revolutionary agency which would unite the advance elements of the army with the urban population.

These representatives of the extreme radical party spoke in the Council as political leaders of the leftist agitators and of the mass of soldiers following them. They formulated their demands; they were the authors of both of the above-mentioned documents; they were the main speakers in the debates, and successfully spoke against the eloquence of Ireton's lawyers. At this moment the Levellers acquired the possibility of a direct and broadly organized influence on the mass of the soldiers. Later, in 1648, in the period of the second Civil War, the Independent command, pushing to support good relations with the Levellers, arranged joint commissions with them to develop a constitutional compromise. This was Cromwell's favourite method. But these commissions were unconnected with the organization of the lower ranks of the soldiers for the simple reason that this organization did not yet exist.

The emasculation of the soldiers' organization was the result of the first open conflict between Cromwell and the Levellers on November 15th 1647, in Carkbushfield near Ware. The attempt to have a mutiny under the banner of the "People's Contract" was too weak and was smothered at birth. Therefore it might have seemed that this

\*[The Russian text has "predatel'stva" (treachery), apparently a misprint for predstavitel'stva" (representation)-Translator's note.]

event did not have decisive significance, that the Levellers had not suffered a final defeat. On the contrary the second Civil War, which began after this, forced Cromwell to support a peace with the leftist elements in the army and, as we have seen, to try for an agreement with Lilburne and other leaders of the Levellers.

Certain of the historians, for example Konrady, are therefore inclined to consider that the Levellers' movement in general did not suffer any losses at Ware. Cromwell, in Konrady's opinion, made in principle certain concessions to their demands. On the other hand, the soldiers understood the necessity of preserving discipline and thus obeyed Cromwell.<sup>42</sup> Konrady forgets the most important thing: after the unsuccessful mutiny at Ware, the soldiers' organization was eliminated and was not thereafter renewed. Formally there is a basis for speaking of the existence of the Council of the Army until January 1648, when it was officially dismissed; however, its revolutionary significance is completely absent at that time. And Savin is entirely right when, in summarizing the results of the events which occurred at the meeting of November 15th, he states, "with this, in fact, the preponderance of the Levellers in the army was finished and at the same time the Council of the Army ended its existence."<sup>43</sup> The restoration of discipline signified that the army, in the sense of its orders and administration, was now entirely subordinate to the military council and the officers. Several weeks later, even the very system of representation established by the agreement of June 5th was abolished and was never resurrected. "Thus ended", writes the English historian Fairs, "the system of representation, established before the realization of the agreement of June 5th, the widest of all those which later spoke in the name of the army. All later councils no longer included representatives from the ordinary soldiers."<sup>44</sup>

In April-May 1647, the army, feeling a threat from the Presbyterian Parliament, created a cohesive political organization, and upon the first attempt to dissolve it (the army) into parts it answered with resistance and concentration of all its powers for the calling of the general army meeting. Then Cromwell and the higher command allowed the course of events to distract them, and partially even supported such a direction of affairs. Now, on the contrary, in October-November 1647, when the army threatened to get out of hand, the generals set themselves a most deliberate goal: to divide the army in order to restore to themselves the freedom to divide it

into separate parts, not allowing general army meetings, destroying the united centre. This constituted the real goal. of their struggle, this decided the question, but by no means the adoption at the mixed convention of one or another draft of the constitution. Cromwell's victory over the November mutiny was preordained when he somehow succeeded in destroying the proposal of the agitators demanding the calling of a general army meeting and in carrying out instead the plan to call three separate meetings. At the same time, on the eve of this meeting, November 8th, the agitators and deputies from the lower officer corps received orders to return to their units. Thus, the united centre was beaten beforehand.

It is hard to say why the agitators did not disrupt this clever plan. That they had certain suspicions is shown by the harsh polemic which arose between them and Ireton with respect to the right of quarters. Already, in the "Case of the Army", the soldiers had complained that although the army should not be dispersed before its demands were satisfied, in fact certain units were being dissolved, others were being dispersed to various areas. Because of this the army was splintered. At the time of the Putney debates, Ireton vented a most irate attack in this respect upon the agitators, arguing in the first place that the quartering and dislocation of the army was not its dismissal, and in the second place that this was entirely within the competence of its leadership.<sup>45</sup> The heated tone of his speech shows that the matter had very great significance. Since only very fragmentary reports have reached us about the meeting of November 8th, it is difficult to say how the generals succeeded in not permitting the general army meeting. But this ensured them of success in advance. The attempt of the two most revolutionary regiments (Harrison and Robert Lilburne) to wreck this plan by an uninvited appearance at the first meeting—to which of course the most law-abiding regiments were called—ended in failure. This resulted in the full destruction of the soldiers' organization. Cromwell received freedom of action. He could now effect all possible reshuffling and reorganization in the army directed at the weakening and distancing of disobedient and unreliable elements. For Cromwell and his supporters it was thereby easier to secure victory over the left with the minimum application of repression, because at the beginning of the second Civil War the need to act against the Royalists and the Scots somewhat ironed out the

contradiction between the Levellers and the generals. Sometime later, at a prayer meeting of December 22nd 1647, an official reconciliation was even achieved. However, having lost their organizational support in the army, the Levellers lost the decisive position, which they did not succeed in regaining. The attempts to co-operate with the generals on the basis of developing the constitutional draft could not of course distil anything other than the most bitter disillusionment. From the example of the mixed commission at the end of 1648, the Levellers were convinced of a wonderful method-to lead its political component by the nose. For after consent was finally given to the draft of the "Agreement of the People", Ireton could only petition its reconsideration in the officers' council for "amendments". Afterwards, in what was now most unacceptable for "Honest John", they sent this draft to the same Long Parliament whose dismissal had already been pressed by the Levellers since the winter of 1647. In January 1649 the Levellers left the commission. In the army, ferment was strengthened and a new crisis evolved. And then the military council at once took the sharpest measures against political activity and political organization by the mass of soldiers. Soldiers were forbidden either to submit petitions to Parliament and generally to anyone other than their own command, or to conduct correspondence on political affairs with private parties. It was also decreed to ask Parliament for the right to courtmarital anyone who should incite the army to mutiny. In April, movements began in the army which in May produced an open uprising against the command of Captain Thompson. The mutineers struggled under the banner of the "Agreement of the People" and demanded the renewal of the General Council of the Army. But now the revolutionary soldiers had to wage their struggle under conditions when all the advantages were on the side of the enemy. Despite the heroic courage of the mutineers, the uprising was suppressed most expeditiously and moreover, as always, Cromwell put his guile into motion with a vengeance. His ambassadors deceived the gullible soldiers, affirming that the general was in agreement with their demands, thus enabling Cromwell to take them by surprise.

The suppression of the May uprising of 1649 rendered the final blow to the Leveller movement. In Cromwell's army was concentrated the most active and politically conscious part of both the peasantry, urban craftsmen and workers. There the Levellers had the

basic mass of their adherents. The destruction of the Levellers in the army, therefore, signified the destruction of radical elements in the entire country. After this the revolutionary energy of the democratic strata was not directed along the lines of mass political struggle. It found its outlet partly in attempts at terrorist struggle in which, among others, Edward Sexby, one of the first agitators, was beheaded; partly in the religious movement of the Quakers among whom the Levellers' leader John Lilburne ended his life. But neither of these directions presented any danger for the rich and the powerful.

### Notes

1. Cf P. Sagnac, *La législation civile de la Révolution française (1898)*, Librairie Hachette, Paris.
2. S. R. Gardiner, *The Constitutional Documents of the Puritan Revolution 1628-1660 (1889)*, Clarendon Press, Oxford.
3. A. N. Savin, *Lectures on the History of the English Revolution (1924)*, Leningrad, p. 87.
4. Cf. F. W. Maitland, *The Constitutional History of England (1920)*, Cambridge, p. 282.
5. R. Gneist, *The History of English State Institutions (1885)*, Moscow, pp. 671-472.
6. K. Marx, "The Bourgeoisie and the Counter-Revolution" (Dec. 11, 1848), in D. Fernbach (ed.), *Karl Marx: Political Writings (1973)*, Random House, New York, vol. 1, pp. 192-193.
7. A. N. Savin, *The English Village in the Age of the Tudors (1903)*, Moscow, p. 37.
8. *ibid.* p. 24.
9. D. M. Petrushevsky, *The Wat Tyler Rebellion (1914)*, Moscow, p. 523.
10. "It would be good if there were as many gentlemen in Norfolk as there are white bulls"-a statement by one of the leaders of the 1540 rebellion.
11. The most systematic views of the Levellers are stated in "Agreement of the People" of May 1st 1649, written by John Lilburne and other Levellers' leaders. See also Lilburne's work "The Fundamental Laws and Liberties of England Claimed and Asserted".
12. A couple of changes were made during Cromwell's rule to judicial procedure and, moreover, the correspondence of these reforms to the needs of bourgeois development was so indisputable that they were not repealed even at the Restoration. Thus, for example, the introduction of the English language into pleas was progress for which England was

obliged to the Republic. It is interesting that in Cromwell's time the court personnel were of such good quality, from the point of view of the administration of justice, that the majority remained in office upon the return of the Stuarts, despite the intense political reaction. Cf Gneist (1885), *op. cit.* p. 672.

13. "The craving of the rich peasantry for the improvement of their farming, by separation from common land, partly explains the weakness of the agrarian movement during the course of the English Revolution." N. M. Lukin, *From the History of the Revolutionary Armies* (1923), Moscow, p. 8.

14. N. I. Kareev, *Two English Revolutions of the Seventeenth Century* (1924), Leningrad, vol. 1, p. 106.

15. S. R. Gardiner, *History of the Great Civil War* (1898-1901), Longmans, Green & Co., Vol. 3, p. 256.

16. S. R. Gardiner (1889), *op. cit.* p. 41.

17. I. M. Morley, *A New Biography of Oliver Cromwell* (1901), St. Petersburg, p. 118.

18. W. T. Walsh, *Outlines of the History of English and American Law* (1923), New York, p. 68.

19. See N. I. Kareev, *History of Western Europe in the Modern Ages* (n.d.), vol. 2, p. 507.

20. A. Savin (1903), *op. cit.* p. 344.

21. See Winstanley's letter to the Military Council, *Clarke Papers*, vol. 2, pp. 217-221; and E. Bernstein, *Socialism and Democracy in the Great English Revolution* (1919), 3rd German edition, p. 124.

22. *Clarke Papers*, vol 1, p. 303.

23. *ibid.* vol 1, p. 312.

24. *ibid.* vol 1, p. 312.

25. Incidentally, even the Diggers did not advance a programme for the division of all land but claimed only empty common lands. In his letter to the Military Council Winstanley states: "You, noblemen, have the right to your enclosed land. We demand the right to communal lands." *ibid.* vol. 2, pp. 217-221.

26. In particular by the representatives of the central state apparatus. See on this A. Savin, *English Secularization* (1907), Moscow.

27. See, in Savin, the pamphlet of the priest, Trigg, *Humble Petition Against Enclosures*. A Savin (1903), *op. cit.* p. 450.

28. Tusser, *63 Comparisons Betweene Champion Countrie and Severall*. The first edition came out in 1557. Cited according to A. Savin (1903), *op. cit.* p. 456.

29. The elimination of serfdom is possible by way of the gradual transformation of peasant estate farms into junker-bourgeois farms, the transformation of the mass of the peasants into landless peasants, the forced maintenance of a low level of life for the masses, the separation of small handfuls of *Grossbauers*, bourgeois rich peasants, the creation of unavoidable capitalism in the peasant milieu. Another way we call the



American way. It also requires a violent rupture. . . . But this necessary and inevitable rupture is possible in the interests of the peasant mass and not of the landlord gang. The basis of the development of capitalism may become the free mass of farmers, without any estate farming, because, as a whole, this farming is economically reactionary, and the elements of private farming are created in the peasantry by the previous economic history of the country (V. I. Lenin, *Sochinenii*, vol. 9, p. 615).

30. A. Savin (1924), *op. cit.* p. 43.

31. E. Bernstein, *Socialism and Democracy in the Great English Revolution* (1919), 3rd German edition, p. 78. See also E. Bernstein, *Cromwell and Communism: Socialism and Democracy in the Great English Revolution* (1930), Allen and Unwin, London [*eds.*]

32. *ibid.* p. 207.

33. *ibid.* p. 111.

34. *Clarke Papers*, vol. 1, p. 40.

35. *ibid.* vol. 1, pp. 87-89.

36. *ibid.* vol. 1, pp. 87-89.

37. *ibid.* vol. 1, p. 165.

38. See H. Hallam, *The Constitutional History of England* (1862), Sheldon, New York, vol. 2, p. 205.

39. N. M. Lukin (1923), *op. cit.* p. 54.

40. *Clarke Papers*, vol. 1, p. 367.

41. *ibid.* vol. 1, xlvii.

42. A. Konrad, *Geschichte der Revolutionen vom niederländischen Aufstand bis zum Vorabend der französischen Revolution* (n. d.), Berlin, vols. 1-2, p. 339.

43. A. Savin (1924), *op. cit.* p. 341.

44. *Clarke Papers*, vol. 1, p. lix.

45. *ibid.* vol. 1, p. 348.

## 6                    *"Economics and Legal Regulation"\**

### **Introductory Note**

In his *General Theory of Law and Marxism*, and elsewhere, Pashukanis had developed a theory of the legal form which contained the provocative proposition that the state was a derivative concept. Indeed, the adamant denial of this proposition had been asserted by Stuchka at least since 1919. By 1929 the Party had set its uneasy course for industrialization and collectivization, the first Five Year Plan had been launched in pursuit of this goal, and Stalin had consolidated the supremacy of his own political line at the expense of other possibilities available with the demise of the New Economic Policy. At the April Plenum of the CPSU CC, Stalin demanded the intensification of the class struggle and the consolidation of the dictatorship of the proletariat. In effect, both demands seemed to require the increased use of state and administrative agencies. No longer merely the politics of academic discourse, but now the politics of Soviet law required that Pashukanis, the pre-eminent figure within Marxist jurisprudence, adapt his thought to the new Party conception of Soviet state and law. His response was a lengthy essay, translated below, on the necessary role of the state in times of economic and political crises. The superficial object of his inquiry is the character and meaning of the economic intervention and regulation exercised by the German and English states during the 1914-1918 war. But the reader quickly learns that Pashukanis uses this

\*"Ekonomika i pravovoe regulirovanie", *Revoliutsiia prava* (1929), no. 4, pp. 12-32 and no. 5, pp. 20-37.

material to examine two more important questions. What is the status of the law of value and the law of primitive socialist accumulation under socialism? What are the differences in the form of regulation exercised by the state under conditions of capitalism, imperialism and socialism?

## *"Economics and Legal Regulation"*

### I

In starting work on this theme, I experienced a misgiving of the following nature. The main problem amounts to the so-called reflexive effect of superstructures on the base. It may be asked, what new can be said in this respect other than positions long since stated and justified? Does this not invite the danger of repeating in one's own words truth long known to all? This abuse occurs rather often among us and, moreover, physiology teaches that the monotonous repetition of one and the same irritation merely reduces the receptivity of the nervous system.

Therefore, first of all I posed the following question for myself. what is new on the subject of the problem before us? And indeed, after the most cursory survey of the literature a great deal appeared to be new. Finally I had to worry about something else, namely that in a brief essay I could hardly succeed in covering all those separate aspects and details of the problem which stands before us.

The influence of the state upon the economy-and legal regulation is merely a special form of this influence must now be considered in the light of the experience of the imperialist stage of capitalist development, particularly in the light of those attempts at control and regulation of the national economy which took place at the time of the World War. Those attempts generated a whole literature which, it must be said, is still insufficiently studied among us. While, for instance, the experience of Germany is more or less well known and studied, the no-less interesting attempts at the control and regulation of the national economy conducted by the English government are significantly less known among us. I, at least, would have difficulty in naming even one work devoted to the regulation of the English economy during the war, although no small number of

such works were published abroad. Another fact of colossal significance is our construction of socialism. Here we can observe the deepest influence of the superstructure upon the base, which is accompanied by the fact that a superstructural organization-the state-is becoming part of the base. The planning of the national economy is a combination of conscious and volitional elements, scientific prediction and purposeful arrangement. This gives a new aspect to the problem and imparts to it a richness of nuances that earlier eluded attention. In our literature these problems must be considered in the light of various attempts to define the limits and nature of the operation of the law of value in our economy. A controversy arose around the statements of Preobrazhensky, who put forth the concept of the law of primitive socialist accumulation, contrasting it with the law of value.\* The acuity of the arguments was undoubtedly caused by the fact that the matter related to the most urgent problems of economic policy. However, very weighty reproaches were heard from both sides at the purely methodological level. In particular, Preobrazhensky saw among his opponents a tendency to deny historical materialism and to slip into the position of Stammler.

As will be apparent from what follows, two other discussions, which have developed among Marxist economists, will also have a bearing on the problems with which we are dealing. These are the discussion about the subject of theoretical political economy, and the continuing discussion unfolding on I. I. Rubin's book, *Essays on Marx's Theory of Value*.

In bourgeois economic literature we have a whole series of works dedicated to the interaction between economic laws and so-called social influences. The urgency of this problem began to be felt even before the World War and before the expansion of state regulation. A decisive part was played both by the intensification of the class struggle inherent in the Imperialist period, and by the growing role of state organization. The bourgeois economists felt the need to turn to the study of the social element in economic phenomena. Characteristic, in this respect, is the statement of one of the shining representatives of the individualist, subjective-psychological

\* This concept is found especially in E. A. Preobrazhensky, *The New Economics* (1926), Clarendon Press, Oxford, 1965; and in his articles in *Vestnik kommunisticheskoi akademii*, (1924)-[eds.].

approach in political economy, the leader of the Austrian School, Bohm-Bawerk. In his work, *Power or Economic Law*, written on the eve of the 1914-1918 war, Bohm-Bawerk stated that there was a gap in economic science precisely in the area of the study of social influences.

This gap [we read in his work] has been always felt as such; but during the past decade it has become particularly noticeable, because the intervention of factors of social power has been continually growing in our most recent economic development. Trusts, cartels, pools and monopolies, on the one hand; workers' organizations with coercive methods in the form of strikes and boycotts, on the other--exercise pressure forcing their way into price formation and distribution; and we still have not even spoken of those fast-growing artificial influences which proceed from state economic policy.<sup>1</sup>

In recent decades in the bourgeois (primarily the German) economic literature, a whole school has taken shape, firmly emphasizing the significance of social regulation as a factor which must be considered in the study of economic phenomena. Karl Diehl belongs to this trend; its most outstanding representatives include Stolzman, Ammon, Oppenheimer, Spann and others. The productivity of this trend has not weakened but, on the contrary, has grown stronger during the post-war years. The problems of the social and economic relationship have begun to interest even the more or less orthodox marginalists; I will point out merely the work of Strigl.<sup>2</sup> A series of chapters of Max Weber's *Essays on Social and Economic Organization* are dedicated to the same theme;<sup>3</sup> Dobretzberger gives a summary of the various theoretical views on the question of the relationships between economy and law.<sup>4</sup>

Finally, as a new element, it is necessary to take into account that our revolutionary practice and the Marxist criticism of the theory of law has created an image of the specific features of the legal superstructure, and one much clearer than before. Thus, for instance, while in the pre-Soviet period one often met the assertion that socialism would result in the uncommon development of the legal superstructure, now, of course, none of the Marxists would agree with this. For us it is now indisputable that the growing significance of the conscious regulation of economic processes, and generally the

development of a conscious collective will on the basis of historical materialism and the basic features of socialist society, are in no way equivalent to the expanding role of law. But on the contrary, they are accompanied by its inevitable withering away.

In its most general formulation, the problem economics and law, or, more broadly, economics and social-regulatory influences-represents and represented an arena for the struggle for the materialist understanding of history. It is along these lines that Marxism must defend its position from attack from all possible varieties of philosophical idealism. The social trend in political philosophy, which was discussed above, has an undoubted ideological affinity with the philosophy of neo-Kantianism, in particular with the philosophical constructs of Rudolf Stammler. Of course, Stammler has tried to refute the materialist understanding of history, declaring legal regulation to be a logical premise of economic processes. The following is one of the formulations which most vividly communicates his basic thought:

At the basis of all studies of political economy, and hence of all study of the national economy, lies a definite legal or conventional regulation in the sense that this concrete legal ordering is a logical condition of the given concept or principle of political economy. If we ever intellectually discard this defined, necessarily assumed regulation, we would be left with nothing from that economic concept or principle.<sup>5</sup>

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The unsatisfactory nature of solutions based upon philosophical idealisms does not, of course, eliminate the problem. Its essence is expressed in the following. A series of spontaneous and entirely objective regularities in the economic order, finding their expression in economic categories, are given; on the other hand, on the basis of these economic regularities, more or less subjectivist factors develop in the form of the interference of organized class forces, preeminently the state as the most all-encompassing organization of the ruling class. It may be asked, how must one conceive of the relationship between the elementary laws of economics and the forceful intervention of social organization? Above all, it is indisputable that the economic and the non-economic should be regarded as a

kind of unity. Social forces do not encroach upon the economic process, tangentially, or *deus ex machina*. The social, as Bukharin properly emphasized in his polemic with Tugan-Baranovsky, is the *alter ego* of the economic. It is absurd to regard, as does Bohm-Bawerk, the economic and the social as pure opposites. However, it is also wrong to limit oneself to emphasizing the element of their unity, thus transforming them into an identity. It is impossible to be complacent about the fact that the class struggle is already *included* in economic categories. The dialectical method requires the consideration of social and economic phenomena as the unity of opposites. Economics not only *includes* elements of class struggle, but also *assumes them outside itself, as basic*, as opposed, comprised of the same unity. Economics achieves its potential through the non-economic ("politics is concentrated economics"); it not only determines its *alter ego*, but in its turn is also determined by it. Socio-political processes not only reflect completed changes in the economic base, but also anticipate future changes. Such is the significance of the proletarian revolution and the dictatorship of the proletariat.

We find an extremely valuable indication of how Marx himself viewed economic categories, in one of his letters to Engels, of October 10th, 1868:

By chance I found in a little bookshop the book *Report and Evidence* about the Irish rent law of 1867 (House of Lords). This was a real find. At a time when gentlemen economists are considering the dispute about whether ground rent is payment for natural differences in the soil or if it is merely interest upon capital invested in land, a purely dogmatic dispute, here we see a practical life-and-death struggle between the farmer and the landlord--to *what extent* rent should also include, beside payment for the different qualities of land, interest upon the capital invested in the land not by the landlord, but by the tenant. Political economy can be transformed into a positive science only in this way, by replacing competing theories with competing facts and the real contradictions forming the hidden basis of the former.<sup>6</sup>

What can be inferred from this letter? First, that Marx proposed searching out the class struggle in a place where the doctrinaires saw merely the task of delimiting economic categories. Secondly, the economic result, and the degree to which one category or another is



embodied purely, will depend upon the practical result of the class struggle. The abstract categories of political economy indicate only general and rather broad limits. The more concrete regularity is that of the class struggle and may be established only by taking into full account all the conditions of the latter. It seems to us that Marx's thoughts have still not been sufficiently mastered by the economists. Although there is a discussion of conflict in the more or less abstract economic studies, this, nevertheless, is usually understood to mean market competition, competition between similar enterprises, in which one defeats another by higher labour productivity or higher technology; in a word, by lower costs and lower market prices. However, in fact, market competition is just one and by no means the only form of economic struggle. In *The Economics of the Transitional Period*, Bukharin distinguishes "vertical, horizontal, and combined competition". Only 'in the case of horizontal competition, i.e. when we have the struggle between similar enterprises for a market, does the method of lower prices find its full application. But this method is inapplicable in those cases when the struggle is over the division of secondary surplus value among enterprises located in a vertical relationship (raw material, semi-finished commodities, final products). The same is true with respect to the struggle between large- and small-scale agriculture for land, and with respect to the struggle between monopolistic organizations for sources of raw material and for areas of capital investment. Although all these phenomena are undoubtedly reflected in prices and, accordingly, are in one way or another connected with the market, this does not nevertheless make them market phenomena.

The overwhelming majority of bourgeois economists is characterized by the attempt to remain in the sphere of market competition and to concentrate exclusively upon the laws of price formation. These laws are considered as the specific subject matter of "pure" economic theory. The Austrian School is based on the derivation of these laws from the simplest assumptions: the importance of demand for, and supply of disposable wealth gives a completed form to an economic theory which chooses to have nothing in common with reality and its laws of development.

As one of the examples in which one may see the difference between Marxist theory and the "pure economic" theories of bourgeois scholars, we direct attention to the problem of imperial-

ism. On the one hand we have the economic theory of imperialism as Lenin formulated it, a theory which includes a whole series of very concrete elements: the degree of concentration of production, the transformation in the role of banks, the export of capital, the monopolistic division of the world etc.; while on the other hand we have, for example, the conclusions of such a prominent bourgeois economist as Schumpeter, who proposes that the concentration and centralization of capital is *economically* profitable only up to certain rational limits-if it goes beyond these limits, this is because causes *not Of an economic nature* are added to *purely economic* causes:

If nevertheless giant enterprises and trusts arise, which dominate the industries of whole countries [he writes] and even more-if the economy of free competition increasingly gives way to struggle between huge monopolies, then for this there are other, not purely economic causes. Above all, this is the influence of nationalist, military, imperialist instincts of struggle, which cannot be entirely explained by the economic condition of our period. In other words, a state policy of force has transformed the economy-by means of protective tariffs, the dumping of commodities and capital-and has made our world economy something other than what would have been achieved as the result of the egoistic economic calculation of isolated individuals left to themselves.<sup>7</sup>

Thus, Schumpeter refuses to use economic regularities in the explanation of the most important phenomenon in capitalist development. His economic theory stops short of this point.

Another representative of the Austrian School-Strigl-goes much further. He simply denies the social element as having any significance whatsoever for economic theory.

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It is clear that such an economic theory is incapable of explaining anything of the economic processes which occur in reality. But it does not even propose to do this. The conclusions of Strigl demonstrate to use that the methodology of the Austrian School is a *reductio ad absurdum*. Pure economic laws turn out to be quite useless. This is certainly not the key opening the door to the cognition of reality, but, as Comrade Stepanov expressed it, "simply the key of a gentleman-in-waiting which the bourgeoisie awards the priests of its science".

## II

Every economic theory worthy of the name must have its basis in some sociological conception. Only from such a theory is it possible to anticipate an answer to our question of the relationship between economic and non-economic elements. Bourgeois political economy, as we saw, was not in a condition to deal with such a task. It attempted either to wrench economics from its social context and to construct economic laws abstracted from social production, or to introduce social elements, which immediately lapses into idealism and naive teleology.

The colossal advantage of Marxism lies in the fact that its economic theory rests upon the solid foundation of historical materialism, constituting a single whole. Economic categories, from the Marxist perspective, are the reflection of a specific system of production relations. In every antagonistic society class relationships find continuation and concretization in the sphere of political struggle, the state structure and the legal order. On the other hand, the particular irreducible quality of economics-as the totality of the social relationships of production-eliminates neither the unity of these relationships nor the material process of production as a process between man and nature. The qualitative and quantitative characteristic of this process, which we find in the concept of productive forces, is decisive in the final analysis. Economics, therefore, must be considered in its dialectic relationship both with the very material process of production and with the superstructural relations in which its potential inheres. Thus, while the primarily Kantian methodology of the bourgeois economists and political scientists seeks relationships of formal logical conditionality, the Marxist dialectic must reveal the real dependence, the real movement of things themselves.

This is by no means such a simple task, for real relationships are much more complex than a priori dependencies. One should not be surprised, therefore, that our Marxist theory had to devote no small amount of attention to certain preliminary questions. Instead of immediately realizing those undoubted scientific advantages which the Marxist theory of political economy enjoys, it was necessary to debate how in fact these advantages should be used. We will presume to intervene in this debate only because the problems

dealt with are by no means special, but instead have a general methodological nature and are linked in the closest manner with our own theme.

The point of departure for the discussion was the Bogdanovian conception, which for a long time was recognized as a model discussion, from the perspective of co-ordinating the Marxist theory of political economy with historical materialism. For this reason, *The Short Course in Economic Science* was, in its time, so highly valued by Lenin. "The outstanding virtue of Mr. Bogdanov's *Course*", wrote Lenin, "consists of the fact that the author has consistently adhered to historical materialism."<sup>8</sup>

Nevertheless, a further step in the development of Marxist economic science here could be made only by way of criticizing and surmounting Bogdanov's conception. For, while at first the connection between the anti-Marxist philosophy of Bogdanov and his understanding of the basic questions of economic theory was not sufficiently obvious (the more so since the philosophical views of Bogdanov at the end of the 1890s had still not taken shape in that finished anti-materialist system in which they were moulded in the period of *Empirio-Monism* and *Tectology*);\* nevertheless, later no doubts could remain in that regard. It is impossible to construct and develop a Marxist theory of political economy by rejecting both materialism and the dialectic. The anti-dialectical and vulgar mechanistic conception of Bogdanov in the area of political economy above all influenced his understanding of the category of value. In Bogdanov, the special quality of this category corresponding to specific social relationships, disappears; value loses its historically conditioned and transient nature; it is equated with physiology and energy. Such a concept cannot be described as anything other than a vulgarization and distortion of Marx's economic theory.

The end of the struggle with Bogdanovism, in the area of economic theory, is usually considered to be the discussion on the subject of political economy which took place in 1925 within the walls of the Communist Academy. But, as often happens, the end of the struggle served as the start for a new, no less heated discussion, kindled in the ranks of Bogdanov's opponents.<sup>9</sup> One must assume one of two things: either Bogdanov's mistakes and his anti-

\* See V. I. Lenin, *Materialism and Empirio-Criticism* (1908), *LCW*, vol. 14, esp. pp. 226-232, and 322-330 [eds.].

dialectical aims still continue to nestle somewhere among the Marxists or, that in the course of struggling with these mistakes, new mistakes and deviations from the Marxist method were in turn committed, and which required prompt correction. I must say that, in my view, it is the latter version which is correct, the version put forward by Rubin's opponents, although even they do not thoroughly think through certain positions to the end. To put it more clearly, I consider that the so-called Rubinite conception, with all its shortcomings, is a logical conclusion from the position according to which the subject of theoretical political economy is *exclusively* the category of commodity capitalist economy and the corresponding production relations. And, on the contrary, I affirm that the struggle for a Marxist, i.e. for an historical understanding of the categories of value, by no means requires a truncated understanding of the subject of political economy.<sup>10</sup>

Thus, despite the most categorical statement that the question of the subject of political economy has been decided once and for all, and that in a limited sense this decision is confirmed by the signatures of all the Marxist authorities, I consider it possible and necessary to pose this question anew—precisely in the interest of the Marxist dialectic to which so much attention has been given among us. For it is very good when a vulgar mechanistic conception gives way to the materialist dialectic, but very bad when bourgeois economists, such as Ammon, become the guides for Marxists in the struggle against Bogdanovism, economists for whom the unit of their scientific subject is not the result of the material unity of the phenomena being studied, but is constructed from the unity and synonymy of logical assumptions.

In fact, it is the concept of the historical specificity of the categories of value that requires of the Marxist dialectician not only the ability to deal with them in their final form, but the ability to show their historical origin, and consequently to show the connection of the commodity-money and the commodity-capitalist economy with the previous economic formations. Economic theory may in no way decline this task if, according to the views of Marx, it must study economic phenomena in their movement and development, i.e. establish the laws of movement from one form to another, from one system of relationships to another. What does it mean, for instance, to study the capitalist system in its origin, development and

decline? Does this mean *to be limited* to the abstract analysis of the forms of value? No, for the forms of value themselves, in their full development, already assume established capitalism. "For the abstract theory of capitalism", wrote Lenin, "there exists only fully developed and established capitalism, and the question of its origin is removed." The same relates, of course, to the decline and destruction of the capitalist order.

Further, when Marx affirms that the concept of ground rent reveals to us the essence of the feudal *metayage* and tithe, how can this be if the subject of political economy is only the objectified (i.e. the value) form of social relationships? In natural economy this form is in fact absent. Why then is it necessary, perhaps, to state that Marx had in mind not the economic essence of *metayage* and tithe but something else? But what? One can hardly find a satisfactory answer to this question. Certain authors, it is true, make attempts to contrast economic regularities (relating only to commodity production) with general sociological laws effective in pre-exchange and postexchange formations. But it occurs to us that such a contrast accords badly with Marxism in general, and with historical materialism in particular.

In general, it is in the example of this category, i.e. the category of exploitation, that the distortion of a limited treatment of the subject of political economy can be seen clearest of all. No one would dare deny that exploitation is an economic concept, and also no one dares deny that relationships of exploitation are in general not restricted by the limits of the form of value. Until now we have thought that Marx's contributions consisted both of the fact that he showed the specific nature of the capitalist form of exploitation, and that he established its connection with other forms (slavery, serfdom). And now, you can see that they teach us that Marxist economic theory ends where the analysis of the particular features of the value form ends, and that every attempt to go beyond the limits of objectified relationships and to identify the natural and the commodity-capitalist economy as two phases of development, threatens to fall into Bogdanovism and portends the physiological and energy-oriented treatment of social relationships.

Let us pause on still another consideration, which was expressed by Comrade Osinsky in a discussion with I. I. Skvortsov-Stepanov and was formulated thus: "To the extent that exchange does not

exist, a national economy does not exist, and to that extent political economy also does not exist."<sup>11</sup>

Thus, the concepts of social relationships and exchange relationships are declared coincident and isomorphic with one another. In fact the first, of course, is broader. Any system of natural exploitation in the ancient Egyptian state, or in the state of the Incas, combined significant human masses with an economic relationship, although this was not a relation through the market, or through exchange. Thus, in the first place, the statement that only exchange creates the concept of a national economy does not correspond to historical reality. In the second place, when exchange is introduced as a concept "constituting" the subject of political economy it by no means bears the features of an historical phenomenon which passed a determinate path of development, which is connected with the natural economy by a thousand different transitions, which have gradations from the exchange of surpluses and of particularly rare products to developed commodity exchange; no, it is taken as something always equal to itself, as a complex of completed formal characteristics, as the logical condition for the development of the theoretical problems of political economy.

If we approach exchange *from an historical perspective*, then we cannot confine ourselves to the limits of the category of value, for we must study the process which first creates this category. If exchange is treated as a logical basis, constituting the unit of the subject of theoretical economy, then we risk imperceptibly sliding into the formal logical conception of bourgeois economists of the type of Diehl, Ammon and others. For the latter, for example, the premise of the theoretical problems of economic science is the individual freedom of those engaging in exchange.

If we imagine the absence of this freedom (the freedom of determining the quantitative exchange relationship of the objects exchanged) and in its place a definite ratio of exchange established for individuals by the social order, and the fixing of prices independent of its individual regulation; then, properly speaking, the theoretical problem of political economy, the problem of price, is destroyed by this.<sup>12</sup>

Linked with the tendency toward the restrictive interpretation of the subject of political economy stands the oversimplified contrast between the organized (pre-exchange and post-exchange) and unor-

ganized (exchange) economy, oversimplified in the sense that in the organized economy all relationships and all development are depicted as entirely and fully subordinated to a collective or other ruling will. And from this the conclusion can be drawn that no objective laws of the development of organized society can exist in general, and that the task of cognition in this case is reduced to pure description plus the assertion of some system of norms.

With respect to pre-exchange society, i.e. primitive forms of natural and semi-natural economy, it is entirely incomprehensible why, in studying the transition from these forms to the more complex, we must be limited to the descriptive method and may not rise to generalization (it is possible not to speak of a "system of norms", for hardly anyone undertakes to affirm that, for instance, the decay of natural economy was the projection of some earlier established norms).

There remains, accordingly, only one thing that is true: the corresponding regularities are not embedded in the form of the law of value, for this form had still not taken shape. If we take the economy of the transitional period to socialism, then no one will be likely to deny the presence of objective regularities in the economic order, which again are by no means confined to the form of the law of value. Finally, under developed socialism, the relationships of production will be maximally determined by the conscious will of the collective. Therefore, there is every basis to say that social technology is the science of the future. However, it would be naive to imagine that social technology is entirely capable of replacing the science of the objective laws of social development. For every technology is nothing other than the application, in practice, of the laws of some science-physics, chemistry, biology etc. One may ask how can social technology develop if it is not accompanied by the powerful development of the science of society? And, on the contrary, how can one imagine the development of a social experiment (and technology is nothing without experiment) which would not involve a deeper, more detailed, and more exact comprehension of objective relationships and connections? It seems to certain comrades that these objective regularities should receive the name "general-sociological".



But one may ask, how can any general social regularities remain with the disappearance of economic regularities? For to the extent that social relationships-in their character and changes-are subordinated to some necessity, then, of course, first, they are subordinated to that necessity which is included in joint production, in the labour relationship. If all objective laws disappear in this area, then, it may be asked, in what manner can any general social regularities be preserved? The whole issue consists in the fact that Engels' "leap from the kingdom of necessity to the kingdom of freedom" is understood too simplistically, too literally.<sup>13</sup>

The broadest, most consistent rationalization of the national economy nevertheless cannot eliminate the fact that the unification of people in society is not the product of their free conscious decision, as Rousseau proposed, but is compelled by the conditions of their existence; these conditions prescribed even the form of this union for them. If this necessity ceased to be blind and was clearly recognized by people, then it would not entirely disappear because of this-no recognition of objective laws destroys their effect. Thus, even under developed socialism there will remain, or rather will grow, the necessity of a science which studies the objective laws of the movement and development of the social relationships of production-which are at the base of all social development as a whole. If the study of economic regularities is reduced *exclusively* to the abstract analysis of the categories of value, then the very succession of economic forms will be entirely incomprehensible for us. At the same time Marx's economic theory will be deprived of all its dynamism. Take for instance such facts as the expropriation of small producers, which constitutes a premise for the development of capitalism, or the development of monopoly capitalism. Is it really possible to derive them from the abstract analysis of the categories of a commodity-capitalist economy? Incidentally, Rosa Luxemburg attempted to construct an economic theory of imperialism on the basis of an analysis of abstract schemes of reproduction, and she suffered complete failure. On the contrary, Lenin's "description" revealed the essence of the growth of pre-monopoly capitalism into monopoly capitalism.

The law of value is in general given disproportionately great significance among us. Thus, for instance, the construction of a theory of the economy of the transitional period was almost entirely

reduced to the problem of the limits of the effectiveness of the law of value in our economy.

The methodological question of the fate of the categories of a commodity-capitalist economy in the conditions of our economy grew disproportionately and pushed everything else into the background. The correct resolution of this question has, of course, very great significance, but nevertheless it does not reveal for us the actual regularities of the development of the Soviet economy. They can be established only after having studied and generalized concrete material involving such questions, for example, as the increased labour productivity under our conditions, and the methods of this increase; the increase in demand by the working masses, and its influence on the economy; the new interrelationship between the so-called popular and the so-called state economy; the economics of co-operation and collectivization etc. Unfortunately, both Bukharin and Preobrazhensky merely promised us a second, substantive part of their studies. Meanwhile it will only be possible to establish the actual laws of the development of the economy of the transitional period in this substantive part.

Disputes over the significance of the law of value for the Soviet economy were raised in connection with the well-known work of Preobrazhensky. There we encountered a problem which has great importance also for us jurists. I will cite just the testimony of Professor Venediktov:

In the seminar on economic law at the Economic Faculty of the Leningrad Polytechnic Institute [he writes], we made an attempt to analyse jointly with the participants in the seminar the problem "Plan and Law" in direct connection with the problem of value in the Soviet economy. This attempt revealed all the difficulty of the legal analysis of this problem in the presence of sharp disagreements on the question of "regulators" of the Soviet economy in the economic literature.

Preobrazhensky, as is well known, put forth the concept of the law of primitive socialist accumulation, which, in his opinion, would be in effect throughout the period when the socialist sector of our society was not yet sufficiently strong to struggle with the private economic sector under conditions of full freedom of competition. This law, in his expression, "dictates, with external coercive force, definite ratios of accumulation for the Soviet state", contrary to the

law of value and in conflict with it. This conception of Preobrazhensky includes a series of vague points and ambiguities. In the first place, the struggle with the law of value could mean the full liquidation of the historical form of the objectification of social relationships, i.e. the final victory of planned, collectivized economy over the market economy; in the second place it could signify the distortion, from one or another side (by state intervention or with the help of monopolies), of those exchange ratios which would be established under free competition. In the former, one is speaking of extirpating the roots of capitalism, of the liquidation of small commodity production which "produces and cannot but produce capitalism". The full unlimited effectiveness of the law of value signifies the unleashing of competition, the merciless struggle of private interests, as a result of which the group of small commodity producers sides partly with the proletariat, and partly with the capitalists. The main policy of the Soviet government is directed towards transforming the development of the peasant economy from the capitalist road to the socialist road. But this process clearly is not embraced by the formula "primitive socialist accumulation". It would be senseless, for example, to affirm that the organization of collective farms is a phenomenon of the law of primitive socialist accumulation. This term relates to another aspect of the matter and the struggle with the law of value has another sense here. It is a matter of measures for the achievement of the maximum level of accumulation in the socialist centre, which would be impossible under conditions of free competition, i.e. the centre of gravity here lies not in the collision between the planned base and the form of value as such, but in the influence on concrete exchange ratios, i.e. in price policy. This influence is encountered at every step in the practice of capitalist states, for nowhere in the world does the redistribution of surplus value take place on the basis of the law of value even in its complex form of prices of production. The true dynamics of the development of each new economic formation is always reflected in the violation of "customary" normal ratios of reproduction. This violation occurs because of the pressure of organized class forces, primarily of the state (politics is concentrated economics). Capitalism, while developing, financed itself most generously. The matter was by no means reduced to the fact that the bourgeoisie struggled against the fetters and constraints of the

feudal-guild order. In the U.S.A., for instance, waging such a struggle was almost unnecessary (if one does not count the defeat of the Southern states in the 1860s). However, the struggle in the area of money circulation, credit, customs policy and railroad policy, consisted specifically in the creation of particularly favourable conditions for large-scale capital at the expense of all the remaining classes and social groups. Capital, or the means of production, never flowed from one sector to another in those ratios which would have derived from the pure effect of the law of value, even in the forms of prices of production; heavy industry, for instance, always achieved a privileged position for itself. It is sufficient to recall budgetary investment in the form of governmental directives, protectionism, bonuses, tariff policy etc.

Thus, the spontaneity with which the law of value acts is entirely sufficient for the constant reproduction of capitalist relationships in the area of small commodity production. However, this spontaneity is insufficient to ensure capitalism a swift and final victory, it is insufficient to strengthen the domination of the leading branches of industry, of powerful industrial and financial capital. The inherent economic potential and concentrated economics always come to the aid in this case, i.e. the policy of the ruling class and the state which is at its disposition. The struggle with the law of value in this sense is something entirely routine in the practice of capitalist states. In Preobrazhensky it appears as if a change in the ratios of accumulation by a definite policy is possible only in the interests of the growth of the socialist sector. This is by no means the case it has been applied and is being applied by large-scale capital for its own benefit.

The struggle between the collective and private sectors cannot therefore be equated with the struggle against the law of value, for the transfer of assets does not take place only through the market.

Imagine that certain economic wealth moves from the collectivized sector to the private economic sector, but not in the order of market exchange and apart from any law of value. Obviously this would be just as undesirable a phenomenon for us, and would threaten us with the same danger of the restoration of bourgeois economic relations. The problem, it appears, is by no means restricted to the effect of the law of value. One might say that in this case I have in mind simple abuses, while Preobrazhensky had in mind economic laws, but this is nothing other than the *fetishization of*

*economic laws.* In fact everything is reduced to the pressure which the proletarian dictatorship experiences from those first manifestations of capitalism which are inevitable with the presence of small commodity production. And it is enough to imagine that the dictatorship of the proletariat became somewhat weakened, to agree that the inevitable result of this would be the transfer of all sorts of social funds into the hands of private businessmen, kulaks etc.

There are no grounds for separating the policy of the protection of collective assets from the policy of supporting the more rapid growth of the socialist sector. However, in the first instance we are dealing with measures which are not connected with interference in exchange ratios, but most often consist of the total removal of the specific objects from circulation (nationalization of land). Thus, undoubtedly, those comrades who objected to Preobrazhensky were more correct, who proposed to speak not of the struggle between the law of primitive socialist accumulation and the law of value as the basic phenomenon of the economy of the transitional period-but of the struggle between the socialist and the private capitalist sectors. Then the policy of collectivization and co-operative formation would also be included here, a policy which likewise is by no means exhausted by interference in spontaneously established exchange ratios,

We are not touching, in this connection, upon the basic error of Preobrazhensky's conception, an error which consists in the fact that he depicted the contradictions of our economy as capitalist contradictions, not taking into account the elements of unity included in it, the expression of which is the union of the working class and the peasantry (hence from here to the peculiar similarity of the peasant economy to colonies etc.).

Speaking generally, the whole "law of primitive socialist accumulation" comes down to the need of preserving, for a certain time, non-equivalent exchange between the *city and the country*. But along with this necessity there exists no small number of laws which are just as imperative: for instance, the necessity of increasing labour productivity; the necessity of raising the annual wellbeing of the working people; the necessity of protecting collectivized assets etc. It is entirely incomprehensible why the whole sum of objective conditions, with which it is necessary to build

socialism, must be embodied in the necessity of non-equivalent exchange and in this alone.

Finally, the last, but by no means the least insignificant misunderstanding, befell Comrade Preobrazhensky with the law of proportional distribution of labour expenditures. Initially, the very mention of the existence of such a law, although it was accompanied by an exact citation to Marx, brought forth sharp accusations of Bogdanovism, of failure to understand the historically transient nature of the category of value etc. However, it proved impossible to solve this problem by means of clamour, and therefore we have an attempt at an explanation in the publication of the second edition of *The New Economics*. It turns out that Preobrazhensky's opponents reveal a

naturalistic, a historical conception of the law of value, when they confuse the form of regulation of economic processes with the regulatory role in the economics of social labour expenditures in general, and of the role these expenditures played and will play in every system of social production.<sup>14</sup>

Thus we sum up: the law of labour expenditures exists, moreover, it functioned and will function in every system of social production. But what the relation of this law to the law of value is, remains nevertheless unclear. One must return to Marx. In the letter of Marx to Kugelmann of July 11, 1868, we read:

As for the *Centralblatt*, the man is making the greatest possible concession in admitting that, if one means anything at all by value, the conclusions I draw must be accepted. The unfortunate fellow does not see that, even if there were no chapter on "value" in my book, the analysis of the real relations which I give would contain the proof and demonstration of the real value relation. All that palaver about the necessity of proving the concept of value comes from complete ignorance both of the subject dealt with and of scientific method. Every child knows, too, that a nation which ceased to work, I will not say for a year, but even for a few weeks, would perish. Every child knows, too, that the masses of products corresponding to the different needs require different and quantitatively determined masses of the total labour of the society. That this necessity of the distribution of social labour in definite proportions cannot possibly be done away with by a particular form of social production but can only change the mode of its appearance, is self-evident. No natural laws can be done away with. What can change in historically different

circumstances is only the *form* in which these laws assert themselves. And the form in which this proportional distribution of labour asserts itself, in a condition of society where the interconnection of social labour is manifested in the *private exchange* of the individual products of labour, is precisely the *exchange value* of these products.<sup>15</sup>

Thus, Marx states, absolutely clearly, that the law of value is a form of expression of the more general law of the ratios of labour expenditures. Does this mean that the concrete quantitative ratios which we establish in our plan between separate branches of the economy must necessarily repeat-and moreover in the purest form-those ratios which would have been established on the basis of the law of value, i.e. in conditions of free competition? Of course not. This is not subject to any doubt. But how do we connect this with the indisputable proposition that the law of proportionality of labour expenditures was in effect in each social formation, is in effect now, and "in general cannot be eliminated"? This question is unanswered by Preobrazhensky, but the answer is clear. The law of proportionality of labour expenditures shows only the most general conditions of equilibrium; it provides broad bounds, within which divergences are possible from one side to the other. By virtue of its generality this law is totally inadequate for the determination of concrete quantitative ratios which are established by one method in the mechanism of market value, and by another method in the plan of socialist construction. To explain how we understand the relation between these "regulators" we will use the following analogy. The process of nourishment is basically conditioned by the necessity of occasionally renewing the energy expended by the organism. The feeling of hunger is the form in which we feel a given physiological necessity. Finally, in terms of quantity, quality and time, the conscious regulation of nourishment is another superstructure. All these things by no means correspond to each other. There are instances of absence of appetite during biological hunger; there are instances of false hunger. The objective law and the form of its appearance may diverge from one another, just as the conscious regulation of nourishment by no means must deal exclusively with the manifestation of subjective feelings. Finally, within the bounds of general physiological laws, the- conscious regulation of nourishment may

be exercised in different ways, varying in the qualitative and in the quantitative aspect, and with respect to time.

In our economy we have just as complex a picture. The law of proportional distribution of labour expenditures marks the most general conditions of equilibrium; within these limits concrete exchange ratios are determined under the powerful and many-sided influence of the economic policy of the proletarian state. Finally, value, as a specific form of the manifestation of the law of labour expenditures, will be in different phases of withering away in relation to the successes of the development of the socialist planned economy. However, there is no basis whatsoever for reducing this complex picture to the simplified form of the struggle between the law of value and the "law of primitive socialist accumulation".

### III

A grandiose experiment in the regulation of the national economy was made by the capitalist states during the war. The study of this experiment has not yet been presented properly in the USSR. In fact it has not only a great theoretical, but also a profoundly practical interest. There is no doubt that in the imminent world conflicts the problem of the organization of economic life will again rise to the fore, and its more or less successful solution will be one of the most important conditions of victory. Only the German experience has been more or less well studied here; there are suitable works and the German literature has been studied. The experience of England is much less well known, but it is just as, if not more, significant. The regulation of economic life in England was in a certain respect more successful than in Germany. Supply in England was never reduced to such a low level as that in Germany. The whole world market of raw materials and food remained at England's disposal. This is why England was not in such a desperate position, and it was for this reason that it was much easier to organize regulatory measures, in particular for food rationing, and the fixing of stable prices. On the other hand, its greater effectiveness of regulation is explained by the fact that England obtained four-fifths of her food and almost all her raw material by sea, which, of course, greatly facilitated supervision.



In every instance the conclusions that we made on the basis of the German experience were too hasty. Thus, for instance, Bukharin, in his *Economics of the Transitional Period*, depicts the breakdown of fixed prices by speculative commerce as an unavoidable phenomenon. However, all of the authors testify to the fact that in England fixed prices were commonly observed, and that regulation maintained its effectiveness with the energetic support not only of the population, but also of the businessmen themselves, each of whom conformed to the actions of his competitor.

There is another question which deserves no less attention—the fate of regulation after the war. In the same *Economics of the Transitional Period*, Bukharin painted a rounded picture of state capitalism as it developed from war regulation. Reality has refuted this picture. After the war we see the rapid and decisive destruction of all forms of supervision and intervention by state power in economic life. However, we should not stop at the fact that we are said to have exaggerated the potential of state capitalism. The process of destruction of "the coercive economy" must be studied in all its details, both from the perspective of the arguments which were offered for and against, and from the perspective of the interests hidden behind these arguments and, finally, the essence of this dispute. Again, we mainly know the German literature, in particular the literature dedicated to questions of socialization, where the problem of the systematic organization of economic life is directly linked to the solution of the problems of the fate of the organization that was created during the war. Moreover, much that is interesting in this regard can also be found in the English literature.<sup>16</sup>

Thus, the absolute statement of the proposition, which was heard before the war, that state power is not able to regulate prices, gives way to a relative statement of the proposition: regulation is possible, but only within certain limits; these limits must be sought out empirically in each separate case.

The English government, in its supervision of industry, made wide use of the support of all sorts of official and semi-official organizations—councils, committees etc. Some of these organizations were occupied exclusively with negotiations and, so to speak, bargaining with the state; others appeared in a consultative capacity;

still others undertook the function of appellate consideration of the various conflicts between the government and individual enterprises, and yet others, finally, directly undertook administrative functions, the distribution of raw materials, orders etc. Through these organizations the imperialist bourgeoisie involved the upper stratum of the working class, providing a place for the representation of trade unions. The bourgeoisie tried to perform this experiment here, organizing military-industrial committees with the participation of workers' representatives. In the period of the war, organized supply and distribution in many respects merely copied on a broader scale the practice which was also used earlier by large monopolies. For instance, commerce in oil products, tobacco and milk products in England, was organized even earlier in such a way that the distribution of commodities was made on the basis of a statistical calculation of the demand in different markets. There was a delivery plan for each district; the commodities were distributed with set prices which could be raised by small merchants only under penalty of cessation of supply.

It is interesting to consider the legal basis which was used by the English government for the regulation of economic life. Special powers were contained in the Act on the Defence of the Realm (DORA). However, it contained only the authority to requisition parcels of land, factories and all other objects necessary for military purposes; the question of prices was left open. At first the form of payment of a fair market price was decided. But such a formulation of the procedure clearly did not limit the increase of market prices. Soon the English government had to worry about finding legal grounds for the setting of prices. For this it used a medieval theory which stated that the Crown has the right to seize any portion of property by virtue of its royal prerogative, and that payment of compensation is a matter of grace. Relying on this doctrine, the English government initiated price regulation but, it must be said, it did this very timidly, beginning by agreement and only gradually moving to the decreeing of prices. The doctrine of the denial for the subjects of the right to compensation was effective throughout the entire war and was recognized by a decision of the Court of Appeal in 1915, in the *Shoreham Airport Case*.<sup>17</sup> Only in 1920 did a decision of the House of Lords strike a blow at this doctrine. But the results of this decision were annulled by the Bill on Indemnity, also

of 1920. During the consideration of this latter Bill, an opinion was stated in the House of Commons that if the decision of the House of Lords was not changed by legislation, then the government would have to deal with suits for hundreds of millions of pounds. A special commission on damages (Defence of the Realm Losses Commission), in accordance with the above-mentioned doctrine, established the principle that suits for compensation were permissible only in those cases where a particular measure was specially directed against an owner; if damages were caused not by some special regulation, but by a regulation of a general nature, then those who suffered losses did not have the right to compensation. The royal prerogative thus played a conspicuous role in justifying the right of intervention. "Only with the help of a doctrine from the age of absolutism", notes one author "was it possible to overthrow the tyranny of market prices."<sup>18</sup> The first departure from market prices occurred as a general order, in the so-called Decree 2B of February 1916. There it was established that for a producer, the requisition price was equated with the costs of production plus an average profit; for a merchant it was his purchase price, but (only) if it was not excessive and was reasonable. Moreover, a person who was in possession of commodities not by virtue of his normal operations, could not claim a profit. The right to establish maximum prices was contained in the same decree. The scrupulousness of the English lawyers went so far at that time that they considered it impossible, in one and the same Act, to make requisitions and to establish prices; by virtue of this, in practice two Acts were issued at different times, one of which prescribed the requisition of supplies, and the other immediately established maximum prices for them. Only towards the end of the war was this scrupulousness discarded, and the practice of fixing maximum prices by decree of individual government agencies began to be widely applied. By then the decrees did not give rise to any complaints, and received support in every court. In 1915 such a practice was still considered "unconstitutional and legally impossible". A further step was the granting, to the government of the right to establish the costs of production by all methods, i.e. up to and including the inspection of books-this was the so-called Decree 7. Thus, commercial and production secrecy was abolished. One should also mention Decrees 30A and 2E. The first contained a general law for the regulation of commerce, and introduced a licensing procedure. It began with

commerce in weapons, but was gradually extended to all the remaining branches of commerce. The second gave the right to regulate any branch of commerce or industry, establishing all possible limitations and prohibitions, to make the issuance of licences depend upon conditions, the non-observance of which was punished criminally. On the basis of Decree 2E, a system of commercial regulation in food products was also established.

One must say that the vaunted partiality of Englishmen to legality generally fluctuated strongly during the war. Lloyd, whom we have cited repeatedly, and who in his book dedicated a special chapter to the "legal basis of control", as a general conclusion expresses the following thought:

In fact in the 'majority of cases the legality or illegality of what was done had no significance. What was important was the extent to which it obtained general support and was applied impartially and equally to all.<sup>19</sup>

It is interesting to consider the general evaluation of the results of state regulation during the war. Almost no disputes were caused by the proposition that it is unthinkable to wage modern war while maintaining a so-called free economy. The system of state regulation showed its undoubted advantages. In Baker's opinion, it saved the life of the U.S.A. and England.<sup>20</sup> But then a single question arises: why cannot these advantages be used in peacetime? In this regard opinions greatly differed. Gray, whose book was published in 1919, i.e. directly after the war, expresses himself very cautiously:

What the long-term significance of government control will be cannot be foreseen at the present moment ... but that which has been done will serve as a precedent and experience; and for the industrial structure which emerges from the war, this experience may take on a greater significance than we suppose.<sup>21</sup>

However, in the next few years a universal repeal of the various types and forms of state intervention occurred, and therefore even the strong, zealous defenders of organizing the economy for military

purposes decided not to recommend it for peacetime. Lloyd, having given a very high evaluation of state intervention during the war, has a most evasive and rather negative position on this question.<sup>22</sup> Baker also tends to link the successes of state regulation with the special conditions of the war, when it was necessary "to lose money to win time".<sup>23</sup> In the opinion of Briefs, which is similar, the methods of economic organization applied during the war were "extraordinary" and may not be transferable to normal conditions. However, even Briefs admits that "the consolidation of the position of the large enterprise, because of the war economy, and the concentrated mass production with the most economic use of raw material and the working masses, are achievements which cannot be rescinded." "However", he proposes, "in both cases it is a matter of the increased manifestation of already-existing or new tendencies, but in any event not of a fundamental reconstruction of the old economic world view."<sup>24</sup> His point of view may be recognized as typical. The experience of state control during the war was acknowledged by bourgeois economists only "so far".

On the one hand, faith was undoubtedly shaken in the unconditional and all-saving power of private initiative. Even in England with the traditions of the Manchester School, the usual opinion that a civil servant is said to be incompetent in economics, and that state intervention will entail bureaucratization, encounters criticism in the form of statements that the pure entrepreneurial type also has its negative aspects, and that maximal effectiveness requires a middle road between the entrepreneurs, with initiative, striving for maximum profit, and the state civil servant who is guided by a consciousness of duty and by general considerations of state interest. It is also recognized that the state organization of industry had a very positive influence in the exchange of technical experience, in the setting up of correct commercial calculation, and in the rationalization of supply etc. Even competition, to which the champions of the free economy allocate such a major role, it transpires, is by no means eliminated and may be used within the limits of the regulated centralized organization. In Lloyd one finds the thoroughly sensible thought that the hopeless struggle of some shopowner with a huge commercial firm essentially brings little benefit-for such a small merchant, condemned to bankruptcy and realizing the hopelessness of his position, in fact is not able to introduce any improvement into his

business; while if he becomes an agent of the huge centralized firm, as the manager of a store or department working for a bonus, for example, he may develop a very healthy competitiveness which will bring real benefit.<sup>25</sup> However, all these admissions do not prevent the majority of authors from recoiling with horror at the picture of military-state capitalism. Here is a typical statement from the foreword to Lloyd's book:

I was convinced and am now convinced that the waging of war necessarily involves the replacement of private initiative by collective organization. In this respect I am in agreement with those who consider that the necessity in wartime of establishing control over life, liberty, and property, is an additional argument for the elimination of war. The next Great War will plunge the world into some species of war communism, in comparison with which the control exercised during the present war will seem to be Arcadia. Individual freedom and private property are condemned by the requirements of modern war; and I admit that I have a prejudice towards both.<sup>26</sup>

. . . . .

From the point of view of individual entrepreneurs, the benefits of centralized organization are nothing in comparison with the possibility of appropriating for one's own enterprise the lion's share of surplus value. Why should an entrepreneur make a concession, agree to egalitarianism, if the possibility exists of reaping a super-profit for himself at the expense of his neighbour? The same relates even more to a period of depression or crisis when each capitalist entrepreneur strives primarily to escape the consequences by cutting his losses from the crisis as much as possible, dumping them on his neighbour. The fate of state regulation after the war, better than anything else, proves the proposition that the combination of capitalist enterprises and the elimination of competition among them, may take place only by way of coercion or force by the more powerful of the enterprises, i. e. by the "natural" method of cartels and trusts, and not by the "artificial" method of state action. The period of state control brought many benefits for the monopolies. In the United States the anti-trust legislation, the famous Sherman Act, which even before had no real significance, was now turned entirely into an incorporeal ghost.<sup>27</sup> Many monopolies in English industry trace their pedigree from the councils and committees organized in wartime. Lloyd tells

of one curious example, how during the war there was created with the help of the government, and under its supervision, an association of leather factory owners with the purpose of holding the prices of leather raw materials at a certain level. The war passed, but from bitter experience the farmers were convinced that this organization, this "ring", continued to exist and function, now without any help from the government and without its supervision, holding down the prices on raw leather. Another motive which leads business circles to struggle for the elimination of state control was the fear of a socialist revolution, the fear of socialism. Well-meaning liberal socialist and pacifist discussions, on the theme that it would be good to apply the gigantic productive possibilities revealed by the war for the elevation of world culture, were greeted with no enthusiasm by capitalist society.

The same Baker, to whom the passage cited below belongs, had to recognize that most of the capitalist world turned out to be the most zealous opponents of the preservation of state control, precisely because there seemed to be a danger of socialism in these plans:

Since state control of industry during the war was considered as something opening the way to socialism, the overwhelming majority was unconditionally ready to condemn this control. The revolution in Russia, and the development of Bolshevism there, the heavy wave of economic and social discontent, with its strikes, socialism and anarchism, which spread over Europe and the United States, produced a wave of conservatism, a wave of sympathy towards law and order which was so apparent in England and the United States. This conservative mood did not have the patience to investigate which of the 57 varieties of socialism was represented by wartime state control, and which could in general be classified as socialism in the real sense. The conservative mood went to the limit in its demand for the abolition of state control, and did not want to examine those positive achievements which it had accomplished.<sup>28</sup>

. . . . .

The experience of wartime regulation clearly shows to what extent, and to what degree, monopoly capitalism prepares the transition to socialist production, and to what extent it does this against its will. For the realization of socialism, leaps are necessary, the dialectical transformation of quantity into a new quality. The

most farsighted bourgeois economists, for example Schumpeter, clearly understood this. In his article, "Socialist Possibilities of Today", Schumpeter writes:

In principle socialization is possible from that moment when huge and giant enterprises have appeared, when the processes of rationalization of the national economy have been clearly revealed, when the machine and calculation have started to transform the psyche. Although this age has no identifiable starting point, nevertheless it is undoubtedly true that it lies far behind us.<sup>29</sup>

Schumpeter thus does not share the reformist dogma concerning capitalist society's unreadiness for the transition to socialism. He considers that the period when socialism has become possible in principle lies behind us, and that therefore the decisive steps to the realization of socialism will be, as he expresses it, "a matter of will and chance".

. . . . .

Alongside such open enemies may be placed the true doctrinaires who have thought of the transition to socialism as a purely organizational task, the task of the rational construction of a socialist economy, entirely abstracting this from the political class struggle. Beck, whose works are cited by Bukharin and are well known in our literature, can serve as a good example of such doctrinarism.<sup>30</sup> These people opposed economic "determinism" (which is purportedly inherent in Marxism) and called for active conscious interference in economic life, and saw in this interference an antidote to the chaos of revolution.

Thus, under the conditions of the post-war crisis of economic dislocation we see, on the one hand, the petit bourgeois, frightened by war and its calamities, thirsting above all to return to peacetime conditions of existence; in their imagination these peacetime or normal conditions are connected above all with the abolition of state control. On the other hand, there are the doctrinaires who come forward with plans for the organization of a planned socialist economy, but who turn their back on the most urgent political tasks, the tasks of class struggle; finally, the commercial bourgeoisie, defending capitalism tooth and nail, comes out against any attempt to preserve and strengthen the system of state control, using at the



same time the achievements of the war period for strengthening the position of monopolies and for the process of capitalist rationalization.

This conclusion presents nothing new for us: the subject of the transition to a planned economy can only be the proletariat led by the Communist Party, the proletariat which has set itself the task of destroying the bourgeois state and establishing its own dictatorship.

#### IV

Moving to the regulation of the economy under Soviet conditions, we must first of all note that this is not merely the technical task of the rational structuring of the national economy, the achievement of proportionality among the separate branches of production; this is not just the task of compilation of an exact balance of the national economy as a whole. This is above all a political task, the continuation of the class struggle, the founding of a socialist economy despite the resistance of hostile strata, despite the still intact ideology of private property; and by means of making many sacrifices. Our regulation has a definite purpose the fastest possible creation of the technical and cultural base for socialism. Our plans must include and do include a particular guiding principle, and are not a simple mechanistic adjustment of demand and supply.

Our regulation is further distinguished by the fact that it is based on nationalization. We did not stop before the sanctity of private property, and we opened up the path of directly influencing the production process. In fact this was considered impossible by bourgeois theorists. Regulation by capitalist states began 'in the sphere of distribution, and was essentially limited to it.

What changes in the area of law derive from the fact of regulation of the national economy? The first and most important is the merger of legislation with administration. We proclaim the unity of legislative and executive power as the basic principle of our state structure, but the principle penetrates especially deeply into practice just as soon as we move to regulated and planned activity. It is sufficient to cite such examples as the approval of production and financial plans in individual branches of industry, approval of plans of export and import, plans of delivery, plans of construction-in all these cases the

creation of a general norm is inseparably merged with individual concrete acts of administration. In all these cases one cannot think of two agencies of which one *solely* legislates, while the other only administers the laws. Regulation with the help of laws alone, regulation establishing only the general forms in which the economic activity of entirely autonomous entities proceeds-and this is the basic principle upon which every civil code is built-this, in fact, is not regulation. Economic processes that are most varied in their character and tempo may be put into these general forms, starting from simple commodity production all the way up to capitalism, and even up to its higher monopolistic forms. True regulation begins where the activity of the state replaces the so-called economic motive, i.e. the motive of individual profit, the egoistic interest of the isolated economic subject. At the same time, state regulation is characterized by the preponderance of the technical and organizational aspect of content over the formal aspects. Legislative and administrative acts, transformed into operational tasks, preserve only a very weak admixture of legal, i.e. formal, elements. Those executors of operative economic tasks have of course formally delineated powers, and bear formal responsibility as administrators. But these elements assume a lower priority in comparison with economic expediency, both in the task itself and in the methods of its execution. On the contrary, the less the state acts directly as an organization engaged in economic activity (and this must be, according to classical bourgeois doctrine), the greater the acts of administration are occupied by their formal side. The process of curtailment of the legal form undergoes a series of stages, in general corresponding to the disappearance of market relations, of relations of exchange. The interesting studies of Professor Venediktov show us how the transition from commodity-exchange relationships to purely planned relationships transforms the economic agency-from a special subject of law contrasted to other such subjects, and connected with them by contractual relationships-simply into one of the cogs of the state machine.

In this case the trust, as a juridic person, as the bearer of a civil-law mask, disappears; it is no longer a question of its (the trust's) rights and duties, but simply of the duties of the officials heading the trusts, duties lying on a purely administrative plane. A demand made to the trust, on the basis of a commodity-exchange transaction, is made to

it precisely as to a juridic person. This demand proceeds as a rule from the same kind of juridic subject, which has been granted civil legal capacity, the previous agreement of the parties serves as a basis for the demand. A demand made to the trust according to the procedure for redistribution of state property, on the direct order of the planning and regulating agencies, is addressed not to the legal personality of the trust, but to its managers by way of administrative subordination. In this case, no role is played by whether or not another enterprise, which has received the property, has been granted the rights of a juridic person—just as no previous agreement whatsoever is required between these enterprises, and no transaction. The transfer of property itself seems to us (if one excludes the element of administrative subordination of the subordinate organizations or agents to the superior) not a legal, but a technical-organizational act.

However, a brick wall does not exist, of course, between the spheres of commodity exchange and pure planning. These relationships intersect and mutually penetrate one another. A border region is created; a gradual movement occurs from purely commercial forms to mixed forms, and from them to purely planned forms. A typical example of intermediate relationships is general contracts which have long since ceased to be free bilateral transactions, although they preserve the external contractual form. The same may be said of intra-syndicate relations. Acts of purchase and sale within a syndicate have long since been turned into a simple executive-technical act. The content of rights and duties and the very obligatory power of these acts, is not based at all on the corresponding expression of will of the parties, but on the decision of a meeting of delegates adopted in accordance with the charter of the syndicate. The fact that non-fulfilment of the obligation nevertheless still entails civil liability in court, merely shows the intermediate nature of this category of relationships.

This perspective of the development of organizational and technical acts and relations at the expense of formal legal ones, is the perspective of the withering away of law, which is most closely linked with the withering away of state coercion in proportion to the transition to a classless society.

The problem of the withering away of law is the cornerstone by which we measure the degree of proximity of a jurist to Marxism.

The attempt to adopt some sort of neutrality on this question is just as impossible as it is to maintain neutrality in the struggle for socialism, or for the successes of the construction of socialism which we are carrying out in practice. One who does not admit that the planned organizational base eradicates the formal legal basis is, essentially speaking, convinced that the relationships of commodity-capitalist economy are eternal, and that their loss at the present moment is merely an abnormality which will be eliminated in the future.

Considering the process of curtailment of the legal form, however, we must take full account of the fact that, so long as the element of state coercion remains in operation, even in the sphere of relationships having nothing in common with the market and exchange, we will be dealing with legal regulation. Until such time as there ensues the full merger of administration with the economy, as a formal function, that is, with the fulfilment of pure production tasks (i.e. for as long as the state of the transitional period is retained), it will be necessary to preserve the systematization of these formal elements, e.g. the jurisdictional areas of individual agencies, their mutual subordination etc. Consequently, a particular type of legal system, which may be called public-economic or a system of administrative-economic law, will also be retained. Even more of these legal elements will remain in the case of regulation of small economic operations, especially by way of direct regulation. Schematically, the matter may be presented in the following manner: the state modifies or limits the possibility of the economic use of certain means of production or consumption. This may be achieved either by way of direct indications of a negative nature, i.e. prohibitions (for instance the prohibition of distilling, the prohibition of contraband), or by way of positive instructions and prescriptions (e.g. maximum prices, fulfilment of a sowing plan); this may also be achieved indirectly, for instance by way of fiscal legislation. Further, the state may, without addressing itself to the small producer with direct instructions or requirements, create economic incentives (e.g. privileges for collective farms, or planned deliveries of manufactured commodities and bread to Central Asia as a stimulus for the expansion of the planting of cotton), or devise coercive economic conditions by using its monopolistic position. Finally, influence may be formalized in the form of a contract (e.g.

procurement), or it may take the form of purely cultural influence, cultural propaganda, propaganda for collectivization, agronomic propaganda, the struggle against the use of alcohol etc. In the evaluation of the purely legal forms of influence, one must bear in mind that the regulation of the economy moves organizational tasks to the foreground as opposed to purely normative tasks. Any broad measures of an economic regulatory nature require, above all, a corresponding and well-adjusted staff that knows its work. Particularly important is the role of staff not of a purely administrative-police nature, but instead an economic operational staff, armed with economic information, using scientific data. The success of regulation largely depends upon scientific research, primarily upon exact and correct statistics. It is particularly necessary to note that the regulatory function of state power will be successful only if it rests upon the support of social class organizations. During the war the imperialist states made very broad use of class organizations, the bourgeois press and all possible types of propaganda among the population. It is the support of the population, as many authors have pointed out, which ensured the success of a whole series of measures. These methods must, of course, be adopted even more extensively, and are adopted in a state where power belongs to the working people. We must consider the experience of our opponents, who openly recognized that the success of a given measure depended much more on the support and sympathy of the population, than on whether or not it was strictly constitutional. Finally, an enormous role is played by the creation of economic motives, the use of economic levers, the creation of the appropriate economic conditions. Only in these conditions can a direct order, or a prohibition with a criminal sanction, be effective.

A general conclusion can be made as follows. If one compares the policy of struggle against usury, attempts to limit interest (which had occurred in the Middle Ages) or the establishment of maximum prices during the time of the great French Revolution, the results of these measures appear inconsequential compared with the effectiveness with which regulation of the economy was conducted by the imperialist states during the war, and in particular with the effectiveness with which it is conducted under conditions of the dictatorship of the proletariat. But at the same time the role of the purely legal superstructure-the role of law-declines, and from this can be deduced the general rule that regulation becomes more effective, the

weaker and less significant the role of law and the legal superstructure in its pure form.

### Notes

1. E. von Böhm-Bawerk, *Macht oder ökonomisches Gesetz, Gesammelte Schriften* (1924), pp. 235.
2. R. Strigl, *Die ökonomischen Kategorien und die Organisation der Wirtschaft* (1923).
3. Max Weber, *Grundriss der Sozialökonomie*, in particular Part III, *Wirtschaft und Gesellschaft* (1925), Tübingen.
4. Dobretzberger, "Beziehungen zwischen Rechts- und Staatskategorien", *Archiv für Rechts und Wirtschaftsphilosophie* (1927), vol. 20, no. 4.
5. R. Stammler, *Economy and Law* (1907), St. Petersburg, vol. I, p. 200.
6. K. Marx, "Letter to Engels" (10th October, 1868), in *Marx and Engels: Selected Correspondence* (1942), International Publishers, New York, p. 249 [eds.].
7. J. Schumpeter, "Socialist Possibilities of Today", *Archiv für Sozialwissenschaften* (1920), vol. 48.
8. Moving ahead somewhat, it may incidentally be noted that Lenin's assessment concurs with the author's "clear and exact definition" of political economy: "the science which studies the development of the social relations of production and distribution". Lenin did not object to this definition on the grounds that the subject of theoretical political economy is *solely* the production relations of commodity-capitalist society, or *only* production relations which have assumed an objectified form. On the contrary, Lenin proceeds from a conception of political economy as a science which studies not one, but various economic systems, and which explains the laws of transition from one system to another. See V. I. Lenin, *Sochinenii*, Vol. 2, p. 371.
9. We have in mind the discussion, which lasted for more than a year, concerning I. I. Rubin's *Essays on Marx's Theory of Value*. See I. I. Rubin, *Essays on Marx's Theory of Value* (1972), Black Rose, Detroit.
10. The developed perspective on the question of the subject of political economy met greater objections within the Section of State and Law, where I outlined it in a talk on the theme "Economics and Legal Regulation". It seemed to me that certain places in my *The General Theory of Law and Marxism* provide a basis for the conclusion that I myself had earlier held other views on this question. In fact, in the period when this work was written, my attention was exclusively concentrated on the social forms of production relations, because I linked them with the characteristic features of the legal form. It also seemed to me, therefore, that natural economy could not be the subject of political economy as a theoretical science. But during the discussion

with Preobrazhensky I was forced to alter my opinion-in the sense that the problems of objectification, and fetishized and defetishized production relations, had necessarily to be included in political economy. Further reflection on this theme has led me to conclude that the attempt to confine economic theory solely to the study of objectified forms threatens to turn Marx's militant revolutionary theory into a collection of fruitless logico-formal exercises.

11. *Herald of the Communist Academy* (1925), no. 11, p. 319.
12. Ammon, *Objekt und Grundbegriffe der theoretischen Nationalökonomie*, 2nd edition, p. 199.
13. . . . from the fact that under socialism one specific divergence between the essence and the form of social relationships-a divergence characteristic of a commodity economy-is eliminated, it by no means follows that in general every divergence between the essence of things and the form of their manifestation is eliminated, or even that this elimination occurs in the area of the social relations of production. To expect this would mean that in one area the laws of the dialectic cease to operate, and that instead of movement and development through contradiction, a dead and indifferent calm ensues.
14. E. A. Preobrazhensky, *The New Economics* (1965), Clarendon Press, Oxford, p. 3.
15. K. Marx, "Letter to L. Kugelmann in Hanover" (July 11, 1868), *MESW*, vol. 2, pp. 418-419 [eds.1
16. The following works have generally been used as the basis of discussion: E. M. H. Lloyd, *Experiments in State Control* (1924), Clarendon, Oxford; C. W. Baker, *Government Control and Operation of Industry in Great Britain and the United States during the World War* (1921), Oxford University Press, New York; *The State and Industry during and after the War*, a conference report from Ruskin College (Oxford), held at Manchester in May 1918; H. L. Gray, *Wartime Control of Industry* (1918), Macmillan, New York....
17. See E. M. H. Lloyd (1924), *op. cit.* p. 52.
18. *ibid.* p. 52.
19. *ibid.* p. 64.
20. C. W. Baker (1921), *op. cit.* p. 126.
21. H. L. Gray (1918), *op. cit.* p. xv.
22. E. M. H. Lloyd (1924), *op. cit.* p. 387ff
23. C. W. Baker (1921), *op. cit.* p. 121.
24. G. Briefs, "Kriegswirtschaftslehre und Kriegswirtschaftspolitik", *Handwörterbuch der Staatswissenschaften* (1926), pp. 984-1022, at p. 989.
25. E. M. H. Lloyd (1924), *op. cit.* p. 358.
26. *ibid.* p. ix.
27. C. W. Baker (1921), *op. cit.* p. 119.
28. *ibid.* p. 124.
29. Schumpeter (1920), *op. cit.* p. 332.
30. H. Beck, *Sozialisierung als Organisationsaufgabe* (1919), n.p.

## ***"The Marxist Theory of State and Law"\****

### **Introductory Note**

In the winter of 1929-1930, during the first Five Year Plan, the national economy of the U.S.S.R. underwent dramatic and violent ruptures with the inauguration of forced collectivization and rapid heavy industrialization. Concomitantly, it seemed, the Party insisted on the reconstruction and realignment of the appropriate superstructures in conformity with the effectuation of these new social relations of production. In this spirit Pashukanis was no longer criticized but now overtly attacked in the struggle on the "legal front". In common with important figures in other intellectual disciplines, such as history, in late 1930 Pashukanis undertook a major self-criticism which was qualitatively different from the incremental changes to his work that he had produced earlier. During the following year, 1931, Pashukanis outlined this theoretical reconstruction in his speech to the first conference of Marxist jurists, a speech entitled "Towards a Marxist-Leninist Theory of Law". The first results appeared a year later in a collective volume *The Doctrine of State and Law*.

Chapter I of this collective work is translated below, "The Marxist Theory of State and Law", and was written by Pashukanis himself. It should be noted that this volume exemplifies the formal transformations which occurred in Soviet legal scholarship during this heated period. Earlier, Pashukanis and other jurists had authored their own monographs;

\* "Marksistskaia teoriia gosudarstva i prava", pp. 9-44 in E. B. Pashukanis (ed.), *Uchenie o gosudarstve i prave* (1932), Partiinoe Izd., Moscow.



the trend was now towards a collective scholarship which promised to maximize individual safety. The source of authority for much of the work that ensued increasingly became the many expressions of Stalin's interpretation of Bolshevik history, class struggle and revisionism, most notably his *Problems of Leninism*. Last, but not least, the language and vocabulary of academic discourse in the 1920s had been rich, open-ended and diverse, and varied tremendously with the personal preferences of the individual author; this gave way to a standardized and simplified style of prose devoid of nuance and ambiguity, and which was very much in keeping with the new theoretical content which comprised official textbooks on the theory of state and law. The reader will perhaps discover that "The Marxist Theory of State and Law" is a text imbued with these tensions. Pashukanis' radical reconceptualization of the unity of form and content, and of the ultimate primacy of the relations of production, is without doubt to be preferred to his previous notions. But this is a preference guided by the advantages of editorial hindsight, and we feel that we cannot now distinguish between those reconceptualizations which Pashukanis may actually have intended and those which were produced by the external pressures of political opportunism.

# ***"The Marxist Theory of State and Law"***

## CHAPTER I

### **Socio-economic Formations, State, and Law**

#### ***1. The doctrine of socio-economic formations as a basis for the Marxist theory of state and law***

The doctrine of state and law is part of a broader whole, namely, the complex of sciences which study human society. The development of these sciences is in turn determined by the history of society itself, i.e. by the history of class struggle.

It has long since been noted that the most powerful and fruitful catalysts which foster the study of social phenomena are connected with revolutions. The English Revolution of the seventeenth century gave birth to the basic directions of bourgeois social thought, and forcibly advanced the scientific, i.e. materialist, understanding of social phenomena.

It suffices to mention such a work as *Oceana* by the English writer Harrington, and which appeared soon after the English Revolution of the seventeenth century--in which changes in political structure are related to the changing distribution of landed property. It suffices to mention the work of Barnave--one of the architects of the great French Revolution--who in the same way sought explanations of political struggle and the political order in property relations. In studying bourgeois revolutions, French restorationist historians--Guizot, Mineaux and Thierry--concluded that the leitmotif of these revolutions was the class struggle between the third estate (i.e. the bourgeoisie) and the privileged estates of feudalism and their monarch. This is why Marx, in his well-known letter to Weydemeyer, indicates that the theory of the class struggle was known before him. "As far as I am concerned", he wrote,

no credit is due to me for discovering the existence of classes in modern society, or the struggle between them. Long before me bourgeois historians had described the historical development of this class struggle, and bourgeois economists the economic anatomy of the classes.

What I did that was new was to prove: (1) that the existence of classes is only bound up with particular historical forms of struggle in the development of production ... ; (2) that the class struggle inevitably leads to the dictatorship of the proletariat; (3) that this dictatorship itself only constitutes the transition to the abolition of all classes and the establishment of a classless society.<sup>1</sup>

[Section 2 omitted-eds.]

### ***3. The class type of state and the form of government***

The doctrine of socio-economic formations is particularly important to Marx's theory of state and law, because it provides the basis for the precise and scientific delineation of the different types of state and the different systems of law.

Bourgeois political and juridical theorists attempt to establish a classification of political and legal forms without scientific criteria; not from the class essence of the forms, but from more or less external characteristics. Bourgeois theorists of the state, assiduously avoiding the question of the class nature of the state, propose every type of artificial and scholastic definition and conceptual distinction. For instance, in the past, textbooks on the state divided the state into three "elements": territory, population and power.

Some scholars go further. Kellen--one of the most recent Swedish theorists of the state distinguishes five elements or phenomena of the state: territory, people, economy, society and, finally, the state as the formal legal subject of power. All these definitions and distinctions of elements, or aspects of the state, are no more than a scholastic game of empty concepts since the main point is absent: the division of society into classes, and class domination. Of course, the state cannot exist without population, or territory, or economy, or society. This is an incontrovertible truth. But, at the same time, it is true that all these "elements" existed at that stage of development when there was no state. Equally, classless communist society--having territory, population and an economy--will do

without the state since the necessity of class suppression will disappear.

The feature of power, or coercive power, also tells one exactly nothing. Lenin, in his polemic of the 1890s with Struve asserted that: "he most incorrectly sees the distinguishing feature of the state as coercive power. Coercive power exists in every human society-both in the tribal structure and in the family, but there was no state." And further, Lenin concludes: "The distinguishing feature of the state is the existence of a separate class of people in whose hands power is concentrated. Obviously, no one could use the term 'State' in reference to a community in which the organization of order is administered in turn by *all* of its members."<sup>2</sup>

Struve's position, according to which the distinguishing feature of a state is coercive power, was not without reason termed 'professorial' by Lenin. Every bourgeois science of the state is full of conclusions on the essence of this coercive power. Disguising the class character of the state, bourgeois scholars interpret this coercion in a purely psychological sense. "For power and subordination", wrote one of the Russian bourgeois jurists (Lazarevsky), "two elements are necessary: the consciousness of those exercising power that they have the right to obedience, and the consciousness of the subordinates that they must obey."

From this, Lazarevsky and other bourgeois jurists reached the following conclusion: state power is based upon the general conviction of citizens that a specific state has the right to issue its decrees and laws. Thus, the real fact-concentration of the means of force and coercion in the hands of a particular class-is concealed and masked by the ideology of the bourgeoisie. While the feudal landowning state sanctified its power by the authority of religion, the bourgeoisie uses the fetishes of statute and law. In connection with this, we also find the theory of bourgeois jurists-which now has been adopted in its entirety by the Social Democrats whereby the state is viewed as an agency acting \*in the interests of the whole society. "If the source of state power derives from class", wrote another of the bourgeois jurists (Magaziner), "then to fulfil its tasks it must stand above the class struggle. Formally, it is the arbiter of the class struggle, and even more than that: it develops the rules of this struggle."

It is precisely this false theory of the supra-class nature of the state that is used for the justification of the treacherous policy of the Social Democrats. In the name "of the general interest", Social Democrats deprive the unemployed of their welfare payments, help in reducing wages, and encourage shooting at workers' demonstrations.

Not wishing to recognize the basic fact, i.e. that states differ according to their class basis, bourgeois theorists of the state concentrate all their attention on various forms of government. But this difference by itself is worthless. Thus, for instance, in ancient Greece and ancient Rome we have the most varied forms of government. But all the transitions from monarchy to republic, from aristocracy to democracy, which we observe there, do not destroy the basic fact that these states, regardless of their different forms, were slave-owning states. The apparatus of coercion, however it was organized, belong to the slave-owners and assured their mastery over the slaves with the help of armed force, assured the right of the slave-owners to dispose of the labour and personality of the slaves, to exploit them, to commit any desired act of violence against them.

Distinguishing between the form of rule and the class essence of the state is particularly important for the correct strategy of the working class in its struggle with capitalism. Proceeding from this distinction, we establish that to the extent that private property and the power of capital remain untouchable, to this extent the democratic form of government does not change the essence of the matter. Democracy with the preservation of capitalist exploitation will always be democracy for the minority, democracy for the propertied; it will always mean the exploitation and subjugation of the great mass of the working people. Therefore theorists of the Second International such as Kautsky, who contrast "democracy" in general with "dictatorship", entirely refuse to consider their class nature. They replace Marxism with vulgar legal dogmatism, and act as the scholarly champions and lackeys of capitalism.

The different forms of rule had already arisen in slave-owning society. Basically, they consist of the following types: the monarchic state with an hereditary head, and the republic where power is elective and where there are no offices which pass by inheritance. In addition, aristocracy, or the power of a minority (i.e. a state

where participation in the administration of the state is limited by law to a definite and rather narrow circle of privileged persons) is distinguished from democracy (or, literally, the rule of the people), i.e. a state where by law all take part in deciding public affairs either directly or through elected representatives. The distinction between monarchy, aristocracy and democracy had already been established by the Greek philosopher Aristotle in the fourth century. All the modern bourgeois theories of the state could add little to this classification.

Actually the significance of one form or another can be gleaned only by taking into account the concrete historical conditions under which it arose and existed, and only in the context of the class nature of a specific state. Attempts to establish any general abstract laws of the movement of state forms-with which bourgeois theorists of the state have often been occupied-have nothing in common with science.

In particular, the change of the form of government depends on concrete historical conditions, on the condition of the class struggle, and on how relationships are formed between the ruling class and the subordinate class, and also within the ruling class itself

The forms of government may change although the class nature of the state remains the same. France, in the course of the nineteenth century, and after the revolution of 1830 until the present time, was a constitutional monarchy, an empire and a republic, and the rule of the bourgeois capitalist state was maintained in all three of these forms. Conversely, the same form of government (for instance a democratic republic) which was encountered in antiquity as one of the variations of the slave-owning state, is in our time one of the forms of capitalist domination.

Therefore, in studying any state, it is very important primarily to examine not its external form but its internal class content, placing the concrete historical conditions of the class struggle at the very basis of scrutiny.

The question of the relationship between the class type of the state and the form of government is still very little developed. In the bourgeois theory of the state this question not only could not be developed, but could not even be correctly posed, because bourgeois science always tries to disguise the class nature of all states, and in particular the class nature of the capitalist state. Often therefore,

bourgeois theorists of the state, without analysis, conflate characteristics relating to the form of government and characteristics relating to the class nature of the state.

As an example one may adduce the classification which is proposed in one of the newest German encyclopaedias of legal science.

The author [Kellreiter] distinguishes: (a) absolutism and dictatorship, and considers that the basic characteristic of these forms is that state powers are concentrated in the hands of one person. As an example, he mentions the absolute monarchy of Louis XIV in France, tsarist autocracy in Russia and the dictatorial power which was invested by the procedure of extraordinary powers in the one person, for instance the president of the German Republic on the basis of Art. 48 of the Weimar Constitution; (b) constitutionalism, characterized by the separation of powers, their independence and their checks and balances, thereby weakening the pressure exerted by state power on the individual (examples: the German Constitution before the 1918 revolution, and the U.S.A., where the President and Congress have independent powers); (c) democracy, whose basic premise is monism' of power and a denial in principle of the difference between power and the subject of power (popular sovereignty, exemplified by the German Republic); and (d) the class-corporative state and the Soviet system where as opposed to formal democracy, the people appear not as an atomized mass of isolated citizens but as a totality of organized and discrete collectives.<sup>3</sup>

This classification is very typical of the confusion which bourgeois scholars consciously introduce 'into the question of the state. Starting with the fact that the concept of dictatorship is interpreted in the formal legal sense, deprived of all class content, the bourgeois jurist deliberately avoids the question: the dictatorship of *which* class and directed *against whom*? He blurs the distinction between the dictatorship of a small group of exploiters and the dictatorship of the overwhelming majority of the working people; he distorts the concept of dictatorship, for he cannot avoid defining it without a relevant law or paragraph, while "the scientific concept of dictatorship means nothing less than power resting directly upon force, unlimited by laws, and unconstricted by absolute rules".<sup>4</sup> Further it is sufficient to indicate, for instance, that under the latter heading the author includes: (a) a new type of state, never encountered before in history, where power belongs to the proletariat; (b) the reactionary

dreams of certain professors and so-called guild socialists, about the return to the corporations and shops of the Middle Ages; and, finally (c) the fascist dictatorship of capital which Mussolini exercises in Italy.

This respected scholar consciously introduces confusion, consciously ignores the concrete historical conditions under which the working people actually can exercise administration of the state, acting as organized collectives. But such conditions are only the proletarian revolution and the establishment of the dictatorship of the proletariat.

#### ***4. The class nature of law***

Bourgeois science confuses the question of the essence of law no less than the question of the state. Here, Marxism-Leninism opposes the diverse majority of bourgeois, petit bourgeois and revisionist theories which, proceeding from the explanation of the historical and class nature of law, consider the state as a phenomenon essential to every human society. They thus transform law into a suprahistorical category.

It is not surprising, therefore, that bourgeois philosophy of law serves as the main source for introducing confusion both into the concept of law and into the concept of state and society.

The bourgeois theory of the state is 90% the legal theory of the state. The unattractive class essence of the state, most often and most eagerly, is hidden by clever combinations of legal formalism, or else it is covered by a cloud of lofty philosophical legal abstractions.

The exposure of the class historical essence of law is not, therefore, an unimportant part of the Marxist-Leninist theory of society, of the state and of law.

The most widespread approach of bourgeois science to the solution of the question of the essence of law consists in the fact that it strives to embrace, through the concept of law, the existence of any consciously ordered human relationships, of any social rules, of any phenomenon of social authority or social power. Thus, bourgeois scholars easily transfer law to pre-class society, find it in the pre-state life of primitive tribes, and conclude that communism is unthinkable without law. They turn law as an empty abstraction into a universal concept devoid of historical content. Law, for bourgeois sociologists,



becomes an empty form which is unconnected with concrete reality, with the relationships of production, with the antagonistic character of these relationships in class society, [and] with the presence of the state as a particular apparatus of power in the hands of the ruling class.

Representatives of idealist philosophy of law go still further. They begin with "the idea of law", which stands above social history as something eternal, immutable and independent of space and time.

Here, for example, is the conclusion of one of the most important representatives of the ideological neo-Kantian philosophy of law-Stammler:

Through all the fates and deeds of man there extends a single unitary idea, the idea of law. All languages have a designation for this concept, and the direction of definitions and judgements expressed by it amount, upon careful study, to one and the same meaning.

Having made this discovery, it cost Stammler nothing "to prove" that regardless of the difference between the "life and activity of nations" and "the objects of legal consideration", we observe the unity of the legal idea and its equal appearance and intervention.

This professorial rubbish is presented without the least attempt at factual proof. In actuality it would be rather difficult to explain how this "unity of the legal idea and its equal appearance" gave birth to the laws of the Twelve Tablets of slave-owning Rome, the serf customs of the Middle Ages, the declarations of rights of capitalist democracies, and our Soviet Constitution.

But Stammler is not embarrassed by the scantiness of factual argument. He deals just as simply with the proof of the eternity of law. He begins from those legendary Cyclops described in the Odyssey; even these mythical wonders were the fathers of families and, according to Stammler, could not do without law. On the other hand, however, while Stammler is ready to admit that the pigmy tribes of Africa and the Eskimos did not know the state, he simply denies as deceptive all reports about peoples not knowing law. Moreover, Stammler immediately replaces the concrete historical consideration of the question with scholastic formal-logical tightrope walking, which among bourgeois professors is presented as a methodological precision.

We present these conclusions, for they typify the whole trend and, moreover, are most fashionable in the West.

Stammler proposes that the concrete study of legal phenomena is entirely unable to provide anything in the understanding of the essence of law. For if we assign any phenomenon to the list of legal ones, this means that we already know that this is law and what its characteristics are. The definition of law which precedes the facts presupposes knowledge of what is law and what is not law. Accordingly, in the opinion of Stammler, in considering the concept of law, it is necessary to exclude all that is concrete and encountered in experience and to understand "that the legal idea is a purely methodological means for the ordering of spiritual life",

This conclusion, which confronts one with its scholasticism, is nothing other than a Kantian ideological thesis embodied in the context of Stammler's legal stupidity. It shows that the so-called forms of knowledge do not express the objective characteristics of matter, are determined a priori, and precede all human experience and its necessary conditions.

Having turned law into a methodological idea, Stammler tries to locate it not in the material world where everything is subordinate to the law of cause and effect, but in the area of goals. Law, according to Stammler, is a definition which proceeds not from the past (from cause to effect), but from the future (from goal to means). Finally, adding that law deals not with the internal procedure of thoughts as such, but with human interaction, Stammler gives this agonizing and thoroughly scholastic definition:

The concept of law is a pure form of thought. It methodically divides the endlessly differentiated material of human desires apprehended by the senses, and defines it as an inviolable and independent connecting will.

This professorial scholasticism has the attractive feature for the bourgeoisie that verbal and formalistic contrivances can hide the ugly reality of [their] exploiting society and exploiting law.

If law is "a pure form of thought", then it is possible to avoid the ugly fact that the capitalist law of private property means the misery of unemployment, poverty and hunger for the proletarian and his family; and that in defence of this law stand police armed to the teeth, fascist bands, hangmen and prison guards; and that this law signifies a whole system of coercion, humiliation and oppression in colonies.

Such theories allow the disguising of the fact that the class interest of the bourgeoisie lies at the basis of bourgeois law. Instead of class law, philosophers such as Stammler dream up abstractions, "pure forms", general human "ideas", "whole and durable bonds of will"-and other entirely shameless things.

This philosophy of law is calculated to blunt the revolutionary class consciousness of the proletariat, and to reconcile it with bourgeois society and capitalist exploitation.

It is not without reason that the social fascists speak out as such zealous exponents of neo-Kantianism; it is not without reason that Social Democratic theorists on questions of law largely subscribe to neo-Kantian philosophy and re-hash the same Stammler in different ways.

In our Soviet legal literature, a rather wide dissemination has been achieved by bourgeois legal theories. In particular, there have been attempts to spread the idealist teaching of Stammler in the works of Pontovich and Popov-Ladyzhensky. The criticism and unmasking of this eructation is necessary for the purpose of eradicating this bourgeois ideological infection.

Thus, we know that the state is an historical phenomenon limited by the boundaries of class society. A state is a machine for the maintenance of the domination of one class over another. It is an organization of the ruling class, having at its disposal the most powerful means of suppression and coercion. Until the appearance of classes the state did not exist. In developed communism there will be no state.

In the same way as the state, law is inseparably tied to the division of society into classes. Every law is the law of the ruling class. The basis of law is the formulation and consolidation of the relationship to the means of production, owing to which in exploitative society, one part of the people can appropriate to itself the unpaid labour of another.

The form of exploitation determines the typical features of a legal system. In accordance with the three basic socio-economic formations of class society, we have three basic types of legal superstructure: slave-owning law, feudal law and bourgeois law. This of course does not exclude concrete historical national differences between each of the systems. For instance, English law is distinguished by many peculiarities in comparison with French bour-

geois law as contained in the Napoleonic Code. Likewise, we do not exclude the presence of survivals of the past-transitional or mixed forms-which complicate the concrete picture.

However, the essential and basic-that which provides the guiding theme for the study of different legal institutions-is the difference between the position of the slave, the position of the serf and the position of the wage labourer. The relationship of exploitation is the basic lynchpin, around which all other legal relationships and legal institutions are arranged. From this it follows that the nature of property has decisive significance for each system of law. According to Lenge, the brilliant and cynical reactionary of the eighteenth century, the spirit of the laws is property.

### ***5. Law as an historical phenomenon: definition of law***

The appearance and withering away of law, similar to the appearance and withering of the state, is connected with two extremely important historical limitations. Law (and the state) appears with the division of society into classes. Passing through a long path of development, full of revolutionary leaps and qualitative changes, law and the state will wither away under communism as a result of the disappearance of classes and of all survivals of class society.

Nevertheless, certain authors, who consider themselves Marxists, adopt the viewpoint that law exists in pre-class society, that in primitive communism we meet with legal forms and legal relationships. Such a point of view is adopted for instance by Reisner. Reisner gives the term "law" to a whole series of institutions and customs of tribal society: marriage taboos and blood feud, customs regulating relationships between tribes, and customs relating to the use of the means of production belonging to a tribe. Law in this manner is transformed into an eternal institution, inherent to all forms of human society. From here it is just one step to the understanding of law as an eternal idea; and Reisner in essence leans towards such an understanding.

This viewpoint of course fundamentally contradicts Marxism. The customs of a society not knowing class divisions, property inequality and exploitation, differ qualitatively from the law and the statutes of class society. To categorize them together means to introduce an unlikely confusion. Every attempt to avoid this qualita-

tive difference inevitably leads to scholasticism, to the purely external combination of phenomena of different types, or to abstract idealist constructs 'in the Stammlerian spirit.

We should not be confused by the fact that Engels, in *The Origin of the Family, Private Property and the State*, uses the expression "the eternal law"; or, that he cites, without particular qualification, Morgan's description of the member of a tribal community as having "equality of rights", and of a person violating tribal customs as having placed himself "outside the law".

It is clear that the terms "right" and "law" are used here not in their direct sense, but by analogy. This does not mean, however, that in classless society we will be dealing only with purely *technical* rules. Such an argument was put forward by Stuchka in his dispute with Reisner. To assign the customs and the norms of pre-class society to the area of technology would mean to give the concept of technology a very extended and undefined sense. Marriage prohibitions, customs relating to the organization of the tribe, the power of the elders, blood feud etc.-all this of course is not technology and not technical methods, but the customs and norms of social order. The content and character of these customs corresponded of course to the level of productive forces and the production relationships erected on it. These social forms should be considered as a superstructure upon the economic base. But the basic qualitative difference between this superstructure and the political and legal superstructures of class society, consists in the absence of property inequality, exploitation, and organized class coercion.

While Marxism strives to give a concrete historical meaning to law, the characteristic feature of bourgeois philosophers of law is, on the contrary, the conclusion that law in general is outside classes, outside any particular socio-economic formation. Instead of deriving a concept of law from the study of historical facts, bourgeois scholars are occupied with the concoction of theories and definitions from the empty concept or even the word "law".

We already saw how Stammler, with the help of scholastic contrivances, tries to show that concrete facts have no significance for the definition of law. We, however, say the opposite. It is impossible to give a general definition of law without knowing the law of slave-owning, feudal and capitalist societies. Only by studying the law of each of these socio-economic formations can we

identify those characteristics which are in fact most general and most typical. In doing so we must not forget Engels' warning to those who tend to exaggerate the significance of these general definitions.

For example, in Chapter VI of the first part of *Anti-Dühring*, having given a definition of life, Engels speaks of the inadequacy of all definitions because they are necessarily limited to the most general and simplistic areas. In the preface to *Anti-Dühring*, Engels formulated this thought still more clearly, indicating that "the only real definition is the development of the essence of the matter, and that is not a definition". However, Engels at once states that for ordinary practical use, definitions which indicate the most general and characteristic features of a category are very convenient. We cannot do without them. It is also wrong to demand more from a definition than it can give; it is wrong to forget the inevitability of its insufficiency.

These statements by Engels should be kept in mind in approaching any general definition, including a definition of law. It is necessary to remember that it does not replace, and cannot replace, the study of all forms and aspects of law as a concrete historical phenomenon. In identifying the most general and characteristic features we can define law *as the form of regulation and consolidation of production relationships and also of other social relationships of class society*; law depends on the apparatus of state power of the ruling class, and reflects the \*interests of the latter.

This definition characterizes the role and significance of law in class society. But it is nevertheless incomplete. In contradistinction to all normative theories-which are limited to the external and formal side of law (norms, statutes, judicial positions etc.)-Marxist-Leninist theory considers a law as a unity of form and content. The legal superstructure comprises not only the totality of norms and actions of agencies, but the unity of this formal side and its content, i.e. of the social relationships which law reflects and at the same time sanctions, formalizes and modifies. The character of formalization does not depend on the "free will of the legislator"; it is defined by economics, but on the other hand the legal superstructure, once having arisen, exerts a reflexive effect upon the economy.

This definition stresses three aspects of the matter. First is the class nature of law: every law is the law of the ruling class. Attempts to

consider law as a social relationship which transcends class society, lead either to superficial categorization of diverse phenomena, or to speculative idealistic constructs in the spirit of the bourgeois philosophy of law. Second is the basic and determinant significance of production relationships in the content that is implemented by law. Class interests directly reflect their relationship to the means of production. Property relationships occupy the prominent place in the characterization of a specific legal order. Communist society, where classes disappear, where labour becomes the primary want, where the effective principle will be from each according to his abilities, to each according to his needs: this does not require law. The third aspect consists of the fact that the functioning of a legal superstructure demands a coercive apparatus. When we say that social relationships have assumed a legal expression, this means *inter alia* that they have been given a coercive nature by the state power of the ruling class. Withering away of the law can only occur simultaneously with the withering away of the state.

Relationships which have received legal expression are qualitatively different from those relationships which have not received this expression. The form of this expression may be different, as was indicated by Engels;<sup>5</sup> it may sometimes be good and sometimes be bad. It may support the progressive development of these relationships or, on the contrary, retard them. Everything depends on whether power is in the hands of a revolutionary or a reactionary class. Here the real significance of the legal superstructure appears. However, the degree of this reality is a question of fact; it can be determined only by concrete study and not by any *a priori* calculations. Bourgeois jurists characteristically concentrate their attention on form, and utterly ignore content. They turn their backs on life and actual history. As Engels showed, "they consider public and private law as independent areas, which have their own independent development and which must and may be subjected to independent systematic elaboration by the consistent elimination of all internal contradictions."<sup>6</sup>

Bourgeois jurists usually define law as the totality of norms to which a state has given coercive power. This view of law typifies so-called legal positivism. The most consistent representatives of this trend are the English jurists: of the earliest Blackstone

(eighteenth century), and thereafter Austin. In other European countries legal positivism also won itself a dominant position in the nineteenth century, because the bourgeoisie either gained state power or everywhere achieved sufficient influence in the state so as not to fear the identification of law with statute. At the same time nothing was better for legal professionals, for judges, [and] for defence counsel since this definition fully satisfied their practical needs. If law in its entirety was the complex of orders proceeding from the state, and consolidated by sanction in the case of disobedience, then the task of jurisprudence was defined with maximum clarity. The work of the jurist, according to the positivists, did not consist in justifying law from some external point of view-philosophers were occupied with this; the task of the jurists did not include explaining from where a norm emerged, and what determined its content-this was the task of political scientists and sociologists. The role of the jurist remained the logical interpretation of particular legal provisions, the establishment of an internal logical connection between them, combining them into larger systematic units in legal institutions, and finally in this way the creation of a system of law.

The definition of law as the totality of norms is the starting point for supporting the so-called dogmatic method. This consists of using formal logical conclusions in order to move from particular norms to more general concepts and back, proceeding from general positions to propose the solution of concrete legal cases or disputes. It is obvious that the practical part of this role developing especially luxuriantly in the litigious circumstances of bourgeois society-has nothing in common with a scientific theory of law. Applications of so-called legal logic are not only theoretically fruitless, they are not only incapable of revealing the essence of law and thus of showing its connection with other phenomena-with economics, with politics, with class struggle-but they are also harmful and impermissible in the practice of our Soviet courts and other state institutions. We need decisions of cases, not formally, but in their essence; the state of the working people, as distinct from the bourgeois state, does not hide either its class character or its goal-the construction of socialism. Therefore, the application of norms of Soviet law must not be based on certain formal logical considerations, but upon the consideration of all the concrete features



of the given case, of the class essence of those relationships to which it becomes necessary to apply a general norm, and of the general direction on of the policy of Soviet power at the given moment. In the opposite case a result would be obtained which Lenin defined as: "Correct in form, a mockery in substance."

The denial of formal legal logic cultivated by the bourgeoisie does not mean a denial of revolutionary legality, does not mean that judicial cases and questions of administration must be decided chaotically in the Soviet state, systematically on the basis of the random whims of individuals, or on the basis of local influences. The struggle for revolutionary legality is a struggle on two fronts: against legal formalism and the transfer to Soviet soil of bourgeois chicanery, and against those who do not understand the organizational significance of Soviet decrees as one of the methods of the uniform conduct of the policy of the dictatorship of the proletariat.

Thus, the law is the means of formulating and consolidating the production relationships of class society and the social relationships which are connected with them. In the legal superstructure, these relationships appear as property relations and as relations of domination and subordination. They appear, in particular, as relations of an ideological nature, i.e. as relations which are formed in connection with certain views and are supported by the conscious will of the people.

We shall not touch upon the question of the degree to which the legal ideology of the exploiting classes is capable of correctly reflecting reality, and in what measure it inevitably distorts it (representing the interest of the exploiting class as the social interest in order, legality, freedom etc.). Here, we merely emphasize the fact that without the work of legislators, judges, police and prison guards (in a word, of the whole apparatus of the class state), law would become a fiction. "Law is nothing without an apparatus capable of enforcing observation of the norms of law" (Lenin).

The conscious will-towards the formulation and consolidation of production and other relationship s-is the will of the ruling class which finds its expression in custom, in law, in the activity of the court and in administration. The legal superstructure exists and functions because behind it stands an organization of the ruling class, namely the apparatus of coercion and power in the form of the army, the police, court bailiffs, prison guards and hangmen. This does not

mean that the ruling class has to use physical force in every case. Much is achieved by simple threat, by the knowledge of helplessness and of the futility of struggle, by economic pressure, and finally by the fact that the working classes are in the ideological captivity of the exploiters. It is sufficient to mention the narcotic of the religious ideology of humility and meekness, or the genuflection before the idol of bourgeois legality preached by the reformist.

But the ultimate argument for, and the basis of, the legal order is always the means of physical force. Only by depending on them could the slaveowner of antiquity or the modern capitalist enjoy his right.

The attempts by certain bourgeois jurists to separate law from the state, or to contrast "law" and "force", are dictated by the attempt to hide and conceal the class essence of law.

Often these proofs that law is independent of the state bear a truly laughable character. Thus, for instance, Stammler claims that he has proved this thesis relying on the fact that on a dirigible which flies over the North Pole, i.e. outside the sphere of action of any state power, the emergence of legal relationships is possible.

By such empty dogmatic chicanery the scientific question of the relationship of state and law is decided. Can one be surprised at Lenin's sharp reaction to Stammler when he says that: "From stupid arguments, Stammler draws equally stupid conclusions."

The dependence of law on the state, however, does not signify that the state creates the legal superstructure by its arbitrary will. For the state itself, as Engels says, is only a more or less complex reflection of the economic needs of the dominant class in production.

The proletariat, having overthrown the bourgeoisie and consolidated its dictatorship, had to create Soviet law in conformity with the economy, in particular the existence of many millions of small and very small peasant farms. After the victory of the proletarian revolution the realization of socialism is not an instantaneous act but a long process of construction under the conditions of acute class struggle.

From the policy of limiting its exploitative tendencies and the elimination of its front ranks, we moved to the policy of liquidating the kulaks as a class by widespread collectivization. A successful fulfilment of the first Five Year Plan; the creation of our own base for the technical reconstruction of the whole national economy; the

transfer of the basic mass of the peasantry to collectivization; these events enabled the basic task of the second Five Year Plan to be:

the final liquidation of capitalist elements and classes in general, the full elimination of the causes of class differences and exploitation, the overcoming of the survivals of capitalism in the economy and the consciousness of the people, the transformation of the whole working population of the country into conscious and active builders of a classless society.<sup>7</sup>

At each of these stages Soviet law regulated and formulated production relationships differently.

Soviet law in each of the stages was naturally different from the law of capitalist states. For law under the proletarian dictatorship has always had the goal of protecting the interest of "the working majority, the suppression of class elements hostile to the proletariat, and the defence of socialist construction. Those individual Soviet jurists who considered law as the totality of norms (i.e. externally and formally) are not in a position to understand this. Finding identically formulated norms in the system of bourgeois and Soviet law, these jurists began to speak of the similarity between bourgeois and Soviet law, to search out "general" institutions, and to trace the development of certain "general" bases for bourgeois and Soviet law. This tendency was very strong in the first years of NEP. The identification of Soviet with bourgeois law derived from an understanding of NEP as a return to capitalism, which found expression in the Marxist ranks.

If NEP, as the Zinoviev opposition asserted at the XIVth Party Congress, is "capitalism which holds the proletarian state on a chain", then Soviet law must be presented as bourgeois law, in which certain limitations are introduced, to the extent in the period of imperialism that the capitalist state also regulates and limits the freedom of disposition of property, contractual freedom etc.

Such a distortion in the description of NEP led directly to an alliance with bourgeois reformists in the understanding of Soviet law.

In fact, NEP "is a special policy of the proletarian state intended to permit capitalism while the commanding heights are held by the proletarian state, intended for the struggle between the capitalist and socialist elements, intended for the growth of the role of the socialist elements at the expense of the capitalist elements, intended for the

victory of the socialist elements over the capitalist elements, intended for the elimination of classes and for the construction of the foundation of a socialist economy."<sup>8</sup>

Soviet law as a special form of policy followed by the proletariat and the proletarian state, was intended precisely for the victory of socialism. As such, it is radically different from bourgeois law despite the formal resemblance of individual statutes.

Juridical formalism, which conceives of nothing other than the norm and reduces law to the purely logical operation of these norms, appears as a variety of reformism, as a Soviet "juridical socialism". By confining themselves only to the norm and the purely juridical (i.e. formal ideas and concepts), they ignored the socio-economic and political essence of the matter. As a result, these jurists arrive at the conclusion that the transformation of property from an arbitrary and unrestricted right into a "social function" (i.e. a tendency which is "peculiar to the law of the advanced", that is, capitalist, countries), finds its "fullest" expression in Soviet legislation. Making this contention, the Jurists "forgot" such a trifle as the October Revolution and the dictatorship of the proletariat.

It is not only important to "read" the norm, but also to know what class, what state, and what state apparatus is applying this norm.

### ***6. Law and production relationships***

Production relationships form the basis of society. It is necessary to begin with these relationships in order to comprehend the complex picture presented by the history of mankind.

To search for the basic characteristic of society and social relations in an area other than production relationships means to deprive oneself of the possibility of a scientific understanding of the laws of development of social formations. However, it by no means follows from this that, according to Marx, only relations of production and exchange are social relations. Such a concept is a caricature of Marxism. The equation of social relations with production relations in this case is understood purely mechanically. However, a number of times Lenin noted that Marx's great service was that he did not limit himself to the description of the economic "skeleton" of capitalist society, but that:

in explaining the construction and development of a definite social formation "exclusively" by production relations, he nonetheless thoroughly and constantly studied the superstructure corresponding to these production relations, which clothed the skeleton with flesh and blood. The reason that *Das Kapital* had such enormous success was that this book ("by a German economist") showed the capitalist social formation as a living thing-with its everyday aspects, with the actual social phenomena essential to the production relations between antagonistic classes, with the bourgeois political superstructure protecting the domination of the capitalist class, with the bourgeois ideas of freedom, equality etc., with bourgeois family relations.<sup>9</sup>

Stuchka looks differently at the matter. In his opinion, Marx considered *only* relations of production and exchange to be social relations. But this would mean affirming that Marx limited himself to the "skeleton" alone, as if having indicated the basic and eventually determinant in social life and social relations he then passed by that which is derivative and requires explanation. However, more than once Marx directly points out the existence of social relationships which are not production relations but which merely derive from them and correspond to them. Characterizing revolutionary proletarian socialism in France in 1848, Marx wrote:

This socialism is the *proclamation of the permanence of the revolution*, a proclamation of the class dictatorship of the proletariat as a necessary transition toward the *elimination of class differences* altogether, toward the elimination of all production relations upon which these differences are based, toward the elimination of all social relationships corresponding to these production relations, toward a revolution in the entire world of ideas arising from these relationships.<sup>10</sup>

Nevertheless, Comrade Stuchka firmly defends his understanding of the term "social relationships":

We proceed from social relationships; I emphasize the word "social", for here my critics are desperately confused. I thus selected the word "social" and a whole chapter in my first book was dedicated to it only in the sense of relations *of* production and exchange (as Marx and every Marxist understands this).<sup>11</sup>

Proceeding from the equation of production and social relationships, Stuchka defined law as a "system (or order) of social

relations corresponding to the interests of the ruling class and protected by its organized force". In this definition, as he himself indicated, there was room only for the law of property and the law of obligations.

As earlier, so even now,

he wrote:

I consider *basic law*, law in general, to be *civil law*, understanding thereby the form of organization of social relationships in the narrow and specific sense of the word (i.e. relations of production and exchange). I consider that all the remaining areas of law are *either of a subordinate or derivative character*, and that only bourgeois law (subjecting to its influence all the remaining areas of law) created a legal state, or state law and criminal law, as an equivalent norm for crime and punishment, not even mentioning administrative, financial etc., and finally international law or even the law of war.<sup>12</sup>

The positions outlined in this excerpt contain a series of mistakes. There is no doubt that the formulation and conformation of social relationships to the means of production is basic to law. Proceeding from the economic basis, from different forms of exploitation, we differentiate slaveowning, feudal and capitalist systems of law. But, in the first place, it is 'incorrect to subsume the property relations of slaveowning or feudal society under the concept of civil, i.e. bourgeois, law as "law in general". In the second place, state law may not be equated with the so-called *Rechtsstaat* of the bourgeoisie. If one takes this point of view then one must either deny the existence of a distinctive feudal state law, or show that despite the existence of a Soviet state we do have Soviet state law. At the same time, in other places in his textbook, Stuchka proceeds from the existence of different class systems of law: feudal, bourgeois, Soviet. Here he argues for a "general law" which is equated with the civil law of bourgeois society. At the same time state law is equated with the theory of bourgeois jurists of the so-called *Rechtsstaat*, and criminal law (i.e. formalized class repression) with the ideology of equivalent retribution.

The basic question-do relationships exist that enter into the content of law, which are not, however, relations of production and exchange?-is avoided by Stuchka; he cites the subsidiary, derivative etc. character of state, criminal etc. law. However, it is clear that the

structure of family relationships, the formalization of class domination in the state organization, the formalization of class repression, all this is embraced by the different branches of law (family, state and criminal).

The content of this legal intermediary is the social and political relationships which, in the final analysis, are reducible to the same production relationships, but by no means correspond to them.

Stuchka's subsequent definition of law suffers from the shortcoming that he limits the area of law merely to production relations. This definition also introduces confusion because it confuses law with economics. Proceeding from the indisputable position that not all which is stated in a norm (in a statute) is realized in fact, Stuchka has made the incorrect conclusion that law is indeed the very relation of production and exchange. Stuchka has therefore declared Marx's teaching---that law is an ideological superstructure to be a tribute to the "volitional theory" of the old jurists.

Whoever has mastered the form of theorizing of Marx and Engels that capital, money etc., are social relationships, will at once understand my views on the system of social relationships. This will be hardest of all for a jurist for whom law is a purely technical and artificial superstructure, strangely enough, holding sway over its base. Even Karl Marx gave a small tribute to this concept when he spoke of law as an ideological superstructure. But Marx was raised on Roman law and in general on the juridic concepts of the 1830s, considering it an expression "of the general *will*" (*Volkswillen*), and he was [therefore] accustomed to its terminology.<sup>13</sup>

In conducting the struggle with the narrow, formal legal concept of law as a totality of norms, we cannot deny the real existence of the legal superstructure, i.e. of relationships formulated and consolidated by the conscious will of the ruling class. Only to the extent that this process of formulation and consolidation proceeds may one speak of law. To study law only as totality of norms means to follow the path of formalism and dogmatism. But to study law only as relationships of production and exchange means to confuse law with economics, to retard the understanding of the reciprocal action of the legal superstructure and its active role. At the same time as production relations are imposed on people regardless of their will, legal relationships are impossible without the participation of the conscious will of the ruling class. The teaching of Marx, Engels and Lenin

on law as an ideological superstructure needs no correction. Law cannot be understood unless we consider it as the basic form of the policy of the ruling class. In the later editions of *The Revolutionary Role of State and Law*, Stuchka supplemented his definition of law, developing the theory of the so-called three forms of law. The first, or in Stuchka's words, the concrete form of law, is a legal relationship which corresponds to a production relationship and, with it, constitutes the base [or] reality. On the contrary, the two "abstract" forms-statute and legal ideology as Stuchka expresses it-are the essence of "the manifest superstructure".<sup>14</sup>

This approach is also incorrect and non-dialectical. A legal relationship is a *form* of production relations because the active influence of the class organization of the ruling class transforms the factual relationship into a legal one, gives it a new quality, and thus includes it in the construction of the legal superstructure. This result is not achieved automatically by *laissez faire*, in the same way that prices are established under free competition. Even in the case of so-called customary law, the ruling class-through its special agencies, through the courts-ensures that the relations correspond to obligatory rules. This is all the more true with respect to the legislative creation of norms.

In particular, the revolutionary role of the legal superstructure is enormous in the transitional period when its active and conscious influence upon production and other social relationships assumes exceptional significance. Soviet law, like any law, will cease to exist if it is not applied. But the application of law is an active and conscious process by which the state apparatus plays the decisive role as a powerful weapon of class struggle. Would it be possible, for instance, to speak of Soviet law which did not somehow recognize the Soviet state, the Soviet agencies of power, Soviet courts etc.? It is clear that while an individual statute may be removed from the real legal order and remain a pious wish, concrete legal relationships may never be removed from the consciousness and will of the ruling class, may never be transferred from the superstructure to the base without parting from the heart of historical materialism.

From all that has been said above it is clear that the definition of law as a formal intermediary of the economy must be recognized as insufficient and incorrect. The different branches of law are connected differently with the economy; this must never be forgotten, and this is not expressed in the above-mentioned definition. On the



contrary it can lead to the notion that the area of law is limited to property relationships alone. Then all the other types of law must be declared non-existent. Stuchka would, in fact, have had to reach this conclusion. But he speaks of criminal and state law, not entirely consistently with his other position, i.e. by referring to them he recognizes their existence.

There is no doubt that economics is at the base of political, familial and all other social relations.<sup>15</sup> But the election law of any capitalist country facilitates the economy differently from civil law or the Criminal Code. To try to force all the varied branches of law into one formula is to give preference to empty abstractions.

Law as a formal facilitation of social and (primarily) production relationships must be studied concretely. This study may not be replaced with ready citations from Hegel with respect to the "transformation of form into substance and substance into form". The dialectical method, which teaches that every truth is concrete, becomes in this instance its own opposite-dead scholasticism, barren arguments and disputes on the theme that "form is not without content and content not without form". However, the matter really consists of showing the role and character of law as form in specific and concrete branches of law and concrete historical conditions with a relation to concrete content. Only in this manner can the real relation of form and content be established and can one be convinced that it is far from identical in different instances. Often legal form hides economic content directly contrary to it (thus in the period when we conducted the policy of restricting the kulak, the leasing of a horse or tools by a poor peasant to a rich one often hid the sale of the first's labour power to the second). A transaction of purchase and sale can hide the most diverse economic content. The same could be said about any other relationships within the so-called law of obligations. Here we meet with a phenomenon whose form is relatively indifferent to its content, but it is improper to conclude from this that in civil law we have a "faceless instrumentality" which must be used independently of the economic class content of the relationships which it implements. On the contrary, the significance of form is recognized only through content, through economics, through politics and through relations between classes.

. . . . .

Therefore, it is a flagrant error to equate law as an historical phenomenon—including various class systems—with the totality of those features of bourgeois law that derive from the exchange of commodities of equal value.<sup>16</sup> Such a concept of law minimizes the class coercion essential to bourgeois law, essential to feudal law and to all law. Law in bourgeois society serves not only the facilitation of exchange, but simultaneously and mainly supports and consolidates the unequal distribution of property and the monopoly of the capitalist in production. Bourgeois property is not exhausted by the relationships between commodity owners. These [owners-*eds.*] are tied by exchange and the contractual relationship is the form of this exchange. Bourgeois property includes in a masked form the same relationship of domination and subordination which, in feudal property, appears chiefly as personal subordination.

This methodological mistake was related to the relegation of the class repressive role of law, and to an incorrect presentation of the relation between state and law (the state as the guarantor of exchange), and to mistakes in questions of morality (the denial of proletarian morality) and in questions of criminal law.

The attempts to distinguish between formal characteristics and abstract legal concepts expressing the relationship between commodity owners, and to proclaim this "form of law" as the subject of the Marxist theory of law, should be recognized as grossly mistaken. This paves the way to the separation of form and content, and diverts theory from the task of socialist construction to scholasticism.

The immediate relation, in practice, between the proletariat (as the ruling class) and law (as a weapon with whose help the tasks of class struggle at any given stage are decided) is in this case replaced by the abstract theoretical denial of the "narrow horizons of bourgeois law" in the name of developed communism.

From this perspective Soviet law is seen exclusively as a legacy of class society imposed on the proletariat and which haunts it until the second phase of communism. The abstract theoretical exposure of "bourgeois" law hides the task of the concrete analysis of Soviet law at different stages of the revolution. Accordingly, it gives insufficient concrete indication of the practical struggle against bourgeois influences, and against opportunist distortions of the Party's general line on Soviet law.

The theoretical mistake of exaggerating the importance of market relations can be the basis for right opportunist conclusions about always preserving the bourgeois forms of law corresponding to private exchange. Conversely, to ignore exchange in considering the problems of Soviet law leads to “leftist” positions about the withering away of law which is now in the process of socializing the means of production, and about the withering away of economic accountability and the principle of payment according to labour, i.e. to the defence of the elimination of individual responsibility and wage egalitarianism.

### Notes

1. K. Marx, “Letter to Weydemeyer” (March 5, 1852), *MES W*, vol. 1, p. 528.
2. V. I. Lenin, “The Economic Content of Narodism” (1895), *LCW*, vol. 1, p. 419.
3. See Kellreiter's article “The State”, in D. Elster *et al.* (eds), *Handwörterbuch der Rechtswissenschaft* (1923), Fischer, Jena, p. 599.
4. V. I. Lenin, “A Contribution to the History of the Question of Dictatorship” (1920), *LCW*, vol. 31, p. 353.
5. F. Engels, *Ludwig Feuerbach and the End of Classical German Philosophy* (1888), *MESW*, vol. 3, p. 371.
6. *ibid.* p. 371.
7. From a resolution of the XVIIth Party Conference (1932).
8. J. Stalin, “The Fourteenth Congress of the CPSU” (1925), *Stalin: Works*, Foreign Languages Publishing House, Moscow (1954), vol. 7, p. 374.
9. V. I. Lenin, “What the “Friends of the People” Are (1894), *LCW*, vol. 1, pp. 141-42.
10. K. Marx, “The Class Struggles in France” (1850), *MESW*, vol. 1, p. 282.
11. P. I. Stuchka, *A Course on Soviet Civil Law* (1927), Communist Academy, vol. 1, p. 13.
12. *ibid.* pp. 78-79.
13. P. I. Stuchka, *The Revolutionary Role of Law and State* (1921), Moscow, p. 15.
14. *ibid.* (3rd edition); and P. I. Stuchka's article “Law” in *Encyclopaedia of State and Law*, (1925-1927), vol. 3, pp. 415-430.
15. “The state and law are determined by economic relations. Of course, the same must be said of civil law whose role in essence consists of the legislative clarification of the existing economic relations between individuals which are normal in the given circumstances.” F. Engels, *Ludwig Feuerbach and the End of Classical German Philosophy* (1888), *op.*

*cit.* p. 370.

16. This erroneous conception was developed in E. B. Pashukanis, *The General Theory of Law and Marxism* (1927), 3rd edition. See also E. B. Pashukanis, “The Situation on the Legal Theory Front”, *Soviet State and the Revolution of Law* (1930), no. 11-12; and *For a Marxist-Leninist Theory of State and Law* (1931) Moscow, where a critique of this mistaken conception is given.

## 8 *A Course on Soviet Economic Law\**

### Introductory Note

In his report to the XVIIth Party Congress, in January 1934, Stalin had observed that a section of the Institute of Red Professors continued to interpret the thesis of the construction of communism to mean that state power must be relaxed under the transitional period of socialism. This section, he warned, would be eliminated quickly and without unnecessary sacrifice if it did not recant its leftist prattle. The selection translated below, taken from an important textbook on Soviet economic law by Pashukanis and Gintsburg, represents a dexterous attempt by its authors both to accommodate to pressures from the Stalinist polity and to maintain the integrity of the implications derived from *The General Theory of Law and Marxism* concerning the nature of rules under the transitional period.

Pashukanis and Gintsburg argue that law is the organized and coercive consolidation of a certain structure of social relationships which correspond to the interests of the ruling class. Soviet economic law is a special form of the policy of the dictatorship of the proletariat, the proletariat organized as the ruling class. Proletarian policy is determined by the general guidance and decisions of the Party, and it is expressed in economic law and revolutionary legality. Soviet economic law is based on unity of purpose (technical rules) and applies to socialist production and commerce. But because the transitional period is characterized by distributive inequality,

\* E. B. Pashukanis and L. Ia. Gintsburg (eds.), *Kurs sovetskogo khoziastvennogo prava* (1935), Gosudarstvennoe Izd. Sovetskoe zakonodatel'stvo, Moscow, vol. 1.

legal (bourgeois) rules will be in effect until the higher stage of communism.

The distinction between legal and technical rules was assiduously applied by Pashukanis and his colleagues at the level of legal education and legal research, and *A Course on Soviet Economic Law* was the first systematic effort to codify the technical rules and institutionalize them in the revised curricula of Soviet law schools. Professor Hazard, who took this course and used this text book during his study of Soviet law in Moscow in the mid-1930s, reported that civil law as a taught discipline had itself almost withered away and was relegated to a few hours at the end of the course. As a result, the concept of the individual as a legal subject was eclipsed in Soviet legal theory and legal education, and was replaced by the state enterprise and other public corporate entities as the principal subject of law.

# *A Course on Soviet Economic Law*

## CHAPTER 1

### **The Subject and Method of Soviet Economic Law**

#### **1. Introductory remarks**

The October Revolution initiated a period of the revolutionary transformation of capitalist society into communist. The state of this period is the revolutionary dictatorship of the proletariat. The proletarian dictatorship is called upon to perform a task of exclusive complexity and difficulty, making unprecedented changes in the innermost bases of human life. The period of the dictatorship of the proletariat is not a passing episode, not an accidental, and not a brief period in the development of modern society.

We say to the workers

[wrote Marx]

you must survive 15, 20, 50 years of civil war and international struggles not only to change existing relationships, but also to change yourselves and to become capable of political rule.<sup>1</sup>

[This is so because]

it is not a matter of transforming private property but of eliminating it, not of concealing class contradictions, but of eliminating classes, not of improving existing society, but of founding a new one.<sup>2</sup>

The doctrine of the dictatorship of the proletariat was created and developed by the greatest theorists of scientific communism: Marx,

Engels, Lenin and Stalin. Marx and Engels showed the necessity and inevitability of the revolutionary overthrow of bourgeois authority and the establishment of the proletarian dictatorship as the political form of the transitional period from capitalism to communism. Lenin re-established and developed Marx's doctrine on the dictatorship of the proletariat which had been vulgarized and distorted by the theorists of the Second International. He also discovered the state form of the proletarian dictatorship which corresponded to the age of imperialism and proletarian revolution (the Soviets), laid the bases of the doctrine of building socialism in one country, and justified the practice of state and economic construction of the proletarian dictatorship in the conditions of capitalist encirclement. This is a continuation of the proletarian class struggle in new forms. Stalin enriched the heritage of Marxism-Leninism with the analysis and development of the basic questions of the theory and practice of the building of socialism. He expanded the Marxist-Leninist doctrine on the dictatorship of the proletariat into the grandiose doctrine of the building of socialism in one country. This occurred under the conditions of the delay of the world revolution and of intensified internal class struggle against the capitalist classes and their ideological arms-bearers-bourgeois restorationist theorists, right and left opportunists, and counterrevolutionary Trotskyites.

Stalin summed up the Marxist-Leninist doctrine on the dictatorship of the proletariat in the following manner. The proletarian dictatorship includes “three aspects”, three “characteristic features”

1. The utilization of the power of the proletariat for the suppression of the exploiters, for the defence of the country, for the consolidation of the ties with the proletarians of other lands, and for the development and the victory of the revolution in all countries.
2. The utilization of the power of the proletariat in order to detach the toiling and exploited masses once and for all from the bourgeoisie, to consolidate the alliance of the proletariat with these masses, to enlist these masses for the work of socialist construction, and to ensure the state leadership of these masses by the proletariat.
3. The utilization of the power of the proletariat for the organization of socialism, for the abolition of classes, and for the transition to a society without classes, to a society without a state.<sup>3</sup>



The proletariat organized as the ruling class solves the world-historic tasks noted here in the process of intensified class struggle. The forms of this struggle are multiple. The proletariat organizes the defence of the first state of the working people against intervention and external war; it suppresses the resistance of the capitalist elements within the country, reconstructs the small individual peasant agriculture and remakes the numerous masses of small owners into active builders of socialism. The proletariat uses, in the service of this new society, those cadres of old bourgeois specialists who were the former assistants of the bourgeoisie. Finally, in the process of intensified struggle with petit bourgeois influences, customs and survivals of the old society, it re-educates itself as well. The inculcation of socialist discipline is one of the most important new forms of the class struggle of the proletariat.

Soviet law, and in particular Soviet economic law, is one of the powerful weapons of the proletarian class struggle. Soviet law is a special form of proletarian policy. Soviet economic law itself is a *special (specific) form of the policy of the proletarian state in the area of the organization of socialist production and Soviet commerce*. This is its significance and role in the system of the proletarian dictatorship. All three aspects of the dictatorship of the proletariat, and all the forms of its class struggle, find their expression in Soviet economic law. Below we will consider the concept of Soviet economic law from three different sides:

(a) Soviet economic law, we affirm, is a form of the policy of the proletarian state in the area of the organization of socialist production and Soviet commerce.

(b) This definition is, however, insufficient. It still does not reveal the specific nature of Soviet economic law as a *special* form of proletarian policy. Its specific nature is determined by the concept of *revolutionary legality*. The application of the bases of revolutionary legality to the organizations of socialist production and Soviet commerce determines the concept of *Soviet economic law in the broad sense*.

(c) We limit our area still further, referring to *the property relations of socialist society* as the direct subject of Soviet economic law in the narrow sense of the term. The following exposition is devoted to Soviet economic law (in this last sense).

***2. Soviet economic law as the class law of the proletariat (as a special form of the policy of the proletarian state in the area of the organization of socialist production and Soviet commerce)***

*(i) Economics and policy*

All the objective possibilities for the building of socialism exist in the proletarian state. To the extent that the country of socialism has inexhaustible natural riches, to the extent that power is at hand—power which has the strength and desire to apply these resources for the use of the people (the dictatorship of the proletariat); to the extent that the system of the economy is planned, free from the accursed ills of capitalism; to the extent that the policy of the state is directed by the only consistently revolutionary Bolshevik part—to this extent, there are no strongholds which the Bolsheviks cannot conquer. It is all a matter of knowing how to manage production. Everything depends on the quality of economic management, on the correct organization of the economy, and on the mastery of technology. Politics cannot take priority over economics. Policy is expressed in the general guidance of the Party, in its decisions, and in such documents as the *Six Conditions of Comrade Stalin*. These “determine the regularities of our economic development and our victorious approach to socialism.”<sup>4</sup>

What explains this new, immeasurably expanding rule of the political superstructure? It is explained by the new combination of productive forces and productive relations under the conditions of the proletarian dictatorship. The only “truly revolutionary class” is the “proletariat”. On the other hand, “of all the means of production the most productive force is the revolutionary class itself.”<sup>5</sup> In a state in which power is in the hands of the working class, “the most productive force” is the bearer of state authority and the owner of the basic means of production. This is the source and explanation of the special role and exceptional significance of the political superstructure during the dictatorship of the proletariat.

These facts are very closely related to Soviet economic law. Soviet economic law has great significance as one of the factors of the revolutionary socialist transformation of social relationships. After the proletarian revolution the greatest task *is organizational* and, particularly, the task of implementing the “extraordinarily complex and fine network of new organizational relations encompassing the

planned production and distribution of the products necessary for the existence of tens of millions of people”.<sup>6</sup> The organizational question takes on a most decisive significance in the conditions of the second Five Year Plan. “Now, when the general line of the Party has won”, states the decisions of the XVIIth Party Congress, “when the policy of the Party has been tested in practice, in the experience not only of the members of the Party but also of millions of workers and working peasants, the task of raising organizational work to the level of political leadership stands out.” The organizational question, remaining subordinate to the question of policy, nevertheless has exceptional significance in this light.

Soviet economic law is a system of measures necessary for the solution of the most important organizational problems of the building of a socialist economy. All its principles and institutions such as plan discipline, one-man management, economic accountability, contract discipline etc.-appear, upon closer examination, to be important levers of the organization of socialist production and Soviet commerce. The plan is the law of the Soviet state. Fulfilment of the plan is the sacred obligation of every economic agency, of every manager, of every working person. The obligatory nature of acts of socialist planning (plan discipline) is supported by various sanctions, in particular by the threat of criminal repression. The plan as law, and the court as the guardian of the plan and law, are thus two of the most important levers in socialist organization. One-man management is the most important principle of the organization of socialist production. The socialist economy, based upon a high-level technology, requires the strictest unity of will, unquestioning subordination to the will of the Soviet manager. The consistent application of one-man management is confirmed by a series of Party decisions and legislative acts; the violation of one-man management is considered a violation of the laws of the Soviet Union, as a distortion of the Party line in questions of economic construction. Economic accountability is the basis of economic activity in all sectors of the national economy. Finally, the Soviet economic contract-the “best means of combining the economic plan and the principles of economic accountability”, one of the elements of unified Bolshevik policy-plays a huge role in the task of implementing a very fine network of organizational relations in the socialist economy. The consistent implementation of economic

accountability, and the strengthening of contractual discipline, are the most important instruments for the expansion of Soviet commerce-of “commerce without profiteers, small and large”.<sup>7</sup>

A quick look at the history of Soviet economic construction also reveals the role of Soviet economic law as a form of the policy of the proletarian state.

In the first years of the building of socialism, one of the first tasks of the victorious proletariat consisted in the expropriation of the basic economic commanding heights from the bourgeoisie. The nationalization of industry, transport, banks and land constitutes the basic content of Soviet economic legislation in the first years of Soviet power. The consistent execution of the legislation on nationalization (i.e. the actual possession by the proletariat of the factories, plants, transportation and credit institutions expropriated from the bourgeoisie) is one of the most remarkable events in the history of socialist construction. Simultaneously, this is one of the most interesting events of the history of Soviet economic law.

In 1921-1922, the Party manned the helm of economic policy. The union of the working class and the peasantry was transferred to the rails of commerce. In connection with this the market was re-established, and capitalist elements were permitted (with essential limitations). This policy found its expression in a series of major legislative acts. A basic document, and characteristic for the years of NEP, is the *Civil Code of the RSFSR* (1922). The basic ideas of the economic policy of the first years of NEP are imprinted in it. Here is the commanding position of socialist property (Arts. 21 and 22 of the *Civil Code*), the limited legalization of private ownership and civil commerce (Arts. 1, 4, 5, 54, 55, 58 of the *Civil Code* etc.), the elements of state capitalism (Arts. 55, 153, 154, 162 of the *Civil Code*) and the priority rights of the working people and the state (Art. 5 of the *Introductory Act*, Art. 30 of the *Civil Code*).

Finally, both the economic legislation now in force, and the practice of its realization, have played a most important role in the conduct of the policy of expanded socialist offensive, of uprooting capitalism and of building a classless society. “The plan, and contracts, and economic accountability-all these are elements of a unified Bolshevik economic policy”, stated Comrade Molotov

at the January Plenum of the Central Committee and the Central Auditing Commission (1933).

The plan, contract and economic accountability on the one hand and social (socialist) property as their basis on the others, are simultaneously the most important categories of Soviet economic law. The concrete application of these principles, and their disclosure in the regulation of different branches of Soviet economy, constitutes the content of the system of economic law of the U.S.S.R.

The role of Soviet economic law as a form of the policy of the proletarian state is revealed exceptionally clearly in judicial and arbitration practice. In 1925, for instance, the Supreme Court of the RSFSR established the rule of the so-called "presumption of state ownership", i.e. that in case of a dispute between state agencies and private persons on the right of ownership to property, such property is always presumed to belong to the state and the burden of proving the opposite always rests upon the private party. This rule was widely used in the conduct of the policy of limiting and eliminating capitalist elements. Another example is provided by the *State Arbitration of the U.S.S.R.* (1932) which established the principle of strictly limited interpretation of instances of so-called "impossibility of performance", i.e. of absolving contractual liability. *State Arbitration* recognized that an accident 'in production, shortages of material supplies and a series of other circumstances, were not a basis for absolving responsibility. This rule had great significance for supporting contractual discipline between economic agencies, and therefore for the fulfilment of the national economic plan. It was subsequently sanctioned in legislation.

*(ii) Soviet economic law-the class law of the proletariat*

Thus, Soviet economic law is a special form of the policy of the proletarian state in the organization of socialist production and Soviet commerce.

Policy is a relation between classes. As a form of the policy of the proletarian state, Soviet economic law expresses the will (or interests) of the ruling class organized in the state-the will of the proletariat. Bourgeois law is supported by all the power of the bourgeois state. Soviet economic law is protected by all the power of the proletarian dictatorship. Soviet economic law is class law, just as bourgeois law is also, just as is law in general. But it does not reflect

the interests of an exploiting class and it does not strengthen and perpetuate exploitative relationships. On the contrary, being a weapon in the hands of the last of the exploited classes, whose emancipation means the “abolition of *all* inhuman living conditions of modern society” (i.e. of capitalist society),<sup>8</sup> Soviet economic law is used in the struggle for classless socialist society, where there will be no exploitation of man by man.

Socialism may be constructed only in the process of intensified class struggle. “The abolition of classes will not be achieved by way of eliminating the class struggle, but by its intensification. “The suppression of the resistance of the expropriated exploiters, the leadership of millions of the masses of the working people, positive creation in the building of the socialist economy—these are the different tasks of the proletarian dictatorship and at the same time the various forms of the class struggle of the proletariat. They determine the content of the institutions of Soviet economic law. Relationships connected with the execution of the laws on nationalization, on collectivization, on the liquidation of the kulaks as a class on the basis of total collectivization (the Law of February 1, 1930, “On Measures for the Strengthening of the Socialist Reconstruction of the Agricultural Economy in the Regions of Total Collectivization and on the Struggle with Kulakism”), on the expansion of Soviet commerce “without profiteers—small or large”—all this is not only the new Soviet economy, but simultaneously also the new Soviet economic legal relationships. Moreover, during the whole course of its development, beginning with the October Revolution, the class nature of Soviet economic law has been *unitary*. This is the law of the proletariat building socialism.

The thesis of the class (and proletarian) nature of Soviet economic law has been repeatedly subjected to dispute. In 1925 Reisner came out with an affirmation of the mosaic, patchwork nature of Soviet law from the perspective of its class content. In Soviet law, in Reisner's opinion, there are different “pieces”: both classical proletarian law (the *Code of Laws on Labour*, the *Decree on Trusts*), petit bourgeois law (the *Land Code*) and bourgeois law (the *Civil Code*). Each of the three “pieces” reflects the will and interests of one of the three social classes of the transitional period: the working class, the petit bourgeoisie, and the NEP-men capitalists.

In 1928, Professor Shreter characterized Soviet economic law as a “faceless instrumentality”. In Soviet economic law there is, purportedly, no “internal social orientation”.<sup>10</sup>

In 1930, Stal'geovich found in Soviet law certain “reactionary possibilities” which were the reflection of the interests of classes hostile to the proletariat.<sup>11</sup>

Finally, in 1931, Liberman presented a theory which ignored the class differences between Soviet and bourgeois law. According to Liberman, every civil law, and thus Soviet civil law, has as its basis the law of private property. Therefore, the abolition of kulak property and the process of the liquidation of the kulaks as a class, were connected (for Liberman) with the proposal of the abolition (liquidation) of Soviet civil law, a proposal that was clearly Trotskyite in its essence. It ignored all differences between kulak private ownership of the means of production and the private property of the medium-scale peasant.<sup>12</sup>

These “theories” slander Soviet law. Soviet law is a form of the policy of the proletarian dictatorship. This policy is unified in its class proletarian essence. The fact that the proletariat, at different stages of socialist construction, structures its relations differently with respect to different classes (with respect to the rural bourgeoisie: for instance, at one stage a policy of tolerance and limitation; at another, liquidation of the kulaks as a class), does not shake the unity of the class essence of working class policy. The methods and concrete ways change, but the final goals and tasks do not change. Accordingly, the nature of those measures, through which those goals are realized directly or indirectly, does not change. Likewise, Soviet economic law, as one of the forms of proletarian policy, remains unitary in its class proletarian nature at all stages of its development.

### **3. Socialist (revolutionary) legality and Soviet economic law**

#### *(i) The concept of socialist (revolutionary) legality*

The proletarian dictatorship builds the socialist economy, organizes the process of expanded socialist reproduction by various ways, method and means. Not all of them are law. We speak of law only as the organized and coercive consolidation of a certain structure of social relationships which correspond to the interests of the ruling class.

Equally, Soviet economic law is not all and not every proletarian policy in the area of the organization of socialist production and Soviet commerce. It is not accidental that we define Soviet economic law as a special form of the policy of the proletarian state. The special (specific) nature of the policy of the proletarian state in the area of the organization of socialist production and Soviet commerce are most clearly revealed through the concept of socialist (revolutionary) legality.

Socialist (revolutionary) legality has enormous significance in the practice of the construction of socialism and of Soviet state administration. The violation of revolutionary legality a disruption of the proletarian state, and an aid to the class enemy. "The least illegality", wrote Lenin, "and the least violation of the Soviet order, is a breach which the opponents of the working people will, immediately use."<sup>13</sup> In 1922, in a letter to Stalin, Lenin characterized revolutionary legality in the following manner:

Legality cannot be one thing for Kaluga and another for Kazan, but must be uniform for all Russia and uniform for the entire federation of Soviet Republics."<sup>14</sup> As the central task of the new agency of Soviet authority created in 1922, the procuracy, Lenin stated: "The procurator has the right and duty to do only one thing: to pursue the establishment of a truly uniform concept of legality in the entire Republic, despite any local differences and influences whatsoever . . ."<sup>15</sup>

Revolutionary legality signifies uniformity in the application of the policy of the Party and government, and undeviating observance of the decrees and prescriptions of the agencies of the proletarian dictatorship in the entire country. There must not be arbitrariness and wilfulness in the understanding and execution of the directives of the higher agencies of the proletarian dictatorship. Local initiative, independence of the lower state, social and economic agencies of the proletarian dictatorship, must develop within the bounds of general Soviet legislation. Revolutionary legality depends on exact and clear instructions from central agencies: directives, decrees, laws, i.e. the publication of general norms that are obligatory for all the local agencies and citizens. A special state apparatus is created to defend revolutionary legality. This guarantees undeviating observance of the bases of revolutionary legality: the procuracy, the court, arbitration. Revolutionary legality finally signifies the uniform



*application of the directives of the Party and the government by the masses of working people themselves* (state discipline) and by their mass social organizations.

In *The German Ideology* Marx defines the concept of bourgeois legality: law is the will of the ruling class. The content of a law “is always given by the relations of this class, as private and criminal law especially clearly show”. In law, the will of the ruling class obtains “general expression in the form of the will of the state”. In the law the ruling classes apply their own will, but at the same time they do this in a form “independent of the personal will of any one separate individual among them”.<sup>16</sup>

Bourgeois legality is directed, naturally, at the defence of the basic conditions of the capitalist mode of production, at the protection and strengthening of bourgeois private property, and the guaranteeing of the rights of “man and citizen”, i.e. the right of the owner and the exploiter to suppress the revolutionary actions of the exploited classes.

In contradistinction to bourgeois legality, socialist (revolutionary) legality expresses the will of the last of the exploited classes, which has taken power—the will of the proletariat. The laws of the proletarian dictatorship are directed at the liquidation and extinction of exploitative relationships. In the hands of the proletariat they are a weapon for building a classless socialist society. They strengthen not private, but public (socialist) property, they protect and preserve the rights of the working people as citizens of the socialist state. “Regularity and order”, states Marx, “are the form of social consolidation of the given mode of production and therefore its relative emancipation from simple chance and simple arbitrariness.” Socialist “regularity and order”, i.e. socialist (revolutionary) legality, is a “form of social consolidation” of the socialist mode of production. In other words, revolutionary legality has a tremendous significance as a factor strengthening new socialist production relations, the new socialist order.

It would be incorrect to think that revolutionary legality is characteristic only of certain stages of the development of the proletarian dictatorship (in particular the first stage of NEP), or that revolutionary legality is peculiar only to the period of the toleration and limitation of capitalist elements. This is the doctrine of bourgeois jurist restorationists, the choir of the capitalist restoration. For them,

revolutionary legality was a synonym for the policy of tolerating capitalist elements. Moreover, in a bourgeois-restorationist spirit, they distorted the purposes of this policy. Emphasizing the significance of revolutionary legality in 1921-1922, they interpreted it as the regression of Soviet Russia, as progress towards ordinary bourgeois social and legal order.

The meaning of this perspective was found in the proof of the purported defeat of the Bolsheviks. For the old-school jurists (the group of bourgeois professors from the journal *Law and Life*), revolutionary legality was “legally unthinkable”; the policy calculated to strengthen revolutionary legality was a policy of strengthening legality “in general”, in other words, bourgeois legality.

In fact, the concept of revolutionary legality was not limited to the first years of NEP. Revolutionary legality is neither a synonym for permitting capitalist elements nor, of course, for the restoration of capitalism. Revolutionary legality keeps its significance for all stages of development of the proletarian dictatorship and for all forms of the class struggle at each of these stages. Revolutionary legality was necessary for the proletariat in the years of Civil War, in the first years of NEP, in the years of elimination of the survivals of War Communism in the countryside (1925-the XIVth Party Congress), and even now, in the period when the foundation of the socialist economy has been built, and the principles of socialism have been finally embedded in the economy of the country.

At the height of the civil war, on December 6, 1918, the VIth All-Russian Congress of Soviets adopted a special decree “On the Observance of the Laws” (*Collection of Legislation*, 1918, no. 90, item 908). The Congress asked “all citizens of the republic, all agencies and all officials of Soviet power, strictly to observe the RSFSR laws, decrees, statutes and orders issued and published by central authority”. Strict legality was necessary for the conduct of Civil War. The proletariat used revolutionary legality as one of the weapons in the most acute form of class struggle.

In December 1921, formulating the bases of the NEP, the IXth Congress of Soviets, in the resolution on the Cheka, emphasized the necessity of strengthening the bases of revolutionary legality. In the resolution on economic work, the *Congress of Soviets* demanded more energy from the People's Commissariat of Justice in two respects:

In the first place, the people's courts of the Republic must strictly monitor the activity of private commerce and entrepreneurs, not allowing the least restraint of their activity, but at the same time strictly punishing the least attempts to depart from the undeviating observance of the laws of the Republic. They must raise the broad masses of workers and peasants to independence, and ensure their swift and effective participation in the work of supervising the observance of legality; in the second place, people's courts must pay more attention to the judicial prosecution of bureaucratism, red tape and economic disorganization (*Collection of Legislation, 1922, no. 4, item 30, para. 7, item 42*).

The Congress emphasized the necessity of the prompt enactment of major legislative work on the preparation of a series of compilations of laws and codes. This work was conducted during 1922 (the *Criminal, Civil, Land and Labour Codes*).

In 1925, the XIVth Party Congress recognized “that the interests of strengthening the proletarian state, and the further growth of confidence in it on the part of the broad masses of the peasantry-in connection with the Party policy currently being conducted require the maximum strengthening of revolutionary legality, particularly in the lower agencies of authority.” In 1927-1930, the Party and the working class applied Soviet laws for the struggle against the kulaks, who had sabotaged the state planned measures on agricultural procurement, on taxes and, on the socialist reconstruction of agriculture.

Finally, at the new stage, when the question of “who-whom” was already decided in full favour of socialism in both the town and the countryside, when on the base of the successful fulfilment of the First Five Year Plan, an advanced technical base had been created for the socialist reconstruction of the whole national economy, the Party again clarified the question of revolutionary legality.

In the Decree of the Central Executive Committee and the Council of People's Commissars (June 25, 1932), it was emphasized that revolutionary legality was “one of the most important means of strengthening the proletarian dictatorship, of protecting the interests of the workers and of the working peasants, and of combatting the class enemies of the working people (the kulaks, middlemen, blackmarketeers, bourgeois wreckers and their counter-revolutionary political agents).” Therefore the Party proposed to all Party organi-

zations; to provide the court and the procuracy with all possible aid and support in the work of strengthening revolutionary legality and consistently executing the Party directive that Communists be strictly accountable for the slightest violation of the laws.

On July 20, 1933, the all-union procuracy was formed. This was for the purpose of strengthening socialist legality and the proper protection of public property in the U.S.S.R. from encroachments on the Party by anti-social elements.

At the XVIIth Party Congress, Comrade Stalin stigmatized Soviet personages” or violators of Soviet laws.

These people, on account of their past services, have become “personages”. They consider that Party and Soviet laws are not written for them, but for fools. These are the same people who do not consider it their duty to carry out the decisions of the Party and the government. They destroy the bases of Party and state discipline. What do they hope to achieve in violating Party and state laws? They hope that Soviet power will decide not to touch them because of their former services. These conceited personages think that they are irreplaceable and that they can violate the decisions of leading agencies without punishment. What should be done with such people? They should be removed from leading posts without hesitation and without consideration of their past services. They should be replaced and demoted and this should be published in the press. This is necessary in order to destroy their arrogance and to put them in their place. This is necessary to strengthen Party and Soviet discipline in all our work.<sup>17</sup>

The creation of the People's Commissariat of Internal Affairs has tremendous significance for the strengthening of the bases of revolutionary legality in all areas of Soviet construction. The main tasks of the People's Commissariat of Internal Affairs consists of protecting revolutionary order, state security and public (socialist) property.

Of course the content of revolutionary legality has now (at the new stage) essentially changed. But it still acts as a powerful working class weapon for uprooting capitalism and building a socialist society. The new content of revolutionary legality at the present stage was exhaustively characterized in the report by Comrade Stalin at the January Plenum of the Central Committee and the Central Auditing Committee in 1933:

Revolutionary legality of the first period of NEP ... was directed mainly against the extremes of War Communism and

“illegal” confiscations and requisitions. It guaranteed the private homeowner, farmer and capitalist the preservation of their property on the condition of their strict observance of Soviet laws. The situation is entirely different with respect to revolutionary legality in our time. Revolutionary legality of our time directs its cutting edge not against the extremes of War Communism, which have long since ceased to exist, but against thieves and wreckers in the public economy, against hooligans and plunderers of public property. The basic concern of revolutionary legality in our time consists only in the protection of public property.<sup>18</sup>

The Party has repeatedly needed to defend the correct concept of revolutionary legality from attacks, onslaughts and distortions by a variety of anti-Party tendencies and movements. Attempts have been made to contrast revolutionary (or economic) expediency. In this instance revolutionary legality was reduced to the “protection of the personal and property rights of citizens of the U. S. S. R. “ and was used in the struggle against the Party line, directed originally at the limitation and then at the liquidation of capitalist elements. Purportedly relying upon revolutionary legality, on the necessity of the strict observance of Soviet laws and decrees, the right opportunists opposed the measures of the Soviet state for mass confiscation of property from the kulaks in connection with all-out collectivization. The erroneousness of this point of view is obvious. The coercion (unlimited by law) against exploiters is written in the Soviet Constitution. On the other hand, even the application of the sharpest measures of struggle against the exploiting and parasitical elements does not eliminate the necessity of struggle with those who apply the measures incorrectly, distorting the policy of the Party and Soviet authority or allow abuses of it. It was so clear to Lenin that Soviet legality could be nothing other than revolutionary that in the above cited letter, to Comrade Stalin, he spoke simply of legality.<sup>19</sup>

The right opportunist concept of revolutionary legality-a concept which merges with the liberal bourgeois concept-is a distortion of the question of revolutionary legality. Other distortions are ignorant, naive and careless attitudes towards revolutionary legality. In practice these degenerate into naked bureaucratism, arbitrariness, wilfulness, ignoring the rights of the working people as citizens of the Soviet Union. The Party also conducts an implacable struggle

with the “left” deviation at the basis of which lies the same contrast between law and revolution, and between legality and expediency.

*(ii) Soviet economic law as the realization of the principles of revolutionary legality in the area of the organization of socialist production and Soviet commerce*

A constituent part (one of the most important parts) of all revolutionary legislation of the first proletarian state in the world is economic legislation. Soviet economic legislation is brought to life under the guidance of the Party by the state (Soviet) apparatus, Soviet economic organizations, by the whole mass of working people and by individual citizens of the Soviet Union. Special agencies of state authority protect revolutionary legality in this area: the procuracy, court, agencies of state and departmental arbitration.

From this viewpoint, all Soviet economic law can and must be understood as the *application of the principles of revolutionary legality to the organization of socialist production and Soviet commerce*. One of the most important institutions of Soviet economic law--contractual discipline--is nothing other than the realization of the principles of revolutionary legality in the mutual relations of economic agencies and other participants in economic commerce in the U.S.S.R. Revolutionary legality, as the “iron discipline of the Party and the state”, is the organizational basis for the administration of socialist enterprises, i.e. the organizational basis of socialist production. Most significant, particularly at the present stage, are questions of the protection of the property rights of toiling people, workers, collective farmers, individual peasant farmers and employees.

The perspective that the question of revolutionary legality found in the report of Comrade Stalin at the January Plenum of the Central Committee and Central Auditing Committee relates only to the area of criminal legislation, is unconditionally wrong. The protection of public (socialist) property is a basic concern of revolutionary legality at the present stage. But the protection and strengthening of public property is realized not only by applying criminal repression against direct plunderers of property, thieves and rogues, but also by a system of measures strengthening socialist production and Soviet commerce. Such measures are: strengthening financial budgeting, credit, plan and contract discipline, the introduction of a system of

savings, economic accountability, and “control by the rouble” of the practical work of Soviet economic organizations etc. These questions are within the competent sphere of Soviet economic law and are, therefore, together with other parts of revolutionary legality, a powerful weapon of the proletarian dictatorship for building a classless socialist society.

#### ***4. Soviet economic law as a system of property relations of the transitional period from capitalism to communism***

##### *(i) The concept of property relations*

The definition of Soviet economic law developed above embraces a very broad area of social relationships. This is the concept of Soviet economic law in the broad sense. We delineate it in the narrower concept of Soviet economic law in the actual (or narrow) sense of the term. Its subject is the *property relations of socialist society*.

Property relations occur when people enter into the process of producing the material conditions of their existence, i.e. production relations. But these are not simply production relations, but are production relations taken from the position of their “legal expression”, i.e. as “relations of property”. In other words, they are “relationships between individuals in connection with the materials, instruments and products of labour”.<sup>20</sup> They are formalized in a definite manner, confirmed and supported by the organized power of the ruling class, and are the relations for the distribution of labour and its products among the members of society. “Whatever the social forms of production”, states Marx, “workers and means of production always remain its factors. But, being in a condition of isolation from each other, both of these factors are only potential factors. In order to produce at all, they must be united. The special character and method by which this union is realized identify the distinct economic stage of a social structure.”<sup>21</sup>

The special character and method which is given to the matrix of labour power and the means of production under capitalism, finds its expression in the institution of the private ownership of the means of production. The special character and method of combining labour power and the means of production under the conditions of a socialist economy, is expressed by the institution of public (socialist) property. Bourgeois property, and the capitalist classes' monopoly

of the means of production, is a source of capitalist domination over the proletariat and of capitalist exploitation (a special form of the appropriation of another's labour). Under the dictatorship of the proletariat, the distance between the direct producer, the means of production and the product of labour, is eliminated. The working class, "the most productive force", itself as the "organizer, as the ruling class" (i.e. as the state), becomes the owner of the instruments and the means of production and the "master of its product".<sup>22</sup>

To the extent that economic law relations are property relations and property relations are relations of ownership—the law of property is the central concept of every system of economic law: private ownership of the means of production is the central concept of bourgeois civil law, public (socialist) property is the central concept of Soviet economic law. All bourgeois "civil commerce" is a particular type of the circulation of private property. Equally, the system of Soviet economic law may be correctly understood only as public (socialist) property set in motion in the struggle with private property. Therefore, the law of August 7, 1932, "On the Protection and Strengthening of Public (Socialist) Property" (*Collection of Laws*, 1932, no. 62, item 360), the significance of which is correctly compared with the *Constitution of the U.S.S.R.*, defines public property as the basis of the entire Soviet system: "The Central Executive Committee and the Council of People's Commissars of the U.S.S.R. decree that public property (state, collective farm, co-operative) is the basis of the Soviet system, and that it is sacred and untouchable."

As the legal expression of production relations, property relations may and must be understood as an organizational form of social production and "the social exchange of objects". This is the way Marx understands them. For him, feudal property relations are "the feudal organization of agriculture and industry", bourgeois property relations are the "modern [i.e. capitalist-eds.] organization of production".<sup>23</sup> Marx sees this organizational content in individual institutions of bourgeois civil (i.e. property) law. Thus, the different forms of property are different stages in the division of social labour. In particular, private property is "a necessary form of intercourse [stress ours, E.B.P.] at a given stage in the development of the forces of production".<sup>24</sup> It is the same with contract, in particular, with the contract of purchase and sale, personal hiring etc. The contract of



purchase and sale, for instance, serves the social division of labour between the various branches of labour, and hired labour is “the essential bourgeois organization of labour”.

P. 1. Stuchka, following Marx, correctly characterizes the bourgeois civil code as a sort of charter of bourgeois civil society, i.e. as an act determining the internal order of society, its organization, the relations of its constituents—accordingly, as an organizational act.<sup>25</sup> It is true that in the conditions of bourgeois society the civil code “organizes” disorganization: the anarchy of production and capitalist competition. But in this respect this is bourgeois society itself; it does not have the power to cease being itself, i.e. to eliminate private property, to end capitalist competition. Therefore, one must not over-rate the organizational possibilities of bourgeois civil law. Furthermore, the bourgeoisie tries to use the political superstructure --state and law—for the purposes of ordering the course of social production. In the period of imperialism in general, and in particular in the recent years of the intensive process of the fascistization of the bourgeois state, these tendencies have been strengthened. But they do not and cannot produce the desired result, for they all leave unmoved the primary basis of capitalist society: capitalist private property.

Property relations in the U.S.S.R., as the legal expression of the production relations of socialist society, are thereby also the “formal organization” of socialist production and of the socialist “public exchange of objects”, i.e. of Soviet commerce. But posing the question of ownership in the U.S.S.R., and of the decisive role of public (socialist) property, places the whole problem of socialist property relations on a new level. To the extent that in the U.S.S.R. the basic economic commanding heights belong to one owner—to the proletariat, organized as the ruling class and also the most productive social force—to this extent possibilities are created for the organization of the management of the processes of social production and exchange, for the conscious and planned construction of a socialist economy; processes that are entirely unattainable for capitalism. Hence, the organization of production and exchange in the U.S. S. R. is the problem of control of the process of social production and organization of economic relations between the individual links of the socialist economy. This compels us to understand Soviet economic law, whose subject is the system of property relations of socialist

society, as a *special form of the policy of the proletarian state in the area of the organization of the administration of the economy and the organization of economic linkages.*

(ii) *Property relations in socialist society*

But the question of socialist property relations under conditions of socialism is more complex than it seems at first glance. In capitalism everything is based upon private property. Private property divides. Private property presumes a multitude of owners with distinct interests, property rights and liabilities. Therefore, the capitalist system of relations of production and exchange is simultaneously an endless chain of relationships between property owners, between capitalists and workers, industrial and commercial capitalists, capitalists and landowners etc.

Conversely, public (socialist) property is *unitary*. It does not divide, but joins. Moreover, in the course of the Second Five Year Plan, public (socialist) property will become the sole form of ownership of the means of production. The socialist mode of production is being transformed into the sole mode of production in the U.S.S.R. It may be asked how are property relations, i.e. relations between owners, possible in these conditions (since there is no longer a *multitude* of owners)?

The classics of Marxism give the answer to this question.

“Law”, says Marx, “can never be higher than the economic structure of society and the cultural development conditioned by it.”<sup>26</sup> The new socialist society proceeds from the womb of capitalism; we can see that during the course of a long period, “in all its relationships-economic, moral and intellectual-it will still bear the imprint of the old society from whose womb it came;”<sup>27</sup> hence the preservation in the new society (at the first phase of its development-under socialism) of the tracer of “bourgeois law” as the regulator of the distribution of products and the distribution of social labour. Lenin, developing Marx’s thoughts, writes:

... At the first phase of communist society (which is usually called socialism), bourgeois law is not abolished in full, but only in part, only in proportion to the economic transformation already achieved, i.e. only with respect to the means of production. Bourgeois law recognizes them as the private property of individual persons. Socialism makes them public property. To this extent-and only to this extent-bourgeois law disappears,

but it remains nevertheless in its other part, remains as a regulator (definer) of the distribution of products and the distribution of social labour. He who does not work, neither shall he eat-this socialist principle *is already* realized; for an equal quantity of labour, an equal quantity of products-this socialist principle is also *already* realized. However this is still not communism and this still does not eliminate bourgeois law that gives an equal quantity of products to unequal people for an unequal (unequal in fact) quantity of labour.<sup>28</sup>

Thus, in the first phase of communist society, under socialism, there is not and cannot be exploitation. Private property in the means of production has been eliminated. The socialist principle of remuneration according to labour is fully in effect, but “bourgeois” (in quotes) law is preserved. The preservation of “bourgeois” law consists here in the fact that an even scale (even measure) is applied to (factually) unequal persons, to unequal relations. Inequality, therefore, is preserved. Therefore, the norms which legalize this inequality are protected by the state, which maintains them by coercion. Only “in the higher phase of communist society, after the enslaving subordination of the individual to the division of labour disappears; when the opposition between mental and physical labour disappears; when labour ceases to be merely a means for life and becomes life’s prime want; when the all-around development of the individual, the forces of production and all the sources of social wealth flow in full stream-only then may the narrow horizon of bourgeois law be fully overcome and may society inscribe on its banner: from each according to his abilities, to each according to his needs!”<sup>29</sup> Only at this stage will law and the state finally wither away.

The preservation under socialism of “bourgeois law”, i.e. of material inequality, means that individual members of society-working people-will enter into relations with one another as bearers of property rights and duties, as “persons “-subjects of law. They are owners, but the range of objects capable of being the object of the right of property for individual persons under socialism is limited to objects of consumption. Means of production belong to all society.

However, according to Lenin, “bourgeois law” is the regulator not only of the social distribution of products, but-within certain limits-also of the “distribution of labour”. The distribution of labour between different branches of the economy is also the

problem of *organization of socialist production*, but in the conditions of socialist society, the *organization of the administration of socialist production*. What does the preservation, in this area, “of the narrow horizon of bourgeois law”, (i.e. the application of an equal scale to the unequal) consist? It consists of the use of the method of economic accountability by the proletarian state for the purpose of the planned management of the socialist economy. Socialist enterprises, transferred to economic accountability, enter into relations with one another as property-wise distinct economic units, as bearers of independent property rights and duties. An organization of economic accountability is not a private owner. The part of state property assigned to an organization of economic accountability is “alloted” to it, but does not cease to be part of the single fund of state property. But at the same time, an organization with economic accountability has “its own” basic property, its own working assets, and independently enters (within limits and for the fulfilment of planned tasks) into property relations with other organizations having economic accountability. Therefore, recalling the words of Lenin at the VIth Congress of Soviets on the remnants of “bourgeois law” under socialism, Comrade Molotov illustrated this with the examples of the organization of the distribution of labour and incomes in collective farms, the policy of wages, co-operative trade and *economic accountability in state industry*.<sup>30</sup>

Such are the reasons why in socialist society not only relations between individual workers, in the distribution of consumer items, take on the nature of property relations, but also the relations between the links of the socialist economy for the organization of socialist production and Soviet commerce.

These reasons are not, however, exhaustive. They do not explain the whole multitude of property relations either beyond the limits of the second Five Year Plan under the conditions of the classless socialist society, or even less so at the present stage of development of the U.S.S.R.

The proletariat of the U.S.S.R. is building socialism within a capitalist encirclement. The presence of intensive economic ties between the U.S.S.R. and the capitalist world invokes a number of institutions of Soviet economic law. Within the limits of the homogeneous and dominant public (socialist) property in the U.S.S.R., the difference between state socialist and collective farm co-operative

property retains all its significance. The Party firmly holds to its course on the organizational-economic strengthening of collective farms in the form of the *artel*, i.e. it also considers it necessary to preserve the personal supplementary farming of the collective farmers along with the public collective farming. For all of the second Five Year Plan, and with the predominant role of socialism in the economy of the U.S.S.R., a petty commodity structure will also be maintained (individual peasant farming, craftsmen who are not members of co-operatives). All these are facts which must be taken fully into account to understand the rich content of the system of Soviet economic law.

### ***5. The system of Soviet economic law***

#### *(i) Public and private law*

Soviet economic law is not one indivisible whole. just like every other sphere of social relations, it is divided into several more or less independent parts. In correspondence with this, the science of Soviet economic law is also divided into a number of sections, the system and order of which is determined by the real delineation of the object itself

The literature of Soviet economic law unanimously sets apart the regulation of relations for labour (labour law), for land use (land law) and for the family (family law) from the general system of Soviet economic law. As for the rest, the delineation of the content of Soviet economic law is usually made in accordance with the forms adopted in bourgeois codes and bourgeois jurisprudence. It is necessary, first of all, to linger on these forms adopted in bourgeois codes and bourgeois jurisprudence and on the question of the propriety of their transfer to Soviet reality.

The division of law into public *and private* is basic to bourgeois law. One of the most important bourgeois civil law specialists, Dernburg, distinguishes between the spheres of public and private law as follows:

The main idea is the following. If a legal norm is designed to serve primarily the interests of individual persons, then it relates to private law; if it is for the social interest, then it belongs to public law. This division corresponds to the dual position of man in society. As a free personality he is the bearer of his own

goals, he is an independent centre of legal relations. But at the same time he is a member of an expanded association to which he is subordinated, and which he serves.<sup>31</sup>

Public law includes state law, criminal law, criminal and civil procedure, canon law and international law. Private law includes civil law in the broad sense of the term (including commercial law and its subdivisions).

Dernburg's definition is not generally recognized. Dozens of theories have been put forth on this question by bourgeois jurisprudence. In particular, in the Russian literature of the last years before the revolution and among Soviet bourgeois jurists, I. A. Pokrovsky's viewpoint enjoyed great success. At the basis of the division of law into private and public it placed the type of *method* of regulation of the relations or the position of the subject 'in the legal relationship. "If public law", wrote Pokrovsky, "is a system of legal centralization of relations, then civil law, on the contrary, is a system of legal decentralization: it by its very existence proposes for its life the presence of a multitude of self-defining centres. If public law is a system of subordination, then civil law is a system of co-ordination; if the first is an area of authority and subordination then the second is an area of freedom and private initiative".<sup>32</sup>

Bourgeois jurists cannot agree and will not agree on the principle of the separation of public and private law. They are not able to do this, for they are deprived of the possibility of revealing the true roots of this division, its source and basis. This may be done only by using the method of historical materialism. The real existence of the difference between private and public law was revealed by Marx with exhaustive clarity.

The roots of the division of law into public and private must be sought in the distinction between *property and the social totality*, the separation of *civil society and political organization*, and in the enhancement of the *individuality of man and the citizen*. "Private law", states Marx, "develops parallel with private property and out of the process of the decay of naturally developing collectivism." On the other hand, "because of the emancipation of private property from the community the state has obtained an independent existence alongside civil society and outside it."<sup>33</sup> The contrast between private and public law is most typical for bourgeois society, and impossible to eliminate. The monopoly of private property in the

hands of individual members of the capitalist class, the separation of the state from society as a special organization of the ruling class for the purpose of supporting the relations of capitalist exploitation this is the basis for the division of law into private and public. The bourgeois (as owner) concludes commodity transactions of purchase and sale, including purchase and sale of labour power--this is private law. The bourgeois as a member of the ruling class exercises authority and punishes the violators of capitalist principles--this is public law.

The division of law into public and private develops and deepens parallel to the process of the development of the law of private property, from its initial primitive forms to "purely bourgeois private property". Marx foresees the removal of this division with the transfer of the right of ownership of means of production into the hands of all society--and also the elimination of class differences and the ending of the opposition between civil society and political (state) organization. He had earlier noted this perspective in *On the Jewish Question*:

When the actual individual man recognizes in himself the abstract citizen of the state, and as an individual man becomes a species *being* in his empirical life, in his individual labour, in his individual relationships, when man recognizes and organizes his "forces propres" as social forces--and thus no longer continues internally to distinguish between social forces and the form of political force, only then will human emancipation be complete.<sup>34</sup>

The development of capitalism into the imperialist phase, characterized by the activation of the bourgeois state, its transition in a number of cases to methods of direct action in connection with the revolutionization of the working class, the growth of its power of resistance and the increasing breakdown of the whole capitalist system, the broad diffusion of methods of state control and "intervention" in economic life in the period of the war--all this has brought to life a whole series of theories showing that the division of law into private and public has already fully outlived itself, that it is now unnecessary for the regulation of social relationships in the present stage and that soon it can be placed in the archives. Anton Menger, one of the first theorists of "Juridical socialism", has affirmed that the capitalist world will move towards socialism through the *publicization* of private law. The entire matter is said to

lie in the fact that the relationships which private law regulates in bourgeois society have fallen into the sphere of public law. The worldwide gradual municipalization of economic relations, possible even within the limits of capitalism—in this, according to Menger, lies the establishment of socialism. Socialism means the victory of public law over private and the elimination of the primitive division of law into two spheres.

This theory was seized upon by the social fascists, the majority of whom are now “Juridical socialists”. On the other hand, a number of purely bourgeois theorists have developed the same or analogous notions. The typical ideologue of the imperialist bourgeoisie, the French jurist Duguit, proclaimed the socialization of private law. From now on the private owner is not simply a free personality, “the bearer of his own goals” (Dernburg), disposing of his property according to his will, but “the servant of society” fulfilling a “social function”, the organizer and manager of production. Only with respect to these social goals does the state preserve and defend the rights of the owner. The boundaries between private and public law are thus fully erased. In the same spirit, appropriately, was the German jurist Hedeman, one of the leading representatives of the “economic law” school. *Economic* or *public economic law* was the name given by the German jurists to the elements of state “regulation” of the economy, the appearance of which was conditioned by the war and the post-war devastation. Goikhbarg, and after him a number of other Soviet jurists, tried to transfer these ideas to Soviet soil. In particular, Goikhbarg himself proclaimed the elimination of the division of law into private and public, both for Soviet and bourgeois law. “The basic division of law into two major parts—public and civil”, wrote Goikhbarg in 1924, “which has rarely been explained well by jurists, now finds recognition only among the most backward jurists (including our own) ... The separation of the concept of civil law from other concepts—which has lost its meaning even in countries which have not lived through a proletarian revolution—is entirely unthinkable for us.”<sup>35</sup> Goikhbarg’s position signified, first, the beautifying of capitalism, masking over its contradictions; it was objectively based upon the social-fascist theory of the peaceful maturation of socialism in the laboratory of capitalism. It meant, secondly, ignoring the qualitative differences between Soviet and bourgeois law. Goikhbarg considered some arguments



drawn from the analysis of the bourgeois Weimar Constitution and the Yugoslavian constitutional monarchy. He used these to prove the unnecessary division of Soviet law into private and public. Goikhbarg's argument was discredited at its very roots.

It is necessary to proceed differentially towards the question of private and public law. This division cannot be eliminated for bourgeois law, to the extent that private ownership of the means of production has stability. This division keeps its significance even for the law of the modern imperialist state, just as competition, with all its conflicts and contradictions, is retained in the economy of imperialism alongside and together with monopolies. On the contrary it loses significance in Soviet law. "We do not recognize anything 'private'", wrote Lenin to Kursky in connection with the preparation of the Soviet *Civil Code*, "for us *everything* in the area of the economy is *public law* and not private. We permit *only* state capitalism ... Hence, we must expand the application of state intervention in 'private law' relations, expand the right of the state to annul 'private' contracts, to apply not *corpus juris romani* to 'civil legal relations', but our *revolutionary* legal consciousness. "36 The contradiction between private and public law vanishes in Soviet law, because in a society whose bases are the dictatorship of the proletariat and public (socialist) property, the contradiction between civil society and the state is eliminated.

Further, if one proceeds from purely practical considerations, there is also nothing in Soviet law which could motivate the preservation of the division of law into private and public. For us there cannot even be a discussion of the *limitation of state intervention* in any sphere of economic activity-but this is the first thing that follows from the division of law into two spheres. Soviet law denies the division of legal norms into compulsory (rules established as *obligatory* for the parties-which is characteristic of public law) and *optional* or *supplementary* (certain rules established for the parties only in the case when they themselves have not decided otherwise-this is characteristic of private law). All the norms of Soviet law, unless otherwise stated in the norms themselves, are compulsory. In bourgeois law, disputes and conflicts arising in the area of private law relations are considered by the court on the initiative of the disputing parties themselves. The initiative for the consideration of disputes and conflicts in connection with the violation of norms of public law

belongs to the agencies of state authority. For us, also, this characteristic never had significance. The agencies of the court and arbitration have the broadest powers for the initiation of any case-to the extent that it is an issue of the property relations of economic agencies and individual persons, or of the violation of the directives of the Party and the governments on questions of economic construction.

*(ii) The law of things and of obligations*

The system of Soviet economic law also denies a second major subdivision of bourgeois law: the division of civil law into the law *of things and of obligations*.

The codes of bourgeois civil law are usually constructed on one of two systems: either on the Institutes system or on the Pandectist system. The Institutes system derived its name from the first part of the famous code of Roman Law: *Corpus juris civilis* of the Emperor Justinian (in the year 529). The French Civil Code of 1804 is compiled according to this system. It is divided into three basic divisions: persons, things and transactions. ("On persons", "On property and on various modifications of ownership", "On various methods by which ownership is obtained"). The Pandectist system derived its name from the second part of the Justinian collection (the Pandects). The German Civil Code of 1896 and other recent codes (the Japanese of 1898, the Brazilian of 1916, and the Chinese of 1929), and also the Civil Code of the RSFSR of 1922 are compiled according to this system. The Pandectist system contains a general part and also: the law of obligations, the law of things, family law and inheritance law. Codes constructed on the Pandectist system include all these parts in one order or another. The most important division for all bourgeois civil law is the division into the law of things and the law of obligations. This division lies at the basis not only of codes constructed on the Pandectist system, but also of those constructed on the Institutes system: the second division of the French Code is the law of things, the third--predominantly--of obligations.

The law of things deals with rights in things, the law of obligations with obligational rights. What is the difference, what content is embodied in these concepts? Bourgeois jurisprudence answers this question in the following manner: the law of things has as its *object* a

thing-an item of the external world; the law of obligations-the *action* of another person. Thus the object of the law of property (the law of things) may be buildings, structures, commodities or consumer goods; the object of a contract of purchase and sale (law of obligations)-the action of the seller (to transfer the thing to ownership) and of the buyer (to accept the thing and pay the price). All rights in a thing have an *absolute* nature, i.e. the right of *one* person, authorized to use and dispose of the thing, contrasts with the obligation of an *unlimited number of* other persons not to violate his right (for instance not to violate the rights of an owner). Obligational rights have a *relative* nature. Here two or more completely determinate persons (seller and buyer, for instance) are connected with one another. The rights in things and obligational rights are further distinguished by the method of their *protection*. A right in a thing is defended by the so-called vindicational suit, under which the right of demanding the thing in kind from the illegal possession of another is understood. Obligational rights are defended by a suit for damages, i.e. by a demand for compensation for the monetary equivalent of harm suffered. Finally, every system of law always establishes only a precisely limited number of types of rights in things (the so-called *numerus clausus*: by the Soviet Civil Code, for instance, the right of property, of lien, and of lease); the law of obligations is not limited to a finite number of institutions; relations not envisioned by the legislator are allowed, to the extent that they do not contradict the general principles of the law of obligations.

Besides rights in things and obligational rights, bourgeois civil law provides still another category of rights, intermediate between rights in things and obligational rights: the so-called *exclusive* rights-copyright, right to an invention, to a trade name, to a trademark. Exclusive rights have an *absolute nature* like rights in things, but the object of an exclusive right is not a thing, but an *action*, an action of the holder of the right himself; in copyright, for instance, the reproduction of a certain literary work. Exclusive rights, therefore, are located, so to speak, between rights in things and obligations.

This is the bourgeois theory of the delineation of rights in things and obligational rights. Despite the fact that as time goes on the boundaries between the law of things and the law of obligations has been further erased-both in legislation and in the practice of

application of the law-contemporary bourgeois science insists upon the preservation of this distinction, upon its significance in principle. What are the actual roots and bases of the division of law into the law of things and the law of obligations?

Stuchka emphasizes the relation between the institutions of the law of things (with feudal relations) and that of obligations (with bourgeois relations). It is no accident that Marx speaks of land ownership as feudal ownership subordinate to bourgeois conditions of production. On the other hand, the law of obligations is the law of “commerce” primarily, facilitating relations of commodity exchange. Its basic institution (contract) is a most important instrument, and with its help capitalist social exchange of things is realized. However, the law of things, and its basic institution, the law of bourgeois private property, are foundations of the bourgeois system. Therefore, the law of things is revered with a special piety and is placed under the special protection of the bourgeois state. “In case of conflict between an absolute right and a relative one, the latter always gives way to the former”,<sup>37</sup> asserts a bourgeois jurist. In other words, the law of obligations is, so to speak, “second class” law in comparison with the law of things. In case of a dispute, preference will always be given to the law of things over the law of obligations.

Stuchka connects the law of things with production, and the law of obligations with exchange. However, the basis of the division of bourgeois civil law into the law of things and the law of obligations consists not only in the fact that one is the law of production and the other is the law of exchange. The question must be posed more deeply. The root of the contradiction that is irreconcilable for bourgeois law-between the law of things and the law of obligations-consists of the antagonistic nature of the capitalist system of production, in the exploiting nature of bourgeois law. The *contradiction between the social nature of production and the private form of appropriation*-this is where it is necessary to look for the real basis of the division of civil law into the law of things and the law of obligations. A capitalist economy is a commodity economy. The bond between the isolated individual producers is established through exchange. “Exchange”, states Marx, “does not create the differences between the spheres of production but establishes a bond between spheres that are already

different, and turns them into branches of social production that are more or less dependent on one on the other.”<sup>38</sup> The law of obligations, the central institution of which is contract, is only the legal expression of this general interdependence of individual branches of social production. The contracts of the purchase and sale of products of different branches of labour, serve the social division of labour. The contracts of loan serve the movement of finance capital. The contracts of employment facilitate the process of the production of surplus value. The law of obligations facilitates, therefore, the relations between individual capitalists, between industrial and finance capitalists, between capitalists and workers.

The law of things (the central nucleus of which is the law of property) is, on the contrary, a legal expression of the breakdown, separation and anarchy dominant in capitalist society. “Private property”, says Lenin, “is the expression of the material isolation of commodity producers.”<sup>39</sup> Private property isolates and distinguishes, since it creates “the possibility of disposing of ... the labour of another”;<sup>40</sup> it confirms relations of the domination and authority of the owner over working people; it facilitates mutual competition between industrial, commercial and finance capitalists. Therefore, the basic contradiction of capitalist society finds its clearest expression in the contradiction between the law of things and the law of obligations: the contradiction between the public nature of production and the private form of expropriation and acquisition. This is also typical for the system of bourgeois law as a whole, and for each of its institutions.

This contradiction does not exist in the socialist economy. It has been eliminated by the expropriation of the expropriators. The division of Soviet economic law into the law of things and the law of obligations is, therefore, artificial. The basic practical difference between rights in things and obligational rights-according to the method of their protection-does not have such a major significance in the conditions of the U.S.S.R. The law of things, according to traditional theory, is protected by a special (vindictive) suit for the thing, by virtue of which it is possible to demand the thing in kind from anyone illegally in possession; obligational rights are protected by a suit on damages. But in 1922 the Soviet *Civil Code* established a rule according to which, if the object of a demand from an obligatory legal relationship is a concretely defined (a so-called

individually defined) thing, then the bearer of the right could demand it in kind, regardless of the recovery of damages. In this case, accordingly, the inviolability of the law of obligations is protected by a method typical only for the law of things.

However, the erasing of the boundaries between the law of things and the law of obligations in Soviet economic law is far from limited to Art. 120 of the *Civil Code*. Current Soviet contract law firmly holds to the principle of so-called *performance in kind*, by virtue of which, not only in the case when the object of an obligation is an individually defined thing, but also in all other instances, compensation for damages, payment of a penalty, or a fine etc., do not free the debtor from fulfilment of the contractual obligation 'in kind. In a series of laws on contract this is specially emphasized. Soviet economic law has always ignored, and now rejects in principle, the characteristic difference between the law of things and the law of obligations. The difference is that there are only a precisely defined number of rights in things (*numerus clausus*), which does not apply to obligational rights; but in this area "all that is not forbidden is permitted". In Soviet law this is not so. The Soviet state precisely establishes determinate organizational forms of relations between economic agencies and between individual participants in economic commerce. They can and must use these forms. To go outside the limits of the permissible is to travel the path of speculation, the route of evading state accounting and supervision-impermissible in Soviet conditions. And from this point of view, accordingly, the division of Soviet economic law into the law of things and the law of obligations would be untenable.

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## **6. Methods of study of Soviet economic law**

### *(i) The dogmatic (formal-juridical) method of studying law*

The bourgeois "science of law" and, in particular, bourgeois civil law is elaborated primarily by the so-called *formal-legal* or *dogmatic* method. According to Shershenevich's definition, "dogmatics consists of the systematic statements of the rules of law in force at a given time in a particular country."<sup>41</sup> The dogma of law begins with legal *norms*, i.e. obligatory rules of conduct protected by the power of

state coercion. Next it systematizes them, and subjects them to formal logical analysis from the referent of the prescriptions contained in these norms. Next, it generalizes them, i.e. brings particular norms of law under more general ones (this is called “establishing the legal nature of an institution”) and dissects, contrasts etc. In the conditions of bourgeois states the dogmatic elaboration of law has a direct practical significance, since it provides material to courts and agencies of authority applying the law in force. “The dogma of private law is nothing more than an endless chain of arguments pro and *contra*, imaginary claims and potential suits. Behind each paragraph of this systematic guide stands an unseen abstract client ready to use the relevant propositions as advice.”<sup>42</sup>

At the basis of the dogmatic method are a number of premises. The first of them is the equation of law and statute. The dogmatic jurist knows only the statute. The dogmatic jurist knows only the statute sanctified by the authority of state power, and therefore obligatory for each person within the territory of the state. The law of each given country is exhausted by the “totality of norms” formally “in force”, i.e. promulgated by the corresponding agencies of the state and not repealed by the established procedure. The application of law consists in the conduct of concrete legal relations under the general norms of the law (the establishment of the “nature of legal relations”) and in the derivation of a conclusion by the rules of formal logic. The second premise is the equation of law with the “will of the legislator”. The task of the jurist, in applying law, consists in the clarification of the exact content of this will with the help of various methods of legal technique. And the third is the belief in the *absence of gaps* in the system of law in force. The state of affairs in which the law in force has no answer for each of the infinite questions arising in life, is recognized as impossible. If there is not a direct answer, then it is contained in hidden form in one of the more general norms from which it must be extracted, by means of operations of various types of the same legal technique.

Legal dogmatism flourishes in full bloom in the bourgeois state. The cult of the dogma of law constitutes the nourishing soil for the juridical world outlook of the bourgeoisie “of the classic world outlook of the bourgeoisie”. Engels characterizes it as follows:

It represented the secularization of theology. The place of dogma or divine law has been taken by human law, the place of

the church has been occupied by the state. Economic and social relations, which earlier, since they were sanctioned by the church, were considered a product of the church and of dogma, were now presented as based on law and created by the state. The exchange of commodities on a societal scale leads in its more developed form (because of the practice of loans and credit), to intricate contractual relations. It therefore requires generally recognized rules which can be established only by the social collective, the need for legal norms established by the state. Among the representatives of the new class this fact has created the illusion that these legal norms owe their origin not to economic relations, but to the formal legislative activity of the state. But since competition-this basic form of relationships between commodity producers-is a great equalizer, so equality before the law became the battle cry of the bourgeoisie. The fact that the struggle of this new class, striving for authority against the feudal lords and the absolute monarchy that protected them at that time and which, like every class struggle had to become a political struggle a struggle for the possession of state power-the fact that this struggle had to be waged around *legal demands* aided still further the consolidation of the juridical world outlook.<sup>43</sup>

Marxism declares a merciless struggle both against the bourgeois juridical world outlook as a whole (and its recidivism and remnants on Soviet soil), and against the dogmatic method in jurisprudence. The latter has nothing in common with true science. It distorts reality. In the place of real facts it places "Juridical illusions", it substitutes "legal stage settings" for real life. "The servants of the division of labour"<sup>44</sup> (in the expression of Marx and Engels), i.e. the professional jurists and courts, created a cult of legal concepts dedicated to hide the real relations of exploitation and of domination-subordination-with the mottoes of freedom and equality.

Marxism exposes the very roots of the bourgeois juridical world outlook and the dogmatic method. It reveals the class rule of the bourgeoisie. Law is the will of the ruling classes expressed in statute. In the bourgeois state, the bourgeoisie rules. The state is merely "a committee managing the common affairs of the bourgeoisie".<sup>45</sup> Only for this reason is the law proclaimed immutable for each and everyone. Only for this reason does the bourgeoisie deceptively declare state authority itself to be subject to law and the state to be bound by law. For law in the bourgeois state is its class will, and



statute reflects the will of the bourgeoisie as the ruling class. Bourgeois statutes *formalize and confirm* the capitalist conditions of production and the relations of capitalist exploitation.

The most recent bourgeois jurisprudence suggests, along with the dogmatic, other methods for studying the law in force. The basic alternatives are the *socio-philosophical* and the *sociological*. Each of them has in its turn a variety of forms serving as the bases of different directions in the “science” of law: legal policy, comparative historical jurisprudence etc. However, the dogma of law always remains as the basis of the scientific development of law for bourgeois jurisprudence. On the other hand, neither the most recent philosophical-legal studies, that led into the chaos of idealistic and metaphysical neo-Kantianism (neo-Hegelianism), nor the sociological and comparative historical research of those bourgeois jurists who have ignored the class nature of law, can assume a true scientific nature. Only individual works of bourgeois sociologists and historians of law have material which, on appropriate critical reworking, can be used for the study of the law of one country or another.

*(ii) The method of dialectical materialism and its application to Soviet economic law*

The Marxist theory of law in general-and the Marxist theory of economic law in particular-use the only truly scientific method, that of *dialectical materialism*. The systematic application of dialectical materialism to the study of Soviet law is one of the major victories of the Marxist theory of law in the U.S.S.R.

Coalescing in 1925 as a solid collective of Marxist jurists, the Section of State and Law of the Communist Academy formulated its tasks in the following manner:

We are united, above all, by the *revolutionary-dialectical* method both in scholarly and in practical work on law-its direction is opposite to the metaphysical, formal-dogmatic and, finally, the historical evolutionary method of bourgeois jurisprudence. This simultaneously means a *class approach* to the study of both state and law, for we consider these phenomena as rooted in the material conditions of social life and as having obtained their development in the process of class struggle. Finally, we, being *materialists*, proceed from the material relations of people in the study of state and law, so as to draw therefrom

an understanding of the ideas and concepts of people about their own relationships.<sup>46</sup>

From this, in particular, it follows that there can be no discussion of the creation of any “dogma of Soviet law”. Socialist construction needs the *systematic*, but not the *dogmatic* study of Soviet law. Attempts to smuggle in the rubbish of the bourgeois-juridical world outlook, under the flag of “the limited” or “the subsidiary” application of the dogmatic method to the study of Soviet law, were met in the past and will be met in the future with invincible resistance.

What, concretely, should the application of dialectical materialism to the study of Soviet law signify?

Above all it signifies the necessity of an *objective-materialist* approach. This means that, in studying Soviet economic law, one cannot operate only with norms, even though they were promulgated by competent agencies of Soviet authority and have not been formally repealed. It is necessary to take norms *in their unity with the corresponding legal relations*. In the opposite case, particularly having in mind the unique dynamism of Soviet law and the “speed of legislation” already noted by Lenin, we will always risk being seduced by and accepting the “formally in force” (more precisely-formally unrepealed) for the actually existing.

Thus, for instance, until the end of 1933, the Law of October 7, 1929, “On Procurement of Products of Agriculture” was not repealed and was formally in force. But it was impossible to put together a correct impression of the organization (in 1933) of the procurement of agricultural products on the basis of this law. From the moment of publication of the law, radical changes took place in the economy of the whole country, and in particular in the economy of agriculture. The relations of the proletarian state with the basically collectivized peasant farming (from early 1933) were constructed very differently for a whole series of important crops. Procurement was entirely abolished for grain crops, for sunflowers, for potatoes, etc.; it was retained only for certain industrial crops, but even here it was often enacted differently to the provisions in the Law of October 7, 1929. From this it is obvious that the pure norm alone does not yet produce current Soviet law. The norm in unity with the legal relation—the norm with a modification for its realization in the practice of economic construction—is the correct position. However, it is wrong to err in the opposite direction: it is wrong also to tear the

legal relation away from the norm. For the legal norm includes the rule which is in force and generally the “effective” directive of the authorized agencies of the proletarian dictatorship. Erring here also threatens the true Soviet law with a distorted reflection.

The objective-materialist approach requires the closest *bond between theory and practice* in the development of questions of Soviet economic law. Soviet economic law is not “pure” and abstract theory. It is a practical discipline, whose propositions must be directed to practice, which must draw the materials for its conclusions from the practice of economic construction, and which must arm practical workers with the power of its theory in their struggle for revolutionary legality and the conduct of the economic policy of the Party.

The next principle is the obligation to take account of the *class nature* of each institution of Soviet economic law.

Every law corresponds to the interests of a ruling class. Soviet law corresponds to the interests of the proletariat organized as the ruling class. Hence: every problem of Soviet economic law must be treated from the point of view of the interests of the ruling class, from the point of view of the policy of the Party (the vanguard of the class) and of the government, and must receive *Party interpretation and a party solution*. ‘the slightest failure along ‘this line revenges itself by a complete distortion of the essence and spirit of Soviet law.

Party-orientation is the highest and obligatory requirement in *every* scientific discipline and for Soviet economic law in no less a degree than any other. Marx and Lenin repeatedly emphasized the Party of Marxist theory. A Party, revolutionary-class, proletarian approach to Soviet economic law, or a bourgeois, formal-legal and reactionary-these are two poles, absolutely excluding one another. It is necessary to choose between them, but they allow no compromise, composite or mutual concessions. Only on the basis of true Party spirit-armed by Party Bolshevik vigilance-is it possible correctly to state and correctly to apply Soviet economic law. From this in particular comes the colossal significance of the problem of cadres for this area of socialist construction. On the contrary, the least concession to the bourgeois dogmatic-legal method leads to the loss of revolutionary-class perspective, to slipping into alien positions harmful to the proletariat.

Finally, there is a third point that derives from the application of dialectical materialism to the study of Soviet law. This is the

requirement of taking each phenomenon in its *motion*, from the point of view of its origin, development and elimination.

Bourgeois jurisprudence transforms its concepts into solid essences. It eternalizes them, and declares them as timeless legal categories characteristic of the specifically bourgeois mode of production. This is not avoided even by the most advanced bourgeois jurists such as Jhering. On the contrary, the Soviet science of law must build its institutions from concepts with concrete content. In Soviet economic law, in particular, each category and each institution must be filled with a definite organizationaleconomic content, corresponding to specific measures of the economic policy of the Party and government at the corresponding stage. If one takes the contract of procurement, this institution must be studied and stated in Soviet economic law in such a way that its origin, its development and its abolition become obvious for the basic mass of products of agricultural production. In Soviet economic activity there is nothing frozen, motionless or static. Soviet economic law must consider and reflect the internal dynamics of its subject: the states of development of the class struggle, the stages of socialist construction.

### ***7. The concepts (categories) of Soviet economic law***

Above (in Section 5) we indicated a series of basic concepts (categories) of Soviet economic law (property, economic accountability, contract etc.). Soviet economic law also uses a number of other elementary concepts whereby the structure of this discipline is erected. We will now list the most important of them, while the detailed critical analysis of their content, the indication of the limits of their application etc. will be made in the corresponding chapters of the treatise. These concepts are borrowed from bourgeois law. This is understandable since Soviet economic law contains a number of elements of “bourgeois law without the bourgeoisie”.

First, it is necessary to distinguish between the concepts of the *legal norm* and the *legal relation*. The first is the traditional terminology of bourgeois jurisprudence, and is so-called “law in the objective sense” (or objective law); the second is “a legal right in the subjective sense” (a subjective legal right). A norm is an objective rule of conduct. A juridic relationship is “the

primary cell of the legal tissue”;<sup>47</sup> it is a “volitional relation whose content is given by the economic relation itself” An example of a legal norm is Article 403 of the *Civil Code of the RSFSR*. According to this the “one who has caused harm to an individual or property of another is obliged to compensate for the harm caused.” An example of a legal relation is the relation which has arisen in connection with the causing of harm to the victim, and the person who caused the harm. Another example: the Law of January 19, 1933, on obligatory supply of grain. This is a legal norm. The relation between the collective farm or the individual peasant farm, on the one hand, and the local branches and offices of Grain Procurement on the other, is a legal relationship for the delivery and receipt of grain.

A legal norm is obligatory (or, as jurists say, is “law in force”) to the extent that it is sanctioned by the state or other organization capable of guaranteeing coercive measures of observance (realization) of the norm. “Law ... is nothing without an apparatus capable of *compelling* the observance of the norms of law.”<sup>48</sup>

In the technical sense, the various forms in which legal norms are expressed and confirmed as generally obligatory are called *sources* of law. These are: Party directives, statutes, decrees of co-operative centres etc. (On the source of Soviet economic law: the authors refer to a later chapter in their book. -eds.)

The elements of every legal relationship are: the subject of the right (or duty), the object, the subjective right and the duty corresponding to it. The *subject of a law* is the bearer of the rights and duties, the final centre in the “legal tissue” to which property rights and duties are attached. In the first chapter of vol. 1 of *Das Kapital*, Marx studies the process of commodity exchange. In an action “C-M” (exchange of commodities for money), two parties participate: the commodity owner and the owner of the money. From the legal perspective, a “C-M” legal relation is a transaction of purchase and sale. The parties in this legal relation, the subjects of the law, are the buyer and seller. The object of the law (or the property) is that which the parties have in mind, the object of their mutual demands and obligations (rights and duties). Above we indicated that bourgeois jurisprudence, according to the *nature of the object* (thing or action) classifies rights into rights to things and obligational rights. In

a transaction of purchase and sale, the object of the law will be an action: of the seller-to transfer the thing to ownership of the buyer; and of the buyer-to pay the price. The latter element of the legal relation-the relation between the parties (the subjects of law) is the *subjective right* of one party and the *subjective duty* of the other

corresponding to it. The duty, whose content is the execution of a certain action for the use of the other party, is also called an *obligation*.

Economic law makes broad use of the concept of a *legal institution*. "By a legal institution", states Stuchka, "we understand a *typical* legal relationship constituting a generic concept for a whole series of identical relations"<sup>49</sup> Examples of institutions of Soviet economic law include the law of public (socialist) property, prescription, the contract between the Machine Tractor Stations and collective farms, trusts, and others.

The bases for the origin of legal relationships are *legal facts* of different types: events, actions, transactions, agreements. For example, an earthquake is an *event* with which a series of important legal consequences are connected: in insurance law, an earthquake is considered one of the "insurable events", whose occurrence involves the payment of the insurance premium provided by the insurance contract. Homicide is a legal *act* which is an act of will, the result of human conduct. This legal act also calls to life a series of legal relations, in particular of a property nature (for instance compensation for injury or provision for the family of the deceased). One of the types of legal actions is *legal transactions*. The *Civil Code of the RSFSR* provides a definition of legal transactions in Article 26. These are actions *directed* at the establishment, change, or cessation of legal relations. The essence of the matter here lies in the direction and the intention of the parties. Transactions may be *unilateral*, i.e. the volitional act of one person (for instance a will) and *bilateral* in which there must be an intent between a minimum of two persons. Bilateral transactions are also called *agreements*. Their significance in economic law is enormous.

### Notes

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## 9 "State and Law under Socialism"\*

### Introductory Note

The Stalinist revolution from above had by 1936 accomplished most of its economic and political tasks, and its incipient proclivities for greater legal formality and stability were now becoming increasingly apparent. The Party pendulum was beginning to swing away from legal nihilism and towards legal stability and socialist legality, and Pashukanis must certainly have been aware of the fact that the leftist tendencies which he seemed to represent were a major obstacle to this impending shift.

As Professor Hazard describes in the Foreword to this volume, Pashukanis was nevertheless still politically pre-eminent within the Soviet legal profession. His colleague, Krylenko, had been appointed the first U.S.S.R. Commissar of justice. In addition to his other roles and titles, Pashukanis was appointed Deputy Commissar, and was assigned special responsibilities in the drafting of the new constitution which would supersede the now outdated Constitution of the U.S.S.R. of 1924. The trend towards greater legal stabilization, and towards a greater reliance on law as an instrument of regulation and control, was readily evident both in the drafting process and also in the statutory changes occurring in the areas of contract law, collective farm law and family law. The clear direction of these changes, and of the forthcoming new constitution, was away from the nihilistic and

\* "Gosudarstvo i pravo pri sotsializme", *Sovetskoe gosudarstvo* (1936) no. 3, pp. 3-11; partially translated into English in M. Jaworskyj (ed.), *Soviet Political Thought: An Anthology* (1967), Johns Hopkins University Press, pp. 315-323.

eliminationist orientation of economic law towards the rehabilitation of the legal form as it was articulated during the New Economic Policy.

Pashukanis, as theorist and symbol of the earlier legal policy, stood in the path of this swinging pendulum. It was, after all, he who had originally characterized all law as "bourgeois" and through the success of his General Theory popularized this view not merely among Marxist legal cadres but even more widely among individuals in positions of authority who thought it convenient to think of themselves as being above the law. Moreover, Pashukanis was clearly identified with opposition to the idea of "socialist law" and he remained the leading advocate for the active process of the withering away of law.

Sensing, at last, that he was officially and publicly out of step with the Party's changing policies on state and law, Pashukanis rushed into print with his third and final self-criticism. This appears below. In this rather abject statement, Pashukanis applauds Stalin's dicta at the April 1929 Plenum of the Central Committee, at the XVIth and XVIIth Party Congresses, and elsewhere, that socialism demands the highest concentration of state power. Pashukanis admits that his General Theory had therefore been seriously deficient in that socialism in practice consisted, not in the imminent withering away of the legal form, but in the preparation for the conditions of this process. Under socialism the legal form disappears only with respect to the ownership of the means of production, but it necessarily remains in operation in the sphere of distribution. Only a Soviet socialist system of law can create the conditions for the transformation to the higher phase of communism.

This recantation was, however, insufficient to save Pashukanis from the purges. The pendulum completed its swing with the ratification of the new Constitution of the U. S. S. R. in December 1936. A month later, in January 1937, Pashukanis disappeared, a victim of Stalinism.

## *"State and Law under Socialism"*

The liquidation of the exploiting classes has been completed in our country.<sup>1</sup> This now poses the problem of the Soviet state as the political superstructure of the classless socialist society.

Colossal socio-economic advances have led to the creation of a uniform type of socialist relations of production in the towns and countryside, and thus to a new stage in the development of the dictatorship of the proletarian state and Soviet democracy.

The question of the role of state and law under socialism now assumes a tremendous theoretical and practical significance. It is therefore necessary to recall a number of Lenin's and Stalin's theoretical propositions-it is necessary to begin with these in order to clarify the significance of state and law during the period of socialism. We must distance ourselves from the mistakes and confusion on these questions, including those errors made by jurists.

In his *State and Revolution* Lenin precisely and clearly solves the question of the nature of the state under socialism. He makes a sharp distinction between communists and the diverse types of anarchist theorists.

We are not utopians [asserted Lenin] and we do not "dream" of immediately having no administration or subordination; these are anarchist dreams and are based on a lack of understanding of the tasks of the dictatorship of the proletariat. At root they are foreign to Marxism and in practice they only delay the socialist revolution until the time when human nature is different. No, we want a socialist revolution with people as they are now-with people who cannot do without subordination, without supervision, without "overseers and auditors".<sup>2</sup>

Lenin's *State and Revolution* was directed not only against opportunist, reformist and Kautskyist distortions of Marxism (distortions which lead to compromise with the bourgeois state and the refusal to

destroy the bourgeois state machine), it was also aimed at the petit bourgeois and anarchist dreamers who counted on the immediate elimination of political authority, state organization, and the organization of coercion and compulsion-"on the second day" of the proletarian revolution.

Lenin's work was evoked both by the necessity of distancing himself from Kautsky et al., and by the necessity of confronting the anarchic mistakes and confusion of Bukharin. In those years Bukharin had published a series of articles in which he developed and preached the anti-Marxist theory of the "explosion" of the state and that the proletarian party had to emphasize the principled hostility of the working class to the state.

Lenin's position on law is equally clear. "Without lapsing into utopianism", he wrote, "it is inconceivable that people will immediately learn to work without any legal norms after the overthrow of capitalism. The abolition of capitalism *does not immediately provide* the economic premises for *such* a transformation."<sup>3</sup>

These compressed positions must be developed in our theoretical work as an all-round, detailed study of the role of the socialist state and socialist Soviet law. Such studies are even more necessary because the lack of clarity on the question of the state under socialism is not exhausted by Bukharin's articles which relate to the period of the imperialist war, about which I have written, but they are also encountered much later.

At the April Plenum of the Central Committee in 1929, Comrade Stalin showed the deep divergence between the anarchist theory of "explosion"-defended by Comrade Bukharin-and the Marxist Leninist theory of the destruction and smashing of the bourgeois state machine. Comrade Stalin scoffed at the pretentiousness of Bukharin and his followers. They claimed that in putting forward their confused non-Marxist theory of "explosion", Bukharin had fought better and more correctly against Kautsky than had Lenin.

It was not accidental that the role of the proletarian state was placed at the centre of the whole Party's attention in those years when the country started to approach the final victory of socialism with rapid strides.

Comrade Stalin explained, at the XVIth Party', Congress, that the path to the future communist, stateless society lies in the all-round consolidation of state power. He repeated this thesis

at the January Plenum of the Central Committee and the Central Auditing Committee in 1933:

The elimination of classes is not achieved by suppressing class struggle, but by intensifying it. The withering away of the state will not happen by weakening state authority but through its maximum consolidation. This is vital if we are to destroy the remnants of the dying classes and to organize a defence against the capitalist encirclement which is still far from eliminated, and will not soon be eliminated.<sup>4</sup>

Finally, at the XVIIth Party Congress, Comrade Stalin again spoke out most sharply against the opportunists who, on the occasion of the approach to the classless society, had tried to project their ridiculous ideas concerning the suppression of the class struggle and the weakening of the dictatorship of the proletariat.

It is understood [said Comrade Stalin] that the classless society will not come of its own accord. It must be achieved and constructed by the efforts of all working people-by consolidating the agencies of the dictatorship of the proletariat, by the development of the class struggle, by the elimination of classes, by the liquidation of the remnants of the capitalist classes-in struggles with both internal and external enemies.<sup>5</sup>

Because of the efforts of the working people the classless society has now been basically constructed. But only an opportunist could think that the further development and consolidation of the socialist system can come by allowing nature to take its course, or that the elimination of classes means that there is no need for either the dictatorship of the proletariat or for the state. Lenin argues:

The essence of Marx's theory of the state can only be mastered by understanding that the dictatorship of *one* class is necessary not only for every class society in general, not only for the proletariat after it has overthrown the bourgeoisie, but also for the entire *historical period* that separates capitalism from "a society without classes", i.e. from communism. The forms of the bourgeois state may be extremely varied, but their essence is the same: in one way or another all these states are, in the final analysis, necessarily *dictatorships of the bourgeoisie*. Inevitably, of course, the transition from capitalism to communism will contain an abundance and variety of political forms, but their essence is the same: the *dictatorship of the proletariat*.<sup>6</sup>

From this excerpt (extraordinarily rich in content), it follows that the proletarian state will preserve its position during the whole period from the overthrow of the bourgeoisie to communist society. Whatever the possible variations of political form, the essence and content of this state will be the dictatorship of the proletariat.

Soviet power is the state form of the proletarian dictatorship, and it has assumed world historical significance. But the Soviet state will not remain an inert entity; it will develop in accordance with victories in the struggle for the abolition of classes.

The construction of a classless socialist society will open a new era in the unfolding of Soviet democracy (a new constitution, a new franchise law). But this change in political form will entail the same essence. This essence is the dictatorship of the proletariat.

Basically, although we have constructed a classless socialist society we have still not achieved the higher phase of communism. The basic difference between socialism and communism, or between the lower and higher phases of communism, consists in the fact that socialism is characterized by the domination of public socialist property, and proceeds are distributed according to labour. Communism is characterized by the consolidation and development of public property, and distribution is according to need.

The development of socialist forces of production and culture-which enables distribution according to need-signifies the elimination of the contradiction between mental and manual labour, and the transformation of labour into man's primary need. It signifies a condition in which people are capable of working without "overseers and auditors", without legal norms, without coercive force, and without the state.

The process of the withering away of the state can therefore begin no sooner than the disappearance of the coercive nature of labour. This constitutes the basic economic premise for the process of withering away, for the gradual demise of state power.

Recall that in his *Economics of the Transitional Period* Bukharin put these processes in the following order: first the abolition of the armed forces, then the instruments of oppression, prisons etc. and finally the coercive nature of labour.

Lenin reverses this order. What Bukharin placed at the end, Lenin places at the beginning, as the first fundamental premise without which it is impossible to speak of the instigation of the process of withering away.

Even in our milieu the theory existed that the actual process of withering away had begun with the October Revolution and that, therefore, it should be proceeding at full speed during the period when classes were being abolished and the classless socialist society was being constructed. But this was a false and opportunist theory. It was false because it did not take into account the fundamental economic premise without which there cannot even be any discussion of the superfluousness of the state.

Confusion on the question of the withering away of the proletarian state began with the fact that this question was itself conflated with the question of the nature of the proletarian state as a semi-state---as a state which, in contradistinction to exploitative states, does not strive to be eternal but which, on the contrary, prepares the conditions and premises for the actual destruction of the state. After the proletariat has overthrown the bourgeoisie it creates a state of a special type. This does not represent the power of an exploiting minority over the majority, but it is a weapon of the labouring majority used against the exploiters.

The Party Programme speaking of the gradual involvement of all the toiling people in the work of state administration (which is made possible by the Soviet system)-concludes that:

The full execution of all these measures represents a further step along the road begun by the Paris Commune. The simplification of administrative functions, and the raising of the cultural level of the workers, will lead to the destruction of state authority<sup>7</sup>

The question therefore concerns *the preparation of the conditions* for the withering away of the state. This withering away will only become possible in the second phase of communism. The creation of the conditions for the future stateless organization does not represent a process of reducing state power, but a process of consolidating it. This is especially done by bringing larger and larger masses of working people into the administration of the state.

There is no barrier between the state apparatus and the mass of working people in the proletarian state. This very state apparatus-in the broad sense of the term-represents the sum of the masses' organizations.

The special role of mass organizations, trade unions and all other organizations of working people, are characteristic of our proletarian state and correspond to its nature. This feature of our state exists, of

course, from the very moment when this state arose, i.e. from the October Revolution. But the development and consolidation of these special features by no means represents the weakening and withering away of state power because of its inutility.

There is contradiction and antagonism between the bourgeois state and society. We do not have this antagonism. Our state includes mass workers' organizations, and the activity of the state apparatus is simultaneously social activity. Our state ownership of the means of production is social ownership. Accordingly, we can see that the mass organizations are constantly and increasingly involved in the work of administration and supervision, and that they are responsible for specific concrete tasks. Yet this does not mean that a process of the weakening and withering away of state power is occurring. This is one of the ways of strengthening state power. The maximum development of the workers' participation signifies the strengthening of the state apparatus which is persuasive, ideologically influential and can use power, compulsion and force as well.

The socialist state administers not just people, but also things and the process of production. In his speech to the First Congress of Councils of the National Economy, Lenin argued that:

there is no doubt that the more the conquests of the October Revolution, the deeper will be the transformation that it initiated. The more implanted the conquests of the socialist revolution and the strengthening of the socialist system, the greater will be the role of the councils of the national economy. These are the only state organizations to retain a firm position. Their position will be consolidated the nearer we are to the establishment of a socialist system, and the less room there will be for a purely administrative apparatus, for an apparatus which only conducts administration. After the resistance of the exploiters is finally destroyed this apparatus is condemned. This apparatus of administration-in the real and narrow sense of the term, this apparatus of the old state is doomed to wither away. The apparatus of the Supreme Council of the National Economy will expand, develop and become stronger: it will conduct all the most important activities of the organized society.<sup>8</sup>

The victory of public socialist property in the town and country, and the successes of state planning and administration of the entire national economy, will further strengthen the role and significance of the apparatuses conducting the state's economic activity. These



agencies will be retained in the stateless, communist society because even there where "labour is the primary need of life"-labour and economic life must still be organized. During the period of socialism the agencies which direct the socialist economy are state agencies. The administration of things and processes of production are inseparable from the administration of people, and from the functions of power, state coercion and state legislation.

The expanding role of state planning and the consolidation and broadening of the economic agencies is the process whereby the socialist state is consolidated. It by no means signifies that the state is beginning its final withering away.

Despite the basic construction of a socialist classless society, it must be understood that the class struggle continues. Further work is essential both for the socialization and re-education of the working masses and for the suppression of recalcitrant and hostile elements. These latter continue to oppose socialism, continue to offer resistance and to act deceptively. The state apparatus-a coercive apparatus-is crucial in combating the enemies of socialism. Finally, it is also necessary to defend ourselves against capitalist encirclement. The defence of the socialist motherland demands ceaseless attention to the strengthening of the Red Army and of all the armed forces of the socialist state.

Socialism is a system based on the social character of the means of production. Distribution is according to the quantity and quality of labour. This means that we must have a national supervisory and accounting organization to oversee labour and consumption patterns. For this legal norms-and an apparatus of coercion, without which law is nothing-are necessary.

Socialist society is organized as a statist society. The socialist state and socialist law will be fully preserved until the highest phase of communism. Only at this phase will people begin to work without overseers and legal norms.

It is just as opportunistic to assert that law will wither away under socialism as it is to affirm that state authority should wither away the day after the bourgeoisie was overthrown.

In this context it is appropriate to offer once again deserved criticism of those erroneous positions put forward by the author of *The General Theory of Law and Marxism*. This is essential if the old mistakes and confusion are not to be repeated in other forms and other ways.

Since distribution according to labour bears some similarity to the equivalent exchange of commodities, thus Marx and Lenin argued that bourgeois law will only be fully abolished under socialism with respect to the ownership of the means of production. Private property is replaced by public property. But in the area of distribution, law is effectively "bourgeois law" because it represents the application of an equal scale to factually unequal individuals. It preserves actual inequality among individuals because in equalizing quantities of labour it does not consider qualitative differences in physical strength, abilities, family influences etc.

This principle of reward according to labour is a socialist principle. It is applied in a society in which each person can give nothing but his labour, where there is no exploitation, crises or unemployment, in a society where the ruling principle is "he who does not work shall not eat", and where the state guarantees the real right to work. This "bourgeois" law, therefore, does not and cannot have anything in common with the class interests of the bourgeoisie. This law is established by the proletarian dictatorship and is the law of the socialist state. It serves the interests of the working people and the interests of the development of socialist production. The condensing attitude that this law is "bourgeois" benefits only the anarchic theories of the "left wing" and the champions of bourgeois equality.

While Marx referred to the necessity of distribution according to labour as a "shortcoming" of socialism, it is nevertheless obvious that this expression is a relative one. The discussion refers to shortcomings in comparison with the higher phase of communism: and only this.

However, this question was totally misrepresented in *The General Theory of Law and Marxism*. Law, state and morality were simply declared to be bourgeois forms which cannot be filled with a socialist content and which must wither away in proportion to the realization of such content.<sup>9</sup> This grossly mistaken position, foreign to Marxism-Leninism, distorts the meaning of the proletarian state, distorts the meaning of proletarian communist morality, and distorts the meaning of Soviet law as the law of the proletarian state which serves as an instrument in the construction of socialism.

The real and concrete history of Soviet law as a weapon of proletarian policy-which the proletariat used at various stages to

defend the conquests of the revolution and the reconstruction towards socialism-was replaced by abstract and mistaken conclusions about the withering away of law, about the "disappearance" of the legal superstructure etc.

Confused conclusions on the withering away of the "form of law", as a phenomenon inherited from the bourgeois world, distracted from the concrete task of combating bourgeois influence and bourgeois attempts to distort Soviet legislation and Soviet law.

The theoretical position which initiated this anti-Marxist confusion was the concept of law exclusively as a form of commodity exchange. The relationship between commodity owners was asserted to be the real and specific content of all law. It is clear that the basic class content of every system of law-which consists in the ownership of the means of production-was consequently relegated to the background. Law was deduced directly from commodity exchange according to value; the role of the class state was therefore ignored, protecting the system of ownership corresponding to the interests of the ruling class. The essence should be: which class holds state power?

The great Socialist October Revolution attacked capitalist private property and instituted a new socialist system of law. The main thing in the Soviet concept of law is its socialist essence as the law of the proletarian state. After the victory of socialism and the liquidation of the pluralist structure of the economy, law did not begin to wither away. Rather, this was the period when the content of Soviet socialist law-both in the town and country-mirrored uniform socialist relationships of production.

The theory of the "bourgeois nature" of all law persistently conflated such different things as the co-existence of the private entrepreneur and the economic accountability of socialist enterprises, capitalist exchange and exchange by co-operatives and agencies of the proletarian state, the equivalent exchange of commodities according to value and the socialist principle of distribution according to labour.

In this theory, socialism was essentially contrasted to exchange, and economic accountability with control by the rouble. With respect to the withering away of exchange and money, and the transition to direct commodity exchange, "leftist" pseudo-theories

are in the same logical category as theories which stress the "withering away of law" and the "disappearance of the legal superstructure".

These mistaken theories were harshly criticized at the First Congress of Marxist Theorists of the State. Emphasis was placed upon the great importance of Soviet law as law which proceeds from the dictatorship of the proletariat and which finds its strength therein:

... For us it must be indisputable that although Soviet law deals with different economic structures, its power and movement and nevertheless has but one source—the October Revolution the dictatorship of the proletariat ... Such facts as the transformation of the proletariat into the ruling class, the creation of the Soviet state, the nationalization of the basic instruments of production, the nationalization of land, transport, banks and the monopoly of foreign trade all these are starting points which imprint themselves on Soviet law and which give it its special quality.<sup>10</sup>

The theory that the specific quality of law is the facilitation of equivalent exchange was criticized and defeated after the discussions of 1930-1931. However, the positive aspect of this task—the broad and all-round development of the system of Soviet socialist law—has not yet been accomplished. Our work in this area still remains backward. Such decisive moments as: the adoption of the Law of August 7, 1932, concerning the sanctity and inviolability of socialist property; the decisions of the XVIIth Party Congress on the liquidation of classes; Comrade Stalin's speech at the January Plenum of the Central Committee and Central Auditing Committee of 1933 on the new tasks of revolutionary legality—were only used for relevant legislation in specialized areas (economic law, criminal law etc.). The general theory of Soviet socialist law has still not yet developed anything thorough and systematic. Decisive conclusions must be drawn from this fact.

The attempt to provide Soviet socialist law with a complete system could not have triumphed in 1930, because this was the time when all out collectivization was taking place (and the liquidation of the kulaks as a class was in process).

Also recall that practical attempts to create new codes suffered failure at this time. But this happened in such a way that a number of zealots, who championed the system of Soviet law as proletarian or socialist law, tried to initiate (under the banner of developing this

system) various politically dangerous and anti-Party orientations. These included the liquidation of NEP in the towns concurrently with the liquidation of the kulaks, and the abolition of civil law for the collective farms which would essentially have meant their transformation into state enterprises.

The opposite trend also took place-the declaration that various relations of production were socialist when in fact they were not. Recall the social revolutionary "theories" of Professor Rosenblum, to the effect that the petty commodity producer (and the peasant who works the land) also build socialism.

Also mistaken were Comrade Stuchka's attempts to base the system of Soviet law on the principle of equivalence equivalence in the sense of compensation according to labour, and equivalence in the sense of the guarantee that no property (including kulak property) would be expropriated without compensation. Such a "system" would be an effective impediment and obstacle for the development of socialist progress.

We struggled against these distortions and criticized attempts to construct the system of Soviet law in isolation from the policy of the dictatorship of the proletariat and from its tasks during the period of transition. We also insisted that Soviet law must enjoy the maximum mobility and flexibility during the period of full-scale socialist offensive. But in itself this criticism was not sufficient because we failed to show clearly the conclusions that could be derived for Soviet law from the tremendous economic advances and those class relationships which have characterized the full-scale socialist offensive. But this obligation was all the more pressing for us because earlier we held the confused view concerning the withering away of all law under socialism.

We have now come to the period when Soviet socialist law formalizes-within the state of victorious socialism and on the basis of socialist property-the domination of uniform socialist relations of production in the town and country. We are in the period when socialist relations of production in industry and agriculture are firmly stabilized. Public socialist property, and distribution according to labour: these are the cornerstones on which we can and must construct the system of Soviet socialist law.

This is an immense task, most gratifying, and it has practical value. In a whole array of areas we still have not yet codified our

legislation. The old codes, which were planned for the co-existence of, and struggle between the capitalist and socialist sectors, are only effective in isolated areas and often only through some of their articles. Most provisions are ineffective. Whether you take the Civil Code, the Land Code or the Labour Code, none of them can be applied as codes any more.

The task before us is to express in Soviet law-in an appropriate, integral and completed code these new and uniform relationships.

When the new Constitution is adopted this task will become urgent, but it will be facilitated by the Constitution. This is because the bases of the socialist legal system will be formulated in the new Constitution; its draft has already been adopted by the Plenum of the Central Committee of our Party.

From the economic and legal perspectives, one of the most fundamental questions concerns the co-existence of two different types of socialist property: state property (i.e. property of all the people) and collective farm property (i.e. property of the cooperatives).

From the legal perspective, one of the most important tasks is to elaborate this distinction and to identify the features of these two types.

The development and consolidation of public socialist property (in its state and collective farm/co-operative forms) assumes the consolidation of the personal property of working people. Socialism signifies the fullest protection of the rights of the individual, of the rights of each member of socialist society, of a society of free working people in the town and country.

This question of the personal and property rights of the working people has been insufficiently developed by us.

In our works on economic law-particularly in Vol. 1 of *A Course on Soviet Economic Law*, there was almost no room for the working person, for man, because everything was absorbed by the problem of the relationship between economic units. Questions of civil law were almost absent.

This was wrong of course. The problem of personal and property rights-and of their protection-is an immense theoretical and practical task.

The socialist state protects not only public socialist property; it also protects the supplementary agricultural plot of the collective

farmer, protects his personal property, the personal property of each working person.

Not long ago there was a scholarly conference of the fascist professors of law in Berlin. They decided that the concept of man should be excluded from civil law: this concept, they argued, was so broad that a foreigner, a non-Aryan, and "even" a Jew might be encompassed by it.

Against this racist gibberish, against this unbridled chauvinism, we propose the defence of the personal and property rights of each member of socialist society.

Soviet socialist law must protect the conquests of the revolution, the security of our socialist state and socialist public system, public socialist property, discipline, personal property rights and the consolidation of the socialist family.

Here there arises the great problem of the relation between Soviet socialist law and socialist morality. We must particularly stress, in the context of the role of the courts, the close bond between our criminal law and our socialist morality.

The decisions of our Soviet courts-made on the basis of our laws-are a method for morally influencing those who are not directly involved in a given judicial hearing-the entire society.

The task of socialization and re-education is now being pushed to the forefront more and more. In practice the court is an agency which uses coercion and repression; simultaneously, it acts by persuasion and re-education.

The practice of the application of Soviet socialist law is that of intensified struggle and the infliction of heavy blows on the remnants of our class enemies. Our court is an agency of the proletarian dictatorship and it will remain as such. But the court therefore has another task-re-education. This must not be isolated from the tasks of coercion and repression. The practice of applying Soviet law in different areas is a massive cultural and educational task. The introduction of socialist legality, socialist legal concepts, the achievement of the correct relation between the citizen and the socialist state this is what is required in the area of the practical application of Soviet law. This is what must be considered in its theoretical development.

### Notes

1. This is a revised transcript of a report to the Moscow Legal Institute, conference on theory, April 3, 1936.
2. V. I. Lenin, *The State and Revolution (1917)*, *LCW*, vol. 25, p. 425.
3. *ibid.* p. 467.
4. J. Stalin, *Problems of Leninism (1933)*, Partizdat', *Moscow*, p. 509.
5. *ibid.* p. 580.
6. V. I. Lenin, *The State and Revolution (1917)*, *op. cit.* p. 413.
7. *Programme and Charter of the All-Union Communist Party (Bolsheviks) (1933)*, Politizdat, *Moscow*, p. 21.
8. V. I. Lenin, *Sochinenii*, vol. 23, p. 36.
9. See E. B. Pashukanis, *The General Theory of Law and Marxism (1926)*, *Moscow*, 2nd edition, p. 105.
10. E. B. Pashukanis, "For a Marxist-Leninist Theory of State and Law", *The Soviet State and Revolution of the Law (1931)*, no. 1, p. 24.



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### *Abbreviations*

BZK-Biulleten' zaochnoi konsul'tatsii  
EGP-Entsiklopediia gosudarstva i prava  
Ezh. SIu.-Ezhenedel'nik sovetskoi iustitsii  
IKP-Institut krasnoi professury  
*Mzh. P.*-Mezhdunarodnoe pravo  
Pod Zn. M.-Pod znamenem marksizma  
RP-Revoliutsiia prava  
SG-Sovetskoe gosudarstvo  
SGRP-Sovetskoe gosudarstvo i revoliutsiia prava  
SS-Sovetskoe stroitel'stvo  
VKA-Vestnik kommunisticheskoi akademii  
VSA-Vestnik sotsialisticheskoi akademii

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