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# **IS THERE A CASE FOR SOCIALIST JURISPRUDENCE?**

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**Presented to the Department of Politics at the University of Glasgow  
on 1 September, 1997 for the degree of PhD**

## ABSTRACT

The field of socialist law generally has incorporated two paradigms of study. The first focuses on the former Soviet Union, China and other "communist" nations and analyses how legal systems have developed in these nations and why they differ from Western ones. The second rejects the classification of the former U.S.S.R. (China, etc.) as representatives of the socialism envisioned by Marx and Engels and concentrates on a Marxist exploration of legal phenomena in capitalism. The first approach ignores the divergence between the socialism expatiated upon by Marx and the socialism which was (and is) functioning in these nations; the second disregards the problem of a regulatory system in post-capitalist society. Arguments that do address the regulatory problem in socialism often call for a re-definition of law (usually rights-based) which embodies socialist principles. Such a demand, however, is in conflict with Marx's original position (one that was expanded by E.B. Pashukanis) that law will become unnecessary in such a society. The purpose of this thesis is to construct theoretically a regulatory system based on the writings of a selection of Marxist legal theorists (Marx, Engels, Lenin, Stuchka, Reisner and Pashukanis), ascertain whether such a system might be considered law, and determine whether or not there is a legitimate claim for a "socialist jurisprudence". Both theoretical constructs and historical examples are used during the course of discussion. In addressing the lacuna in the two paradigms of this field, the results of the thesis indicate that there is a viable alternative to law which does not ignore the regulatory needs of society and is compatible with the Marxist critique of the legal order.

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## PREFACE

No term has generated such a variety of conceptions (and misconceptions) as the word "socialism". While "socialism" often refers to the transition period from capitalism to communism, this meaning is rather confusing. Marx and Engels often spoke of socialism or socialist theory, when indeed they were referring to post-transition-period society. In some of their works (notoriously the *Communist Manifesto*), however, this future society was referred to specifically as communist and much space was dedicated to the justification of this label. In the current political lexicon, the meaning of socialism is even more confusing. Often "welfare states" are described as socialistic, and various political parties proclaiming to be socialist can advocate anything from a welfare/market economy to radical overthrow of the capitalist system.

Also in confusion are the meanings of "communism" and "Marxism". What was referred to in the West as the "Communist Bloc" was in technical terms, still in the "socialist" phase of things (if even that), despite the fact that the political party was the "Communist" party. As Ivo Lapenna points out, the phrase "Communist State" often used in articles or books on the former Soviet Union or China is "an obvious contradiction in terms: either a State exists—and in that case being a class category, it cannot be 'Communist'—or there is a classless communist society, and in that case it cannot be organised as a State."<sup>1</sup> Similarly, "Marxism" is used both to describe the ideological basis of the former U.S.S.R. and to refute the claim that the U.S.S.R. actually was "socialist". It has also been associated with the regimes of Cuba and China, the legacy of Pol Pot, the activities of the Shining Path and Sandinistas and a host of other campaigns which have been described alternatively as "people's movements" and "terrorism". Lapenna aptly sums up the situation:

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<sup>1</sup> Ivo Lapenna, "Marxism and the Soviet Constitutions" in *Conflict Studies*, No. 106 (London: The Institute for the Study of Conflict, 1979) p. 1

Given the nature of Marx and Engels' polemics, terms that appear to have obvious meaning, such as "politics" or "democracy", become clouded. For example, Marx and Engels asserted that communist institutions would be "non-political". Similarly, a Marxist definition of democracy would include direct control over economic resources. Using the term institution or democracy with their current meanings while speaking of communism would breed confusion. More specific to this thesis, which explores the legal aspect of socialism, using such terms as "law", "arbitration" and "rules" might prove misleading. The problem becomes even larger when considering the traditional Marxist position that communism will have no "law" per se. For the most part, I have used the term "law" until it becomes necessary (and this occurs quite early) to distinguish between what might be considered "law" in capitalism and "law" in communism. At this point, I continue to use law, when referring to capitalism, and use the term "regulation" when referring to communism. The term "rule", as initially defined by Marx and Engels, implies an outcome of necessity and is generally not used to express any meaning which may be associated with current jurisprudential debates (e.g. Hart). Similarly, it becomes necessary to differentiate the *process* of dispute resolution in capitalism and communism. For the process of conflict resolution in communism, I have used the term "arbitration". As with the term "rule", arbitration does not refer to the current legal meaning of arbitration in Western systems. It is merely used as a linguistic tool to differentiate between the legal process in capitalism and the dispute resolution process in communism. Once it becomes established that there may be fundamental differences between law in capitalism and conflict resolution in communism, I refer to the entire future system as "regulation" rather than "law" to avoid confusion. As with the other terms discussed, "regulation" does not imply any formal "legal" concept.

Other problems occur within quoted materials. The German word *Recht*, for instance, can mean "right", "privilege", "law", "justice" or the administration of

justice; while *Gesetz* translates in English as “statute”. Similarly in Russian *pravo* resembles the German *Recht* and *zakon* is akin to *Gesetz*. Unfortunately the English usage of law reflects *all* of these meanings. Most often, the meaning of various terms is clarified in context. Translation ambivalences are mentioned in footnotes.

The method of transliteration of Russian titles and text follows the Library of Congress system (with diacritical marks omitted). Titles of Russian materials not transliterated by me are, however, as they appear in the source.

The old style Russian calendar was 13 days behind that of the West. As of February 1, 1918 old style, the Bolsheviks standardised dates with the West. When relevant, the new style calendar date appears in parenthesis. For example November 1 (14), 1917.

All quoted material is cited precisely; including the use of American spellings, the now outdated universal “he” as a representation of a person and various styles of transliteration (for instance Trotsky instead of Trotskii). Footnotes restart at each chapter; *op cit* and *loc cit* are not used, but rather the author’s last name and short title of work followed by the page number are used for multiple references. Any contribution on my part is denoted by brackets.

### **A special thanks...**

In such a project as a thesis, the number of people to thank grow with each year of work. For those that I do not mention directly, and there are many, I offer a generic “Thanks” for all the input, rip-roaring discussions, “study breaks”, article exchanges, whining sessions, etc. and hopefully a pint or two when we meet again.

Formally I’d like to thank Elspeth Attwooll for her advice, theoretical critiques, enthusiasm and pleasure in working with students; Stephen White for his encouragement and source hunting assistance; the post-graduate scholarship committee of Glasgow University and Bowdoin College, and the Politics and Law

departments for financial aid; and those closest to me, my family and my partner, for putting up with me.

### **An opening remark...**

Often I am confronted with students who do not see the point in theoretically exploring possibilities of social organisation. Mired in the day-to-day trauma of passing tests, making a living, keeping up with assignments and fulfilling roles in their various partnerships and relationships, such work seems beyond the purview of "real" life and to some extent rather pointless. At best it is a method to engage in utopian visions, at worst it is a cruel waste of precious energy. I have never met one student, however, who did not have some idea of how things could be different. I have also never met a student who, once charged with the task of analysing our own society, has not discovered new pieces of information that in one way or another have changed the way they thought and approached things. Such is the process of scholarship. It is a process of growth, of gathering new information, of assembling that information into coherent thoughts and progressively re-defining, defending, expanding those thoughts in order to apply them to our own lives. It is a process to understand where we are in historical context, and in doing so a process that aids in directing where we might go, both as individuals and a society. By nature, scholarship cannot operate within any defined realm of possibility. If we are not willing to take information we gather and pose why not, then the whys of what we do become lost, and we become passive agents rather than creators. *Many* social "facts" today were the imagination of yesterday. So, I tell my students, it is your duty to imagine the future into becoming; if you do not, the future is only the present, a predicament too bleak for the human spirit to endure.

## INTRODUCTION

### THE NEED AND PURPOSE

The purpose of this thesis is to construct theoretically a regulatory system in communism compatible with the principles outlined by Marx and Engels on the subject of law and socialism. The search for clarification of such a system makes use of historical examples, philosophic works and theoretical constructs. After such a regulatory system has been defined and discussed, it can be ascertained whether such a system can be considered law, and whether it merits a "separate" jurisprudence.

Exploration into a socialist theory of law has developed along two distinct paths. One branch restricts itself to the writings of Marx and Engels and those theorists that have closely followed the precepts of dialectics and materialism (notably E. B. Pashukanis), and the other focuses on the development of legal systems in nations proclaiming to follow a socialist path. Consequently, analysis most often results in either a discussion of the merits (or demerits) of Marx's critique of the capitalist legal system or a critique of Marxist theory based on the shortcomings of the legal systems of "communist" nations, in particular the former U.S.S.R.

A large part of the problem, as previously discussed in the Preface, rests with the confusion over the meaning of "socialism" and whether, despite the claims of officials, countries like the U.S.S.R., China or Cuba can be considered "socialist". Though there is ample evidence from the writings of Marx and Engels that they cannot, such nations have drawn, nevertheless, on certain Marxist doctrines in shaping their political ideologies; and the connection is undeniable. Whilst they may not be considered "socialist" they cannot be considered "capitalist" either. Such a differentiation has fostered the growth of the notion that these legal systems do not resemble Western legal systems and therefore should be considered "socialist" legal systems.

The former U.S.S.R. represented a crucial element in the development of the concept of socialism throughout the modern world. There are several reasons for this. Foremost, it was the first nation to attempt to put Marxist theory into practice. Second, the founding ideologists of the Soviet Union (namely Lenin and Trotskii) drew heavily on Marxist theory. Third, it was the first nation to proclaim itself "socialist". The link between Marxism and the U.S.S.R. should therefore be obvious and unproblematic. As is well-known, however, this is not the case. The structure and philosophy of the various periods of Soviet history are extremely diverse and in some instances contradictory. This is definitely true for the subject of law. Up until 1936, it was proposed and taught that law was to weaken constantly until it completely "withered away". With the consolidation of the power of Stalin, however, law was proclaimed to be an instrument of the Soviet State and it was stipulated that it, along with the state, must actually be strengthened until the *world* revolution had occurred.

The branch of "socialist law" that pertains to legal systems in "communist" nations has developed sub-branches within its own general paradigm. There are those that approach the Soviet Union from a completely Western perspective, and examine the former U.S.S.R. in terms of its legal culture (or lack of it), the absence both of the rule of law and of the separation of powers principle—concepts which are prominent in the legal theory of Western societies. Much has been done in this regard with historical analysis of the development of Soviet law and the ramifications for its own infrastructure.<sup>1</sup>

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<sup>1</sup> See *Toward the "Rule of Law" in Russia?* ed., Donald Barry (New York: M.E. Sharpe, 1992) with contributions by Eugene Huskey and Louise Shelley among others; Gordon Smith, "Development of 'Socialist Legality' in the Soviet Union" in *Perspectives on Soviet Law for the 1980s*, eds., F.J.M. Feldbrugge and William Simons of the *Law in Eastern Europe* (series), No. 24, general ed., F.J.M. Feldbrugge (The Hague: Martinus Nijhoff Publishers, 1982) pp. 77-97; and also Teruo Matsushita, "Legality in East and West: A Comparative Study of 'Socialist Legality'" in the same work, pp. 99-106. See also works by John Hazard, notably *Communists and Their Law* (Chicago: University of Chicago Press, 1951) and *Law and Social Change in the U.S.S.R.* (London: Stevens and Sons, 1953); Harold Berman, notably, *Justice in the U.S.S.R.: An Interpretation of Soviet Law* (Cambridge: Harvard University Press, 1963). Also interesting is Peter Solomon Jr.'s "Local Political Power and Soviet Criminal Justice, 1922-1941" in *Soviet Studies*, Vol. 37, No. 3 (July, 1985) pp. 305-329; Richard Pipes' *Legalised Lawlessness: Soviet Revolutionary Justice*

The second branch focuses far more on theory. These authors have tried to explain the shift that took place from the withering away thesis of law (1917-1936) to the consolidation of state power (1936-1991). Several authors attempt to explain the differences between Marxist theory and Soviet theory and try to unite them on one plane or another, treating Sovietology as a logical and predictable outcome of Marxism, hence labelling the entirety of Soviet history "socialist".<sup>2</sup> Others use the Marxist influence on the development of the U.S.S.R. as a basis for distinguishing a "communist" legal system from a Western one.<sup>3</sup> As interesting as this material is, an in-depth examination is not directly pertinent to the subject under investigation.

Far more relevant is that body of literature which primarily focuses on the works of Marx and Engels. Whilst this branch has recognised that the U.S.S.R. did not represent the socialism described by Marx and Engels, authors restrict themselves to a largely critical position. As Boaventura de Sousa Santos writes "It is almost a commonplace to say that there is no Marxist theory of law, though it is less commonly acknowledged that there are a few Marxist theories *against* law."<sup>4</sup> Such a concept arises from the common notion that Marx and Engels actually called for the end of law as society progressed towards communism. As a result, the thrust of the literature critiques,<sup>5</sup> defends or tries to fine-tune<sup>6</sup> a Marxist interpretation of legal

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(London: London Institute for European Defense and Strategic Studies, 1986) and Robert Sharlet's "Stalinism and Soviet Legal Culture" in *Stalinism*, ed., Robert Tucker (New York: W.W. Norton, 1977) pp. 155-179.

- <sup>2</sup> Imré Szabo writes a fascinating theoretical history of socialist law from this perspective, see "The Socialist Conception of Law", *International Encyclopedia of Comparative Law*, Vol. II, chief ed., René David (The Hague: J.C.B. Mouton, 1975) pp. 49-83. See also Michel Villey, "The Philosophy of Law in the Communist World" in *Marxism, Communism and Western Society*, ed., C.D. Kerning (New York: Herder and Herder, 1973) vol. 5, pp. 140-147 and Hans Kelsen's *The Communist Theory of Law* (London: Stevens and Sons, 1955).
- <sup>3</sup> See the works of Alice Ehr-Soon Tay and Eugene Kamenka especially "Marxism and the Problem of Continuity or Heritability of Law" in *Perspectives on Soviet Law for the 1980s*, pp. 1-12, "Beyond the French Revolution: Communism, Socialism and the Concept of Law" in *University of Toronto Law Journal*, Vol. 21 (1971), pp. 109-140 and "Socialism, Anarchism and Law" in *Law and Society*, eds., Eugene Kamenka, et al. (London: Edward Arnold, 1978) pp. 48-80. Also interesting is Olimpiad Ioffe's *Soviet Law and Soviet Reality of the Law in Eastern Europe* (series), No. 30, general ed., F.J.M. Feldbrugge (The Hague: Martinus Nijhoff Publishers, 1985).
- <sup>4</sup> Boaventura de Sousa Santos, "Popular Justice, Dual Power and Socialist Strategy" in *Marxism and Law*, eds., Piers Beirne and Richard Quinney (New York: John Wiley and Sons, 1982) p. 364
- <sup>5</sup> See for example Paul Phillips, *Marx and Engels on Law and Laws* (New Jersey: Barnes and Noble Books, 1980); Alan Hunt, "Law, State and Class Struggle" in *Marxism Today*, Vol. 20, No. 6 (June,

phenomena in capitalism. This approach has given rise to the critical legal studies movement and the radical or "new criminology" which began to flourish in the 1970's.<sup>7</sup> As several authors point out, however, such a field does little for *construction* of socialist regulation.

Because of the lack of focus on how the future society will be regulated *without* law, some authors have questioned the validity of the claim that law will actually "end". Concluding that it will not, they pose arguments from a socialist perspective that actually call for the preservation of law. Hence the Marxist branch of literature has "sub-branched" much as the Sovietologist branch.

Thus a dichotomous situation has arisen. One side assumes that law will play no role in a future society and that, therefore, a socialist theory of law should be restricted to the critical evaluation of capitalist legal phenomena. The major

1976) pp. 178-187; Maureen Cain, "The Main Themes of Marx and Engels' Sociology of Law" in *British Journal of Law and Society*, Vol. 1, No. 2 (Summer, 1974) pp. 136-148; Colin Sumner, *Reading Ideologies: An Investigation into the Marxist Theory of Ideology and Law* (London: Academic Press, 1979) and Paul Hirst, *On Law and Ideology* (New Jersey: Humanities Press, 1979).

- <sup>6</sup> See: Chris Arthur, Introduction to E.B. Pashukanis, *Law and Marxism*, trans., Barbara Einhorn (London: Ink Links, 1978) pp. 9-31; Andrew Fraser, "The Legal Theory We Need Now", *Socialist Review* 40-1 (July-October, 1978) pp. 147-187; Bernard Edelman, *Ownership of the Image*, trans., Elizabeth Kingdom (London: Routledge and Kegan Paul, 1979). Also interesting is an excellent collection of essays by authors Piers Beirne, Douglas Hay, Karl Klare, Nicos Poulantzas, Richard Quinney, Colin Sumner, E.P. Thompson and others prominent in this field, see *Marxism and Law*; Bob Fine, *Democracy and the Rule of Law* (Leichhardt, Australia: Pluto Press, 1984) which includes a discussion of the role of law as a tool for working class; Bob Jessup, "On Recent Marxist Theories of Law, the State, and Juridico-Political Ideology" in *International Journal of the Sociology of Law*, Vol. 8, No. 4 (November, 1980) pp. 339-368, which surveys several Marxist approaches to law including, Pashukanis, Poulantzas, Edelman and Hirst; and Issac Balbus, "Commodity Form and Legal Form" in *The Sociology of Law*, eds., Charles Reasons and Robert Rich (Toronto: Butterworth, 1978) pp. 73-90.
- <sup>7</sup> See the collection of articles in *Capitalism and the Rule of Law*, eds., Bob Fine, et al. (London: Hutchinson, 1979) including articles by Jock Young, Bob Fine, Phil Cohen and others; *Essays in Law and Society*, eds., Zenon Bankowski and Geoff Mungham (London: Routledge and Kegan Paul, 1980); *Radical Issues in Criminology*, eds., P. Carlen and M. Collison (New Jersey: Barnes and Nobel Books, 1980) and *The Sociology of Law: A Conflict Perspective* especially William Chambliss, "Toward a Political Economy of Crime", pp. 191-211 and Austin Turk's "Law as a Weapon in Social Conflict", pp. 213-232. See also Robert Brown, "The new criminology" in *Law and Society*, pp. 81-107; Gordon Hawkins, "The new penology" in *Law and Society*, pp. 108-127 and Richard Quinney's *Class, State and Crime* (New York: David McKay, 1977). For a critique of radical criminology from a Marxist perspective see Paul Hirst, "Marx and Engels on law, crime and morality" in *Economy and Society*, Vol. 1, No. 1 (February, 1972) pp. 28-56. Also useful is Mark Kelman's *A Guide to Critical Legal Studies* (Cambridge, MA.: Harvard University Press, 1987).

shortcoming of this approach is well put by Steve Redhead who does not necessarily disagree that law could be transformed but asserts that “the question ‘into what’ cannot be allowed to ring out for too long.”<sup>8</sup> Those representing the other point of view argue that, whilst Marx’s evaluation of law may be correct in part, it does not necessarily commit a socialist to abandon law. Some elements of capitalist law (e.g. rights, the rule of law), just as some elements of capitalist production, can be incorporated into socialism—indeed *must* be for *any* system to maintain its integrity.<sup>9</sup> On a more basic level, some argue that to insist on the disappearance of law is simply ridiculous given the organisational needs of society.<sup>10</sup> As Richard Kinsey asserts, “no socialist society will be ‘free’ from organisation any more than it will be free from the need to produce.”<sup>11</sup>

The absence of discussion of a viable alternative to a law-based regulatory system on the part of the theorists who wish to defend Marx’s claim that law will disappear forces one to accept that there *is* no alternative to law. Apparently if one wants to argue for *some* sort of regulation, socialism *must* incorporate a theory of law into its programme. The apparent gap in this literature, then, is the need for an exploration into what the “disappearance” of law actually indicates. Are there grounds in the writings of Marx and Engels that suggest a need for some sort of regulation in communism? If the answer is yes, what might this system entail and could it be considered law? Not only do answers to these questions provide an

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<sup>8</sup> Steve Redhead, “Marxist Theory, The Rule of Law and Socialism”, *Marxism and Law*, p. 342

<sup>9</sup> See Alan Hunt’s “The Politics of Law and Justice” in *Politics and Power*, eds., Diane Adlam, et al. (London: Routledge and Kegan Paul, 1981) pp. 3-26 and “A Socialist Interest in Law”, *New Left Review*, No. 192 (March-April, 1992) pp. 105-119. Also, Piers Beirne and Alan Hunt, “Law and the Constitution of Soviet Society: The Case of Comrade Lenin” in *Law & Society Review*, Vol. 22, No. 3 (1988) pp. 575-614 and Amy Bartholomew and Alan Hunt’s “What’s Wrong With Rights” in *Law and Inequality*, Vol. 9, No. 1 (1990) pp. 1-58. Also pertinent is E. P. Thompson, *Whigs and Hunters* (New York: Pantheon Books, 1975); Timothy O’Hagan, *The End of Law?* (Oxford: Basil Blackwell, 1984); Christine Sypnowich, *The Concept of Socialist Law* (Oxford: Clarendon Press, 1990) and Tom Campbell, *The Left and Rights* (London: Routledge and Kegan Paul, 1983).

<sup>10</sup> See Hugh Collins, *Marxism and Law* (Oxford: Clarendon Press, 1982); Paul Hirst, *Law, Socialism and Democracy* (London: Allen and Unwin, 1986) and Richard Kinsey, “Despotism and Legality” in *Capitalism and the Rule of Law*, pp. 46-64.

<sup>11</sup> Kinsey, “Despotism and Legality”, p. 64

alternative to the two positions described above, but they also throw light on exactly *why* the labelling of the legal systems of the former U.S.S.R. and China as “socialist” might be a misnomer. The interest for those concerned with socialism is grounded in fundamental issues that must be addressed if the road to communism was *not* that posed by the U.S.S.R. On a broader level, the interest to the field of jurisprudence in general assumes more theoretical importance. Indeed, *is* there a system of social regulation that can be considered non-legal? Why is it considered non-legal? How might it work? Is law a perpetual category, a concept embodied by the famous phrase of Roman jurisprudence *ubi societas ibi jus*?<sup>12</sup> To delve into such questions the meaning of law itself must be explored, as well as the nature of its form, content and function.

The purpose of this thesis then, is to fill the gap existing in the literature of “socialist law”. Its primary focus is to define the theoretical concept of regulation in communism and ascertain whether such a system might be considered “law”. Once these areas are explored, the question as to whether or not there is a legitimate claim for a “separate” socialist jurisprudence can be addressed on a more substantial basis. To this date, such an attempt to define theoretically a regulatory system in communism compatible with the writings of Marx and Engels has not been made. Thus the originality of the thesis rests in the fact that it is the first attempt of its kind.

## METHODOLOGY

The search for the definition of what is meant by regulation in communism will not include a defence or critique of socialism in general. Such issues as economic feasibility, socialist institutional structure, abundance issues, direct control over resources, etc. will not be explored. Since there has never been a “real” communist society per se, much of what communism entails must involve

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<sup>12</sup> Where there is society there is law.

theoretical constructs. Since the purpose of the thesis is *only* to address what is meant by regulation in communism rather than to define socialism as a whole, basic precepts of socialism (summed up in the Preface) are accepted to allow focus on regulation itself. There are, nevertheless, certain principles that relate to a discussion of regulation, such as direct control of resources, that need to be *conceptually* defined in order to allow analysis to proceed. These elements shall *only* be discussed to the point that they are theoretically clear.

Although a description of elements of communism must by necessity involve theoretical constructs, this construction should take place within a defined framework. Theoretical works which relate to the future of law provide the basis for such a framework and are focused on in this thesis. Other avenues, such as historical examples, provide concrete cases to exemplify certain theoretical principles. As there are no examples of communist societies, the historical examples that *do* contribute to a theory of regulation do so in a limited way, primarily by providing a source to demonstrate how theoretical principles *might* be applied and also to draw to the forefront issues of concern.

The methodology used in the search for a theoretical definition of a regulatory system in communism primarily engages philosophic works and theoretical constructs. Historical examples are used to pinpoint pertinent issues and demonstrate some principles derived from theoretical discussion.

If a regulatory system in communism is to be based on the principles proposed by Marx and Engels, a natural starting point for the inquiry begins with the writings of Marx and Engels. The first chapter (*Marx and Engels*) elucidates these writers' general views on law and its role in society. Also examined are the scant writings that describe the future society. Though none of these writings contains a "legal theory", there is enough information to extract a general framework of discussion.

Chapter two (*The People's Courts*) investigates the initial endeavour by Russia<sup>13</sup> to incorporate into societal structure a judiciary that attempted to fulfil some of the criteria established by Marx and Engels for a communist regulatory system. Analysing the situation of the People's Courts further illuminates some of the concepts proposed by Marx and Engels, and raises important questions with regard to the construct of a communist regulatory system.<sup>14</sup>

The main thrust for a development of a Marxist theory of law occurred in the Soviet Union during the twenties. Studying the works of several key theorists from this period serves to detail and clarify some of Marx and Engels' more general precepts. Chapter three (*The Theorists*) is dedicated to an in-depth survey of the works of these theorists and a summation of their analysis of the phenomena of law and the role for law (if any) in communism.

From the works of Marx and Engels, the analysis of the People's Courts and a survey of pertinent theoretical literature quite an extensive portrait of what a socialist legal theory might incorporate emerges. Despite this more specific framework, however, certain gaps and problems in the theory of regulation in communism become evident. Chapter four (*Theoretical Synthesis*) sums up the conclusions drawn from the previous three chapters and addresses possible theoretical difficulties through the use of philosophic constructs within the framework established in the summary.

Chapter five (*Towards a Model*) uses the material of the previous four chapters to elicit any theoretical questions as yet unanswered in order to present a succinct, yet full summary of what is meant by "regulation" in communism. After

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<sup>13</sup> There are many brands of socialism in current political practice, many of which were influenced by the former U.S.S.R., but all of which have individual variations. However, for the purpose of theoretical debate, major problems and questions regarding a Marxist view of law are well-illustrated by the example of the Soviet Union.

<sup>14</sup> Also interesting were the Comrades' Courts which were designed specifically to handle problems inside industrial enterprises. See Albert Boiter, "Comradely Justice: How Durable Is It?" in *Problems of Communism*, Vol. 24, No. 2 (March-April, 1965) pp. 82-92 and Robert Sharlet's "Pashukanis and the Withering Away of Law in the U.S.S.R." in *Cultural Revolution in Russia 1928-1931*, ed., Sheila Fitzpatrick (Ontario: Fitzhenry and Whiteside, 1978) esp. pp. 178-179.

such a model has been drawn, the chapter draws once again from historical example to evaluate and clarify definitions thus far developed.

Drawing from the definition established through the proceeds of the previous chapters, the final chapter addresses the issues of: (1) whether communist regulation could be considered law; and (2) whether there is a defensible argument for a call for a separate socialist jurisprudence.

## **THE SPECIFICITIES**

### **Marx and Engels**

The sole purpose of this section is to investigate what Marx and Engels' vision of a regulatory system in communism entails. The task becomes complicated due to the nature of Marxist analysis. In short, one phenomenon, such as law, cannot be evaluated in isolation from other social phenomena (notably economic relations). Thus a discussion of communist law incorporates the writers' analysis of law in capitalism as well as their theoretical portrait of what socialism and its accompanying social relations might involve. Since the purpose of this thesis is to construct a theory of communist regulation, I will not be addressing critical arguments regarding their analysis of law *in capitalism*. As mentioned earlier, the literature in this area is rich. When certain criticisms become relevant to regulation discussions, however, they are incorporated in the discussion. For the most part, the interpretation of law and legality by Marx and Engels is accepted.

Similarly, debates regarding the merits and demerits of the basic tenets of socialism will not be explored. By "basic tenets" I mean such assumptions that socialism will be a technologically advanced society able to produce an abundance of products for human consumption. Also included are the methodological approach of dialectics, the theory of materialism, the schematic interpretation of society via base and superstructure and the key role class antagonisms play in historical

progress. My approach is to accept these tenets, and draw them to their logical conclusions as they pertain to the field of law.

Victor Serge expressed concern over turning the “scientific spirit of Marxism” into a “Marxist orthodoxy.”<sup>15</sup> Serge, in essence, warned of the danger of subjecting human thought towards a pre-determined path. Such interpretative variety has been stimulated by Marx’s works that he is both classified as the founder of totalitarianism and anti-humanist and the true father of democracy and defender of human individuality. It appears implausible that such a variety of interpretations even *could* result in an orthodoxy. History has proven the reverse, however, and Serge’s warnings must go heeded. Any interpretation of theoretical work involves the reader’s personal views to some degree. Whilst some positions may be better supported than others, it is important to keep in mind that the works of these two authors were: (1) composed over a life-time; and (2) were written by two different people. When considering that a life entails a certain amount of development, change of perspective and added experience, theoretical “inconsistencies” which take place over a *forty year period* should assume a lesser importance. There has been much ado in regards to the different theoretical “stages” of Marx. As Terrell Carver aptly describes:

...in many accounts Marx’s career is conceived as a series of logically related stages, e.g. romanticism, liberalism, Hegelianism, and Feuerbachianism, which lead as a succession to an ‘end’, namely the ‘self-clarification’ which Marx mentions as a feature of *The German Ideology*. In these accounts Marx is presented as somehow imprisoned intellectually within each stage as a kind of ‘cell’, yet magically granted the right key in producing each ‘key’ text, in order to unlock that particular ‘cell’ and proceed to the next.

While there is considerable continuity of a developmental sort in Marx’s early (and indeed later) works, a mysterious teleology is not required in explanation. Marx’s political interests and circumstances provide a sufficient clue, the one he himself offered in his autobiographical sketch.<sup>16</sup>

There *are* noticeable differences in the “early” (pre-1844) and “later” (post-*The German Ideology*) Marx; and as Carver points out, there is a definite intellectual

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<sup>15</sup> Victor Serge, *Memoirs of a Revolutionary*, trans., Peter Sedgwick (London: Oxford University Press, 1963) pp. 375-376

<sup>16</sup> Terrell Carver, *Marx and Engels: The Intellectual Relationship* (Bloomington: Indiana University Press, 1983) p. xii

development towards a more defined theory of historical materialism. For this reason, I rely more heavily on materials that are in accordance with materialism, which eliminates some of Marx's earlier work on law. It is erroneous, however, to assume that the use of *any* position described by the young Marx is indefensible when trying to define Marxism. Certain congruities between the "early" and the "later" Marx exist; the specification of the role of law, however, is heavily influenced by the developments in Marx's later works.

Another concern associated with studying "Marxism" is the exact nature of the relationship between Marx and Engels. Although Terrell Carver asserts that Engels greatly diverged from Marx (to the point of actually doing Marx's work a disservice),<sup>17</sup> and W.O. Henderson emphasises the fact that Engels "made his own contributions to socialist doctrines",<sup>18</sup> Gustav Meyer and Isaiah Berlin support the common view that there was no serious discrepancy with regards to fundamental issues.<sup>19</sup> While Carver's argument has merit, in terms of law there appears to be no essential variance between their views (different as their writings may be). Following Robert Tucker's thoughts that "[c]lassical Marxism is an amalgam in which Engels' work is an essential and inalienable part,"<sup>20</sup> in this thesis their works shall be considered in tandem in the search for the foundation for a socialist view of law. When the term "Marxist" or Marxism is used, some concepts and ideas most succinctly expressed and widely recognised as originating from Engels are included. The specificities of "Marxist" theory and its ramifications for the legal structure in capitalism and socialism I leave to the chapter itself.

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<sup>17</sup> *Ibid.*, pp. 152-158. See also Norman Levine's *The Tragic Deception: Marx Contra Engels* (Santa Barbara, CA: Clio Books, 1975).

<sup>18</sup> W.O. Henderson, *The Life of Friedrich Engels*, two volumes (London: Frank Cass, 1976) vol. 1, p. 2

<sup>19</sup> Gustav Meyer, *Friedrich Engels* (New York: Howard Fertig, 1969) and Isaiah Berlin, *Karl Marx* (Oxford: Oxford University Press, 1963)

<sup>20</sup> Robert Tucker, Introduction to *The Marx and Engels Reader*, ed., Robert Tucker (New York: W. W. Norton, 1978) p. xxxviii

## The People's Courts

Investigating the "People's Courts" in the Soviet Union as an example of an attempt to incorporate some characteristics prescribed by Marx and Engels presents a host of difficulties. The divergence of ideologies of the different phases of Soviet history makes classification of the Soviet Union quite difficult. Its history can be divided into *roughly* 5 phases: (1) the initial period (1917-1918); (2) the Civil War (1918-1920); (3) The New Economic Programme (N.E.P. 1921-1928), where small-scale capitalism was reintroduced into the economy; (4) Stalinism (1928-1952);<sup>21</sup> and (5) post-Stalinism (1952-1991). Each of these historical phases had distinct ideologies. The Bolsheviks' initial attempts at directly implementing Marxist principles ended soon with the appearance of "war communism".<sup>22</sup> N.E.P. was categorised by Lenin as a "retreat", in part brought about by the failure of revolution in the West. Also evident during N.E.P. was the consolidation of power in the hands of the party rather than the workers.<sup>23</sup> Stalin's ideology, founded on the complete empowerment of the State to work towards "socialist" aims, fundamentally altered the course of the initial years of the revolution; an alteration that would affect the U.S.S.R. until its demise. Gordon B. Smith sums up the impact of Stalin well:

More than any other figure, Stalin was the architect of the Soviet political system. He shaped the massive bureaucratic apparatus to bring the economy under his command. He transformed the Party from a diverse array of more-or-less free-thinking leftist intellectuals into a tightly controlled and monolithic force, subservient to his will. He destroyed the "rural mentality" of the Russian peasant through collectivization. He harnessed virtually every resource in his headlong drive to develop and modernize the Soviet Union...If Stalin is immortalized as larger than life, it's because he *seems* larger than life...<sup>24</sup>

The principles behind the People's Courts, at least at the early stages (1917-1920), strongly attempted to adhere to Marxist ideology. They did not, however,

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<sup>21</sup> While most historians place the consolidation of Stalin's power at this date (the beginning of the first Five Year Plan), it should be noted that the effects of Stalin's move towards power could be felt as early as 1924.

<sup>22</sup> Even the initial stages of the Russian revolution were not classified as "socialist" by some. Russia, they argued, was too underdeveloped to sustain a socialist revolution. Ivo Lapenna makes a compelling argument in this regard, see "Marxism and the Soviet Constitutions" in *Conflict Studies*, No. 106 (London: The Institute for the Study of Conflict, 1979) pp. 1-21.

<sup>23</sup> R.W. Makepeace, *Marxist Ideology and Soviet Criminal Law* (London: Croom Helm, 1980) p. 59

<sup>24</sup> Gordon Smith, *Soviet Politics* (New York: St. Martin's Press, 1992) p. 36

progress towards the communist regulatory system envisioned by Marx and Engels. The introduction of N.E.P. seems a natural stopping point for the analysis of the People's Courts for the purpose of theoretically examining the results of a practical excursion into putting theory into practice.

The influence of Lenin on the shaping of the ideology and structure of the U.S.S.R. is so pervasive that an examination of the People's Courts without exploring Lenin's theory of law during the transition period and communism would be remiss. The first section of the chapter is dedicated to the legal concepts of Lenin.

The second part of the chapter focuses on the structure, operation, development and problems of the workings of the People's Courts. Interesting enough, little research has been conducted with regard to these courts, especially in the early period.<sup>25</sup> Research regarding these early local courts involves a great deal of original work, especially in the use of a rather obscure law journal of the early Soviet Union, *Proletarskaia revoliutsiia i pravo*, from which much material of the description of the courts and their problems comes.

The third section of the chapter is dedicated to analysis. When the example of the People's Court is contrasted with the theoretical goals outlined by Marx and Engels, deeper theoretical questions regarding a system of regulation arise. It is through the analysis of this example that these issues are clarified and brought to the forefront.

### **The Theorists**

The history of legal theory in the U.S.S.R. has rather clearly delineated stages. It is generally accepted that from 1917-1928, legal philosophy centred on the thought that law was a bourgeois phenomenon that was to gradually wither away as the

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<sup>25</sup> John Hazard's research on the People's Courts, *Settling Disputes in Soviet Society* (New York: Columbia University Press, 1960) excepted.

U.S.S.R. progressed towards communism.<sup>26</sup> So pervasive was this feeling that the legal institutions and courts were in constant preparedness to shut down; and indeed some of them did.<sup>27</sup> The leading theoretical figure of this time period was E.B. Pashukanis. Even in the modern West he is acknowledged as “[t]he only man who has made a real contribution towards a materialist philosophy of law”<sup>28</sup> and is described as being “virtually the only revolutionary socialist to give us a Marxist analysis of the phenomenon of law.”<sup>29</sup> Much of this chapter is occupied with an in-depth exploration of Pashukanis’s work. Also examined are P.I. Stuchka, instrumental in his work in the Commissariat of Justice, and M.A. Reisner, who presents a slightly different approach in his vision of “communist law”. This chapter is not concerned with these authors’ views of Soviet legal development, but rather with their analysis of the essence of “law” and what the ramifications of their arguments would be for the future of law under communism. Similar to the chapter on Marx and Engels, its purpose is not to critique their concept of law (the critical literature is referenced in footnotes), but rather accept the premises of their arguments and proceed to their descriptions of the future of law. Despite the strategic and ideological upheavals of this period of Soviet history in regards to transition period strategies, the *theoretical* notions of communism are largely unaffected and provide fruitful material for a more detailed concept of communist regulation.

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<sup>26</sup> Historians often divide Soviet legal philosophy into two broad periods: 1917-1936/37, when the “withering away” thesis prevailed and post 1936-37, when the withering away thesis became incompatible with Stalin’s demand for the centralisation of power of the State and law. Others suggest the addition of a middle period (1928-1936/37) where the move towards an empowered state was beginning to become evident. I am inclined to agree with the more specific periods. See Tay and Kamenka, “Beyond the French Revolution: Communist Socialism and the Concept of Law”, pp. 125-126 note 15 and Hazard, Introduction to *Soviet Legal Philosophy*, trans., Hugh Babb (Cambridge, MA: Harvard University Press, 1951) p. xix. For a short history of Soviet legal theory see Huskey, “From Legal Nihilism to *Pravovoe Gosudarstvo*” in *Toward the “Rule of Law” in Russia?* pp. 23-42.

<sup>27</sup> See Sharlet, “Pashukanis and the Withering Away of Law in the U.S.S.R.”, pp. 169-188.

<sup>28</sup> Arthur, “Towards a Materialist Theory of Law” in *Critique* 7 (Winter, 1976/77) p. 31

<sup>29</sup> Peter Binns, “Law and Marxism” in *Capital and Class*, Issue 10 (Spring, 1980) p. 100

After 1928 (the start of the Five Year Plans), Stalin's drive to consolidate power began to take full effect. Stalin's re-definition of socialism and the goals of the Soviet Union naturally altered perceptions of the legal situation. Key to this change was Stalin's emphasis on "socialism in one country", which gave him the theoretical justification for actually *increasing* state power in order to protect the U.S.S.R. against the capitalist encirclement. Concomitantly, with the assertion that the Soviet State was to become stronger, so then was the role of law increased.

With the implementation of the Five Year Plans, an accompanying increase in the need for centralised planning and hence centralised bureaucracy occurred. Law became a crucial element in carrying out state objectives. At this point, the withering away thesis was completely contradictory to Stalinism,<sup>30</sup> and Stalin's legal theorist, Vyshinskii, "replaced"<sup>31</sup> Pashukanis as *the* Soviet legal theorist.<sup>32</sup>

Vyshinskii's work, *The Law of the Soviet State* (1938) laid the foundation for the Soviet legal system. Law was redefined as a positive tool of the state to shape Soviet society. In Vyshinskii's words:

Stalin's teaching is that the withering away of the state will come not through a weakening of the state authority but through its maximum intensification, which is necessary to finish off the remnants of the dying classes and to organize against capitalist encirclement which is now far from being—and will not soon be—destroyed...

...constantly by reinforcing the socialist state and law by every means...the toilers of our country will guarantee the building of the communist society and the triumph of communism.<sup>33</sup>

Accordingly, law is defined as:

...the totality (a) of the rules of conduct expressing the will of the dominant class and established in legal order, and (b) of customs and rules of community life sanctioned by state

<sup>30</sup> Wojciech Sadurski wrote an extremely illuminating article on the transformation of Marxism by Stalin and its effect on Soviet legal theory, see "Marxism and legal positivism" in *Essays in Legal Theory*, ed., D.J. Galligan (Melbourne: Melbourne University Press, 1984) pp. 187-246. See also Rudolph Schlesinger, *Soviet Legal Theory* (London: Kegan Paul, Trench, Trubner, 1945).

<sup>31</sup> Pashukanis was shot in 1937.

<sup>32</sup> Huskey writes an interesting article regarding the struggle between the 'legal nihilists' and Vyshinskii; see "Vyshinskii, Krylenko, and the Shaping of the Soviet Legal Order" in *Slavic Review*, Vol. 46, No. 1 (Spring, 1987) pp. 414-428. Also interesting is Lon Fuller's "Pashukanis and Vyshinsky: A Study in the Development of Marxian Legal Theory" in *Michigan Law Review*, Vol. 47 (1949) pp. 1157-1165 and Rudolph Schlesinger, "Recent Developments in Soviet Legal Theory" in *The Modern Law Review*, Vol. 4 (December, 1942) pp. 21-38.

<sup>33</sup> Andrei Vyshinsky, *The Law of the Soviet State*, trans., Hugh Babb (New York: The Macmillan Company, 1961) p. 62

authority—their application being guaranteed by the compulsive force of the state in order to guard, secure, and develop social relationships and social orders advantageous and agreeable to the dominant class.<sup>34</sup>

Despite Vyshinskii's denunciation after de-Stalinisation for his role in the purge trials, the principles set down in his work remained in operation through much of Soviet history.<sup>35</sup> A majority of the legal literature after this point, became a justifying philosophy for the role law was to play in Soviet society.

There are two rather obvious exclusions in regards to a theory of socialist law. One is the Italian socialist Antonio Gramsci (1891-1937) whose most influential works were written in prison (1929-1935) and are often referred to as *The Prison Notebooks*, and Karl Renner<sup>36</sup> (1870-1950), an Austrian Marxist that wrote the well-recognised work *Institutions of Private Law and their Social Function*.

Gramsci's significant contribution towards a Marxist theory of law stems from his acknowledgement that law is not *only* a repressive instrument of the state, but also serves to unify public values. The dichotomy has been labelled the "coercion" vs "consent" argument in Marxist debates. The seed of Gramsci's two-fold approach can be found in his conception of hegemony. For Gramsci, the development of production forces established an historical basis for the formation of social classes. Members of these classes became aware that their interests corresponded with each other's on an economic level. He explains that the development of class consciousness eventually evolves into an awareness "that one's own corporate interests, in their present and future development, transcend the corporate limits of the purely economic class and can and must become the interests of other subordinate groups too."<sup>37</sup> Thus these ideologically transformed groups compete and conflict until "only one of them...tends to prevail, to gain the upper hand, to propagate itself throughout society—bringing about not only a unison of economic

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<sup>34</sup> *Ibid.*, p. 50

<sup>35</sup> See Sharlet, "Stalinism and Soviet Legal Culture" and Boiter, "Law and Religion in the Soviet Union" in *The American Journal of Comparative Law*, Vol. 25 (1987) pp. 414-428, esp. p 100.

<sup>36</sup> Also published under Karner, Rudolf Springer and Josef Hammer.

<sup>37</sup> Antonio Gramsci, *Selections From the Prison Notebooks*, eds. and trans., Quintin Hoare and Geoffrey Smith (New York: International Publishers, 1971) p. 181

and political aims, but also intellectual and moral unity, posing all the questions around which the struggle rages not on a corporate but on a 'universal' plane, and thus creating a hegemony of a fundamental social group..."<sup>38</sup> In capitalism, not only does the ruling class maintain economic domination through a coercive apparatus, but also attempts to create moral unity. Law, therefore, reflects these two roles:

The general activity of law (which is wider than purely state and governmental activity and also includes the activity involved in directing civil society, in those zones which the technicians of law call legally neutral—i.e. in morality and custom generally) serves to understand the ethical problem better, in a concrete sense. In practice, this problem is the correspondence 'spontaneously and freely accepted' between the acts and the admissions of each individual, between the conduct of each individual and the ends which society sets itself as necessary—a correspondence which is coercive in the sphere of positive law...and is spontaneous and free (more strictly ethical) in those zones in which 'coercion' is not a state affair but is effected by public opinion, moral climate.<sup>39</sup>

Although his description of the role of law is grounded in materialism (in that formation of classes arose from production relations), he is praised for his shift away from "mechanical materialism" in that, for him, law is not only a coercive arm of the state but also aids in creating a moral milieu that is more-or-less not forcefully propagated.

As interesting as this position and the various reactions to it are,<sup>40</sup> the gist of Gramsci's work focuses on an interpretation of law in capitalism, which falls outside the general aim of this thesis. His contribution, however, is worth noting.

Renner's work<sup>41</sup> primarily focuses on the role of law during the transition period. For him, revolution would occur through institutional reform, Richard Kinsey describes Renner's position:

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<sup>38</sup> *Ibid.*, pp. 181-182

<sup>39</sup> *Ibid.*, pp. 195-196

<sup>40</sup> See Sumner, *Reading Ideologies: An Investigation into the Marxist Theory of Ideology and Law*, pp. 256-263; John Hoffman's *The Gramscian Challenge* (New York: Basil Blackwell, 1984) which focuses specifically on the "coercion and consent" issue in Marxist theory; Perry Anderson's "The Antinomies of Antonio Gramsci", *New Left Review*, No. 100 (November, 1976-January, 1977) pp. 5-78; Hunt's "Dichotomy and Contradiction in the Sociology of Law" in *Marxism and Law*, pp. 74-97, sp. 86-88 and Eugene Genovese's "The Hegemonic Function of the Law" in the same volume, pp. 279-294, sp. 279-280. For Gramsci's original writings *An Antonio Gramsci Reader*, ed., David Forgacs (New York: Schocken Books, 1988) is quite useful.

<sup>41</sup> Karl Renner, *The Institutions of Private Law and their Social Function* (London: Routledge and Kegan Paul, 1976, c1949)

Revolution which can obtain only at the level of political institutions—the economic substratum knows evolution only—will in the transition to socialism take the form of a legal revolution in which there occurs a cognitive re-appropriation and normative re-ordering of the social relations of production. It is a revolution of re-form.<sup>42</sup>

Renner regarded the legal form as essentially neutral and believed it could be utilised to shape whichever particular social order that emerged from the mode of production. Thus legal institutions, as well as others, are vehicles to be used to achieve social transformation. The function of law differed from its form; and indeed, law could perform a socialist function.<sup>43</sup>

He argued that eventually private law—whose function was rooted in private property—would give way to public law, which represents the collective interest of society. To some degree, this was already occurring in capitalism:

Regulations relating to the normal working day, factory inspection, and protection of working women and children are institutions of public law which increasingly supplement institutions of private law...In the end the relations of labour are as to nine parts regulated by public law, and the field of private law is restricted to the remaining tenth...

...Elements of a new order have been developed within the framework of the old society.<sup>44</sup>

Renner used the example of the joint stock company to further emphasise the gradual shift from private to public law. He argued that the superfluous role of the capitalist was revealed by the fact that managers operate and utilise companies. The capitalist merely has the title to the surplus value produced by the company. For Renner, this represented a step in the direction of coordinated and collectivised organisation of economic resources—in other words, a progression towards socialism. Once public interests, protected by the state, superseded the interests of a handful of individuals (capitalists), society *via already existing institutions*, could be transformed to a socialist one. Managers would work for the whole of society rather than a small group of capitalists; yet the form of joint stock companies would remain fundamentally the same.

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<sup>42</sup> Richard Kinsey, "Karl Renner and Socialist Legality" in *Legality, Ideology and The State*, ed., David Sugarman (London: Academic Press, 1983) p. 21

<sup>43</sup> This is in direct opposition to Pashukanis' position.

<sup>44</sup> Renner, "The Development of the Law" from *The Institutions of Private Law and their Social Function in Austro-Marxism*, trans. and eds., Tom Bottomore and Patrick Goode (Oxford: Clarendon Press, 1978) pp. 273-274

The fact that Renner treats the legal form as inherently neutral and that the content of the law is determined solely by its function places him outside of traditional Marxist theory. Paul Hirst comments that the methodology of *The Institutions of Private Law and Their Social Functions* "is...not drawn like Pashukanis' from the general body of Marxist theory. Renner adopted the formalist legal philosophy dominant in central Europe at the time."<sup>45</sup> This, combined with the fact that Renner was most concerned with the transition period, places him on the outskirts of this thesis. As with Gramsci, however, Renner's contribution towards a viable transition strategy is worth mention.<sup>46</sup>

The chapter closes with an analysis of the contributions of the chosen authors with regard to a more defined concept of regulation.

### Theoretical Synthesis

The purpose of this chapter is not critically to compare theorists examined in previous chapters (Marx, Engels, Lenin, Stuchka, Pashukanis and Reisner), nor to expound upon their differences. As the title indicates, a discussion of the *similarities* in the description of communist regulation takes place. Despite obvious theoretical differences, a remarkably coherent portrait of communist regulation can be extracted from the works of these theorists.

The chapter then proceeds to address some gaps in the theoretical description of regulation and to explain more fully the key theoretical elements involved with it. Some discussion of basic socialist tenets which directly affect regulation occur, but only to the extent that their concepts are theoretically clarified in order to further explain key notions of regulation in communism.

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<sup>45</sup> *On Law and Ideology*, p. 122. For a discussion of the differences between Renner and Marx see Kinsey, "Karl Renner and Socialist Legality", pp. 12-42.

<sup>46</sup> For comments on Renner and law see Hirst, *On Law and Ideology*, esp. pp. 122-126; Sumner, *Reading Ideologies: An Investigation into the Marxist Theory of Ideology and Law*, pp. 248-249, 253-260 *passim*; and Peter Robson, "Renner Revisited" in *Perspectives in Jurisprudence*, ed., Elspeth Attwooll (Glasgow: University of Glasgow Press, 1977) pp. 221-236.

Lastly, some problems with the theory of regulation are discussed and grounds for a model of regulation are established.

The work of this chapter, and indeed all subsequent chapters, are completely theoretically constructed by myself (save for the summation of points at its beginning). Explanations and discussions should not be attributed directly to the theorists studied, although they do take place within a framework derived from these theorists.

### **Towards a Model**

This chapter addresses the structural components of a regulatory system in communism. Previous chapters focused on the theoretical basis of regulation, and while structural components were mentioned they were not discussed methodically.

Once the structural elements are clarified, it becomes possible to construct a summary of what is meant by regulation. Though the summary draws from all previous material, it does not reiterate the logical connection between various points.

To abate the completely speculative nature of such a model, I draw on a concrete example of social organisation based on socialist production relations and administrative institutions. Curiously enough, the Israeli kibbutz fits many of the major characteristics described in the model. There are some important differences, however, which are discussed in the chapter. The purpose of this particular example is to examine the effects of socialist administrative structures and social relations with regard to conflict. Whilst there is much material on kibbutz life, one particular study gives a detailed-enough analysis of relations in operation on a particular kibbutz to evaluate some of the theorists' claims. While the results of such an evaluation cannot be considered at all conclusive, they do cause pause for thought.

## Conclusion

With a full theoretical explanation of regulation, its meaning and structure, it now becomes possible to assess whether such a system can be considered "law". The theorists examined defined law in such a way that precluded regulation in communism from ever being considered a legal phenomenon. If a more general definition of law were considered, however, it might be possible that regulation could be considered law. Several arguments are examined in this regard. The first seeks to divorce the component of coercion from law and concludes that law can be defined by its institutional source. The second, returning to the kibbutz example, seeks to answer whether institutional sources of law would have to be formal "legal" institutions and questions whether other institutions might not have legal power. The third attempts to define law as the process of decision-making in a democratic society. All of these arguments pose alternative definitions of law that should be considered before answering whether regulation can be considered law.

After the classification of regulation is settled, whether or not it merits a "separate" jurisprudence is discussed.

## THE GOAL

Despite the divergence between the two branches of the study of socialism and law, there are several common factors. Both branches recognise that the U.S.S.R. (both historically and theoretically) had *some* relevance to the development of a socialist theory based on Marxism. Both acknowledge that legal systems in countries like the Soviet Union *are* different from Western legal systems (if only slightly). Both are categorised under the paradigm of socialist law. These similarities, however, have bred more confusion than definition. Those that accept that the U.S.S.R. was socialist throughout its history and analyse the Soviet legal system in terms of Western principles of law, completely ignore Marx's basic critique of

capitalist legal phenomena (especially in terms of rights and the rule of law). The error is, in part, rectified by those that assess the Soviet Union within the general framework of Marxism (rather than liberalism). They, however, tend to regard the U.S.S.R. as an actual development of Marxist principles. Given the textual descriptions of socialism and communism presented by Marx, it is clear that U.S.S.R. strayed from a socialist path quite early on. Those that accept this conclusion have made great strides in clarifying a Marxist perspective of law, but have failed to address what type of regulation could possibly replace it or *why* regulation would not be needed. The authors that accept the fact that some regulation would be needed, and that the system that was operating in the modern U.S.S.R. was incompatible with Marxist principles, call for a redefinition of law to: (1) protect those rights that seemed to be flagrantly absent in the Soviet system—namely civil rights and non-political legal institutions; and (2) protect those rights which seem to be absent in capitalism—namely economic security and quality of life minimum requirements. The latter position seems to have gained much authority recently. This position, however, is subject to the same criticism as the first group, namely, given the traditional Marxist antagonism towards law, can a “new” definition of law be defended against Marx’s original critique of legality (and in this case “rights”)? At the same time, how can opponents to law in socialism maintain their position without any explanation of what will replace law?

Christine Sypnowich, author of *The Concept of Socialist Law* writes: “...they [Marxists] have been unable to make any further contributions to legal theory. They do not consider the role law might play in a post-capitalist society, and a socialist jurisprudence is virtually non-existent.”<sup>47</sup> This thesis seeks to alleviate the problem posed by theoretically constructing a regulatory system in communism compatible with the principles outlined by Marx, Engels and subsequent theorists on the subject of law and socialism. After such a regulatory system has been defined and discussed,

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<sup>47</sup> Christine Sypnowich, *The Concept of Socialist Law* (Oxford: Clarendon Press, 1990) p. 2

it can be ascertained whether such a system can be considered law, and whether it merits a "separate" jurisprudence.

The overall goal of this thesis is to address the current lacuna existing in the literature of "socialist law" created by the fact that a full exploration of a regulatory system in communism within the boundaries of principles established by Marx and Engels has not been made. In this way, the thesis contributes in original form to the field of jurisprudence.

## CHAPTER ONE—MARX AND ENGELS

### INTRODUCTION

Much of the literature that pertains to a Marxist theory of law has examined Marx and Engels in terms of their views of law in a capitalist state. Relatively few sections of their work deal directly with the notion of law in post-capitalist society. Once communism is reached, law in itself, like the state, will “wither away”. Evident in the writings of Marx and Engels, however, are implications of a system of regulation which will exist in communism. Whether or not this regulation can be considered law will be explored through the entire thesis. The purpose of this chapter is to examine the works of Marx and Engels and extract from them passages relevant to establishing at least a rough outline for a theory of socialist regulation, as well as some indications as to what the function of this regulation might be, its nature and how it is formed.

Much is involved in trying to grasp the general picture of post-capitalist regulation. Marx and Engels sought to analyse society in a completely integrated sense, making it difficult to discuss one social phenomenon, such as law, apart from other social phenomena, such as economic status. Although a full inquiry into their analysis of social structure is prohibited by space, their general philosophy regarding the basis of capitalist social organisation and its transformation into socialism must be discussed to some degree to elicit a sense of which direction a system of regulation must take. When elements relevant to law and regulation are assembled, even in brief, it becomes evident that the sense of regulation that emerges from their more general theory of social relationships is complex and demands further explanation. The first part of this chapter deals with Marx and Engels’ general views of social organisation, and the second examines the significance of these views with regard to the regulation issue.

## THE BASIS

When examining social phenomena, Marx tried, as Hugh Collins aptly points out in his book *Marxism and Law*, to take what was labelled a “social” science and make it “scientific” in constitution.<sup>1</sup> On this basis, Marx sought to examine society through direct observation and thus founded his analysis on what he termed concrete experience:

The concrete is concrete, because it is the sum of many determinations, and therefore a unity of diversity. Hence the concrete appears in thinking as a process of summarization, as a result, not as a starting point, although the concrete is the actual starting point and hence also the starting point of perception and conception.<sup>2</sup>

In social terms, this concrete form manifested itself in the material conditions of life, the basis of which is work. Marx argues that the one unassailable constant in all human societies (including future ones) is that people must work in order to survive. “Work is the eternal natural condition of human existence. The process of labour is nothing but work itself, viewed at the moment of its creative activity. Hence the universal features of the labour process are independent of every specific social development.”<sup>3</sup> Work, then, is the fundamental element in human existence and is not specific to any particular society.

Marx asserts that work is intrinsically social, that is, has involved a system that is outside of yet inclusive of individual effort. Persons interact with and are a part of a social system that provides for their means of survival. The basis of *all* societies, then, is how work is socially organised, or in other words, economics. Since all work is social, the economic sphere is defined in terms of social relations. All other social phenomena are based, to some degree, on the social relations which arise from specific economic conditions, or more simply the method of production. The evolution of social relations can therefore be traced through the development of the mode of production over time.

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<sup>1</sup> Hugh Collins, *Marxism and Law* (Oxford: Clarendon Press, 1982) pp. 4-5

<sup>2</sup> Karl Marx, *Texts on Method*, trans./ed., T. Carver (Oxford: Basil Blackwell, 1975) pp. 72-73

<sup>3</sup> Marx, *Capital Volume I* (New York: Penguin Books, 1979) p. 998

History, then, has movement. The “progressive” element (as opposed to random movement) stems from the process of dialectics and the theory of materialism. In a philosophical sense, dialectics embody a method of logic that allows advancement through the resolution of contraries. Materialism applies this logic to concrete reality, which for Marx, was the mode of production. Through this method, internal contradictions of a system (and hence relations) are made manifest, and by the natural<sup>4</sup> progress of history, these contradictions seek resolution: (when speaking of dialectics):

[It is] Reflection of the motion through opposites which asserts itself everywhere in nature, and which by the continual conflict of the opposites and their final passage into one another, or into higher forms, determines the life of nature.<sup>5</sup>

And to relate this concept to human history:

It is the reflection of the actual development going on in the world of nature and of human history in obedience to dialectical forms.<sup>6</sup>

As various production methods and social forces develop, so does knowledge—both technical (scientific) and social (in the form of consciousness). The greater the knowledge that is achieved, the more humans can utilise natural forces for their own ends and the freer society is.<sup>7</sup> In the process of acquiring knowledge, in the first instant of the forces of nature, and at later stages of the social forces generated by the mode of production, contradictions are resolved until a final phase is reached where persons in a society are in control over the social forces generated by the economic system and use them in total for their own ends (communism). History thus has progressive stages, passing from primitive and slave-owning societies, through feudalism, capitalism to a transitional period that leads to eventual communism. At the apex of each stage of development, the social forces are in such a state of

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<sup>4</sup> Natural is used with no political or legal implications.

<sup>5</sup> Engels, *Dialectics of Nature*, trans., C. Dutt (London: Lawrence and Wishart, 1954) p. 280

<sup>6</sup> Engels, *Letter to Schmidt in Marx and Engels Selected Correspondence*, trans., I. Lasker, ed., S. Ryazanskaya (Moscow: Progress Publishers, 1965, 2nd ed.) p. 439

<sup>7</sup> Obviously this summation is vastly simplified and discussions abound as to whether this progress is inevitable, or whether one day complete “knowledge” or “freedom” will exist; but for a general account this will suffice.

contradiction that revolution occurs and the next phase begins. The process of history then, is a record of peoples' struggle with the social forces that bind them. The struggle proceeds until people control these social forces and can harness their power, thus creating a unity between individuals and economic forces.

Although the mode of production is the impetus of history and the basis for all social relations, other elements also play a role. These Marx sums up as the "superstructure". The superstructural components—politics, philosophy, law, ideology, etc.—contribute to social relations and how they are perceived and categorised. It is important to stress that the relationship of the substructure to the superstructure cannot be characterised as strictly deterministic. The *process* of historical development is dialectical: an event (cause) in a given moment of history may generate changes (effect) that may alter the original basis (cause) of the first event in a future moment of history. Hence, development in the superstructure may alter the substructure even though the superstructure is determined by the substructure. In a given moment of history, social relations are determined by the mode of production. History, however, is always in motion. Capitalist relations may prevail now, yet political and legal struggles develop the knowledge that leads to the advent of socialism, which will eventually causes a metamorphosis in the substructure. Engels summarises this dialectical relationship:

It is not that economic conditions are the sole active cause and everything else mere passive effect. Rather there is interaction on the basis of a prevailing economic necessity in the last instance... Hence there is not...an automatic effect produced by economic conditions; rather men make their history themselves, but in a given milieu which conditions them; they do this on the basis of pre-existing relations, amongst which the economic are decisive in the last instance, though they may be influenced by other relations, political and ideological...<sup>8</sup>

The perception of one's social circumstance, that is consciousness, which is affected by superstructural phenomena (including law), does not always coincide with actual concrete circumstances. This, in essence, is Marx's notion of "false consciousness".

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<sup>8</sup> Engels, *Letter to Borgius* in *Werke* (Berlin: Dietz Verlag, etc., 1956, etc.) vol. 39, p. 206 in Gerard Bekerman, *Marx and Engels: A Conceptual Concordance*, trans., T. Carver (Oxford: Basil Blackwell, 1983) p. 71

The identification of labour as the sole constant in historical development, the process of dialectics as the impetus of history, the theory of materialism and the recognition of the complex substructure/superstructure relationship are basic tenets of Marx that must be taken into account when analysing elements of social structure. Discussion of how these elements affect Engels and Marx's notion of regulation necessitates further explanation of capitalist legal relationships and how these relationships will be altered by a socialist revolution.

### **Legal and economic relations in capitalism**

According to Marx and Engels, the systemic contradictions in capitalism stem from the social forces generated from the capitalist mode of production which was designed to produce profit, contrasted with the aim of society which is to provide for human need. The social relations arising from profit-driving mechanisms procured what Marx labelled commodity fetishism and were described in terms of "atomisation" and "isolation".

In capitalism, society is a conglomeration of commodity owners. Commodities embody the abstract quality of value in that they can be exchanged for other commodities in defined quantity, regardless of varying use-values. This value is realised via the act of exchange; an act which does not occur as a property of commodities themselves. Exchange requires the external volition of commodity owners. Simultaneously, individuals engaged in production also relate to each other as values and become commodities themselves (by selling their labour power). When functioning in this society humans assume the role of objects (commodities) and also agents of free will but only in association with things (i.e. via commodities). Through these categories we are universalised and objectified; we are commodities and exert our will via commodities—in essence commodity fetishism. The notion of this equivalence appears in fully developed form in

advanced capitalism, which unifies *all* of society through exchange and its corresponding relations.

In this state of affairs, we are both objects (sellers of labour time) and subjects (bearers of free will). Our social relationships, therefore, reflect both an objective status and a subjective one. Marx asserts that the subjective role is characterised in civil society and indeed mirrors our role in production. We, as commodities, are equalised and objectified through the act of exchange. We, as members of civil society, are equalised and objectified through our categorisation as possessors of free will; equalised because our wills have equal effect, objectified because we exert our wills through commodities. When an act of exchange occurs, there is assumed a relation between two *equal* free wills (contract); and the ramifications of the effectuation of free will entails certain rights and obligations. In our subjective role, we therefore become bearers of equal rights (equal wills).

Commodity exchange represents the equalisation of *all* forms of labour in the abstract notion of value. The social condition accompanying the development of the commodity form is depicted as the total abstract unification of the alienated working society: a society whose individuals are possessors of independent, equal and free egoistic wills and hence bearers of certain rights and obligations. These individual free wills are abstractly united in the ideological notion of civil society. Law, then, assumes the ideological role of an objective, independent force operating to ensure individual rights, and enforce obligations, protected by a state whose duty is to provide for the "common interests".

Marx and Engels saw a fundamental contradiction between the characterisation of *social* producers as *individuals*, and unequal persons possessing equal rights. Since individuals are, in reality, *not* equal (i.e. one owns property, one does not; one is a manager, one is a worker; one is smarter, one produces more than another, etc.), the only way this equality could be achieved was in the abstract. Law may operate *in the abstract* as an objective criterion by which to regulate society, but

in reality, individuals are not equal, nor can they be viewed as isolated individuals without regard to their differentiated roles in production. In reality, individuals' wills, rights and obligations are *not* equal but are affected by their positions in the economic structure, as well as their differences as human beings. The abstract role of law as an objective system of evaluation contradicts its actual function, which according to Marx and Engels, is to maintain the capitalist power structure.

Marx contrasted the role of individuals in the political (civil) realm and in the production process to elucidate the contradiction of capitalist social relations in general. He portrays individuals as leading a "twofold life", that of a private producer who "regards other men as a means, degrades himself into a means, and becomes the plaything of alien powers,"<sup>9</sup> and that of a member of the state, where s/he is regarded as a "the imaginary member of an illusory sovereignty, is deprived of his real individual life and endowed with unreal universality."<sup>10</sup> For Marx, the contrast between economic and political is nonsensical for *neither* embodies a notion of community in reality. They both serve to preserve the categorisation of individuals as isolated, egoistic beings. The argument is connected intricately with Marx's perception of rights.

He turns to the French, whom he credits with discovering rights, for enumeration. "Rights" were classified by the French in terms of the *droits de l'homme* (rights of man) and the *droits du citoyen* (rights of the citizen). For Marx, this separation reflects the divided role of the individual perceived as an isolated individual (*droits de l'homme*) and in the political capacity (*droits du citoyen*). The rights of the isolated individual generally ordain freedom of conscience.<sup>11</sup> Beliefs are separated from the realm of the state, which is the culmination of the political essence of society. A person's conscience is considered to be an individual endeavour.

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<sup>9</sup> Marx, *On The Jewish Question in Marx and Engels Collected Works*, vol. 3, p. 154

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, p. 161

The rights of citizens, however, stipulate rights of individuals as part of a political community. These rights are specified as the right to “equality, liberty, security and property.”<sup>12</sup> Marx discusses each. “Liberty,” he writes, “...is the right to do everything that harms no one else. The limits within which anyone can act *without harming* someone else are defined by law...”<sup>13</sup> Marx asserts that the right is based on the assumption that human actions are *strictly* determined by the individual. He opines: “the right of man to liberty is based not on the association of man with man, but on separation of man from man.”<sup>14</sup>

The right of property specifies that individuals can enjoy or dispose of their property (goods, income, “the fruits of his labour and industry”) as each sees fit.<sup>15</sup> Again, Marx avers, the right of property appears to have nothing to do with community. In fact, it allows individuals to dispose of property “without regard to other men, (and) independent of society.”<sup>16</sup>

Security, Marx summarises, is the claim to the protection of these rights.<sup>17</sup> The sole purpose of the state, as stipulated in the 1791 constitution, then becomes the express protection of the rights of all its citizens: “The aim of all *political association* is the *preservation* of...rights.”<sup>18</sup> Given Marx’s assertion that property and liberty apply to isolated individuals, security simply *further*s egoism by ensuring it.<sup>19</sup> In the same sense, the right to equality, which prescribes that all are the same

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<sup>12</sup> From the French Constitution of 1793: *Déclaration des droits de l’homme et du citoyen*: Article 2: “*Ces droits du citoyen...sont: l’égalité, la liberté, la sûreté, la propriété.*” *Ibid.*, p. 162. Marx’s citations from the 1793 Constitution were taken from P.J.B. Buchez and P.C. Roux, *Histoire Parlementaire de la Révolution française* (Paris, 1837) vol. 31 [as specified in footnote 25, written by Velta Pospelova in “Notes”, *Marx and Engels Collected Works*, vol. 3, p. 592]

<sup>13</sup> Marx, *On The Jewish Question* in *Marx and Engels Collected Works*, vol. 3, p. 162

<sup>14</sup> *Ibid.*

<sup>15</sup> (1793) Article 16: “*Le droit de propriété est celui qui appartient à tout citoyen de jouir et de disposer à son gré de ses biens, de ses revenus, du fruit de son travail et de son industrie.*” *Ibid.*, p. 163.

<sup>16</sup> *Ibid.*

<sup>17</sup> (1793) Article 8: “*La sûreté consiste dans la protection accordée par la société à chacun de ses membres pour la conservation de sa personne, de ses droits et de ses propriétés.*” *Ibid.*

<sup>18</sup> “*Le but de toute association politique est la conservation des droits...de l’homme.*” *Ibid.*, p. 164

<sup>19</sup> *Ibid.*, pp. 163-164

before the law,<sup>20</sup> translates in Marx's words to the right of each person to be regarded to the same extent as a "self-sufficient monad."<sup>21</sup>

Marx concludes that no rights go beyond the egoistic human acting in isolation. "Political rights" hence becomes a contradiction in terms. This contradiction is made manifest by the fact that rights cease when they threaten "public good" (e.g. "Freedom of the press should not be permitted when it endangers public liberty.")<sup>22</sup> Marx articulates the blatant ideological contradiction:

The right of man to liberty ceases to be a right as soon as it comes into conflict with *political* life, whereas in theory, political life is only the guarantee of human rights...<sup>23</sup>

How are we connected as members of society if both economic and political rights are individual phenomena? Marx answers that we can be connected only through law, which governs relations *between* citizens. Thus in the economic realm of society we are individual producers and politically we are juridic persons.<sup>24</sup>

Marx contrasts the above ideological perception to material conditions. In terms of conscience being an individual activity, Marx argues that, by nature, conscience is social because it is conditioned by the surrounding environment. Individuals cannot be placed in a vacuum. In terms of the rights of citizens, labour is a *social* activity; therefore we are *connected through production*. The "right to property" is actually a societal right to use resources to provide for needs—a situation impossible in capitalism. The bourgeois right to property applies only to those who own property. Security, then, only defends property owners. Freedom, in these terms, becomes the liberty of property owners to ignore societal needs. The state assumes the role of the protector of property owners. Equality is relegated to

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<sup>20</sup> (1795) Article 3: "*L'égalité consiste en ce que la loi est la même pour tous, sont qu'elle protège, soit qu'elle punisse.*," *Ibid.*, p. 163. Marx's citations from the 1795 Constitution were taken from P.J.B. Buchez and P.C. Roux, *Histoire Parlementaire de la Révolution française* (Paris, 1837) vol. 36 [as specified in footnote 26, in "Notes", *Marx and Engels Collected Works*, vol. 3, p. 593]

<sup>21</sup> Marx, *On The Jewish Question* in *Marx and Engels Collected Works*, vol. 3, p. 163

<sup>22</sup> "*La liberté de la presse ne doit pas être permise lorsqu'elle compromet la liberté publique,*" *Ibid.*, p. 165 quoted by Marx from Robespierre jeune, *Histoire parlementaire de la Révolution française* par Bouchen et Roux, vol. 28, p. 159

<sup>23</sup> Marx, *On The Jewish Question* in *Marx and Engels Collected Works*, vol. 3, p. 165

<sup>24</sup> *Ibid.*, pp. 167-168

the abstract, because, in actuality, we are *not* equal (especially in that we all do not own property). The false division between political and economic resides in the contradiction of the perception of individuals as egoistic and separate entities who in fact operate in a completely social capacity.<sup>25</sup>

The highest form law can achieve in capitalism is formal, institutional equality: a form that is abstract in nature. Similarly, “rights” cannot evolve beyond formalised politics. Marx did say of political emancipation, however, “True, it is not the final form of human emancipation in general, but it is the final form of human emancipation within the hitherto existing world order.”<sup>26</sup>

Capitalist society may regard law as fulfilling the role of objectively maintaining order and resolving disputes. It fulfils this role by treating individuals as bearers of *individual, equal* rights, and concurrent obligations. However, according to the philosophy of materialism, relations, including legal, proceed from production relations. Law thus reflects capitalist production relations in that it directly embodies our roles as independent economic agents—isolated agents with free will which entails both rights and obligations. Capitalist production relations *in themselves*, however are contradictory. Individuals *do not* operate in isolation and are *not* equal. In reality, law itself reflects this contradiction for, whilst it maintains the false notion that it regulates objectively, in reality it perpetuates the contradiction present in economic relations. Law actually performs the role of reasserting the “right” of property owners over non-property owners, to reduce it to its simplest form. In the broad sense, law will protect production relations that are based on procuring capital, the core of which is private property.

Proceeding from the above arguments, law, in essence, *cannot* exist in socialism because the production relations that allow an objective abstract force that deals with citizens as isolated and equal individuals cannot arise amidst socialist

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<sup>25</sup> At the root of all this is the theory of commodity fetishism: a link best explained by Pashukanis. It will be covered in Chapter three.

<sup>26</sup> Marx, *On The Jewish Question* in *Marx and Engels Collected Works*, vol. 3, p. 155

production relations where there is no fundamental contradiction between individual and social roles. If law is to fulfil the role of “social regulator” in actuality, then production relations have to actually *be* social and if they were, then law in the capitalist form simply could not exist. What happens to legal relations when social relations proceed from an economic system whose only goal is to provide for human need? How will social relations change under a socialist economic system?

### Legal and economic relations in socialism

Marx affirms that if individuals are operating *actually* as communal beings (in that they own, operate and control production), then the distinct category of “political”, is superfluous. Consequently, the *separate* category of “juridic” also becomes unnecessary. Political and economic relations are one and the basis for contradiction is gone.<sup>27</sup> Only when citizens *control* their material and social environment can true “rights”—in essence, emancipation—be achieved,<sup>28</sup> but they will no longer assume the form of “law”. The question as to what form rights will assume was not discussed at length by Marx and Engels directly.<sup>29</sup> They did, however, describe the changes in social relations that would occur in the transition to capitalism. Contributions to the legal debate can be found in these discussions.

Structurally, Marx and Engels integrally linked law with the state. The state essentially uses law to maintain power. State and law are wedded in this way to the capitalist class. Both state and law are part of the superstructure, the characteristics and foundation of which lie with the substructure. As was discussed previously, legal relations as well as all social relations proceed from the material conditions of life manifested in the mode of production. “Political, legal, philosophical, religious,

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<sup>27</sup> A vast simplification. Pashukanis, again, explains this in more depth. See Chapter three.

<sup>28</sup> Marx, *On The Jewish Question* in *Marx and Engels Collected Works*, vol. 3, p. 168

<sup>29</sup> This question is fundamental to the regulation question and shall be discussed at great length through this thesis. Marx and Engels, however, did not directly write about the form regulation would assume. Perhaps this is why there is so much controversy in the debate over “socialist law”.

literary, artistic development, etc. rest on the economic base.”<sup>30</sup> It is commonly held that Marx and Engels dismissed law, as well as the state, as a coercive function to maintain the power of the ruling class. Hence, once a socialist state had arisen, the need for both state and law would be simply non-existent.

Some of the most stringent arguments against the need for law in socialism arise from Marx and Engels’ discussions of the abolition of the state. The most damaging passage of this nature is the oft cited quotation which reads:

...the government of persons is replaced by the administration of things, and by the conduct of the process of production. The state is not ‘abolished’. It dies out.<sup>31</sup>

And further:

Marx and I...have held the view that *one* of the final results of the future proletarian revolution will be the gradual dissolution and ultimate disappearance of that **political** [my emphasis] organisation called the *state*.<sup>32</sup>

Indeed Marx states even more directly in *Preface to A Contribution to Critique of Political Economy* that, once the economic foundation of capitalism is destroyed, the superstructure will cease to exist.<sup>33</sup>

The above would seem clearly to indicate the absence of state and law in socialism. What Engels and Marx convey, however, is that the state will not endure *as a political organ*. The state is *replaced*<sup>34</sup> by the administration of things. Logically, if the superstructure is based on the substructure, and the substructure is defined by the mode of production, when that *particular* substructure is eradicated so will be the corresponding superstructure. Thus elements of the superstructure do not “disappear”, but their specific forms do.

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<sup>30</sup> *Ibid.*

<sup>31</sup> Engels, *Anti-Dühring* in *Marx and Engels Collected Works* (London: Lawrence and Wishart, 1987) vol. 25, p. 268. The last line of the quote is often translated as “withers away” as in the separate work, *Anti-Dühring* (London: Lawrence and Wishart, 1969). The German version [in *Werke*, vol. 20, p. 262] reads “*Er stirbt ab.*” The verb *absterben* literally means to die off or away.

<sup>32</sup> Engels, *Letter to Van Patten* in *Marx and Engels Selected Works in two volumes* (Moscow: Foreign Language Publishing House, 1951) vol. 1, pp. 340-341

<sup>33</sup> Marx, *Contribution to Critique of Political Economy* in *Marx and Engels Selected Works in two volumes*, vol. 1, p. 503

<sup>34</sup> “*An die Stelle der Regierung über Personentritt die Verwaltung von Sachen und die Lietung von Produktionsprozessen.*” [Engels, *Anti-Dühring* in *Werke*, vol. 20, p. 262] The verb (*Stelle*) *treten* means supersede, take the place of.

The fact that Marx and Engels imply the possibility of a form of law in socialism raises interesting questions as to what this concept of law might involve. They portray capitalist law as a coercive tool to maintain power, as a manifestation of egoistic wills, as a process of political justice. All of these definitions of law would be irrelevant given socialist production relations. Since analysis of law in capitalism is prevalent throughout their works, it is rather difficult to fathom what role law outside of a bourgeois society might play. Examining a passage that refers to the need for some regulation provides enlightenment (whilst referring to socialism):

Justice concerned with criminal cases ceases of itself, that dealing with civil cases, which are almost all rooted in the property relations or at least in such relations as arise from the situation of social war likewise disappear, conflicts can then be only rare exceptions...and will easily be settled by arbitrators... It is infinitely easier to maintain peace than to keep war within certain limits so it is vastly more easy to administer a communist community rather than a competitive one.<sup>35</sup>

The passage indisputably establishes the possibility of conflict in socialism and a need for arbitration. It also suggests a definition of the function of a regulatory system: that is "to maintain peace and administer a community." Further descriptions of law in socialism confirm the above points to a greater degree:

In order to protect itself [capitalism] against crime, against direct acts of violence, society requires an extensive, complicated system of administration and judicial bodies which requires an immense labour force. In communist society this would likewise be vastly simplified, and precisely because—strange as it may sound—precisely because the administrative body in this society would have to manage not merely individual aspects of social life, but the whole of social life, in all its various activities, in all its aspects.<sup>36</sup>

Engels illustrates here that the need for *some* regulation still remains. He does not allege that the system of administration and judicial bodies would be *abolished*, but *simplified*.<sup>37</sup> As exemplified above, administration and arbitration are required. The mutual exclusivity of capitalist and socialist production relations,

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<sup>35</sup> Engels, *Speeches in Elberfeld in Marx and Engels Collected Works*, vol. 4, pp. 248-249. Especially important for my argument is the line "...conflicts can then be only rare exceptions...and will easily be settled by arbitrators.."; the German version reads virtually the same "...Streitigkeiten (quarrels, squabbles) können dann nur seltne Ausnahmen sein, wo sie jetzt die natürliche Folge der allgemeinen Feindschaft sind, und werden leicht sich durch Schiedsrichter schlichten lassen (literally allowed to arbitrate)." [Werke, vol. 2, p. 542]

<sup>36</sup> Engels, *Speeches in Elberfeld in Marx and Engels Collected Works*, vol. 4, pp. 248

<sup>37</sup> "In der kommunistischen Gesellschaft würde sich auch dies unendlich vereinfachen (simplified)..." [Engels, *Zwei Reden in Elberfeld I in Werke*, vol. 2, p. 541]

however, preclude any correlation between administration and state, and law and arbitration. The term “socialist law” then becomes a conceptual problem. Law, a product of capitalist social relations, is incorporated in bourgeois political ideology. The state is often referred to as “nothing but a machine for the oppression of one class by another.”<sup>38</sup> The state would not assume a coercive, political form, but rather would be transformed into an administration<sup>39</sup> which in essence, can be describe as an organising body whose function entails the management of society. Indeed, one could not even use the term, state, without confusion. Similarly, regulation does not operate in the capacity of law in maintaining capitalist production relations, yet there is a definite need for the task of arbitration.

How might a socialist production method influence the conditions surrounding the arbitration process? Engels wrote in *Anti-Dühring* an illuminating passage regarding the nature of relations in socialism:

So long as the really working population were so much occupied with their necessary labour that they had no time left for the looking after the common affairs of society—the direction of labours, affairs of state, legal matters, art, science, etc.—so long was it necessary that there should constantly exist a special class freed from actual labour to manage these affairs; and this class never failed, for its own advantage, to impose a greater and greater burden of labour on the working masses. Only the immense increase of the productive forces attained by modern industry has made it possible to distribute labour among all members of society without exception, and thereby to limit the labour time of each individual member to such an extent that all have enough free time left to take part in the general—both theoretical and practical—affairs of society. It is only now therefore, that every ruling and exploiting class has become superfluous and indeed a hindrance to social development and it is only now, too, that it will be inexorably abolished, however much it may be in possession of direct force.<sup>40</sup>

Engels indicates that there will no longer be a separate juridical body; rather, matters would be attended to by all and they would have the time to fulfil this duty. Likewise, the state, a separate antagonistic political body, will be superseded by public power. Marx and Engels explain: “When in the course of development, class distinctions have disappeared and all production has been concentrated in the hands

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<sup>38</sup> Engels, *Introduction to Civil War in France* in *Marx and Engels Selected Works in one volume* (London: Lawrence and Wishart, 1973) p. 258

<sup>39</sup> For an interesting discussion on this point see Hal Draper’s “The Death of the State in Marx and Engels” in *The Socialist Register*, eds., R. Miliband. and J. Saville (London: The Merlin Press, 1970) pp. 281-307.

<sup>40</sup> Engels, *Anti-Dühring* in *Marx and Engels Collected Works*, vol. 25, p. 169

of a vast association of the whole nation, *the public power will lose its political character* [my emphasis]."<sup>41</sup> A concordant view was published in an article in the *International Herald* in 1872: "there will be no longer any government or state power, distinct from society itself."<sup>42</sup> Engels defines the abolition of the state as "the future conversion of political rule over men into an administration of things and a direction of the process of production."<sup>43</sup> In other words, the language of these passages suggests that juridical and political power are absorbed (slightly different from "abolished") by the populace itself. Society, as a whole, discharges administrative and "legal" functions.

Under these social conditions, the *concepts* 'political' and 'juridical', as defined by Marx and Engels, become irrelevant. It is beyond doubt, however, that the two writers acknowledged a requirement for administration and arbitration. For clarity, it would seem obvious that law should be used when speaking of capitalism and regulation when speaking of communism.

The advent of communist production creates a situation where the social relations categorised in the substructure and the superstructure in capitalism (such as legal relations, political rights, etc.) no longer exist as contradictory and antagonistic forces. The nature of these affairs, however, will fundamentally differ from those in capitalism. Marx stresses that although the "old society is pregnant with the new", no element from the bourgeois superstructure can be "adapted" directly to socialism. Marx explains quite eloquently why this is the case:

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<sup>41</sup> Marx and Engels, *Communist Manifesto* in *Marx and Engels Selected Works in two volumes*, vol. 1, p. 34. In German: "Sind im Laufe der Entwicklung die Klassenunterschiede verschwunden und ist alle Produktion in den Händen der assoziierten Individuen (association of individuals) konzentriert, so verliert (lose, forfeit, let slip) die öffentliche Gewalt den politischen Charakter." [Werke, vol. 4, p. 482]

<sup>42</sup> Marx, *International Herald* (London) 15 June, 1872 as cited in *Marx and Engels: A Conceptual Concordance*, p. 114

<sup>43</sup> Engels, *Anti-Dühring* in *Marx and Engels Collected Works*, vol. 25, p. 247. Also in Engels, *Socialism: Utopian and Scientific* in *Marx and Engels Selected Works in two volumes*, vol. 2, p. 113. The citation in the German version of *Anti-Dühring*: "...so ist doch die Überführung (transference, conversion) der politischen Regierung über Menschen in eine Verwaltung von Dingen und eine Leitung von Produktionsprozessen..." [Werke, vol. 20, p. 241]

Society is not based on the law, that is legal fiction, rather law must be based on society; it must be the expression of society's common interests and needs, as they arise from the various material methods of production, against the arbitrariness of the single individual. The Code Napoleon which I have in my hand did not produce modern bourgeois society. Bourgeois society...merely finds its legal relations expressed in the Code. As soon as it no longer corresponds to social relationships it is worth no more than the paper it is written on. You cannot make old laws the foundation of the new social development any more than these old laws created the old social conditions.<sup>44</sup>

As the above passage spells out, legal codes and systems are malleable, and adjust to the material conditions which generate the social relations on which they rely. Marx and Engels indicate that, in the event of communism, the power to enforce regulations does not emanate from a separate political body, but from the community as a cohesive whole. Under these conditions the contradiction between "individual" and "civil" vanishes, for when production is socialised and citizens are no longer operating under the principles of commodity fetishism there is no need for dichotomous sets of rights ("rights of man" and "rights of citizen"); nor is there a need for the concept of "juridic" person for the conditions that necessitated law as a tool to govern between isolated, atomistic individuals are no longer present—citizens, in actuality, *are* unified.

Thus in communism the situation arises where citizens are unified through production relations, yet conflict is still present. Although communism removes the potential antagonism between individuals and the social forces that govern them, or more pertinent to this discussion, law and society, there still is a need for regulation. The situation is not contradictory, but can be understood through dialectical logic. As Engels explains:

...every organised being is every moment the same and not the same...every organised being is always itself, yet something other than itself.

Further, we find upon closer investigation that the two poles of an antithesis, positive and negative, e.g., are as inseparable as they are opposed, and that despite all their opposition, they mutually interpenetrate.<sup>45</sup>

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<sup>44</sup> Marx, *Speech in His Defense in Werke*, vol. 6, p. 245 in David McLellan, *Karl Marx: His Life and Thought* (London: The Macmillan, 1973) p. 215

<sup>45</sup> Engels, *Socialism: Utopian and Scientific in Marx and Engels Selected Works in two volumes*, vol. 2, p. 121

Since materialism dictates that our thoughts can only conceive of what exists in reality (and within an historical epoch), it is impossible to deduce what relations, including the relation of arbitration, *would* entail in communism.<sup>46</sup> Following this logic, any attempt at concrete analysis of social relations in communism would amount to the same sort of intellectual exercise involved in surmising capitalist relations in feudalism. Social relations do not proceed from supposition, but actual material conditions themselves.<sup>47</sup> It is for this reason that Marx and Engels were notoriously silent on the structure of the “new” society, in regulation and other realms. On the other hand, they maintained that certain elements (e.g. developed working class consciousness or advanced technological production methods) would most probably be present in socialism for they had developed *already* in capitalism. The continuing maturation of these elements would actually necessitate revolution. From this basis, Marx and Engels provide much discussion regarding the type of society socialism might bring into being:

With the seizing of the means of production by society, production of commodities is done away with, and simultaneously, the mastery of the product over the producer. Anarchy in social production is replaced by systematic, definite organisation. The struggle for individual existence disappears. Then for the first time man, in a certain sense, is finally marked off from the rest of the animal kingdom, and emerges from mere animal conditions of existence into really human ones. The whole sphere of the conditions of life which environ man, and which have hitherto ruled man, now comes under the dominion and control of man, who for the first time becomes the real, conscious lord of nature, because he has now become master of his own social organisation. The laws of his own social action, hitherto standing face to face with man as laws of nature foreign to, and dominating him, will then be used with full understanding, and so mastered by him. Man’s own social organisation, hitherto confronting him as a necessity imposed by nature and history, now becomes the result of his own free action. The extraneous objective forces that have hitherto governed history pass under the control of man himself. Only from that time will man himself, with full consciousness, make his own history—only from the time will the social causes set in movement by him have, in the main and in a constantly growing measure, the results intended by him. It is the humanity’s leap from the kingdom of necessity into the kingdom of freedom.<sup>48</sup>

The passage reiterates the point that social forces, though antagonistic in capitalism, would be transformed to the cooperative forces that would form the next

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<sup>46</sup> This question has led to huge amounts of speculation of left-wing jurisprudence thinkers. It is, however, only informed speculation. Much of Chapter four is dedicated to this type of speculation.

<sup>47</sup> In fact, it was for this reason that Marx and Engels criticized the Social Utopians.

<sup>48</sup> Engels, *Anti-Dühring* in *Marx and Engels Collected Works*, vol. 25, p. 270

society. Similarly, although humans are bound by necessity, they nevertheless harness nature by first discovering and then utilising scientific laws to progress technologically (and hence improve the means for meeting their needs). In this way, social forces can be released from antagonism and unified into the goal of furthering freedom. This unity of purpose allows social relations to grow on a cooperative level rather than conflict on an antagonistic one. Can complete control over natural and social forces (essentially, perfect knowledge) be attained? Engels asserts it cannot: He argues, if “at any time the development of mankind such a final, conclusive system of the interconnections within the world—physical as well as historical—were brought about, this would mean that human knowledge had reached its limit, and, from the moment when society had been brought in accordance with that system, further historical development would be cut short—which would be an absurd idea, sheer nonsense.”<sup>49</sup>

He reasons that there is a contradiction between the “endless progressive development of humanity” which impels us to search for greater knowledge (to facilitate control over natural and social forces) and the realisation that perfect knowledge is unattainable. “Life is therefore a contradiction which is present in things and processes themselves, and which constantly originates and resolves itself; as soon as the contradiction ceases, life, too, comes to an end, and death steps in...”<sup>50</sup> Engels concludes:

A system of natural and historical knowledge, embracing everything, and final for all time, is a contradiction to the fundamental law of dialectic reasoning. This law, indeed, by no means excludes, but on the contrary, includes, the idea that systemic knowledge of the external universe can make giant strides from age to age.<sup>51</sup>

The label of communism as “the end of history” clearly does not indicate the completion of human development, but rather a cessation to antagonistic social forces. From a materialist perspective, there can be no improvement on an

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<sup>49</sup> *Ibid.*, p. 135

<sup>50</sup> *Ibid.*, p. 145

<sup>51</sup> Engels, *Socialism: Utopian and Scientific in Marx and Engels Selected Works in two volumes*, vol. 2, p. 122

economic system designed solely to fulfil human needs for it is in this environment that class antagonism disintegrates, and social forces become unified in purpose. In this light, communism is merely the "last phase of history". At this stage, development proceeds from new production relations. One organisational method might meet a goal better than another, and the possibility of change and improvement is ever-present. As knowledge increases society advances. Unless knowledge becomes perfect, and Engels indicated that it cannot, society will constantly change, progress and grow. History, in this sense, will not "stop". In terms of arbitration, if society cannot advance to the point of perfection, a potential for conflict is always present.

As previously discussed, the role of arbitration would involve conflict resolution and Engels referred to a "maintaining of peace." The details, however, are unspecified. Neither Marx nor Engels identifies the source of differences and consequently the content of regulations is not addressed. We do have, however, several indications from the analysis of capitalism of what regulations would *not* be. Marx and Engels' critique of the capitalist penal system indicates that regulation would be non-coercive:

A penal theory which at the same time sees in the criminal the *man* can do so only in abstraction, in imagination precisely because *punishment, coercion* is contrary to *human* conduct.<sup>52</sup>

Consequentially, punishment would become unnecessary:

...crime must not be punished in the individual but the anti-social sources of crime must be destroyed, and each man must be given social scope for the vital manifestation of his being. If man is shaped by his environment his environment must be made human. If man is social by nature, he will develop his true nature only in society, and the power of his nature must be measured not by the power of the separate individual but by the power of society.<sup>53</sup>

The notion that society is responsible as a whole for the conduct of its members precludes punishment of individuals as a consequence of conflict. Engels mentioned directly that the point of arbitration is to resolve conflicts. Punishment

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<sup>52</sup> Marx and Engels, *The Holy Family* in *Marx and Engels Collected Works*, vol. 4, p. 179

<sup>53</sup> *Ibid.*, pp. 130-131

does not resolve the *cause* of conflicts (although it may control its effects). The only way to alter the cause of conflicts is to change the social arrangements that brought them about. When the above passages are taken in context, it is apparent that Marx and Engels were discussing “crimes” as defined in capitalism, a majority of which pertained to breaches of a code based on capitalist relations involving primarily questions of private property. Is society, however, responsible for *all* conflict? Or, do individuals bear some responsibility for their actions? The thrust of their answer to this question takes into account the whole of the discussion thus far: society and individuals *cannot* be considered independent of each other. Individual responsibility occurs in social form; that is, if conflict is present, individuals are responsible for resolving the conflict by changing the social situation which created it. One set of responsibility cannot be divided from the other. Therefore, in socialism, individuals have responsibility for their own actions through the power of social organisation. In capitalism, individuals do *not* have this power—which is why the entire dichotomy between “individual” and “society” has developed and why capitalist law takes the form of individual juridic persons. To understand the ramifications of this position on regulation, other elements of Marx and Engels’ position on the social condition must be explored.

## **FURTHER CLARIFICATION**

### **Introduction**

In order to comprehend more fully the characteristics of the regulation system Marx and Engels described, a further exploration of their analysis of the human condition is required. Obviously volumes could be written (indeed they have been) on this very broad subject. I have selected several issues most pertinent to the legal question: (1) human nature; (2) free will; (3) authority; and (4) democracy.

The variety of these topics is striking and indicates that the legal question for Marx and Engels did not concern a separate area, but one that incorporated a myriad of other aspects of social organisation. Michel Villey writes of Marx:

Marx reintegrated law into the whole of reality; for law is not a being in itself (i.e. a closed universe of norms), but a function within a whole. Law cannot be thought of in independence of that which first gives it meaning, and so cannot be cut loose from the relationships in the world: from the struggle of men banded together against nature and thus, in the first instance, from economics.<sup>54</sup>

Taking the function of arbitration as the resolution of conflicts, we can see why other larger issues might be important. If, for instance, human nature was "inherently evil", then conflicts would appear to be inevitable and would suggest that an outside force was necessary to suppress this evil. If, however, human nature was perceived as "inherently good", conflicts at one point or another might disappear. Leaving aside the absolute categorisations of human nature as basically "good" or "evil", if we surmise that certain aspects of the human character, say, for instance, both violent behaviour *and* sympathy, were permanent characteristics of the human condition, then potential for violent confrontation would always exist yet simultaneously a reduction of conflicts through sympathetic understanding would always be a possibility. With such a variety of views regarding human nature available, it is important to establish Marx and Engels' views on this topic.

Similarly, the issue of free will is of paramount importance as regards the possibility of conflict. Can humans control their actions? To what degree can they achieve this control? The question directly relates to the enquiry about human nature. If the possibility for violent behaviour is inherent yet we have the capacity to exercise free will, then there is a potential for non-violent behaviour under any circumstances. Conflicts, therefore, would not necessarily involve violence. The position would suit Marx and Engels well; however, they do not advance this viewpoint. In fact, their arguments against free will add an interesting perspective to the notion of authority.

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<sup>54</sup> Michel Villey, "The Philosophy of Law in the Communist World" in *Marxism, Communism and Western Society*, ed., C.D. Kerling (New York: Herder and Herder, 1973) vol. 5, p. 141

Authority can be related to a resolution of conflicts in the immediate sense: the arbitrator can be assumed to have authority over the two disputing parties involved. However, Marx and Engels do not regard authority in this manner. In essence, they classify authority as what is demanded by the circumstances of a given situation. For instance, if walking in the desert water is needed. The fact that water is required cannot be determined by choice. Circumstances do, however, involve decision-making as well. In the above example, for instance, such issues of how much water should be brought, what method should be used to carry it, etc., do involve choice. How we make these decisions leads us to the fifth topic, democracy.

The specifics of the decision process involved in arbitration are absent in the works of Marx and Engels. They do, however, provide a basis for a general decision-making process that will be useful for later discussions<sup>55</sup> of how a communist regulation system might work.

As stipulated in the general introduction, no attempt is made here to defend these arguments or respond to the plethora of critiques directed at particular topics. It is the purpose of this chapter to sketch a broad framework of related issues that will place discussions of socialist regulation in perspective.

### **Human nature**

It is often commented that Marx's idealised conception of human nature presented in the *Philosophical Manuscripts* and other earlier writings is incompatible with the theory of materialism.<sup>56</sup> There are also many authors who, while they acknowledge a difference in attitude, agree that some of Marx's idealistic views could be incorporated to some degree in materialism.<sup>57</sup> The dichotomy between the 'humanist' perspective and the 'scientific' approach of Marx has been a constant source of academic debate.<sup>58</sup> It should be pointed out that Marx and Engels

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<sup>55</sup> See Chapter four.

<sup>56</sup> E.g. Althusser, Sydney Hook, Daniel Bell, Lewis Feuer

<sup>57</sup> E.g. Calvez, Tucker, McLellan, Felscher, Harrington, Avineri

<sup>58</sup> Tom Bottomore stated the debate in these terms in *Modern Interpretations of Marx* (Oxford: Basil

were writing over a lifetime where personal and political experience changed them and their theories. It is unreasonable to assume that a logical and progressive argument should appear throughout the entirety of their work.<sup>59</sup> Researchers often use materials for rational arguments that perhaps were not obviously meant for that purpose. For instance, although political and philosophical points were discussed in letters, it cannot be assumed that these letters were ever meant to stand up to any academic scrutiny. One can take certain pieces of writing into account *for clarification*, but not really for argumentation. Those that posit the classification of Marx as a humanist would have much supportive material available.<sup>60</sup> Others that accuse Marx of presenting a purely moral argument, despite his rhetoric against bourgeois morality, would also have many passages from which to cite.<sup>61</sup> There is a difference, however, between moral indignation (of which there was much) and moral *argument*.

Marx and Engels envisioned a "human" as an overall rounded individual interested in intellectual pursuits, the affairs of society, physical exercise and creative work. For them a society that encouraged the quest for knowledge and experience through direct control over and participation in all facets of society was a "superior" form of social organisation. They firmly believed that such a system would allow the rational capacity of humans to develop fully and would free

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Blackwell, 1981) which is a collection of essays discussing this dichotomy. The great variety of contributors include: Jürgen Habermas, Svetozar Stojanovic, Agnes Heller, Louis Althusser, Rudolf Hilferding and Maurice Godelier. Also interesting and from a slightly different approach is the collection of essays in *Marx's Socialism*, ed., Shlomo Avineri (New York: Lieber-Atherton, 1973). All contributors incorporate (as opposed to ignore) Marx's earlier writings while formulating their conclusions regarding Marx's prescriptions for socialism. Contributors include: Robert Tucker, Donald Hodges, Daniel Bell, Gerald Cohen and Ralph Miliband.

<sup>59</sup> This assumption also discounts the fact that they were distinct writers, as discussed in the introduction.

<sup>60</sup> One of the most widely read authors, Eric Fromm, makes the humanist argument in *Marx's Concept of Man* (New York: Ungar Press, 1961).

<sup>61</sup> An in depth discussion of Marx and his problems with morality, especially in terms of justice and rights and the means/end question, can be found in Steven Lukes, *Marxism and Morality* (Oxford: Clarendon Press, 1985). Also interesting is a collection of essays in *Socialism and Morality*, eds., David McLellan and Sean Sayers (London: The Macmillan, 1990). Roy Edgley responds to some of Lukes' point in the essay titled "Marxism, Morality and Mr. Lukes" found on pages 21-41 in the afore mentioned work.

emotional needs from material wants. The arguments put forth in the earlier works of Marx (most notably "Alienated Labour" in the *Philosophical Manuscripts*) and the vehemence of his and Engels' disgust towards capitalism for creating a "non-human" environment (prevalent throughout their entire works) certainly lends credence to the humanist interpretation.

Yet their style of *argument*, especially in later works, did not rely on the humanist approach. They made one simple assumption: that humans need to work to live. Other than this, in the scheme of materialism, "human nature" was an abstract idea only. The "nature" of our being is determined by the social relations in which we are engaged, which, in turn are conditioned by the mode of production. Social forces and individual forces are directly linked in this way. As Marx explains:

The way in which men produce their means of subsistence depends first of all on the nature of the actual means of subsistence they find in existence and have to reproduce. This mode of production must not be considered simply as being the reproduction of the physical existence of individuals. Rather it is a definite form of activity of these individuals, a definite form of expressing their life, a definite *mode of life* on their part. As individuals express their life, so they are. What they are, therefore coincides with their production, both *what* they produce and *how* they produce. The nature of individuals thus depends on the material conditions determining their production.<sup>62</sup>

From a Marxist perspective, it is impossible to think of individuals outside of their social relations without venturing into the realm of pure abstraction. This was Marx and Engels' fundamental criticism of theories that specified the individual as the isolated starting point.<sup>63</sup>

Marx and Engels may have had a preconceived notion of what was a "better human";<sup>64</sup> but their conceptual argument (as opposed to opinion) proceeded from the *physical* observation that there were contradictions between the roles citizens

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<sup>62</sup> Marx and Engels, *The German Ideology* (Moscow: N.P., 1968) p. 31 in *Karl Marx: His Life and Thought*, p. 145

<sup>63</sup> Which is one reason they were dismissive of the bulk of bourgeois legal theories.

<sup>64</sup> E.g. one that can "hunt in the morning, fish in the afternoon, rear cattle in the evening, criticize after dinner" in Marx, *The German Ideology in Selected Writings*, ed., David McLellan (Oxford: Oxford University Press, 1977) p. 169. It is most clear throughout the *German Ideology* that Marx believed that humans freed from the division of labour would pursue a wide variety of interests.

assumed in the political realm and those in the economic realm. Until these contradictions were resolved, the form that human nature took was an alienated form: not because capitalism was inhuman (which they constantly asserted it was through the form of moral *rhetoric*), but because the form was contradictory (an *argument* Marx and Engels expose in their major works on materialism).<sup>65</sup>

Admittedly, Engels and more so Marx did not adhere to the distinction between ideological rhetoric and argument as clearly as I have implied; and for this reason many of their arguments lend themselves to ambiguity.<sup>66</sup> This ambiguity, however, should not detract from the purpose of materialism *in the broad sense*, which is to examine, through dialectics, how the development of society (and hence "state" and "law") has proceeded and why it would lead to socialism. It is evident in the theory of materialism that human nature is malleable and depends on social relations conditioned by one's role in the mode of production.<sup>67</sup>

If human behaviour is tied to social conditions (as opposed to "human nature") directly, then "crime" is not inherent in human conduct, but a product of social conditions. If we are to have control over our behaviour, then we must have control over our social environment. The recognition that conflict is possible in communism, however, suggests that this control is somewhat incomplete. The dialectical concept of freedom resolves this apparent inconsistency.

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<sup>65</sup> Most notably Marx's *Capital* and Engels, *Socialism: Utopian and Scientific*.

<sup>66</sup> Norman Geras in a fine article titled "On Marx and Justice" in *New Left Review*, No. 150 (March/April, 1985) makes the argument that while Marx claims that the moral phenomenon of "justice" will vanish in socialism, he nevertheless is espousing a just society.

<sup>67</sup> This point becomes especially important in discussions of arbitration, where human conduct is most relevant. The "norms" surrounding "correct" human behaviour are dependent on social relations incorporated in the method of production. While Marx and Engels indicate this argument, other theorists (most notably Pashukanis) clarify their position to a great extent. This will be discussed in much detail in Chapter three—*The Theorists*. For now it is only necessary to: (1) acknowledge the ambiguity in the works of Marx and Engels; and (2) assert that despite these ambiguities, materialism dictates that human nature is malleable, and is reliant on environmental conditions (i.e. mode of production).

## Freedom

Marx and Engels posit that if humans are to be truly free, they must be free in the material sense, i.e. have direct management of providing for their needs. If they do not, then they can be free only in the political sense. Therefore, abstract power, such as that guaranteed by law, constitutions, civil rights, etc. are merely that. People have power in a theoretical sense to be protected from this or that, but they have no real power actually to mould their environment and ensure their quality of life.<sup>68</sup> It logically follows that once we have this power, as in communism, then we will have complete control over our environment, and hence our behaviour. This is not the case, however.

While we may direct the production process, we cannot determine our needs.<sup>69</sup> For instance the human body requires food. By an act of will, we produce food. This production in turn, requires work. Whilst we cannot control the requisite of work, we can dictate the method in which we work. Concomitantly, the method itself demands certain actions. Dialectically speaking, an act of will stems from a need and in turn creates another need, which can be met by an act of will, which creates another need, etc. As Engels explains in *Anti-Dühring*:

Freedom does not consist in any dreamt-of independence from natural laws,<sup>70</sup> but in the knowledge of these laws, and in the possibility this gives of systematically making them work towards definite ends. This holds good in relation both to laws of external nature and to those which govern the bodily and mental existence of men themselves—two classes of laws which we can separate from each other at most only in thought but not in reality. Freedom of the will therefore means nothing but the capacity to make decisions with knowledge of the subject. Therefore the freer a man's judgement is in relation to a definite question, the greater is the necessity with which the content of this judgement will be determined...<sup>71</sup>

The freedom that Marx and Engels referred to is associated directly with knowledge, knowledge of natural and social forces. The more knowledge humans

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<sup>68</sup> Marx/Engels, *Holy Family* in *Marx and Engels Collected Works*, vol. 4, pp. 130-131

<sup>69</sup> Agnes Heller dedicates *The Theory of Need in Marx* (London: Allison and Busby, 1976) to exploring what Marx implies by needs. At this point, it is only important to recognise the general point that certain needs are inevitably entailed in being human. Non-controversial (for the most part!), is the physical need of food.

<sup>70</sup> Engels is referring to laws active in nature (e.g. the laws of physics, the "law" that animals must eat to live and work to eat, etc.).

<sup>71</sup> Engels, *Anti-Dühring* in *Marx and Engels Collected Works*, vol. 25, p. 105

gain, the more they utilise physical and social forces for their own benefit. At the same time, if material conditions are at such a stage of development where citizens *can* have more control over scientific and social forces then it becomes *necessary* that we do have control over them (hence the impetus for revolution). For Marx and Engels this idea of necessity embodies a certain notion of authority.

### Authority

Marx and Engels' views on authority are best illustrated through their debates with the anarchists,<sup>72</sup> and with Bakunin in particular. The anarchists designated authority, directly represented in capitalism by the state, as the main ill of society.<sup>73</sup> Marx and Engels, on the other hand, asserted that the prime cause of malaise in the social system was the phenomenon of capital (and consequently capitalists); and with the disappearance of capital the state would be rendered useless.<sup>74</sup>

Both Marx and Engels maintained that a certain amount of authority was integral to any form of production. In *On Authority*, Engels poses the question, "Will authority have disappeared or will it only have changed its form" after instruments of labour have become the collective property of the workers?<sup>75</sup> He responds by pointing out the fact that machinery requires maintenance in order "to avoid accidents." Regardless of the process of decision-making involved (e.g. dictatorial or democratic) in assigning these responsibilities, these duties *must* be fulfilled if the machines are to run. He uses further examples of running ships, train stations, cotton mills, etc.—all cases where procedure has been established out of necessity and it must be followed. Authority, in this sense, is unavoidable:

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<sup>72</sup> Such as Proudhon, Stirner, Bakunin. Paul Thomas's *Karl Marx and the Anarchists* (London: Routledge and Kegan Paul, 1980) explores in depth Marx's disputes with the anarchists (primarily those named in this footnote).

<sup>73</sup> To be more specific, the anarchists regarded the state as an immoral authority. Social authority, referred to in general as social pressure, they argue, is of a qualitatively different character. Robert Nozick in his well-known work, *Anarchy, State and Utopia* (New York: Basic Books, 1974) explores the concept of a moral state.

<sup>74</sup> Best expressed by Engels in his letter to Theodor Cuno, January 24, 1872.

<sup>75</sup> Engels, *On Authority* in *The Marx and Engels Reader*, ed., Robert Tucker (New York: W. W. Norton, 1978) p. 731

We have thus seen that, on the one hand, a certain authority, no matter how delegated, and, on the other hand, a certain subordination, are things which, independently of all social organisation, are imposed on us together with the material conditions under which we produce and make products circulate.<sup>76</sup>

The qualification that this subordination should only be dictated by necessity then follows:

If the autonomists confined themselves to saying that the social organisation of the future would restrict authority solely to the limits with which the conditions of production render it inevitable, we could understand each other; but they are blind to all the facts that make things necessary and they passionately fight the word.<sup>77</sup>

The vehemence with which Marx and Engels criticised Bakunin for revolving social revolution around the destruction of all authority, show their acceptance and recognition of the requirement for organisation and decision-making. It is the *nature* of these institutional practices that will be transformed. The previously discussed differences between political power and social power become extremely important:

Why do the anti-authoritarians not confine themselves to crying out against political authority, the state? All socialists are agreed that the political state, and with it political authority will disappear...that is, that public functions will lose their political character and be transformed into simple administrative functions of watching over the true interests of society.<sup>78</sup>

The perpetual element of authority requires a method for administration. If the method is not political in form but social, it remains to be asked, how is a social form of decision-making characterised?

## Democracy

Combining the previous discussion of the relationship between free-will and necessity with the above conclusions regarding authority creates the following situation: (1) society has certain needs (which are not in its control) that must be met; (2) it operates a production system that *is* in its control; (3) there are certain demands this production system requires for its self-perpetuation (e.g. the running

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<sup>76</sup> *Ibid.*, p. 732

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

of transport, etc.) that are beyond society's control; (4) decisions (which *are* in society's control) must be made as to *how* to meet the needs of society and the demands of the production system. There *is* an administrative organisation to fulfil this function. As exemplified earlier, the power of this administrative organ is not political but social.

Can this social power be labelled democratic? It is doubtful. As should be evident by now, the terms used in capitalism do not carry the same meaning as in socialism. Marx's disdain of the concept of "the People's State" evidences his mistrust of "democracy". Even if workers gained *political* power in a country, the state would still not be socialist until the production process was placed in their hands. "Democratic" in this sense would only indicate a political abstract power, not an actual power. For this reason, despite Marx's support of some democratic principles, and his communal notions, it would be confusing to label him "democratic". Nevertheless, certain prescriptions for decision-making in the future society have democratic resemblances. It should be kept in mind, however, that "democratic" as used in these passages assume a meaning different from that in capitalism. Marx and Engels describe "democratic" control in communism as "social" control.

Again Marx and Engels' battles with the anarchists brings to light important implications of their notion of "social" control. They were accused by Bakunin of advocating a severely authoritarian state, justified by historical materialism, where all would be subjugated to the will of the workers—summarised well in the catch phrase "dictatorship of the proletariat". Several points must be noted here. First of all, by the time material conditions are ripe enough for revolution, a majority of the society would be workers. In the case where significant membership of other classes (e.g. the peasants) still prevails, Marx explains that: (1) the revolution will fail due to active opposition; or (2) the revolution will succeed by bringing the peasantry into

the proletarian ranks.<sup>79</sup> The future society becomes classless because *everyone* is a worker, "...with labour emancipated, every man becomes a working man, and productive labour ceases to be a class attribute."<sup>80</sup> "Dictatorship of the proletariat" becomes an incongruous concept if the *entire* society is proletarian.<sup>81</sup> Secondly, it is of paramount importance that the workers, themselves, as a whole, are responsible for revolution:

The emancipation of the working class must be achieved by the working class themselves. We cannot therefore co-operate with people who openly state that the workers are too uneducated to emancipate themselves...<sup>82</sup>

Here, Marx was criticising the Blanquists<sup>83</sup> who operated on the basis that a small number of well-organised and committed revolutionaries could seize power and retain control until "they succeeded in sweeping the mass of people into the revolution and ranging them around the small band of leaders."<sup>84</sup> Further in the passage Marx exhorts the working class to "on the one hand do away with all the old repressive machinery previously used against it itself, and, on the other, safeguard itself against its own deputies and officials, by declaring them all, without exception, subject to recall at any moment."<sup>85</sup>

"Dictatorship of the proletariat" was used to describe the Paris Commune which Marx and Engels acclaimed because "every position, be it administrative, judicial or educational, was filled by universal suffrage of the people and was subject to immediate recall by the same people."<sup>86</sup> The notion of universal suffrage and the

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<sup>79</sup> Marx, *After the Revolution* in *The Marx and Engels Reader*, p. 543

<sup>80</sup> Marx, *The Civil War in France* in *The Marx and Engels Reader*, p. 635

<sup>81</sup> Issues of the transition period will be discussed in Chapter two.

<sup>82</sup> Marx, *Circular Letter to Bebel, Liebknecht, Bracke, and others* in *The Marx and Engels Reader*, p. 555

<sup>83</sup> Name after socialist Auguste Louis Blanqui (1805-1891) who advocated that a small number of disciplined revolutionary conspirators could take power. The group would assume dictatorial powers to establish socialist production associations under its guidance and train the masses until citizens were able to manage the economy to meet their own ends.

<sup>84</sup> Marx, *The Civil War in France* in *The Marx and Engels Reader*, p. 627

<sup>85</sup> *Ibid.*

<sup>86</sup> Engels, *Introduction to Civil War in France* in *Werke*, vol. 17 p. 624 as cited in Michael Harrington's *Socialism* (New York: Saturday Review Press, 1972) p. 51

potential for recall are hardly characteristics of a "dictatorship" in the political sense of the word. The same attributes were praised in the Commune judiciary:

The judicial functionaries were to be divested of that sham independence which had but served to mask their object subserviency to all succeeding governments to which, in turn, they had taken, and broken, the oaths of allegiance. Like the rest of the public servants, magistrates and judges were to be elective, responsible, and revocable.<sup>87</sup>

Perhaps more convincing than these extracts from *The Civil War in France*, which was for the most part an ode to the Commune, were Marx's writings of mock conversations with Bakunin titled *After the Revolution*. The dialogue is quite revealing:

Bakunin: There are about forty million Germans. Will all forty millions really be members of the government?"

Marx: Certainly, because the thing starts with self-government of the township.

.....

Bakunin: This dilemma has a simple solution in the Marxists' theory. By popular administration they understand administration of the people by means of a small number of representatives elected by the people.

Marx: The ass! This is democratic nonsense, political windbagery! Elections are a political form....The character of these elections depends not on these designations but on the economic foundations, on the economic ties of the voters amongst one another, and from the moment these functions cease being political (1) no governmental functions any longer exist; (2) the distribution of general functions takes on a business character and involves no domination; (3) elections completely lose their present political character.<sup>88</sup>

The key elements of the conversation revolve around the concept that authority, though necessary, will not be "dominating" beyond the procedural necessity of organising production. Positions of "administration" lose political character in that there is no inherent power differentiation between "administrator" and "voter". This relationship arises when the mode of production is directly responsive to the actions and needs of citizens. As a result, an administrator does not have power *over* an individual, but rather *facilitates* society's demands. The "authority" of an administrator stems from the *need* of social organisation rather than the element of force used to maintain state power in capitalism.

Given the prescriptions of social power, what might the content of socialist regulations be? Most bourgeois laws would become irrelevant:

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<sup>87</sup> Marx, *Civil War in France* in *The Marx and Engels Reader*, p. 632

<sup>88</sup> Marx, *After the Revolution* in *The Marx and Engels Reader*, p. 545

From the moment when private ownership of movable property developed, all societies of which this private ownership existed had to have this moral injunction in common: Thou shalt not steal. Does this injunction thereby become an eternal moral injunction? By no means. In a society in which all motives for stealing have been done away with in which therefore at the very most only lunatics would ever steal, how the preacher of morals would be laughed at who tried solemnly to proclaim the eternal truth: Thou shalt not steal.<sup>89</sup>

Marx and Engels contend through much of their work that if men are treated as criminals, they will act as criminals; and if these circumstances are removed, then most crime disappears.<sup>90</sup> All property laws, tax laws, etc. would be rendered extraneous. Engels also implies in the above excerpt that those values once deemed “immoral”, or more pertinently “criminal”, are by no means eternal, but conditional. But what of the “resolution of minor conflicts”? What might these minor conflicts (*Streitigkeiten*) be? What is their source? How should they be handled? Unfortunately, Marx and Engels fell silent in this area.<sup>91</sup> Their specificity ended in the general acknowledgement that minor conflicts would occur whatever the mode of production. They did provide, however, a unique theoretical basis for post-capitalist regulation.

## SUMMARY

The crux of Marx and Engels position on law rests with their analysis of the perpetuation of economic relations throughout all forms of social organisation. The contradiction embodied in capitalist production relations as reflected in the phenomenon of commodity fetishism is reflected directly in law. Such relations create a false dichotomy between “individual” and “society” and equalise all humans—a situation quantified legally in the notion of a juridic person. At the root of the concept of juridic person is the idea that all individuals have free will and are equal. With the dramatic transformation of production relations, the concept of law

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<sup>89</sup> Engels, *Anti-Dühring* in *The Marx and Engels Reader*, p. 726

<sup>90</sup> The theme was prevalent throughout much of their works, but was stated most succinctly by Engels in *The Conditions of the Working Class in England*. (specifically in *Marx and Engels Collected Works*, vol. 4, pp. 411-412, 424-427, *passim*).

<sup>91</sup> Other theorists, however, did not. This will be discussed in more depth later.

in the capitalist sense is made irrelevant (hence Engels' use of the term 'arbitration'). The dichotomy between individual and society dissolves and eliminates the need for the concept "juridic person". Under such conditions, the quantification of people as "equal" ceases; for people are only falsely equal in capitalist society in an abstract sense. Law cannot regulate objectively, for in reality one individual can not be measured against another in a quantitative sense, as occurs in capitalism via rights and obligations. The resolution of conflicts then, does not involve determining the rights or obligations of one individual against another, but rather involves a *social* resolution of a discordant situation. In such circumstances, punishment is ineffective for it does not resolve the *situation* that created the conflict and therefore becomes irrelevant in a system of regulation which aims at eradicating conflict.

The identification of crime or conflict as a *completely* social phenomenon must be considered fully to grasp the meaning of the theoretical difference between law and regulation. The argument that Marx and Engels present indicates that responsibility for conflict is assumed by individuals *via their ability to control their social environment*, at least as far as necessity allows. Since individuals do not have this power in capitalism, a system of regulation whose purpose is strictly conflict resolution cannot exist under the capitalist mode of production. The fact that regulation emerges as a social phenomenon directly reflects communist economic production relations which are also completely socialised. What occurs in capitalism, embodied in the form of commodity fetishism, is that law operates under the same fetishised relations as production. Put in extremely simple form, production relations are individualised (that is, sets of rights and obligations are determined between two individuals of equal rights and wills in a given situation, the basis of which is contract). In reality, however, production relations are social, a fact recognised only through the act of exchange and only through commodities. As Marx puts it, "things" then reflect social relations and individuals are perceived as

“things” (commodity fetishism). The contradiction creates a false dichotomy between “individual” and “society” whose only reconciliation can take place in the legal arena where individuals are objectified (hence the reflection of people as things) through abstract equality which takes the form of individual rights and obligations. Legal decisions determine which set of rights and obligations prevail at a given time. Given that, according to Marx and Engels, actual relations are *not* equal, and laws enforce rights and obligations which are in fact *not* equal but are designed to protect capitalist economic relations that are based on private property, the purpose of law, in principle, becomes to reinforce production relations rather than resolve conflicts.

Suggestions of exactly how a communist regulation system might work are scarce, though a few general prescriptions emerge from descriptions of other elements of the future society. Marx and Engels indicate that authority will lose its political character in that there will be no decision-making bodies apart from society itself. While functions may be differentiated according to purpose, the *power* to enforce decisions do not emanate from a “state” or in the legal sense a “court”, but rather from all members of society. The impetus for obligation stems from necessity rather than force, hence the differentiation between “authority” and “power”.

It is also assumed that the relative abundance of socialism brought about by coordinated production priorities designed solely to meet the needs of society will reduce vastly required labour time and that people would actually have time to participate in societal affairs. The bureaucratisation in capitalism would be vastly simplified as the need for codified law would decrease, and perhaps actually disappear altogether. The types of institutions that might arise would be purely social, meaning that one individual would not have power over another, but rather roles would be determined in a strictly organisational sense based on the necessities of a given situation.

The notion of freedom presented is not one based on individual rights and obligations exerted in an abstract political realm, nor does it rely on enforced "protection" of these rights, but it is rather based on individual development of knowledge via participation in an organised whole. As the level of technology increases with production demands, the depth of knowledge obtained will provide the basis for a continual increase in human potential. The actual knowledge and education attained from these experiences, creates a public realisation to a greater and greater degree that social cohesion and cooperation is necessary for individual development.

It is assumed that the types of conflict that would arise from a society at this stage of development would not be ones of severe social disruptiveness. Presumably, as human potential develops, the need for law in the "control" sense of the word dissipates. It is doubtful whether the need for arbitration would entirely disappear (then history would be at an end); what Marx and Engels indicate is that the severity of conflict would be vastly reduced and the method for its resolution completely different than its legal counterpart in capitalism.

At the heart of this difference is their concept of social as opposed to political power. Social power embodies the concept that citizens must control economic forces and they shall do so in a completely associative manner, commonly described as "democratic". The use of the word "democratic" is highly confusing however. Though Marx and Engels praise the Paris Commune for direct elections and recall options, it must be noted that democracy still indicates a political form, meaning that at some point or another one individual has power over another. What Marx and Engels emphasise, however, is that individuals can operate in organisational capacities *without* having power over each other. Such organisational roles are determined by the needs of society itself and managed by the coordination and cooperation of those involved. This notion is the basis of the concept of administration as opposed to state and regulation as opposed to law.

There is a multitude of extremely contentious theoretical points, ideas and concepts that proceed from the above framework which will be discussed and developed more fully in the following chapters. What is evident is that Marx and Engels provide a rich theoretical basis for communist regulation. They were not at all specific, however, as to how the above theoretical notions regarding regulation might be actualised and what structural form they might assume. Such an endeavour was for others to attempt.

## CHAPTER TWO—THE PEOPLE'S COURTS

### INTRODUCTION

In 1875, Marx declared, "Between capitalist and communist society lies the period of the revolutionary transformation of the one to the other."<sup>1</sup> In October 1917, Lenin proclaimed that Russia was embarking on this "revolutionary transformation" commonly known as the transition period.<sup>2</sup> During this interval of socialist development, the workers were to seize the means of production and organise themselves into administrative bodies. A proletarian state, often referred to as "the dictatorship of the proletariat", would remain until all vestiges of capitalism had been "swept away". When production and distribution were operating on socialist principles, the state would become futile and accordingly "die out". [*aussterben*]

Marx and Engels wrote little about this particular stage of history. Marx did stress that transformation from capitalism to communism could not happen immediately:

What we are dealing with here is a communist society not as it *emerges* on its own foundations, but on the contrary, just as it *emerges* from capitalist society, which is thus in every respect, economically, morally and intellectually, still stamped with the birth-marks of the old society from whose womb it emerges.<sup>3</sup>

He also describes the transition period economically, explaining that, despite the seizing of the means of production process and its reorganisation in accordance with communist production principles, a bourgeois distribution method (commodity exchange) would prevail for a period of time. A certain amount of labour time would be exchanged for a certain amount of products. He stipulates, though, that form and content have changed. No one can give anything but labour time and cannot receive or own anything but products for consumption. "In spite of this

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<sup>1</sup> Marx, *Critique of the Gotha Programme* in *Marx and Engels Collected Works* (London: Lawrence and Wishart, 1975) vol. 24, p. 95

<sup>2</sup> To avoid confusion that was discussed in the general introduction, "socialism" will be used when referring to the transition period. "Communism" depicts the fully developed society.

<sup>3</sup> Marx, p. 85

advance, this *equal right* is still constantly encumbered by a bourgeois limitations."<sup>4</sup> Marx argues that only when equal products are *not* given for equal labour will communism evolve. Humans have different abilities and needs that simply cannot be quantified, hence any principle of equality would be contradictory. Only when society operates on what Marx labels as the "right of inequality," epitomised by the well-known maxim "from each according to his abilities, to each according to his needs",<sup>5</sup> can it be deemed communist.<sup>6</sup>

In terms of this thesis, which focuses primarily on a theory of regulation in advanced socialism (communism), the transition period might appear to be of little interest. After all, developments in the transition period would still be affected by bourgeois economic principles. This situation would indicate that some sort of law would arise, but like economics, one different in form and content. Nevertheless, this "law" would not be communist regulation either, and hence appears to be out of the scope of this discussion. What *is* intriguing about the transition period in terms of law were the institutions (the People's Courts) that were created to carry out justice and the reasoning behind these institutions. In essence, the principles behind the People's Courts attempted to actualise the Marxist concepts of a fully participatory regulatory structure. Examining the goals of these institutions and analysing the problems and complications in their establishment and function provide a fruitful concrete example of an effort to put theory into practice.

The use of such an example, however, is not without attendant difficulties. The relationship of the Soviet experiment, in all its various stages, to Marx's theories is a highly contentious issue both presently and historically. Some assert that Marx has little to do with the former Soviet Union while others maintain that Marxist theory and the Soviet Union are integrally linked. Despite the multitudinous debates revolving around the topic one point is rather clear. Russia

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<sup>4</sup> *Ibid.*, p. 86

<sup>5</sup> *Ibid.*, p. 87

<sup>6</sup> Marx implied also the condition of abundance. The specific line is "all the springs of common wealth flow more abundantly." *Ibid.*

was the first nation to carry forth societal restructuring (both economic and social) based on Marxist theory. For this reason it should not be excluded from forays into Marxism (such as this thesis). At the same time, however, developments in the Soviet Union should not necessarily be regarded as direct results of Marxist theory put into practice; and it is here where the difficulty of fitting the Soviet experiment into the Marxist paradigm becomes most evident. Whilst the People's Courts provide a unique historical example, it remains to be seen whether this particular historical example is all that relevant to the general theoretical framework outlined in Chapter one with regard to regulation. At best the example might show the merits or demerits of such a position, at worst it might confuse rather than elucidate Marx's position. In either case, analysis of the experiment of the People's Courts will bring to the forefront further questions that must be explored in the conduct of an inquiry into a theory of communist regulation, and for this purpose it is a valuable exercise.

Although the People's Courts operated as institutions throughout the history of the Soviet Union, it is most valuable to examine them in their early years of operation (1918-1920). There are several reasons for this. First, and most obvious, is the natural historic break occurring at the time of the initiation of the New Economic Policy (N.E.P.) in 1921. At this point, revolutionary goals had changed and a "strategic retreat" [*strategicheskoe otstuplenie*] was in effect.<sup>7</sup> While the "early period" of the revolution (1917-1920) sought to implement socialism as fast as possible, N.E.P. was designed to help the Soviet Union recover from the Civil War (1918-1920) through economic rejuvenation via the reintroduction of limited capitalism. Second, during the very early stage of the revolution, development of such local institutions as the People's Courts were relatively "free".<sup>8</sup> The chaos of organising a country as large as Russia and the disorderly effects of revolution itself

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<sup>7</sup> Lenin V. I., *Doklad na II Vserossiiskom S"ezde Politprosvetov, Polnoe Sobranie Sochinenii* (Moskva: Izdateľstvo Politicheskoi Literatury, 1974) tom 44, p. 158 [2nd Congress of Political Education Departments in Collected Works (London: Lawrence and Wishart, 1974) vol. 33, p. 63]

<sup>8</sup> Batsell, Walter, *Soviet Rule in Russia* (London: The Macmillan Company, 1929) p. 585

placed much initiative in the hands of the populace initially. Third, the People's Courts, for the most part, were decentralised and largely left to their own development until the beginning of the New Economic Policy at which time they were firmly under Communist Party control.<sup>9</sup> Fourth, 1922 witnessed the promulgation of the formal codification of "Soviet Law" operating under an economic system of limited capitalism. The reintroduction of capitalism, the vast centralisation of the government, and the firm establishment of the party apparatus in place by the end of 1922 propelled the Soviet Union further away from conditions favourable to socialist development in the Marxist sense. Historians and Marxist scholars debate whether or not the Russian revolution was a "socialist" one even at its inception. It cannot be denied, however, that at least at the beginning, the Bolsheviks actively tried to implement socialism on economic and social levels. During N.E.P., however, the direction of development was drastically changed. For the purpose of using the People's Courts as an example to explore further the theoretical concepts of regulation outlined in Chapter one, a brief examination of their early years provides ample opportunity to elicit further theoretical questions that should be addressed.

It is impossible to analyse the experiment of the People's Courts without at least brief discussion of Lenin's theory of law. Prior to Stuchka's work *A General Doctrine of Law* (1921), there was no comprehensive work in legal theory. Lenin was the first to clarify some of Marx and Engels' more general pronouncements on law. Whilst they maintained that a capitalist notion of law would have no place in communism, they did not discuss the role of law in the transition period. It can be surmised safely that with the acknowledgement that a state (albeit a proletarian one) was required, then so would be law. Lenin began to fill this theoretical gap. Because of his position, he immensely affected the guiding principles behind the activities of

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<sup>9</sup> Schapiro, *Communist Party of The Soviet Union*, (London: Methuen, 1966) p. 264. See also, "The Machine of Justice—The Procuracy and The Courts" in *Smolensk Under Soviet Rule* by Merle Fainsod (London: The Macmillan Company, 1955) pp. 174-192.

the first courts.<sup>10</sup> Without at least a general understanding of Lenin's basic tenets, interpretations of the legal situation would be incomplete.

Exploration of the establishment and proceedings of the People's Courts in the early stage of the revolution (1917-1920) has revealed that little research has been conducted in this area.<sup>11</sup> Whilst there are no concrete reasons for such an exclusion there are several possibilities. The formation of the nation was disrupted severely by the Civil War of which much has been written.<sup>12</sup> It is possible that the enormous events that occurred during the Civil War have historically obscured the functioning of the local People's Courts. Another possibility might involve the existence of the Cheka and Revolutionary Tribunals—the Bolshevik arms of “red terror”. In October of 1917, the second Congress of Soviets abolished the death penalty. It was reintroduced officially in June of 1918.<sup>13</sup> As Lenin stated: “...revoliutsioner, kotoryi ne khochet litsemerit', ne mozhet otkazat'sia ot smertno kazni. Ne bylo ni odnoi revoliutsii i epokhi grazhdanskoi voiny, v kotopykh ne bylo by rasstrelov.”<sup>14</sup> In December of 1917, The Vecheka (Cheka) (All-Russian Extraordinary Commission for Combating Counter-Revolution and Sabotage) was created and endowed with the powers of search and arrest.<sup>15</sup> In February of 1918 these powers were extended to summary trial and passing of sentence, including the

<sup>10</sup> Ivo Lapenna writes: “During the six years of Lenin's rule nothing important in the field of law was ever enacted without his direct participation, approval or at least tacit consent.” in “Lenin, Law and Legality”, *Lenin The Man, the Theorist, the Leader*, eds., L. Schapiro and P. Reddaway (London: Pall Mall Press, 1967) p. 249.

<sup>11</sup> With the exception of John Hazard's excellent piece of research, *Settling Disputes in Soviet Society* (New York: Columbia University Press, 1960).

<sup>12</sup> For an in-depth history of the Civil War years see W. Bruce Lincoln, *Red Victory* (New York: Simon and Schuster, 1989) or Evan Mawdsley's *The Russian Civil War* (London: Allen and Unwin, 1987). Also interesting is Geoffrey Swain's *The Origins of the Russian Civil War* (London: Longman Group, 1996).

<sup>13</sup> H.C. d'Encausse, *Lenin*, trans., Valence Ionescu (New York: Longman, 1982) p. 95

<sup>14</sup> ...a revolutionary who does not want to play the part of a hypocrite cannot renounce capital punishment. There has never been one revolution or epoch of civil war in which there were not shootings. Lenin, *V Vserossiiskii S'ezd Sovetov Rabochikh, Krest'ianskikh, Soldatskikh i Krasnoarmeiskikh Deputatov in Polnoe Sobranie Sochinenii*, tom 36, p. 503 [*Fifth All-Russia Congress of Soviets in Collected Works*, vol. 27, p. 519]

<sup>15</sup> A well-researched book titled *The Cheka: Lenin's Political Police* (Oxford: Clarendon Press, 1986) by George Leggett covers the development of the organisation in depth. Richard Pipes in the section titled “The Red Terror” in *The Russian Revolution* (London: Collins Harvill, 1990) vol. 1, pp. 789-840 presents an interesting and researched argument regarding Lenin and the use of terror.

death penalty, despite the official law against it.<sup>16</sup> Because of these powers, the Cheka was deemed an “extra-judicial” body. The Revolutionary Tribunals, which also could mete out the death penalty, were established in November of 1917 to pursue counterrevolutionary or “political crimes”. Such crimes included anything that was considered harmful to the state and covered a vast array of economic activities such as racketeering, theft, speculation and purchases from the black market (in many cases, the only way people could survive, including Communist Party members).<sup>17</sup> The majority of sections on law and order in the histories of the early stages of the revolution focus on these organisations rather than the People’s Courts, most probably because their dealings caused the most outrage both inside and outside of Russia, and also the fact that they were charged with handling the most serious of crimes (namely counterrevolution).<sup>18</sup> Although the existence of these institutions affected the operation of the People’s Courts to some degree (and this will be discussed in the “Analysis” section of this chapter), the People’s Courts did operate quite independently within their own realm of jurisdiction—primarily the daily affairs of a locality. It is these institutions that tried to accommodate a notion of an associative “legal” institution outlined in Chapter one.

## THE LEGAL CONCEPTS OF LENIN

### Law in communism

By far the clearest account of Lenin’s view of law in communism is found in *The State and Revolution*. It resembles Marx and Engels’ views to a large degree.

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<sup>16</sup> Leggett, p. 32

<sup>17</sup> Serge, *Memoirs of a Revolutionary*, trans., Peter Sedgwick (London: Oxford University Press, 1965) p. 115. Victor Serge was an anarchist revolutionary who joined the Bolsheviks in 1919. He was eventually driven out of Russia and was exiled to Mexico.

<sup>18</sup> E.g.: Sheila Fitzpatrick’s *The Russian Revolution* (Oxford: Oxford University Press, 1982); *The October Revolution* (London: Constable, 1979) by Roy Medvedev, trans., George Saunders; *The Russian Revolution* (London: Collins Harvill, 1990) and *Legalised Lawlessness: Soviet Revolutionary Justice* (London: London Institute for European Defense and Strategic Studies, 1986) by Richard Pipes; John Keep’s *The Russian Revolution* (London: Weidenfeld and Nicholson, 1976) and William Henry Chamberlin, *The Russian Revolution 1917-1921 in two volumes* (New York: The Macmillan Company, 1954).

Lenin states quite succinctly that the point at which a society is communist is when social inequality disappears.<sup>19</sup> He argues that social inequality is a result of capitalist production relations. When labour does not have to be quantified and equalised in commodity form, the familiar communist precept of taking what one needs and giving according to one's abilities can evolve. The economic condition which allows such a development rejects capitalist distribution methods which are still in effect during the transition period. The social organisation which accompanies the economic transformation focuses on the development of an administration (as opposed to a state). In order to progress towards an administration, Lenin argues that the functions of the civil service must be transformed into simple operations of control "...kotorye dostupny, podsil'ny gromadnomu bol'shinstvu naseleniia..."<sup>20</sup>

The training for all to take part in the administration of the state occurs in advanced capitalist societies and includes such factors as universal literacy and organisation and management skills developed in industries like railways, big factories, large-scale commerce and banking.<sup>21</sup>

Given this state of affairs, that it is in the scope of each individual to perform administrative functions of the state (and hence law), institutions become a method for participation. The organs for these various tasks are based in democracy, but not a political democracy. Lenin, in concordance with Marx, distinguishes between a democratic state and a state of democracy:

No, democracy is *not* identical with the subordination of the minority to the majority. Democracy is a *state* which recognises the subordination of the minority to the majority, i.e., an organisation for the systematic use of *force* by one class against another.

We set ourselves the ultimate aim of abolishing the state, i.e., all organised and systematic violence, all use of violence against people in general...the need for violence against people in general, for the *subordination* of one man to another, and of one section of the population to another, will vanish altogether since people will *become accustomed* to

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<sup>19</sup> Lenin, *Gosudarstvo i Revoliutsiia in Polnoe Sobranie Sochinenii*, tom 33, pp. 93-96 [*State and Revolution in Selected Works in Three Volumes* (Moscow: Progress Publishers, 1977) vol. 2, pp. 306-308]

<sup>20</sup> ...which is intelligible and within the ability of the vast majority of the population... *Ibid.*, p. 78 [p. 294]

<sup>21</sup> *Ibid.*, p. 100 [p. 311]

observing the elementary conditions of social life *without violence and without subordination.*"<sup>22</sup>

A few pages later Lenin continues this line of thought:

Only then will a truly complete democracy become possible and become realised, a democracy without any exceptions whatever...people will gradually *become accustomed* to observing the elementary rules of social intercourse that have been known for centuries and repeated for thousands of years in all copy-book maxims. They will become accustomed to observing them without force, without coercion, without subordination, *without the special apparatus* for coercion called the state.<sup>23</sup>

The above passages demonstrate the dialectics of social development. Once people are actually engaged in and have control over society as a whole, the necessity of certain actions is learned through direct experience via trial and error. It is imperative that each and every individual actually commits these mistakes and lives through the consequences of them in order that the results illuminated during these experiments become *internalised*. The rules of conduct, become, as Lenin says, "habit", by virtue of the individual recognition of the *necessity* of them.

As Marx and Engels, Lenin believed that crime is largely caused by the chaotic and abstract social relations that capitalism produces.<sup>24</sup> During socialism these relations are "righted" and as contradictions are eventually resolved, the level of crime decreases. Then "the *necessity* of observing the simple, fundamental rules of the community will very soon become a *habit*."<sup>25</sup>

Will crime, or more apropos, infractions of social rules, completely disappear?

Lenin, as Engels, indicates otherwise:

Lastly, only communism makes the state absolutely unnecessary, for there is *nobody* to be suppressed—"nobody" in the sense of a *class*, of a systematic struggle against a definite section of the population. We are not utopians, and do not in the least deny the possibility and inevitability of excesses on the part of *individual persons*, or the need to stop *such* excesses. In the first place, however, no such special machine, no special apparatus of suppression, is needed for this; this will be done by the armed people themselves, as simply and as readily as any crowd of civilised people, even in modern society, interferes to put a stop to a scuffle or to prevent a woman from being assaulted.<sup>26</sup>

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<sup>22</sup> *Ibid.*, p. 83 [pp. 297-298]

<sup>23</sup> *Ibid.*, p. 89 [pp. 302-3 03]

<sup>24</sup> *Ibid.*, p. 90 [p. 304]

<sup>25</sup> *Ibid.*, p. 102 [p. 313]

<sup>26</sup> *Ibid.*, p. 91 [p. 304]

Lenin goes on to claim that as the social causes of these excesses dissipate, the seriousness of the infractions will steadily diminish.

Bukharin and Preobrazhenskii in the *ABC of Communism* describe the role of the People's Courts after the state dies out, much in the spirit of Lenin, Marx and Engels: "*Pravda, sud togda izmenit svoi kharakter;*<sup>27</sup> *postepenno, po mere otmiraniia gosudarstva, on budet prevrashchat'sia v organ vyrazheniia obshchestvennogo mnienia, priblizhaia'sk kharakteru tovarishcheskogo suda, resheniia kotorogo ne privodiatsia v ispolnenie nasil'stvennym putem, a imeiut lish' moral'noe znachenie.*"<sup>28</sup>

The elements of associative, non-coercive public power, simplicity of procedural structure, social cohesion and internalisation of necessary rules characterise Lenin's vision of communist regulation. It resembles Marx and Engels' descriptions to a large degree. He, like them, is silent as to the exact state of affairs in communism, or as to precisely when this stage of social development will appear. These facts, Lenin states, "*my ne znaem, i znat' ne mozhem.*"<sup>29</sup> With the above goals in mind, Lenin and the Bolshevik Party focused on the immediate task of reformation of the courts.

### Conceptual foundations of law in the transition period

The administration of the courts was left, for the most part, in the hands of the Commissariat of Justice.<sup>30</sup> Lenin, however, had definite ideas as to the function of law and its supporting ideology during the transition period.<sup>31</sup>

<sup>27</sup> It is true that the court will change its character; (as opposed to its role in the transition period.)

<sup>28</sup> gradually, as the state dies off, it will turn into an organ expressing social opinion approaching the character of a comrade court, decisions will not be accompanied by the use of force, and will have only moral significance. N. Bukharin and E. Preobrazhenskii, *Azbuka Kommunizma* (Peterburg: Gosudarstvennoe Izdatel'stvo, 1920) p. 177

<sup>29</sup> we do not know and to know is impossible. Lenin, *Gosudarstvo i Revoliutsiia*, p. 96 [*State and Revolution*, p. 308]

<sup>30</sup> Created on October 26 (November 8), 1917. See Lenin, *Postanovlenie ob Obrazovanii Rabochego i Krest'ianskogo Pravitel'stva in Polnoe Sobranie Sochinenii*, tom 35, pp. 28-29 ["Decision to Form the Workers and Peasants' Government", *Second All-Russia Congress of Soviets*, in *Collected Works*, vol. 26, pp. 262-263].

<sup>31</sup> Piers Beirne and Alan Hunt, "Law and the Constitution of Soviet Society: The Case of Comrade

As discussed earlier, Lenin maintained emphatically that the transition period was not a stateless society. It contained class antagonisms and required the use of external force (that is, of one class against another; in this case, the proletarian class against the bourgeois class). Because Russia was still a state, the transition period would not be a time span devoid of law:

...if we are not to indulge in utopianism, we must not think that having overthrown capitalism people will at once learn to work for society *without any rules of law*. Besides, the abolition of capitalism *does not immediately create* the economic prerequisites for *such* a change.<sup>32</sup>

Despite the retention of a bourgeois-based law (one of class antagonism and force), there were distinct differences between proletarian law and bourgeois law. These distinctions lie primarily in the areas of: (1) the property basis; (2) its class nature; (3) its institutional structure.

Law in capitalism arises from relations created by private property; law in socialism arises from public property. From a premise of social ownership, law would not apply to atomised individuals, but would engage society as a whole. Crime becomes not a violation of individual rights, but a violation of the entire community.<sup>33</sup> (For instance, if a thief stole bread from a shop, it is not the shopkeeper that would be violated, but the entire community whose bread it actually was.)

The class nature of proletarian law reflects Lenin's view on the state and democracy as well. Law would no longer be used by the minority against the majority, but rather the majority against the minority. The class element in law was extremely important for several reasons. First, Lenin had faith in the consciousness of the worker, but complete mistrust of the bourgeois consciousness that still retained a predisposition towards capitalist values. In socialist legal terms, bourgeois consciousness was inadequate to carry out socialist justice. Second, the

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Lenin" in *Law & Society Review*, Vol. 22, No. 3 (1988) pp. 595-598

<sup>32</sup> Lenin, *Gosudarstvo i Revoliutsiia*, p. 95 [*State and Revolution*, p. 307]

<sup>33</sup> This became extremely interesting in later criminal codes when "the people" became synonymous with "the state" and hence theft, as well as other violations, became a "crime against the state".

bourgeoisie were class enemies and under the dictatorship of the proletariat were to be “smashed.” In bourgeois legal terms, these “class enemies” had no formal rights;<sup>34</sup> hence the laws prohibiting freedom of the press, participation in most elections and prohibition of all political parties that embraced bourgeois philosophy.<sup>35</sup> The proletariat could administer any measures (including death) it thought necessary to repress recalcitrant bourgeois elements.<sup>36</sup> Jurists who operated under the former government were allowed only a restricted role in the new court system.

Structurally, Lenin sought to: (1) simplify the legal process, hence eliminating the need for specialists in law; and (2) require all citizens to participate in the legal process. Lenin observed of bourgeois law that legal personnel (bureaucrats) were a separate body “*v otorvannykh ot mass, v staiashchikh, nad massami.*”<sup>37</sup> In order to reunify legal institutions with the populace, communities were instructed to organise and manage the courts themselves. With a simplified legal process and simplified civil relations with the demise of private property rights, it was hoped self-regulating courts would be possible.

Lenin attempted to fulfil participation goals through the functions of the soviets and the local courts. The soviets were to be a training ground for the great mass of people to learn how to govern in all areas. The courts were the institutions where the populace would acquire the skills to grapple with legal problems. It was only through practical experience, rather than passive instruction, that knowledge and skills of adjudication could be discovered. The requirement of all to participate was absolutely necessary for this reason:

All citizens must take part in the work of the courts and in the government of the country. It is important for us to draw literally all working people into the government of the state. It is a task of tremendous difficulty. But socialism cannot be implemented by a minority, by

<sup>34</sup> Lenin, *Sed'moi Ekstrennyi S'ezd R.K.P. (B)* in *Polnoe Sobranie Sochinenii*, tom 36, pp. 73-74 [*Seventh Congress of the R.C.P. (B.) in Collected Works*, vol. 27, p. 155]

<sup>35</sup> Later on these included most parties that were not Bolshevik, even though they were leftists.

<sup>36</sup> This was the main justification for the actions of the Cheka and Revolutionary Tribunals.

<sup>37</sup> alienated from the masses and standing above the masses. Lenin, *Gosudarstvo i Revoliutsiia*, p. 115 [*State and Revolution*, p. 323]

the Party. It can be implemented only by tens of millions when they have learned to do it themselves.<sup>38</sup>

## THE PEOPLE'S<sup>39</sup> COURTS (1917-1920)

### Structural reorganisation

The first decree on the judicature on November 22 (December 5), 1917<sup>40</sup> sought to create a condition in which simplification could be attained, and class power and democratic participation could function. It called for the abolition of all existing courts and their related offices (court investigators, procurator's surveillance, and official and private counsellors at law).<sup>41</sup> Former judges were to be replaced by a judge (permanent) elected<sup>42</sup> from the district. At first, they were to be chosen by the soviet until they could be selected by direct democratic suffrage.<sup>43</sup> The post of people's assessor, whose weight of opinion was equal to that of the judge, was to be created. Two assessors were to be chosen from citizens of the district involved. Appointments were temporary and the soviets were to draw up lists of assessors and arrange for a schedule of attendance. The army was instructed to proceed with similar changes.<sup>44</sup>

The decree stipulated that initial criminal investigation was to be carried out by local judges, whose actions would then be subject to approval by a full local

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<sup>38</sup> Lenin, *Sed'moi Ekstrennyi S'ezd R.K.P. (B)* in *Polnoe Sobranie Sochinenii*, tom 36, p. 53 [*Seventh Congress of the R.C.P. (B.) in Collected Works*, vol. 27, p. 135]

<sup>39</sup> The first decree (December, 1917, new calendar) referred to these courts as local courts; the second decree (February, 1918, new calendar) labelled them as People's Courts. Local courts and People's Courts are used interchangeably.

<sup>40</sup> "Dekret O Sude" in *Dekrety Sovetskoi Vlasti* (Moskva: Izdatel'stvo Politicheskoi Literatury, 1957) tom 1, pp. 124-126. For an abridged collection of significant legal documents in English see *Soviet Government: A Selection of Official Documents on Internal Policies* edited by Mervyn Matthews (London: Jonathan Cape, 1974) and *First Decrees of Soviet Power*, compiled by Yuri Akhapiin (London: Lawrence and Wishart, 1970).

<sup>41</sup> "Dekret O Sude" in *Dekrety Sovetskoi Vlasti*, tom 1, p. 124, art. 1

<sup>42</sup> Former jurists were allowed to be elected to the courts, but the bourgeois class was not allowed to vote.

<sup>43</sup> Direct democratic suffrage was never installed. Judges were elected by the local soviets until 1948, R.W. Makepeace, *Marxist Ideology and Soviet Criminal Law* (London: Croom Helm, 1980) p. 67.

<sup>44</sup> "Dekret O Sude", p. 124, art. 2

court.<sup>45</sup> Also, preliminary prosecution and defence investigations, and the duties of civil attorneys, were to be performed "*vse ne oporochennye grazhdane oboego pola, pol'zuiushchesia grazhdanskimi pravami.*"<sup>46</sup> Special revolutionary tribunals to try counter-revolutionary actions (acts of pillage, sabotage, mercantilism, etc.) were established. They were to comprise of a chairman and six alternate assessors elected by the soviets.<sup>47</sup> The decree also instructed courts to abide by the laws of the overthrown government as long as they have not been revoked by revolutionary decrees and "*ne protivorechat revoliutsionnoi sovesti i revoliutsionnomu pravosoznaniu.*"<sup>48</sup>

Lenin's prescriptions for a simplified, participative, class-based court are directly evident in the first decree, which virtually eradicated the old court system. Although former legal personnel were allowed to stand for election, the likelihood of their return was much reduced by the fact that bourgeois class members could not vote. The measure was designed to ensure a peasant/proletarian prevalence in the legal structure. Bourgeois influence was reduced further by the large role the soviets played in the initial establishment of the courts (e.g. judges were to be chosen by soviets until elections, and that they supervised the selection of people's assessors).

There are no detailed procedures or maxims (except decrees)<sup>49</sup> other than the advice to the judges (and assessors) to "*rukovodit'voovat'sia sotsialisticheskim pravosoznaniem, otmetaia zakony svergnutykh pravitel'stv.*"<sup>50</sup> Court participants had little to guide them,<sup>51</sup> which in effect, empowered them greatly. Not only could judges determine the nature and gravity of a crime, but they could directly control

<sup>45</sup> *Ibid.*, p. 125, art. 3

<sup>46</sup> by all upstanding citizens of both sexes who enjoy civil rights. *Ibid.*

<sup>47</sup> *Ibid.*, pp. 125-126, art. 8

<sup>48</sup> do not contradict revolutionary conscience and a revolutionary sense of justice. *Ibid.*, p. 125, art. 5

<sup>49</sup> Decrees were numerous (950 during the first 9 months of the revolution, Beirne and Hunt, "Law and the Constitution of Soviet Society: The Case of Comrade Lenin", p. 588), but relatively small compared to the volumes of codified laws inherited from the old regime.

<sup>50</sup> be guided by the socialist sense of justice, rejecting the laws of overthrown governments. Lenin, *Pervyi Abzats Punkta Programmy o Sude Proekt Programmy R.K.P. (B)* in *Polnoe Sobranie Sochinenii*, tom 38, p. 115 [Draft Programme of the R.C.P. (B.) in *Collected Works*, vol. 29, p. 131]

<sup>51</sup> The first detailed codification of law did not appear until 1922.

investigation procedures. They were at complete liberty to use whichever old codes seemed appropriate (unless they directly contradicted decrees), and had freedom to determine punishment. It was thought that the people's assessors, who were not under the judges authority, would intervene if procedures or results seemed inadequate or wrong. The absence of restriction on who could run for the position of people's assessor and the limited term<sup>52</sup> of this office were aimed at discouraging any notions of "professional jurists" and reducing the possibilities of corruption.

The most striking feature of the new system was the reliance on "revolutionary conscience (*sovest*)".<sup>53</sup> It was envisioned that citizens could adequately handle legal situations through consensus without depending on formal codes or procedures. The People's Courts were not to be regarded as repressive or antagonistic institutions, but ones that would aid in the solution of the problems of day-to-day life. The removal of "counter-revolutionary" crimes from the jurisdiction of the People's Courts<sup>54</sup> paved the way for an absence of government interference in local matters.

The tasks of the People's Courts fell into two basic categories one of education<sup>55</sup> and one of discipline.<sup>56</sup> Discipline focused on: (1) strict accounting and strict control; (2) maintenance of labour laws ("«*Kto ne rabotaet, tot pust' ne est*'» — *vot prakticheskaiia zapoved' sotsializma.*");<sup>57</sup> (3) solution of general disputes (disturbing the peace, citizens' complaints, etc.). These functions of the court coincided with Lenin's requirements for the infant stages of socialist productive mechanisms (accountability, control of distribution and production and the "purge"

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<sup>52</sup> Term length was to be determined by the soviets.

<sup>53</sup> Also referred to as revolutionary or socialist consciousness (*soznanie*) (a term which became most prevalent in the writings of Soviet legal theorists).

<sup>54</sup> These matters were to be handled by the Revolutionary Tribunals and later the Cheka.

<sup>55</sup> See Lenin, *Tretii Vserossiiskii S'ezd Sovetov* in *Polnoe Sobranie Sochinenii*, tom 37, p. 270 [*Third All-Russia Congress of Soviets in Collected Works*, vol. 26, p. 464].

<sup>56</sup> See Lenin, *Variant Stat'i «Ocherednye Zadachi Sovetskoi Vlasti»* in *Polnoe Sobranie Sochinenii*, tom 36, pp. 162-164 [*The Immediate Tasks in Collected Works*, vol. 27, pp. 217-218].

<sup>57</sup> "Who does not work, will not eat"—here is the practical commandment of socialism. Lenin, *Kak Organizovat' Sorevnovanie?* in *Polnoe Sobranie Sochinenii*, tom 35, p. 203 [*How to Organise Competition?* in *Collected Works*, vol. 26, p. 414]

of the bourgeois notion of earning money other than from labour).<sup>58</sup> Discipline could also involve ruthless suppression (e.g. shooting) of anti-proletarian behaviour (such as pillage, withholding food, sabotage, trading on the black market, refusing to work, speculation and profiteering). Although these cases were for the Revolutionary Tribunals and the Cheka primarily, obvious breaches could be responded to by any member of the proletariat.<sup>59</sup>

The educational aspect had a dual purpose. First, by participating in the legal system all would become aware of the problems of society and *all* would be engaged in trying to resolve these difficulties. This notion reflects Lenin's concept of regulation in a communist society, where all would "become accustomed" to rules of society. Habit would be derived from direct experience and individual realisation of what was necessary; and then perpetuated by continued practice. The content of laws would *evolve* out of this universal and participative experience. Due to the experience being personal, the impetus to follow the law would be an internal one and eventually non-coercive compliance would evolve.

The second element of education involved encouraging socialist behaviour in a population where capitalist principles and habits were still prevalent.<sup>60</sup> Lenin described how the character of those raised under capitalism would not change immediately. The population in Russia was still "culturally backward", and its transformation would be a painstaking and long process, but one that would be progressive in essence. The objective of punishment of a non-class crime<sup>61</sup> (i.e.

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<sup>58</sup> These requirements became desperate ones during the Civil War, where food shortages and lack of goods were chronic.

<sup>59</sup> This was more typical in the first month of power when the People's Courts were not assembled, or in places where even after the Decree their actual creation was delayed.

<sup>60</sup> Re peasants: Lenin, *VI Vserossiiskii Chrezbychaynyi S'ezd Sovetov in Polnoe Sobranie Sochinenii*, tom 37, pp. 141-142 [*Extraordinary Sixth All-Russia Congress of Soviets in Collected Works*, vol. 28, p. 141]; re: petty bourgeoisie (small commodity producers): Lenin, *Detskaia Bolezn' «Levizny» v Kommunizme in Polnoe Sobranie Sochinenii*, tom 41, pp. 26-28 [*"Left-Wing Communism": An Infantile Disorder in Collected Works*, vol. 31, pp. 44-45].

<sup>61</sup> Excluding matters of the Cheka or Revolution Tribunals.

disturbing the peace) was, then, to have the worker reflect upon his/her error and contemplate why it was wrong and how it affected society.<sup>62</sup>

### The operation of the early courts

Even after the first decree on the courts was published, their formation in different areas took some time. By the beginning of 1918 local courts were in evidence in the more central areas of Russia, and by the end of March they were operating in the distant regions under control by the new government.<sup>63</sup> Before the first decree local authorities had established "revolutionary people's courts", "investigation committees", or "revolutionary tribunals."<sup>64</sup> The spirit of these "courts" is captured well by G. Ovchinkin's description of "The First Soviet Court", a spirit that would carry over to the People's Courts after their official creation. I cite it here at length:

October 25 [November 7], 1917

In Moscow, the bolsheviks have seized power. The autocracy has been crushed. In our village, Ramenskoe, the policemen were arrested as early as March 1917; the police chief vanished; the village elder, who had held the office for twelve years as a protégé of the territorial administrator and was known among the peasants as 'the dog', was driven out. The territorial administrator, himself a drunkard and debauchee, ran away heaven knows where, and Isafiev, the examining magistrate, also went into hiding. But behold, not so long ago these scoundrels were handling all the peasants' cases in our locality. Decisions over matters of life and death of every peasant and worker rested with them alone.

Land administration, the last bastion of capitalism and Kerenskii's forces, held out until October 25, 1917, when the people put it to rout. A soviet was elected—a soviet composed of local workers, peasants, and several bolsheviks.

A plant committee was organized at the factory, and also red guards, a trade union, and a soldiers' section. Finally, a revolutionary committee was formed; but there was no court.

As the first step, one had to take a look at the judicial legacy of the autocratic regime. There were heaps of unfinished cases that had accumulated over the years.

We turned to the judgement docket and did not find a single decision in favor of a worker or a peasant. Everyone held either for the local landlord, Count Prozorovskii, or for the tradesmen. More than one hundred of the pending cases involved either peasants caught cutting wood in the count's 7,000-acre forest or damage done by their cattle to his 1,000 acres of inundated meadows.

I glanced at these cases and thought, well, the count is no more and the traders have vanished. Who will press these matters? So, I picked up that pile and shoved it into the stove. The stove had not been burning too well. Secretary Sergeev, one of the local hands,

<sup>62</sup> This element of "self-criticism" was to play a huge role in the Stalin trials.

<sup>63</sup> S. Ivanov, "Sudebnye Organy" in *Istoria sovetskogo gosudarstva i prava, 1917-1920*, ed., A. P. Kositsin (Moscow: n.p., 1968) pp. 190-191

<sup>64</sup> M. Kozhevnikov, *Istoriia sovetskogo suda* (Moscow: n.p., 1957) p. 15

saw the cases on fire and darted to save them. I held him back and tried to set him at ease, but he was terrified. While we two were kicking up a row, the papers went up in smoke.

We opened the archives and found many more judgements, their writing still unfaded: A peasant was sentenced to receive twenty-five blows for non-payment of rent. A youth to be whipped for refusal to obey his parents and for fighting in the village.

These were no longer of any use. Only a memory remained...

Then, the people began to sense a weakening of authority. There was no one to be afraid of: no police chief, no territorial administrator. The soviet was packed with their chums. The young in the villages became noisy and unruly and committed thefts. Complaints of rowdyism reached the soviet. The executive committee, the plant committee, the trade union, and the workers' and soldiers' sections. A detachment of red guards was trained for the occasion. An announcement was sent through the village soviet to reach all the people.

The accused were summoned to appear before the soviet. The youngsters—four of them, twenty-five years old, former front-line soldiers of the tsarist army, at present from the village of Dergaev. They were advised of being charged with rowdyism, more specifically, with drunkenness and breaking up a play enacted by a group of party youths—and told that the court would examine the charge. The accused maintained that, as of that time, there was no decree establishing a judiciary and that, therefore, the court had no basis in law. But when the chairman of the court explained that all power had been vested in the local soviets and that offences of this kind were not to be left unpunished, and, moreover, drew their attention to the presence of the red guard detachment, the accused submitted to the jurisdiction of the court. After questioning the accused and the witnesses, the court sentenced each of the former to deprivation of freedom for two weeks. They were to begin to serve their term immediately.

Long resounded the applause of the workers and peasants in attendance. They left very much satisfied with the judgement of the court and conceded that the Soviet power knew how to protect the people from thieves and ruffians. They decided to support the Soviet authorities with all their might. As for the young people, they long remembered the first Soviet trial in Ramenskoe as a lesson to ruffians.<sup>65</sup>

There are several noticeable elements in the above passage. The description poignantly portrays the ambience of the society just after the revolution. The class bias of the law was illuminated for many by Bolshevik propaganda, and by the fact that citizens were not only allowed, but encouraged, to investigate and completely take over realms that were previously relegated to the chosen few (in this example to the legal personnel). It also displays the wariness of individuals at the total dissolution and destruction of a system they had lived under their entire lives. More importantly, the passage shows a recognition that some law and order was necessary, and that with the destruction of the old system and norms, new ones would arise. This task of reformulation was not for legal specialists, but for the community as a whole.

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<sup>65</sup> G. Ovchinkin, "Kak proshel pervyi sud v Bronnitskom uezde Moskovskoi gubernii", *Proletarskii sud*, 1927 no. 19-20, p. 40 as found in Zile, *Ideas and Forces in Soviet Legal History*, pp. 93-95.

Records from the Viborg city ward (in Petrograd) also provide interesting examples of the activities of these pre-decree "courts":

It was the first meeting of the revolutionary tribunal<sup>66</sup> of the Viborg city ward [in Petrograd]. The...hall was filled with spectators...eager to know what kind of court it was going to be...Everybody was convinced that now there would be real justice and not as before...

The judges, consisting of workmen and soldiers, took their places. One could see they were excited, for they recognized their responsibility.

The defendants were brought in. A number of Red Guards showed them politely to their seats and offered them cigarettes. They smoked and chatted. How different from the old court!

One of the judges...addressed the assembly, explained...the underlying ideas of the court, and invited those present to help the judges...Then the chief judge...said: "The procedure [of the court] will be as follows: Each side will state its case, then the audience will be allowed to take a hand, two for and two against conviction"...

The first man up [for trial] was the soldier-militiaman, Beliaev, accused of firing off his rifle while intoxicated. When asked to explain, he...said: "Comrades, it is true that I was drunk, and it is possible that I fired the gun, but I do not know. I swear it will never happen again."

The chairman called for someone in the audience to say something for the prosecution. After a pause two men came forward and pointed out the harm that a man could do with a gun in these exciting days and demanded that the accused be punished.

When the judge asked for someone to come to the defence of the accused, no one offered his services...But finally one workman asked to be permitted to say a word...He argued that "the misfortune of the poor soldier might come to any of us"...and recommended that he be acquitted but be dismissed from the militia. The audience approved with exclamations of "That's right; that's fair!" After a brief consultation the chairman announced that Beliaev was to be set free and dismissed from the militia, but he warned the soldier that if he ever did that again he would be severely punished. After hearing the decision of the judge, Beliaev turned to the public and said, "Thank you humbly, comrades," and walked out...

Great interest was aroused by the case of a thief called Vaska, the Red-haired. He was caught with a burglar's outfit and seven keys—"One to my trunk, one to my mother's and...from other trunks..."

"You have served a term before?"

"Yes, for stealing."

There was a titter in the audience, but Vaska paid no attention and proceeded: "I stole until the revolution but since—never."

It was a clear case. One of the judges recommended forced labor...The audience approved and suggested a full year. Vaska was not without friends. Someone urged a milder sentence, but this did not meet with public favor...In the end he was sentenced to hard labor for a year with the understanding if he behaved himself his term might be shortened...

The next case was that of two waiters in a hotel...who concealed and sold strong drink. They were fined three hundred rubles each, the money to go to a fund for those who suffered in the war against Kerensky...<sup>67</sup>

<sup>66</sup> Note: the local courts were called tribunals before they were renamed to People's Courts. Hence, the passage is not referring to the Revolutionary Tribunals established for counter-revolutionary crimes.

<sup>67</sup> *Izvestiia*, No. 219, November 21 (December 4), 1917, p. 2., as cited in James Bunyan and H. H. Fisher, *The Bolshevik Revolution, 1917-1918, Documents and Materials* (Stanford: Stanford University Press, 1934) pp. 289-290

The element of consensus is evident in the above cases, as is the complete lack of "professionalism". Citizens assumed the roles of "prosecution" and "defence", as well as the function of "jury". The ideal of "popular courts" was transformed into reality during these initial weeks of the revolution. The promulgation of Decree No. 1 on the courts did not alter substantially the essence of the above proceedings. Those involved in the Commissariat of Justice, however, were far from unanimous in their embracement of an unregulated court.<sup>68</sup>

Opinions differed as to how free of formalities the law should be or to what degree the courts should be cleansed of legal experts from the previous regime. Questions of the capability of the masses to carry out this "evolution of law" were prevalent in policy debates. Steinberg maintained that the law provided not only guidance to citizens, but also to the government. His main concern was that while the freedom of procedure and decision-making allowed much creativity, it also permitted abuse. He advocated a standard of procedure to which legal bodies could be held accountable. The demand exacerbated his theoretical difference with the Bolsheviks. If the people controlled the soviets, and also the courts, to whom would the legal bodies be accountable? To advocate such a position suggested that law was autonomous and carried some sort of moral weight outside of the circumstances within which it was born. Philosophically, for the Bolsheviks, there was no division of power. For Steinberg, who was a Left Socialist-Revolutionary (SR) and not a Bolshevik, this theoretical problem was minimal. His attack was mainly aimed at combating actions of the Cheka, which were not regulated at all.<sup>69</sup> Stuchka, a major influence on the first decree on the courts, expressed doubts regarding the capability of the People's Courts. He argued that while the local courts

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<sup>68</sup> Major influences in the Commissariat during this time were I. N. Steinberg, Commissar of Justice from December, 1917 to March, 1918. He was a left Socialist-Revolutionary (SR) and left the government after the signing of Brest-Litovsk; P. I. Stuchka (Commissar from March-August, 1918); D.I. Kurskii (Commissar from August, 1918-1928); E. B. Pashukanis who was one of three permanent members of a 7-man presidium that oversaw organisation and administration of the Moscow local courts. He was later to become director of the Institute of Soviet Construction and Law; and N.V. Krylenko, who was later to serve as Commissar after Kurskii.

<sup>69</sup> N. V. Krylenko, *Sudoustroistvo R.F.S.F.R.* (Moscow: n.p., 1923) pp. 36-37

could easily handle simple cases (as in "The First Soviet Court"), perhaps some expertise was needed in more complicated matters. He proposed pre-revolutionary judges should be temporarily retained in the event that their experience was required (hence the clause in the first decree that at least allowed judges to participate if they were so elected). Kurskii, on the other hand, was annoyed at the demand for legal specialists and thought that the local courts could manage *any* cases, regardless of their complexities.<sup>70</sup>

This debate was manifested in the question of the District Courts. These courts, created in the second decree of the courts (15 February, 1918), were designed to hear cases that went beyond the authority of local People's Courts.<sup>71</sup> There were to be three permanent judges (elected and subject to recall by the soviet) and four people's assessors (chosen from a list of people submitted by the soviet), with criminal cases requiring twelve people's assessors.<sup>72</sup> The laws of the old code were still valid unless annulled by decree or claimed to be against socialist legal consciousness.<sup>73</sup> The second decree also contained small steps towards formalising legal procedure in that it provided guide-lines for the use of advocates in both prosecution and defence,<sup>74</sup> instructions for preliminary investigations,<sup>75</sup> and further guidance to people's assessors.<sup>76</sup> A regional court (cassation court) was instituted to handle complaints against District Court decisions (no formal appeal was permitted).<sup>77</sup> The regional cassation court personnel were to be elected from permanent members of the district courts (hence subject to recall by the soviet)<sup>78</sup> and could reverse decisions which violated form or were clearly unjust.<sup>79</sup> A "Supreme

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<sup>70</sup> Hazard, *Settling Disputes in Soviet Society*, pp. 4 and 10

<sup>71</sup> "Dekret O Sude No. 2" in *Dekrety Sovetskoi Vlasti*, tom 1, p. 466, art. 1

<sup>72</sup> *Ibid.*, pp. 466-467, art. 2

<sup>73</sup> *Ibid.*, pp. 468-469, art. 8

<sup>74</sup> *Ibid.*, pp. 471-472, Part Seven, arts. 23-28

<sup>75</sup> *Ibid.*, p. 471, arts. 21-22

<sup>76</sup> *Ibid.*, p. 472, arts. 29-30

<sup>77</sup> The court could annul previous decisions, but not conduct a re-trial.

<sup>78</sup> "Dekret O Sude No. 2", p. 467, art. 4

<sup>79</sup> *Ibid.*, p. 468, art. 5

Supervisory Authority" was created to ensure uniformity of reviews and evaluations.<sup>80</sup> These cassational courts, however, were never created.<sup>81</sup>

Kurskii, who became Commissar of Justice after the passing of the second decree (under Steinberg), claimed that many judges in the District Courts were legally trained in the old code, which was resented by personnel of the local courts in the provinces. The antagonism towards the District Courts, both from local court personnel and Kurskii grew to such an extent their jurisdiction was reduced in the third decree (July 20, 1918), and eventually phased out in the People's Court Act (November 30, 1918).<sup>82</sup>

During the first few months of the People's Courts there was clearly a tension between the desire to place justice in the hands of the people and also a slight reluctance to forgo any sort of formal procedural restraint. The first three decrees show a move towards preserving the freedom of decision while defining loosely the procedure and personnel with which to render it. Judges themselves were actually calling for procedural guidance especially in complicated criminal cases.<sup>83</sup> The goal was to keep procedure as least formal as possible, but defined enough to instruct judges and people's assessors when needed.<sup>84</sup>

The notion of decision-making with minimal but some procedural guidance was the backbone of the most comprehensive juristic act promulgated until this point, the People's Court Act of 1918.<sup>85</sup> This Act formalised the notion that the People's Courts were to be the only courts dealing with all non-political matters. Unlike before, this Act forbade any reference to the old codes. If no decrees were enacted to instruct judges in a particular case, they were to be guided *solely* by their

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<sup>80</sup> *Ibid.*, art. 6

<sup>81</sup> Krylenko, *Sudoustroistvo R.F.S.F.R.*, p. 58

<sup>82</sup> Kozhevnikov, *Istoriia sovetskogo suda*, p. 75

<sup>83</sup> *Ibid.*, p. 25

<sup>84</sup> The result of this request was a document of instruction on court procedure to local People's Courts on July 23, 1918 titled "Instruktsiia ob organizatsii i deistvii mestnykh narodnykh sudov" (this is not the same as Decree No. 3 on the courts passed on July 20, 1918 titled, "Dekret No. 3"). *Ibid.*, p. 37

<sup>85</sup> "Polozhenie V. Ts. I. K. O Narodnom Sude R.F.S.F.R." in *Dekrety Sovetskoi Vlasti* (1968), tom 4, pp. 97-110

socialist sense of justice (*sotsialisticheskoe pravosoznanie*).<sup>86</sup> A college of defenders, accusers and representatives (in effect a bar) was founded formally.<sup>87</sup> These positions were salaried and treated as civil service jobs. Bar personnel were not to act in private interest of their clients, but more to assist judges in discovering "the truth". Judges were still to function as "managers" of the trial, and were allowed to question freely all parties (including the advocates).

Freedom of judges in matters of punishment was maintained.<sup>88</sup> They were even allowed to change the punitive measures stipulated in post-revolutionary decrees as long as they explained their reasoning in detail.<sup>89</sup> Investigation committees were officially established to aid the local People's Courts (anyone with political rights could be nominated for the investigation committees; this requirement of course excluded the bourgeoisie and political prisoners).<sup>90</sup> The selection procedures for judges became more defined. List of eligible<sup>91</sup> judges were to be compiled by the executive committee of the borough soviet in the cities, and the village soviets in the country; subject to approval by the entire soviet.<sup>92</sup> Some specialisation was introduced formally. For criminal cases of a serious matter (murder, rape, robbery, counterfeiting, bribery, etc.) there was to be one professional judge<sup>93</sup> and six lay judges;<sup>94</sup> while civil cases and lesser crimes retained the one

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<sup>86</sup> *Ibid.*, p. 101, art. 22

<sup>87</sup> *Ibid.*, pp. 103-104, arts. 40-49. Representatives were guaranteed in more serious crimes (art. 43, p. 104). In other cases they could be denied (art. 34, p. 103).

<sup>88</sup> For a discussion on punishment versus "correction" in the case of crimes such as "speculation", petty theft, etc., see L. A. Savrasov, "Prestuplenie i nakazanie v tekushchii perekhodnyi period" in *Proletarskaia revoliutsiia i pravo*, No. 5-6 (1-15 October, 1918) pp. 21-26; and for a response to Savrasov's article see Ia. Berman, "Nakazanie ili ispravlenie" in *Proletarskaia revoliutsiia i pravo*, No. 8-10 (15 November-15 December, 1918) pp. 46-51.

<sup>89</sup> "Polozhenie V. Ts. I. K. O Narodnom Sude R.F.S.F.R.", p. 101, art. 23

<sup>90</sup> *Ibid.*, p. 102, art. 31

<sup>91</sup> A person was selected to be a judge if s/he had political rights, if s/he had experience in proletarian organisation or had practical experience in the post. *Ibid.*, pp. 99-100, art. 12

<sup>92</sup> *Ibid.*, p. 100, art. 13

<sup>93</sup> A professional judge was elected permanently to the post. S/he did not require any legal experience necessarily.

<sup>94</sup> Note: Lay judges are people's assessors. "Polozhenie V. Ts. I. K. O Narodnom Sude R.F.S.F.R.", p. 98, art. 7

judge two assessors of the first decree.<sup>95</sup> The equal say of lay judges was preserved and a minority opinion could be noted in the record.<sup>96</sup> A reviewing committee was brought into being on the provincial level, and in the cities of Moscow and Petrograd.<sup>97</sup> The judges on the review committee were to be elected by a meeting of the judges in the district; and the selection was to be approved by the executive committee of the provincial soviet. A decision could be set aside for incorrect application of decrees, violation of procedure, incomplete investigation or if the decision was a clear injustice.<sup>98</sup> Any party taking part in the proceedings could bring a complaint against a decision, as could the executive committee of the local soviet.<sup>99</sup>

The goals of simplicity, mass participation and freedom of judges seemed to have prevailed in this Act. Although mechanisms for direct Bolshevik influence on the courts were in place,<sup>100</sup> at this time, courts were relatively independent of central government control.<sup>101</sup> It should be noted, however, that, if so desired, the Bolsheviks had a large potential to influence the court system. After the a decision of a local court had been set aside by a borough soviet, the jurist Pashukanis (as a member of the Presidium to oversee Moscow courts) campaigned successfully to pass a resolution in May of 1918 that stated the courts must have separate and exclusive authority in matters of jurisdiction.<sup>102</sup> The jurists' awareness of the potential for political coercion in the local courts forced local soviet committees, at least, to have to go through the proper procedure (via the review boards) in order to question decisions.

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<sup>95</sup> *Ibid.*, pp. 98-99, art. 8

<sup>96</sup> This was stated previously in art. 38 of the instruction, "Instruktsiia ob organizatii i deistvii mechnykh narodnykh sudov", July 23, 1918, Krylenko, *Sudoustroistvo R.F.S.F.R.*, p. 226

<sup>97</sup> "Polozhenie V. Ts. I. K. O Narodnom Sude R.F.S.F.R.", p. 108, art. 81

<sup>98</sup> *Ibid.*, p. 109, arts. 90-92

<sup>99</sup> *Ibid.*, p. 107, art. 75 (note)

<sup>100</sup> Soviets, which were gradually succumbing to direct Bolshevik control, elected judges, drew lists of people's assessors and had the right to question decisions.

<sup>101</sup> The fact that the Cheka and Revolutionary Tribunals acted as the government's "legal arm" aided this independence.

<sup>102</sup> Hazard, *Settling Disputes in Soviet Society*, p. 17

The requirement to relinquish *all* references to the old codes was a remarkable feature of the Act. The emphasis on the desire for a entirely "new" law to evolve required a creative approach to problem solving. It was still hoped that resolutions would be thought fair by all those involved (including the criminals) *without necessity of legal justification*, but through *internal recognition* that the court's prescription was a "just" solution. Presumably, this internal conviction would be generated by social consciousness. Since this same sense of revolutionary consciousness was employed by the court to arrive at decisions, antagonism between the court and the defendant would be reduced. Theoretically, the source of authority, both in obligation to obey the court, and the method in which decisions were reached, sprang from the same origins.<sup>103</sup> This sense of consensus, then, includes not only the jurists, but the defendants as well. Jurists strove to tap into the idea of an ever-developing sense of proletarian justice in the belief that from the mistakes and reckoning of these errors, a new form and content of law would emerge.

### **Early decision-making**

Within this framework, what kind of decisions did the first year of the People's Courts bring? It is interesting to examine a few actual cases. Case A: Citizen Smirnov, a landlord, was accused of paying a 13-year-old girl to have sexual relations with him. There were no witnesses, but through medical examination and testimony the court found him guilty of personal harm and depriving society of a worker healthy in mind and body. His punishment was public censure and payment of court costs.<sup>104</sup>

Case B: An intoxicated Red Army soldier, Poliakovich, had murdered a fellow intoxicated soldier. Poliakovich pleaded guilty but claimed that he was provoked

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<sup>103</sup> As opposed to capitalist law, which was direct domination imposed by a separate, antagonistic body.

<sup>104</sup> D. Kurskii, "Iz praktiki narodnogo suda," *Proletarskaia revoliutsiia i pravo*, No.11 (January, 1919) p. 29

and pleaded for leniency. The provocation was never proved, but the judges ascertained that the killing was unplanned and happened as a result of drunkenness. Poliakovich was sentenced to five years deprivation of freedom. The decision was justified by the belief that such an incident between two comrade soldiers was inexcusable.<sup>105</sup>

Case C: A house owner, Makarov, accused one Piniagin of attempted robbery. He was discovered to be an idealistic anarchist and was found with a bomb and revolver on his person. The court decided that it was not proved that Piniagin had desired to better himself at the expense of another (robbery), nor was it proved that the weapons found on him were to be used against another person. Piniagin had explained that he went to Makarov to requisition a room. The court found this requisition to be unauthorised and he was sentenced to 6 months' deprivation of freedom, 3.5 of which had already been served.<sup>106</sup>

Case D: Comrade Batov had embezzled 21,953 rubles. He admitted his guilt and three witnesses also testified against him. The court decided that Batov was not in any exceptional circumstances but that he had not committed the act deliberately. They concluded that he embezzled due to a weak will common to people of his age and disposition. Batov appeared to be generally a good citizen with 25 years of labour service. The court also concluded that Batov needed to be punished so as not to set a bad precedent for other proletarians. He was sentenced to a year's deprivation of freedom, with time held before trial counted as already served.<sup>107</sup>

Case E: A 15-year-old boy, Nesterenko brought a suit against the Southeast Railway Company for 10,000 rubles. Nesterenko was waiting for a train and went to pick some flowers. He heard the train whistle, ran back to the station and jumped onto a step of one of the cars. The train had already begun to move and the conductor struck him in the chest to remove him. Nesterenko fell and the wheel of

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<sup>105</sup> *Ibid.*, pp. 30-31

<sup>106</sup> *Ibid.*, pp. 31-32

<sup>107</sup> *Ibid.*, pp. 32-33

a car smashed his foot. At the trial, the representative of the railway wanted to wait for further medical examination as to whether Nesterenko could work. The judges already possessed medical testimony that the boy was in shock and had lost his capacity to work and the onset of hysteria had reduced his mental capacities by one-third. The judges rejected any more medical expert testimony, declaring that they could see the youth was not fit for any type of employment and ordered the railway to pay support wages to the youth from the day of the accident until his death or until a social insurance system was introduced.<sup>108</sup>

These examples are interesting in several respects. Personal and environmental circumstances figured heavily in verdicts and sentencing (Batov, the embezzler, the mental state of Nesterenko). The element of "injury to society" is prevalent in cases involving personal harm (e.g. "loss of a worker" as a social crime in the case of the abuse of the 13-year-old girl). Sentences tended to be rather lenient, except in cases where what was considered a gross breach of socialist consciousness took place (as in the case of the Red Army soldiers).

The historian Speranskii described the decisions of the courts in general as follows. The judges preferred to take into account the circumstances of each individual case, keeping in mind the eventual return of the criminal to society.<sup>109</sup> Lay judges were strict especially on elected officials who were convicted of bribery or had committed crimes, distillers of illegal alcohol (especially wealthy peasants, or those who stole grain to make alcohol), or those who seemed to be wealthy in general. They were more lenient towards those in poor circumstances, even in crimes such as murder.<sup>110</sup>

The class character of the court did not mean necessarily that all cases were decided in favour of the proletarian or the poor peasant. Although the urge to favour the workers was strong, the professional judge of the Moscow court reported,

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<sup>108</sup> *Ibid.*, pp. 33-34

<sup>109</sup> Speranskii, "Narodnye zasedateli (Lichnye vpechatleniia)" *Proletarskaia revoliutsiia i pravo*, No. 5-6 (October 1-15, 1918) p. 29

<sup>110</sup> *Ibid.*, p. 28

in the first six months of his practice, that "there was not a case where this primitive view of the class character of the court had triumphed."<sup>111</sup>

Not all reports of "people's justice" were favourable, especially in the early months after the revolution. These incidents were recorded in *Svoboda Rossii*, No. 38, May 30, 1918:

The following "penal code" was formulated in the village of Lubny, Lebediansky Uezd, Tambov Gubernia:

"If one strikes another fellow, the sufferer shall strike the offender ten times. If one strikes another fellow causing thereby a wound or a broken bone, the offender shall be deprived of life."

Such is the brief code of law. For its enforcement a revolutionary court was elected. Soon two thieves were brought to trial. They were condemned to death. One was killed outright. They broke his head...and ribs...and threw him naked on the highway...The other thief began to cry aloud and implore that a priest be sent to him for confession and communion. The priest and the reader who arrived on the scene pleaded with the mob and secured a pardon for the condemned. The death sentence was commuted and twenty-five blows by a rod were substituted (*Novoe Slovo*, No. 20, February 21, 1918).

...In Seraoulsky Uezd a peasant woman, aided by her paramour, killed her husband. The people's court sentenced the man to death and the woman to be buried alive. A grave was dug; the body of the dead paramour was placed in first and on top they put the woman bound and alive. An arshin [a Russian unit of measure equalling 28 in./71cm] of earth was already on her but she still continued to cry "Help, little fathers." (*Delo Naroda*, No. 10, April 28, 1918).<sup>112</sup>

M. M. Isaev describes incidents from newspaper clippings in the spring of 1918. Red Guards seized robbers, shot them on the spot and tossed their bodies into the Ekaterina Canal. Three robbers who threw a bomb were seized by a mob, two were killed and the third severely injured. Arson suspects in a village were seized and slain before the entire village. After the killing, the bodies were burned and the property of the parents of the suspects were pillaged. One peasant who stole food was thrown from a roof onto the tines of a pitchfork. Another thief was quartered and decapitated. By order of a local soviet four peasants suspected of thievery were burned at the stake (one of them a woman in the advanced stages of pregnancy).<sup>113</sup> Isaev mentions perpetrators of these incidents as the Red Guard and the local soviet, but there is also evidence of brutal mob justice.

<sup>111</sup> Hazard, *Settling Disputes in Soviet Society*, p. 17

<sup>112</sup> Bunyan and Fisher, *The Bolshevik Revolution*, pp. 290-291

<sup>113</sup> M.M. Isaev, *Obshchaia chast' ugolovnogo prava RSFSR* (Leningrad: n.p., 1925) pp. 62-64 in Zile, *Ideas and Forces in Soviet Legal History*, p. 91-92.

Steinberg in his memoir, *In the Workshop of the Revolution*, states that incidents of mob justice occurred only early in the history of the revolution.

The violent events, however, must be viewed and judged in fairness. They had been impulsive acts of the anonymous masses, that is to say, they had definitely not been organized by anyone. In the outbreaks of political lynch-mob justice the masses, long enslaved and corrupted by oppressive regimes, gave rebellious expression to their pent-up spirit of protest. Such outbursts of the peoples wrath often took cruel forms, which must never be hushed up or ignored. But these paroxysms never lasted, precisely because they were spontaneous. In stormy, short convulsions the people gratified their impulses of rage—and then came to their senses. Within a little while, feelings of friendship, comradeship and solidarity gained the ascendant.<sup>114</sup>

He claims that most reports of atrocities committed after the first few months of the revolution were committed by the soviets or the Cheka,<sup>115</sup> and the people themselves were not as harsh as these stories portray. By the statistics of the People's Courts, Steinberg seems to have been right. In fact, the leniency of the People's Courts (and also of the Revolutionary Tribunals!<sup>116</sup>) aroused the ire of Kurskii and more so Lenin.<sup>117</sup> Out of 12,037 cases analysed by Cherliunchakevich in the first half of 1918, 32% were acquitted and 7% were released from punishment. Of the 61% of the remaining cases, 25% were sentenced to prison, 15% were under arrest, 54% were fined, 4% were reprimanded and 2% were sentenced to other kinds of punishment (such as public censure).<sup>118</sup> In 1919, out of 61,128 judgements on non-political crimes that were analysed by Kurskii, 35% were imprisoned (75% of which were under conditions of probation), 8% sentenced to socially necessary labour (without imprisonment), 4% were fined, 10% received other punishments (e.g. admonition) and 43% were acquitted. Seventy-five per cent of the cases were property related. The Supreme Revolutionary Tribunal, whose sole responsibility was treason, sentenced more prisoners to serve jail time than to death.<sup>119</sup> In 1920,

<sup>114</sup> Steinberg, *In the Workshop of the Revolution*, p. 141

<sup>115</sup> *Ibid.*, pp. 152-156, 226-227 (note). For an objective analysis of the Cheka death toll see Leggett, *The Cheka: Lenin's Political Police*, pp. 463-468 (Appendix C).

<sup>116</sup> Richard Pipes, *Legalised Lawlessness: Soviet Revolutionary Justice*, p. 10

<sup>117</sup> See Lenin, *Variant Stat'i «Ocherednye Zadachi Sovetskoi Vlasti»* in *Polnoe Sobranie Sochinenii*, tom 36, pp. 162-164 [*The Immediate Tasks in Collected Works*, vol. 27, pp. 217-218].

<sup>118</sup> H. Cherliunchakevich, "Karatel'naia Praktika Mestnykh Narodnykh Sudov v Tsifrah", *Proletarskaia revoliutsiia i pravo*, No. 8-10 (15 November-15 December, 1918) p. 64

<sup>119</sup> Figures are from Kurskii, *Soviet Justice* (Moscow: n.p., 1919) in Rudolf Schlesinger's *Soviet Legal*

acquittals were over or near 50% in 8 major provinces.<sup>120</sup> The Revolutionary Tribunals, according to a report in January of 1919, had only sentenced 14 defendants out of 4,483 to death.<sup>121</sup>

### Moves towards centralisation

The section titled "Jurisprudence" of The Party Programme of 1919 reads as follows:

Proletarian democracy, taking power into its own hands and finally abolishing the organs of supremacy of the bourgeoisie—the former courts of justice—has replaced the formula of bourgeois democracy: "judges elected by the people" by the class slogan: "judges elected from the workers and only by the workers" and has applied the latter in the organization of the law courts, having extended equal rights to both sexes, both in the election of judges and in the exercise of the function of judges.

In order to attract the broadest masses of the proletariat and poor peasantry to take part in the administration of justice, a system of constantly changing, temporary judges-jurors is introduced in the law courts and the mass workers' organizations, the trade unions, etc., must be attracted to compile lists of such prospective judges-jurors..

The Soviet government has replaced the former endless series of courts of justice with their various divisions, by a very simplified, uniform system of people's courts accessible to the population, and free of all red tape.

The Soviet power, abolishing all the laws of the overthrown governments, ordered the judges elected by the soviets to carry out the will of the proletariat in compliance with its decrees and in cases of absence or incompleteness of such decrees to be guided by socialist conscience.

Constructed on such a basis, the courts of justice have already led to a fundamental alteration of the character of punishment, introducing suspended sentences on a wide scale, applying public censure as a form of punishment by obligatory labour with the retention of freedom, turning prisons into institutions for training, and applying the principle of comradesly tribunals.

The R.K.P. [Russian Communist Party] in order to assist the further development of the courts of justice along these lines, must strive to induce all workers without exception to

*Theory* (London: Kegan Paul, Trench, Trubner, 1945) p. 72

<sup>120</sup> The provinces in which Communist judges were in the minority had the highest acquittal rate. Hazard, *Settling Disputes in Soviet Society*, p. 96

<sup>121</sup> Pipes, *Legalised Lawlessness: Soviet Revolutionary Justice*, p. 10 Interestingly, in 1918, 90% of the Revolutionary Tribunals' staff were Bolshevik Party members (Pipes, *The Russian Revolution*, p. 799). An interesting example of the leniency of the Revolutionary Tribunals can be found in *The History of the October Revolution*, eds., P.V. Sobolev, Y. G. Gimpelson, G.A. Trukan and F.V. Chubayevsky (Moscow: Progress Publishers, 1966): "Revolutionary Tribunals, noted at first for extreme leniency in their verdicts, had to be convened to combat counter-revolutionary activities and sabotage. An example of the clemency displayed by these tribunals can be seen in the trial of the former Countess Panina, who had, whilst occupying a position of responsibility in the Provisional Government, appropriated a large sum of money and used it to finance a counter-revolutionary sabotage ring. The bourgeois press raised a great clamour at her arrest and trial, calling her a martyr and a victim of the Bolsheviks; the hall where the tribunal sat could not accommodate all those who wished to attend; but Countess Panina was only condemned to 'censure by society', and ordered to return the money she had misappropriated." p. 282.

perform judicial duties and finally replace the system of punishment by measures of an educational character.<sup>122</sup>

It is clear from the early decrees of the People's Courts<sup>123</sup> that jurists were attempting to effectuate the goals summarised above. Even before Decree No. 1, the soviets created courts which operated with the understanding that direct involvement of the citizens of a community was essential to the new system of law. Derivations of solutions relied on general consensus of those participating (including defendants). Though structuring the system to some extent, the initial decrees, which culminated in the People's Court Act of 1918, sought to preserve simplification, the freedom of judges and people's assessors, and participation of the masses. It was expected that the experience of regulating a country would create a sense of cohesion and further expand the governing power of the populace. The statistics Kurskii examined in 1919 support the claim that a "fundamental alteration of the character of punishment" was being implemented, in that the judges considered the background of defendants (as in Batov) while evaluating the seriousness of their crimes. These environmental considerations influenced penal measures. The courts were generally lenient, and imprisonment was hoped to be phased out by such tactics as public censure.

Despite the intent of the Party Programme, the leniency and lack of uniformity of decisions and sentencing in the courts precipitated a move towards centralisation. Tendencies towards centralisation had materialised by the time People's Court Act of 1920 (21 October) was passed.<sup>124</sup> The rights of judges to mitigate sentences or renounce sentences dictated by decrees were reduced.<sup>125</sup> Judges also had to justify their sentences in greater depth, including information such as the age,

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<sup>122</sup> *K.P.S.S. v Rezoliutsiakh i Resheniakh S'ezdov, Konferentsii i Plenumov Ts. K.* (Moskva: Izdatel'stvo Politicheskoi Literatury, 1983) tom 2, p. 8 [translated in *Resolutions and Decisions of the Communist Party of the Soviet Union*, ed., Robert McNeal (Toronto: University of Toronto Press, 1974) vol. 2, p. 63]

<sup>123</sup> Up to the People's Court Act of 1918.

<sup>124</sup> "Polozhenie V. Ts. I. K. O Narodnom Sude R.F.S.F.R. (1920)" in *Dekrety Sovetskoi Vlasti* (1983), tom 11, pp. 81-93

<sup>125</sup> *Ibid.*, p. 85, art. 23

education, profession and the Communist Party status of the sentencee.<sup>126</sup> The Act also allowed more control over the courts by the soviet executive committee (such as determining the number of courts needed in an area).<sup>127</sup> Professionalisation of court personnel such as prosecutors and advocates was also mandated.<sup>128</sup>

In a separate instruction, "special sessions" of the People's Courts were instigated to deal with the more political crimes that had been transferred to local courts from the Revolutionary Tribunals and the Cheka. It was thought the local judges were not able to handle these matters in that they were too lenient in dealing with class crimes due to lack of political maturity.<sup>129</sup>

Kurskii still wanted simplicity and freedom in decision-making on the one hand, but also some degree of uniformity and control on the other. He was also concerned with the education aspects of the courts. Popular participation via the lay judges was still preserved<sup>130</sup> in the hopes that mass participation would increase socialist awareness. Without it, he writes "*...nevozmozhno uglublenie sredi politicheskii otstalykh sloev naseleniia proletarskogo pravosoznanie i oznakomleniia ikh s novym sovetskim pravom, dekretirovannym Raboche-Krest'ianskim Pravitel'stvom.*"<sup>131</sup> The pressures that were to bring about further centralisation came from the changing circumstances of party politics and a shift in economic policy.

### **Further centralisation: the New Economic Policy (N.E.P.)**

N.E.P. policies were designed to encourage small-scale capital to mollify a population which had been stripped of private earning capacities, yet was under a

<sup>126</sup> *Ibid.*, p. 90, art. 75

<sup>127</sup> *Ibid.*, p. 82, art. 3

<sup>128</sup> *Ibid.*, p. 90, art. 75 and *Instruktsiia ob Organizatsii ob Vineniia i Zashchity na Sude* (23 November, 1920) in Krylenko, *Sudoustroistvo R.F.S.F.R.*, pp. 274-276

<sup>129</sup> *Vsem Otdelom Iustitsii i Sovetom Narodnykh Sudei* (16 September, 1920) in Krylenko, pp. 273-274

<sup>130</sup> "Polozhenie V. Ts. I. K. O Narodnom Sude R.F.S.F.R. (1920)", p. 84, arts. 16-20

<sup>131</sup> ...it is impossible to deepen the proletarian sense of justice in those politically backward and acquaint them with the new soviet laws decreed by the Workers'-Peasants' Government. *Instruktsiia o Poriadke Sostavleniia Spisokov Narodnykh Zasedatel'ei* (6 November, 1920) in Krylenko, *Sudoustroistvo R.F.S.F.R.*, p. 276

government that could not provide for it. The reintroduction of small-scale capitalism<sup>132</sup> (and consequently capitalist relations) created a need for more centralised control by the state and party, for according to Lenin, N.E.P. was a theoretical step backwards, and the capitalist elements that would accompany its implementation needed to be kept under strict control.

The drive for centralisation affected all aspects of Soviet government structure: the soviets, the party<sup>133</sup> and the courts. Lenin perceived that a consolidated, systematic approach in controlling capitalist elements was demanded to ensure the success of N.E.P. He declared that the courts must maintain their class nature,<sup>134</sup> and they must be unified in approach, achieved essentially through state (party) control. This desire was clearly explained in a piece by Lenin called “Dual Subordination<sup>135</sup> and Legality”:

I therefore propose that the Central Committee should reject ‘dual’ subordination in this matter, establish the subordination of all local procurators solely to the *central authority*, and allow the procurator to retain the right and duty to challenge the legality of any decision or order passed by the local authorities with the proviso, however, that he shall have no right to suspend such decisions; he shall only have the right to bring them before the courts.<sup>136</sup>

The increase in complexities of civil relations (due to the revival of private property and the notion of contract) also implied for Lenin a need for state (party)

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<sup>132</sup> Peasants were still required to give their produce to the government, but could also sell excess produce on the market. Craftsmen as well could sell their products as long as they did not hire labour.

<sup>133</sup> Party factions were disbanded in 1921 to guarantee a cohesive party. Lenin, *X S"ezd R.K.P (B) in Polnoe Sobranie Sochinenii*, tom 43, p. 91 [*Tenth Congress of the R.C.P. (B.) in Collected Works*, vol. 32, p. 243]

The maintenance of “strict and unified party discipline” was one of the guiding principles of the party. The point is extremely relevant to those historians that argue that the situation Lenin created led directly to Stalinism. See Leonard Schapiro’s *Communist Party of The Soviet Union*, specifically p. 270; Robert Payne, *The Life and Death of Lenin* (London: W. H. Allen, 1964) specifically p. 631; Adam Ulam, *Lenin and the Bolsheviks* (London: Martin Secker and Warburg, 1966) specifically p. vii. For an argument against this position see Beirne and Hunt, “Law and the Constitution of Soviet Society: The Case of Comrade Lenin”, pp. 595-598.

<sup>134</sup> Lenin, *XI S"ezd R.K.P.(B) in Polnoe Sobranie Sochinenii* (1975), tom 45, p. 120 [*Eleventh Congress of the R.C.P. (B.) in Collected Works*, vol. 33, p. 313]

<sup>135</sup> Dual subordination was the idea that the local authorities (i.e. soviets) would be answerable to central authorities, but central authorities would respect local authorities in terms of each location’s individual circumstances.

<sup>136</sup> Lenin, *O «Dvoinom» Nodchinenii i Zakonnosti in Polnoe Sobranie Sochinenii*, tom 45, p. 201 [*“Dual” Subordination and Legality in Collected Works*, vol. 33, p. 367]

intervention. He exhorted leaders “*ne vypustit' iz svoikh ruk maleishei vozmozhnosti rasshirit' vmeshatel'stvo gosudarstva v «grazhdanskii» otnosheniia.*”<sup>137</sup>

Edward Carr describes the legal atmosphere during N.E.P.:

Centralization of authority was accompanied by a gradual modification of current attitudes to law. The Marxist concept of law as an instrument of class rules, destined eventually to wither away with the state, and in the meanwhile to be administered with special indulgence for workers and peasants, was silently abandoned. The market practices of N.E.P. demanded the development of strict enforcement of civil law. The maintenance of law and order under the label of “revolutionary legality” became a major objective. Initial emphasis on the reformatory rather than the punitive aspects of penal policy faded away. These changes reflected the growing economic and political tension.<sup>138</sup>

The demand for centralisation and uniformity led to the passing of the first Criminal Code (June 1922) and Civil Code (October 1922); as well as codes for procedure (Criminal, May 1922; Civil, July 1923). Unlike before, the judges were not allowed to depart from prescribed punishment for those crimes deemed threatening to Soviet society.<sup>139</sup> Most of the judges for the “special sessions” of the People’s Courts were Communist Party members.<sup>140</sup> By 1923, all decisions made by the courts were subject to review by the Commissariat of Justice,<sup>141</sup> which was firmly controlled by the Communist Party.<sup>142</sup> People’s Courts were subject to the scrutiny of the regional/circuit courts, and at the highest level, the supreme court of the region.<sup>143</sup> The court system was gradually becoming hierarchical, bureaucratic,

<sup>137</sup> not to let slip out of our hands the least possibility to expand government intervention in “civil” relations. Lenin, *Pis'mo D. I. Kurskomu s Zamechaniiami Na Proekt Grazhdanskogo Kodeksa* (28 February, 1922) in *Polnoe Sobranie Sochinenii* (1974), tom 44, p. 412 [Letter to D.I. Kurskii With Notes on the Draft Civil Code in *Collected Works*, vol. 33, p. 203]

<sup>138</sup> E. H. Carr, *The Russian Revolution: From Lenin to Stalin* (London: The Macmillan Press, 1979) p. 121

<sup>139</sup> Pipes, *Legalised Lawlessness: Soviet Revolutionary Justice*, pp. 19-20

<sup>140</sup> Hazard, *Settling Disputes in Soviet Society*, p. 145

<sup>141</sup> *Ibid.*, p. 133

<sup>142</sup> Schapiro, *Communist Party of The Soviet Union*, p. 264. Schapiro describes the evolution of party control over the courts in the section titled “Control Over the Provinces, Army and Legal Machines”, pp. 252-266, especially 262-266. Schapiro asserts the party was in firm control of all social institutions in 1923. See also, “The Machine of Justice—The Procuracy and The Courts” in *Smolensk Under Soviet Rule* by Merle Fainsod (London: The Macmillan Company, 1955) pp. 174-192. For a well-researched article on the influence of local politicians on the functioning of courts, see Peter Solomon, “Local Political Power and Soviet Criminal Justice, 1922-41”, *Soviet Studies*, Vol. 37, No. 3 (July, 1985) pp. 305-329.

<sup>143</sup> Batsell, *Soviet Rule in Russia*, pp. 585-587

controlled by the party and centralised despite attempts to maintain some independence of action.

## **ANALYSIS**

### **Introduction**

Whilst the People's Courts provide fascinating, and uncharted, grounds for a discussion on the problems facing legal institutions in a socialist transition period, they are most useful in this thesis to evaluate certain theoretical precepts outlined by Marx, Engels and Lenin. Indeed, it is impossible to evaluate the effectiveness of these institutions in a transition period when what they are being transformed to is unclear. Lenin's theory of law in communism is consistent with Marx and Engels vision. There are, however, deeper theoretical questions that arise that are not fully explained by Marx, Engels or Lenin. These concerns are brought to the forefront when the People's Courts are contrasted with the initial theoretical goals thus far outlined.

A brief summary of these theoretical principles facilitates the framework within which the discussion of the People's Courts takes place. The basis of Marx's position, and one that is restated by Lenin, rests with description of law as an outcome of economic relations. In essence, the existence of the "juridic person" and the abstract role of law as an enforcer of rights and obligations among persons of equal wills depends on production relations that are embodied in capitalism. In socialism (communism), production relations are "socialised", meaning that the populace, as a whole, has control over production and uses productive forces to produce for its needs. The political form of state power is replaced by the associative authority of an administration. At this point, institutions lose their "political" character. While some authority is needed for organisational purposes, this authority does not take the form of power of one individual over another individual, but rather individuals become cooperatively engaged in a mutually

beneficial process. Thus, the use of force is absent, since no one has power over another. Compliance becomes “internal” and occurs as a direct result of participative decision-making (Lenin described this process as development of “socialist consciousness”). Through exerting control over production and how it is organised, people become empowered to control their social environment, and hence are empowered to address conflict in that environment by negotiating changes in social relationships. This distinction between social power and political power is at the heart of the difference between “state” and “administration” and consequently “law” and “regulation”.

It is obvious that the People’s Courts fell short of these theoretical objectives; after all, Russia was a nascent socialist nation, not an advanced one. Examining exactly *how and why* they succeeded, or did not succeed, brings to focus some quintessential theoretical issues. Based on the above summary, analysis of the People’s Courts will be narrowed to the following topics: (1) economic conditions and legal relations; (2) public control over production and its effects on the courts; (3) the institutional nature of the People’s Courts: political vs administrative; (4) the role of force; (5) social vs political power.

### **Economic conditions and legal relations**

The first decrees of power issued by the Bolsheviks economically sought to nationalise all major industry and declare land and natural resources to be state (public) resources.<sup>144</sup> Such steps virtually eliminated private property. Politically, the Bolsheviks sought to give the responsibilities of government to the soviets.<sup>145</sup> The soviets were meant to be the “training ground” for the working class to begin

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<sup>144</sup> The gist of Bolshevik aims before the Civil War is summarised in Lenin, *Deklaratsiia Prav Trudiashchegosia i Ekspluatiruemogo Naroda in Polnoe Sobranie Sochinenii*, tom 35, pp. 221-223 [The Declaration of Rights of the Working And Exploited People in Collected Works, vol. 26, pp. 423-425]

<sup>145</sup> Hence the declaration that the soviets had taken power—see “K Grazhdanam Rossii”, *Istoriia Sovetskoi Konstitutsii v Dokumentakh 1917-1956* (Moskva: Izdatel’stvo Iuridicheskoi Literatury, 1957) pp. 41-42.

organising production and its accompanying social relations.<sup>146</sup> Nationalisation of resources was only a first step, however, and as predicted by Marx, a bourgeois distribution method (commodity exchange) would prevail for a period of time. Money still operated as the medium of exchange and labour time was still a measure for the amount of money one received. Put simply, labour time was still directly exchangeable for products.

Theoretically, since a capitalist distribution method was still in effect, the legal category of “juridic persons” would still be present and presumably, law would exist in that it would enforce production relations in the concrete situation, and would render which individual rights and obligations prevailed in a given situation in the ideological form.

Despite the major structural changes sustained by the courts, theoretically they still incorporated elements of a capitalist legal structure. The proclaimed goal of the Bolshevik government was to establish a workers’ state. The goals of such a state would be to base economy along proletarian lines. Such an economy would produce for need rather than profit, and hence be under the control of the proletarian class rather than the bourgeois class. Production relations, then, would reflect needs-based values and incorporate “proletariat power”.

Did the People’s courts enforce these principles? From the survey of decisions made they did to a great degree. Crimes of theft were treated quite harshly (reflecting the value that one is stealing from society rather than another individual). Crime regarding lack of work was treated harshly. Enforcement of the labour laws were stringent. Eradicating bourgeois values was a prime goal of the courts. Proletarians were instructed to use their “socialist sense of justice” (*sotsialisticheskoe pravosoznanie*) to determine the outcome of cases. Despite the

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<sup>146</sup> See Lenin, *Proletarskaia Revoliutsiia i Renegat Kautskii* in *Polnoe Sobranie Sochinenii*, tom 37, pp. 101-110 and *Tretii Vserossiiskii S’ezd Sovetov*, tom 35, 277 [Lenin, *Proletarian Revolution and Renegade Kautsky* in *Collected Works*, vol. 28, pp. 104-112; *Third All-Russia Congress of Soviets* in *Collected Works*, vol. 26, p. 469].

fact that the values procured by a proletarian law are different in content from capitalist ones, the form of law is the same in that it reinforces production relations.

Although production priorities were geared to be under state control, presumably to produce for need rather than profit, distribution was firmly along capitalist lines. Workers, in essence, were still commodities in that they could “exchange” labour power for things. Did such a situation create the ideological form of “juridic” persons in that an individual represented certain rights and obligations?

Much like in capitalism, individuals still represented certain rights and obligations, and similarly to capitalist courts, the aim of the People’s Court was to determine what rights had been “violated” and what the compensation (punishment) was to be. For instance, in the case of Nesterenko and the Southeast Railway Company, the company was held responsible for personal damages to Nesterenko. Smirnov who had paid to have sex with a thirteen year-old girl, had to pay court costs. Despite the fact that the judges often mentioned the wrong to society (such as the loss of a productive worker) decisions were still based on the concept of individuals as bearers of certain rights and obligations, and the role of law was to determine the outcome of clashes of these individual interests. Even though the background of individuals weighed heavily in the outcome of their punishments, the central issue of the courts was to determine the culpability of an individual based on rights and responsibilities—however those rights and responsibilities may have been redefined by the government or “socialist consciousness”.

### **Control over production**

The above depicts a radically restructured judicature that nevertheless is theoretically linked to capitalist legal structures. Such a depiction calls into question whether citizens were really in control of the production process. If they were not,

the requisite impetus to transform political power into social authority was missing, and hence institutions, such as the People's Courts would retain political attributes.

In one way the question is straight forward. The People's Courts *were* political institutions by virtue of the declaration that the revolutionary society still existed in political form and that class power was still characteristic of both production and social relations. In essence, there was still a state apparatus. Thus the questioned should be slightly modified: over the period examined (1917-1920), was the direction of transformation heading towards control of the production process by citizens? And consequently, how did this trend affect the People's Courts?

The question of whether or not the nascent socialist Russia was heading towards the establishment of citizen control of production forces is fraught with difficulty. Whilst the answer historically became clearer in later years, initially the question of exactly how much faith the Bolshevik leadership had in the proclamation "all power to the soviets" is difficult to assess. It is clear that Lenin was convinced the revolution could not succeed in the long term without the power of the masses. Nevertheless, it is also clear that he had doubts as to whether workers and peasants were actually competent to run a country.<sup>147</sup> Lenin indicated that the masses should participate as fully as possible in the new society, but they were to do so under the guidance of the party. This "guidance" became increasingly

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<sup>147</sup> Lenin argued that revolutions can not be *created* but must have concrete conditions that allow them to come to fruition. See *Sed'moi Ekstrennyu S'ezd R.K.P.(B)* in *Polnoe Sobranie Sochinenii*, tom 36, pp. 52-54 [*Seventh Congress of the R.C.P. (B.) in Collected Works*, vol., 27pp. 135-136]. Some historians (e.g. d'Encausse) doubt Lenin's reliance on the masses. What is more appropriate to conclude is that Lenin thought the country was too backward for soviet power to work properly. See: Lenin, *Luchshe Men'she, Da Luchshe* in *Polnoe Sobranie Sochinenii* (1975), tom 45, p. 390 [*Better Fewer, But Better* in *Collected Works*, vol. 33, p. 488]; *Kak Organizovat Sorevnovanie in Polnoe Sobranie Sochinenii* (1974), tom 35, pp. 198-199 [*How to Organise Competition?* in *Collected Works*, vol. 26, p. 409]; *VI Vserossiiskii Chrezvychainy i S'ezd Sovetov in Polnoe Sobranie Sochinenii*, tom 37, p. 140 [*Extraordinary Sixth All-Russia Congress of Soviets in Collected Works*, vol. 28, p. 139]

strict through the Civil War years, and more pervasive during N.E.P. Citizens gradually lost power rather than gained it.<sup>148</sup>

Part of the reason Russia's citizenry may have been "incompetent" to run the country is that Russia was hardly a prime candidate for revolution:<sup>149</sup> (1) Russia was not industrialised at the time and only 18% of the population was urban;<sup>150</sup> (2) the country was, for the most part, illiterate; (3) the population had not developed under bourgeois institutions (an evolution which was necessary in both for the procurement of technical skills and the cultivation of worker consciousness). Part of Lenin's answer to the Menshevik and Socialist-Revolutionary arguments<sup>151</sup> was

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<sup>148</sup> Lenin best summed the role of the party in his Speech at the Conference of Education Workers. See *Rech' Na Vserossiiskom Soveshchanií Politprosvetov* in *Polnoe Sobranie Sochinenii*, tom 41, p. 403 [Collected Works, vol. 31, pp. 367-368]. See also *Detskaia Bolezn' «Levizny» v Kommuniste* in *Polnoe Sobranie Sochinenii*, tom 41, pp. 3-104 ["Left-Wing Communism": An Infantile Disorder in *Collected Works*, vol. 31, pp. 17-117].

Lenin believed that centralisation was indispensable for proper production and distribution (which was still under bourgeois terms) to be maintained. Only after workers had learned the technical aspects of running an industry under the guidance of the party were they to take power. Interestingly, the number of workers and Bolsheviks that were knowledgeable in areas of management and technical expertise was so low that the "specialist", though bourgeois, had to be retained; and were even given "bonuses", strictly by the token that they were so necessary to development and were willing to work for the Bolsheviks. Lenin, *Proekt Programmy R.K.P.(B)* in *Polnoe Sobranie Sochinenii*, tom 38, pp. 97-99 [Draft Programme of the R.C.P. (B) in *Collected Works*, vol. 29, pp. 113-114]

<sup>149</sup> Marx and Engels stressed that consciousness must be achieved through praxis, and that much of this growth would occur in capitalism. [Marx, *Preface to Critique of the Gotha Programme* in *Marx and Engels: A Conceptual Concordance*, trans., T. Carver (Oxford: Basil Blackwell, 1983) p. 154]

<sup>150</sup> d'Encausse, *Lenin*, p. 3

<sup>151</sup> The crux of the situation for the left was whether a socialist revolution was actually possible in Russia at the time of the Bolshevik takeover. Within Russia, the debate took place between three major parties, that of the Mensheviks, the Socialist-Revolutionaries (SRs) and the Bolsheviks. All parties held the belief that Russia first had to pass through a bourgeois revolution before a socialist revolution could become viable. For Lenin, the first 1917 revolution in February was a bourgeois one, and hence when the time became ripe, the Bolshevik seizure of power was indeed a socialist revolution. The Mensheviks, however, claimed that after this bourgeois revolution had occurred a period of capitalist development would need to ensue.

The SRs' primary concern was agricultural reform. Socialisation of land, a phrase that sought to emphasise the fact that the land was owned by no one, became the central theme of their programme. Land use could take any form—private individuals, families, collectives—but it was envisioned that the peasants would discover (non-coercively) the advantages of collectivisation and would organise themselves along these lines eventually. The SRs hoped to avoid any sense of private property all-together, considering it possible to circumvent the "petty bourgeois" stage of development in Marxist terms. Socialism, therefore, would evolve (over a substantial period of time) out of agrarian reform.

The theoretical and tactical debates of the Mensheviks and the party history during the revolution are well covered in a book by Vladimir Brovkin titled *The Mensheviks After October* (Ithaca: Cornell University Press, 1987). Also useful is *The Mensheviks*, by Leopold Haimson (Chicago: The University of Chicago Press, 1974).

that revolution in Russia would spark revolution in the West,<sup>152</sup> where institutions, class consciousness, and other elements necessary for popular take over would be more developed than the “backwards” Russia.<sup>153</sup> Revolution did not occur in the West, however, and its possibility grew more indefinite as Russia struggled through the Civil War.

Regardless of the reasons for a lack of development of actual “worker control”, by 1922 it was quite evident that the decisions that affected the course of the country were made by a handful of individuals and carried out under strict Communist Party supervision.

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Oliver Henry Radkey has written several useful books on the Socialist-Revolutionaries, examining theoretical developments, debates and splits in the party, and their responses to the early stages of Bolshevik rule. See *The Sickle Under the Hammer* (New York: Columbia University Press, 1963) and *The Agrarian Foes of Bolshevism* (New York: Columbia University Press, 1962).

<sup>152</sup> Marx and Engels themselves felt that a revolution in Russia could incite revolution in the West: “If the Russian Revolution becomes the signal for a proletarian revolution in the West, so that the two complement each other, the present Russian common ownership of land may serve as the starting point for communist development.” Marx and Engels, *Preface to the Second Russian Edition of the Manifesto of the Communist Party* in *Marx and Engels Collected Works* (Moscow: Progress Publishers, 1989) vol. 24, p. 426. Marx also suggests in a letter of March 8, 1881 to Vera Zasuliich (a Russian revolutionary) that the *obshchina* (rural community/village) “is the fulcrum of social regeneration”, but that it would have to be freed of “the deleterious influences which are assailing it from all sides.” in *Marx and Engels Collected Works* (Moscow) vol. 24, p. 370-371 (quotes on 371). Passages such as these have added confusion to the historically developmental approach of class struggle embraced by Marx and Engels. It is quite clear, however, that a peasant revolution would perhaps only be useful to inciting revolution in developed countries. Adam Ulam points out that these passages were written at a time where revolutionary fervour was far more pervasive in Russia than in the West. (Ulam, *Lenin and the Bolsheviks*, esp. pp. 442-443). Engels, in response to the revolutionary Tkachov who believed that capitalism could be “skipped” because of the communal nature of the *obshchina*, states that “...a man who says that this revolution can be more easily carried out in a country where, although there is no proletariat, there is no bourgeois either, only proves that he has still to learn the ABC of socialism.” Engels, *On Social Relations in Russia* in *Refugee Literature* (Part V), *Marx and Engels Collected Works* (Moscow) vol. 24, p. 40. This passage affirms the argument (most prevalent in *Capital* and *The Communist Manifesto*) the two had been making their entire lives, that capitalist development was necessary to the advent of socialism. There is no indication that Marx or Engels embraced the idea of an isolated peasant revolution leading to socialism. Makepeace discusses this in *Marxist Ideology and Soviet Criminal Law*, pp. 39-55. Another relevant text by Marx and Engels is *The Russian Menace to Europe*, eds., P.W. Blackstock and B.F. Haselitz (Glencoe, IL: The Free Press, 1952).

<sup>153</sup> Lenin thought revolution in the West would place Russia again in a “backward” state. See Lenin, *Detskaia Bolezni' «Levizny» v Kommuniste* in *Polnoe Sobranie Sochinenii*, tom 41, p. 3 [“Left-Wing Communism”: An Infantile Disorder in *Collected Works*, vol. 31, p. 21]. He was dependant on the West for final success of the revolution. See Lenin, *Tretii Vserossiiskii S'ezd Sovetov* in *Polnoe Sobranie Sochinenii*, tom 35, p. 271 [Third All-Russia Congress of Soviets in *Collected Works*, vol. 26, p. 465].

### The institutional nature of the People's Courts: political vs administrative

Accordingly, the effects on the People's Courts reflected a decrease in popular, direct control propelling the courts further away from the concept of a "non-political" institution. Initially, complete freedom *was* given to the operation of these courts. Gradually, however, terms of punishment and formalisation of procedure decided by the Commissariat of Justice (not by the courts themselves) became more defined. Instructions were given to use one's socialist consciousness; but increasingly, the party determined what socialist consciousness entailed, to the point that a full codification of law was promulgated in 1922.

The masses were to learn from the experience of running the courts. Yet as early as 1919, Stuchka stated that "I do not deny that the People's Court need theoretical guidance". He continues, "A great task confronts us—to liberate proletarian consciousness from bourgeois thought, and to provide the proletariat with a general educational understanding."<sup>154</sup> The "us" invariably refers to the "vanguard" or the party. To receive education is a far different task than that of learning from mistakes.<sup>155</sup> The attitude that the people must be "led" signifies a notion of state that is superior to the people it governs and thus has power "over" them.

Hierarchical power is directly observable in the courts themselves. From their inception, they had three people (a judge and two people's assessors) that had final authority. It should be noted that these judges often encouraged participation and input from all those present. Also, the judges themselves came from the general population and "anyone" could serve as one. Increasingly, however, court

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<sup>154</sup> Stuchka, *Proletarian Law* (1919) in *Selected Writings of Soviet Law and Marxism*, eds. and trans., Piers Beirne, Peter Maggs and Robert Sharlet (New York: M.E. Sharpe, 1988) p. 9

<sup>155</sup> In his work, *Revolution and Revolutionary Legality* written in 1930 the *necessary* role of the party as a guiding force both in legal statutes and economic policy, and the need for centralisation, is heavily emphasised. No mention of mass participation—except through the local Communist soviets—occurs. Laws become something that must be popularised, expressing the lack of the role of the populace in law enforcement.

staff became more specialised and procedures became more rigid as the power structure of the court itself became more defined.

### **The role of force**

The political nature of the People's Courts is further observable via the element of force associated with their development. As Ovchinkin's description of the first soviet court exemplifies, the presence of the red guard lent legitimacy, or at least enforceability, to the early decisions of the courts. While it is a possibility that citizens eventually would have respected the court's authority of their own accord, history did not demonstrate such a development. It is worth mentioning, however, that given peaceful, stable evolution it is possible that the courts may have become less reliant on force. Part of the emphasis of the People's Courts was to replace more traditional forms of punishment, such as imprisonment or physical penalties, with alternative, more "social" punishments such as public censure; and the courts were, for the most part, lenient in their recommendations. Despite the goal of replacing punishment, however, the party leadership, in particular Lenin, was actually disturbed at the leniency of the courts and actively encouraged the courts to be more severe.<sup>156</sup> In his mind, the courts were not promoting revolutionary discipline and were not strict enough in punishing class enemies.

Notwithstanding these criticisms, the People's Courts by 1920 were relatively more independent and less centralised than all other institutions of the government.<sup>157</sup> The autonomy of local courts was mainly due to the existence of the Cheka and the Revolutionary Tribunals, which attended to most of the complaints Lenin had of the People's Courts. Through these institutions, Lenin could maintain the use of unchecked force without directly interfering with the local courts.

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<sup>156</sup> See Lenin, *Variant Stat'i «Ocherednye Zadachi Sovetskoi Vlasti»* in *Polnoe Sobranie Sochinenii*, tom 36, pp. 162-164 [*The Immediate Tasks in Collected Works*, vol. 27, pp. 217-218].

<sup>157</sup> Batsell, *Soviet Rule in Russia*, p. 585

The role of the Cheka and Revolutionary Tribunals did influence the general operations of the court, in large part through their affect on society in general. The primary function of these institutions was to carry out class warfare, and to do so quite ruthlessly.

Members of the Cheka were selected from the party. Cadres for this purpose were at first chosen selectively. Lenin wanted to get "good communists" that would not abuse power but be ruthless enough to carry out a "class war". Unfortunately, trusted party members were too few in number and subsequent recruitment for the Cheka relied on psychological disposition. Victor Serge describes them:

The temperaments that devoted themselves to this task of 'internal defence' were those characterised by suspicion, embitterment, harshness, and sadism...the chekas inevitably consisted of perverted men tending to see conspiracy everywhere and to live in the midst of perpetual conspiracy themselves.<sup>158</sup>

And despite personal interventions by Dzerzhinskii, Zinoviev, Lenin etc. at the behest of acquaintances (e.g. Maxim Gorkii, Victor Serge), many extravagances went unchecked and unnoticed.

In theory, the Cheka was to spread terror only among a minority of the population (class enemies)—a minority that deserved brutal suppression in the eyes of the Bolsheviks. However, the difference between a peasant stealing bread to eat or a peasant stealing bread to "speculate" lost all clarity when the Cheka could shoot both justifiably. Adding to the confusion was the scope of interpretation that was allowed under the term "counter-revolutionary".<sup>159</sup> This could include anything from conspiracy to overthrow the Bolsheviks to sluggishness in snow removal.<sup>160</sup>

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<sup>158</sup> Serge, *Memoirs of a Revolutionary*, p. 80

<sup>159</sup> See James Bunyan's *Intervention, Civil War, and Communism in Russia: April-December, 1918, Documents and Materials* (New York: Octagon Books, 1976) pp. 553-554.

<sup>160</sup> Decree of February 15, 1919 "On Repression of Persons Who Sabotage the Removal of Snow from Railway Tracks": The Council of Workers' and Peasants' Defence, at its February 15 session, having heard discussion exempting from mobilization all persons who live within 20 versts [ca. 20 kilometres] of a railway line, decrees:

To instruct Sklianskii, Markov, Petrovskii, and Dzerzhinsky immediately to arrest several members of the executive committees and committees of the poor in those areas in which the progress of snow removal has been entirely unsatisfactory. In the same localities, they are to take hostages from among peasants so that, if the snow is not removed, they [i.e., the hostages] be shot. A report on action taken, with information about the number of persons arrested is due within a week." from *Decree of the Council of Defence*, February 15, 1919, "On Application and

The difference between a proletarian who was not quite conscious enough and a class enemy was by no means apparent.

Also, there was no defined process to determine guilt: "We do not require evidence of guilt against an exploiter of other men's labour, or a counter-revolutionary; it is sufficient to determine his social standing or his political physiognomy, in order to apply administrative measures to him, as a class enemy of the proletariat and of communism."<sup>161</sup>

Steinberg was concerned that the Bolshevik revolution was dictated by science (historical materialism). The Bolsheviks used this to justify terror—the means justifies the ends at whatever costs.<sup>162</sup> The socialist revolution for Steinberg (and indeed many others) was to be one not only as a prescript of materialism but one of moral necessity as well; which included freedom from inhumane punishment of any kind.<sup>163</sup> Lenin, however, was adamant in the need for terror that was dictated by revolutionary necessity; a necessity defined by material circumstances. The backward masses who were not able to understand this could not get in the revolution's way (hence Steinberg's point that Lenin was not a person but a "machinist servicing the engine of history"<sup>164</sup>).

The Cheka and the Revolutionary Tribunals were the institutions of the party, and the population had no recourse against them.<sup>165</sup> It can be argued, as it was by Lenin, that these were trying times and these measures were absolutely necessary

Repression to Persons Who Sabotage the Removal of Snow from Railway Tracks," in *Dekrety sovetskoi vlasti*, vol. 4. Moscow, 1968, pp. 626-627 as cited in Zigurds Zile, *Ideas and Forces in Soviet Legal History* (Oxford: Oxford University Press, 1992) p. 91.

<sup>161</sup> *Instruktsiia iuridicheskomu otdelu*, undated, top secret document in the B. I. Nicolaevsky Collection, Hoover Institution, Stanford cited in Leggett, *The Cheka: Lenin's Political Police*, p. 115

<sup>162</sup> Angelica Balabanoff, *Impressions of Lenin*, trans., Isotta Cesari (Ann Arbor: University of Michigan Press, 1964) p. 149

<sup>163</sup> His theory is explained in full in I.N. Steinberg, "Five Types of Russian Revolutionists" in *In the Workshop of the Revolution* (New York: Rinehart, 1953) pp. 195-217.

<sup>164</sup> *Ibid.*, p. 201

<sup>165</sup> Lapenna, "Lenin, Law and Legality", p. 254

to maintain socialism.<sup>166</sup> Regardless of the reasoning, the use of terror adversely affected the population.<sup>167</sup> The historian Roy Medvedev writes:

In general, one could say without great exaggeration that by the early summer of 1918 the Bolsheviks had lost much of the confidence they earlier won among the peasants...artisans...and even a section of the industrial workers.<sup>168</sup>

In February of 1918 alone there were 118 peasant uprisings as well as severe worker disaffection.<sup>169</sup>

The use of terror and extra-judicial agencies continued into the N.E.P. period (and beyond).<sup>170</sup> Lenin complained in a letter to Commissariat of Justice, Kurskii (February 20, 1922) that there was no recognition of the militant role to be played by the Commissariat of Justice. He instructed Kurskii that the Commissariat of Justice must play a more militant role in repressing exploiters of N.E.P. and other political enemies. He exhorted Kurskii to use whatever means necessary, including execution, to maintain strict central control of the economic and political apparatus.<sup>171</sup> "*Sud dolzhen ne ustranit' terror—*"<sup>172</sup> Lenin writes, "*...a obosnovat' i uzakomit' ego prinsipial'no...*"<sup>173</sup>

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<sup>166</sup> Interestingly, during the Civil War many Mensheviks, SRs and anarchists fought on the side of the Bolsheviks despite the fact that opposition parties were outlawed and many members were already in prison. There were also peasant and worker uprisings during this time. Depending on the nature of the disturbance, various parties would adopt various tactics. When it came to White collaboration, however, most parties would support the Reds. On the Mensheviks and the Social-Revolutionaries, see Brovkin, *The Mensheviks After October*, especially pp. 256-293. For support of Anarchists against the Whites see L. Trotsky, *Stalinism and Bolshevism in Essential Works of Socialism*, ed., Irving Howe (New Haven: Yale University Press, 1976) p. 368 and Leggett, *The Cheka: Lenin's Political Police*, pp. 309-311.

<sup>167</sup> Ulam, *Lenin and the Bolsheviks*, p. 421

<sup>168</sup> Medvedev, *The October Revolution*, p. 150

<sup>169</sup> Tony Cliff, *Lenin* (4 volumes) (London: Pluto Press, 1975-1979) vol. 4, p. 130.

<sup>170</sup> By January, 1922 the Cheka had disbanded and was replaced by a new organisation, the G.P.U. (*gosudarstvennoe politicheskoe upravlenie*—State Political Administration) was created (January of 1922). Initially the powers of the G.P.U. were restricted, but these restrictions were short-lived. By August, 1922, the G.P.U., like the Cheka, was again equipped with extra-judicial power. (Leggett, *The Cheka: Lenin's Political Police*, pp. 346-347)

<sup>171</sup> Lenin, *O Zadachakh Narkomiusta v Usloviakh Novoi Ekonomicheskoi Politiki, Pis'mo D.I. Kurskomu in Polnoe Sobranie Sochinenii*, tom 44, pp. 396-7 [not found in English translation]

<sup>172</sup> The courts must not eliminate terror—

<sup>173</sup> ...but substantiate it and legalise it in principle. Lenin, *Pis'mo D. I. Kurskomu* (17 May, 1922) in *Polnoe Sobranie Sochinenii* (1975), tom 45, p. 190 [Letter to D.I. Kurskii in *Collected Works*, vol. 33, p. 358]

From these descriptions, it can be surmised that the government was, in fact, “above” and “external” to the population and used physical violence to rule the country. Whilst the People’s Courts, especially in the early period, were not directly involved in systematic terror, an atmosphere of fear prevailed. Decisions emanating from the People’s Courts had the enforceability of the Commissariat of Justice under the Bolshevik government. A clear power structure existed, and one that used “terror” as an element of control—an element that was present through much of Soviet history.

### **Social vs political power**

As has become evident throughout this discussion, whatever the aims of the Bolsheviks had been, by the time of N.E.P. development toward direct control of the society by the populace was not occurring.

The People’s Courts were a fascinating experiment that was passed over by many legal historians due to the fact that it seemed Bolshevik Russia was lawless. Much of Western outrage (e.g. Richard Pipes, *Legalised Lawlessness*) was due to the fact that there was no “due process” of law nor was the common legal commandment of *nullum crimen, nulla poena, sine lege*<sup>174</sup> in effect. It was believed that common sense (i.e. “socialist consciousness”) would determine most solutions to everyday problems, and that eventually there would be no need for imprisonment or monetary fines. It was thought that through participative management of society, a developed sense of cohesion and cooperation would develop and conflict would not take the form of individual rights and obligations, but rather a social form of conflict would evolve; a form that required “solution” rather than “punishment” as a result of a disruptive situation. Lenin emphasised that progress towards social power would come about from the development of “socialist consciousness”.

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<sup>174</sup> No crime, no punishment without law.

Increasingly, however, the party defined "socialist consciousness", as opposed to the development coming from the experience of mass participation itself. By placing the initiative of legal workers under the supervision of the state (and in the final analysis the party), the prime motive for a participative legal system was removed: that is, citizens did not have the power to implement lessons learned through direct participation. The situation directly reflects relations that were present in production. The workers did not have direct control over production. If the responsibility for production is removed from workers, the prerequisite for the development of social power is missing.

Also, the existence of "extra-judicial" bodies was detrimental to the operation of the People's Courts. It was difficult for the populace to feel in charge of justice when a member of the Cheka could shoot them at will.

Gradually, the expansion of centralisation allowed control over the decisions of the soviets, and via the soviets over the decisions of the People's Courts. The soviets became alienated from the people, which by the end of the Civil War and perhaps before, were now seen as organs of Bolshevik control rather than participative institutions.<sup>175</sup>

The notion of a development towards social power was undermined by the growing lack of economic and social control by the populace, the effects of terror and the political structure of a state that procured a programme of strict party control, including the use of violence over its own workers.<sup>176</sup>

### **Theoretical implications**

Despite the radical restructuring of the courts and the theoretical aims behind the People's Courts, they remained firmly institutions of law in the Marxist sense. The theory proposed by Marx, Engels and Lenin suggests that because capitalist

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<sup>175</sup> "The party committee began to emerge as the dominant local authority after the Civil War, with the soviet falling into a secondary role..." Fitzpatrick, *The Russian Revolution*, p. 95

<sup>176</sup> Ulam, *Lenin and the Bolsheviks*, p. 215

elements of production were still present in the economic structure, so would capitalist legal elements still be present in the realm of law. Such elements are readily observable in the People's Courts: the courts still produced decisions through the evaluation of an individual's rights and obligations (however these rights and obligations may have been redefined), punishment was still a factor, political rather than social power remained and coercion was still a component in the enforcement of these decisions. The court structure itself progressed towards the structure of capitalist courts. This progress was marked through increased prescribed structure of personnel, specialisation of those serving in the courts, more stringent control over the decisions of judgement, consistency of sentencing, and finally full codification of the law.

The theoretical principles so far outlined may *suggest* why the People's Courts were not institutions of regulation. These principles, however, are not necessarily *proved* by the example of these courts. Whilst one explanation for the fact that the courts still resembled capitalist courts is the presence of capitalist exchange relations, other explanations might exist. For instance, it could be suggested that evaluating rights and responsibilities when conflict occurs *is* the function of law *in any society*. In order to evaluate such a claim the economic link to law must be discussed more fully to understand exactly *how* a transformation in economics would effect the legal institution. Unfortunately, the People's Courts never operated under the circumstances that would allow them to progress towards regulation. Thus the answer to this question must be sought theoretically.

Once the economic nature of the law is more fully explained, other questions of import can be addressed. As was evident in the analysis of the People's Courts, the question of direct control was of great import. Without it, theoretically, institutions will remain political and social power will not develop. The theoretical explanation of social authority is fairly clear—that no one will have power over another. Its ramifications, however, are less clear. If no one is to have power, will

the decisions of arbitration and administrative institutions be enforceable? If they are not, then what is the exact purpose of regulatory institutions?

Marx and Engels indicate that the element of the necessity of social cohesion created by the production system will cause people to cooperate. Given that Soviet Russia did not have communist production relations, it is difficult to assess whether this would really be the case. Lenin emphasised that the skills and necessary behaviour required to run a communist society would be acquired through direct participation in building one. Once this "necessary behaviour" was learned, people would follow rules from "habit" and coercion would be unnecessary. Because of the role of force both within the operation of the courts and outside of it, and the development towards central rather than participative control such a claim is also difficult to assess. If coercion is to have no role in communist society, further theoretical exploration of the notion of obligation is demanded.

Once these elements are more fully explored, perhaps a clearer picture of what regulation entails, and what is exactly meant by conflict resolution in a communist society will emerge.

### **A note on the People's Courts and the transition period**

The People's Courts provide a valuable example in evaluating the political strategy of the Bolsheviki during the early part of the revolution. They also provide an opportunity to discuss the circumstances of Russian society at the time, and the ramifications of the various elements that played a part in the direction Soviet Russia was to take. Fascinating as these opportunities may be, this scope of discussion is beyond the purpose of this thesis.

It is important to note, however, that the rift in the field of "socialist law" discussed in the Introduction came about as a result of Russia's socialist experiment. While the courts did resemble their capitalist counterparts to some degree, there were also significant differences. The courts, at first, rejected any notion of

specialisation; rights and obligations were redefined along proletarian lines; the courts were defined by Lenin as political institutions which should carry out class warfare; and separation of powers was not a theoretical concern.

Given these differences, much of the literature on "socialist law" focuses on the development of these institutions throughout Soviet history and has grown to include other "socialist" nations (most notably China<sup>177</sup>). Thus the study of "socialist law" has oft assumed the meaning of examination of institutions in various "socialist" countries and discussions have focused both on a comparative level (the differences between "socialist" and "Western" legal institutions) and on a theoretical level, which has mostly involved a discussion of the state's justification of these institutions. While this type of study of "socialist law" is extremely valuable, it does not address the question of regulation—what is meant by it and how it might theoretically work. Such discussions are also notoriously absent in what was referred to in the Introduction as the branch of scholars that is concerned primarily with the theory presented by Marx and Engels and which usually disassociates the Soviet experience from this paradigm of study. Interestingly, the example of the People's Courts also provides material for discussing exactly *why* the Soviet experiment cannot be considered a "socialist experiment" in the Marxist sense.<sup>178</sup> This task, however tempting, is also beyond the focus of this thesis.

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<sup>177</sup> E.g.: Victor Li's *Law Without Lawyers* (Boulder, CO: Westview Press, 1978); *Justice and Politics in People's China: Legal Order or Continuing Revolution* (New York: Academic Press, 1982) by James Brady; and Phillip Chen's *Law and Justice* (New York: Dunellen Publishing, 1978).

<sup>178</sup> Lenin used Marx to justify his use of terror; a justification that is unacceptable to some leftist scholars. Robert Payne writes "He called himself a Marxist, but in fact he hammered and bent Marx to his own will, using Marx whenever it was necessary and jettisoning him whenever it served his purpose. He was closer to the medieval autocrats than to Marx." *The Life and Death of Lenin*. A less harsh, though similar evaluation can be found in Angelica Balabanoff's book *Impressions of Lenin*. (She knew Lenin personally and left Soviet Russia because of the terror tactics.)

There is material for both the democratic and violence-oriented interpretation of Marx's dictatorship of the proletariat. Saul Padover writes: "Both the democratic socialists...and the totalitarian communists have interpreted Marx to suit their own purposes...Such varied interpretations have been made possible by Marx's own ambiguities, exaggerations, imprecisions, and lacunae." in Marx, *On Revolution*, trans., Saul Padover (New York: McGraw-Hill Book, 1971) p. xxix.

Marx and Engels did proclaim that the bourgeois class would not give up power without a struggle, hence the need for violence. [Marx and Engels, *The Manifesto of the Communist Party* in

Whilst the example of the People's Courts provides ample research material in areas that are relatively unexplored, the primary use of them in this thesis is to draw attention to theoretical elements that need further attention if the theory of communist regulation is to be taken seriously. As mentioned in the Introduction,

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*Marx and Engels Collected Works* (Moscow) vol. 6, p. 519] Marx also indicated that perhaps in a very developed country such as America or England, the transformation to socialism could happen peacefully. [Marx, *The Possibility of Non-Violent Revolution* in *The Marx and Engels Reader*, ed., Robert Tucker (New York: W. W. Norton, 1978) p. 523] It is clear, however, that Marx considered a *vast majority* of the population would be directly involved in a socialist revolution: "...it [social revolution] is possible only where the industrial proletariat, together with capitalist production, occupies at least a substantial place in the mass of the people." in Marx, *After the Revolution* in *The Marx and Engels Reader*, p. 544.

He also explicitly warns against the proletariat losing power to its own leadership, hence his recommendations for complete universal suffrage and the power of recall. Ivo Lapenna makes a strong argument against Lenin's use of Marx in this respect in "Marxism and the Soviet Constitutions" in *Conflict Studies* No., 106 (London: The Institute for the Study of Conflict, 1979) especially, pp. 2-6. He writes in "Lenin, Law and Legality", "But what in fact does 'dictatorship of the proletariat' signify? In the theory of Marx and Engels, it certainly does not mean the dictatorship of one man, nor of a small organised group of persons, nor has it all the meaning which is usually given to the word 'dictatorship'. According to Marxism, 'dictatorship of the proletariat' is not the reverse of 'democracy', but the reverse of 'dictatorship of the bourgeoisie'." He goes on to say, "For Lenin, 'dictatorship', in fact, means direct violence whenever necessary." in *Lenin The Man, the Theorist, the Leader*, p. 242 and 243 respectively. Also interesting in this collection is J.C. Rees's "Lenin and Marxism", pp. 87-105 which addresses the Blanquist accusation. See also Bertell Ollman, "Marx's Vision of Communism: A Reconstruction", *Critique* No. 8 (Summer, 1977) p. 15.

socialist legal literature—either involving the study of socialist nations or the theory of Marx and Engels—has been diverted from such an exploration.

The theoretical questions emerging from the experiment of the People's Courts revolve around: (1) the *exact* nature of the legal-economic relationship; (2) a clearer definition of social vs political organisation; (3) and a more thorough theoretical explanation of a process of "conflict resolution" not based on rights and obligations and lacking coercion as an enforcement mechanism. Since the courts did not progress in a society that was moving towards communism and regulation, the path of inquiry leads away from historical analysis and returns to theoretical hypothesis.

## CHAPTER THREE—THE THEORISTS

### INTRODUCTION

Although the first works of jurisprudence appeared during a time period that was characterised as a retreat to limited capitalism (N.E.P.), they were still written on the theoretical assumption that law would eventually “wither away”. This particular period was short-lived (1921-1927),<sup>1</sup> but produced works that greatly contributed to the development of a theory of communist regulation.

The 1920s was a comparatively open and creative period for society under the Bolshevik regime. Despite the push towards centralisation and the government’s continued use of repressive measures, legal debate was extremely active and frank.<sup>2</sup> At the end of N.E.P. and the beginning of the first Five Year Plan (1928), Stalin consolidated power fully. It is widely recognised that “freedom of debate” after 1928 was severely restricted.<sup>3</sup> The nature of Soviet scholarship under Stalin was transformed; less emphasis was placed on individual works and an atmosphere of “collective scholarship” prevailed. Stalin’s influence on academia was pervasive. In the words of Robert Sharlet:

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... Last, but not least, the language and vocabulary in the 1920’s 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 any 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.<sup>4</sup>

It also became evident at this time that the “withering away” thesis was contradictory to Stalin’s political programme. Legal theorists assumed the transition

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<sup>1</sup> Some historians place this date at 1937. See the Introduction, “The Theorists”.

<sup>2</sup> Eugene Huskey, “From Legal Nihilism to *Pravovoe Gosudarstvo*” in *Toward the “Rule of Law” in Russia?* ed., Donald Barry (New York: M.E. Sharpe, 1992) pp. 26-27 and M. Jaworskyj, Introduction to “Intellectualism in the 20’s” in *Soviet Political Thought*, ed. and trans., M. Jaworskyj (Maryland: Johns Hopkins Press, 1967) p. 51

<sup>3</sup> Michael Villey, “The Philosophy of Law in the Communist Worlds” in *Marxism, Communism and Western Society*, ed., C.D. Kerning (New York: Herder and Herder, 1973) vol. 5, p. 144; and also M. Jaworskyj, Introduction to “Stalinist Authoritarianism” in *Soviet Political Thought*, pp. 277-278.

<sup>4</sup> E.B. Pashukanis, *Pashukanis: Selected Writings on Marxism and Law, Selected Writings on Marxism and Law* by Piers Beirne, et al. (London: Academic Press, 1980) p. 274

period was to be one of constant progressive growth towards a decrease of the role of the state and of law. This assertion stood in direct contradiction to Stalin's conception of the growing role of the state and its centralisation. The retreat from N.E.P. and the embarkation on the first Five Year Plan marked a significant shift in the economy towards massive centralisation. This revolution was to be a "revolution from above", one that would place economic initiative in the hands of the state (the Communist Party). The development of this policy did not mesh well with claims that the state and concomitantly law would assume a decreasing position in socialist society. Stalin's re-definition of socialism led to the need for a centralised state and legal apparatus. While the re-definition of law did not officially occur until 1938 with the publication of Vyshinskii's *The Law of the Soviet State*, the "withering away" thesis came under attack even before the initiation of the first Five Year Plan (1928).<sup>5</sup>

As 1921 witnessed the publication of the first work on jurisprudence and 1928 marked the start of a major theoretical shift away from the "withering away" thesis<sup>6</sup> and a move towards "collective scholarship", the period between 1921-1927 is the most fruitful to survey for the purpose of theoretical exploration. This chapter examines the major works of jurisprudence from 1921-1927 with the aim of further delineating a theoretical position with regard to regulation in communism. Consequently, specific questions regarding law during the transition period are not

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<sup>5</sup> See Tay and Kamenka, "Beyond the French Revolution: Communist Socialism and the Concept of Law", pp. 125-126 note 15 and Hazard, Introduction to *Soviet Legal Philosophy*, trans., Hugh Babb (Cambridge, MA: Harvard University Press, 1951) p. xix. For a short history of Soviet legal theory see Huskey, "From Legal Nihilism to *Pravovoe Gosudarstvo*" in *Toward the "Rule of Law" in Russia?* pp. 23-42.

Pashukanis began to address some initial criticism in his piece, *The Marxist Theory of Law and the Construction of Socialism* which was published in 1927.

<sup>6</sup> The question of whether subsequent Soviet work in legal theory represented a "reversion to bourgeois ideology", however interesting, is quite beyond the scope of this thesis. It is clear that most legal theory post-1928 focuses on the role of the State and law during the transition period. Many scholars that examine Soviet law make the claim that it is the same as bourgeois law and any proposed differences are simply pure rhetoric. [Most notably Harold J. Berman, *Justice in the U.S.S.R.: An Interpretation of Soviet Law* (Cambridge: Harvard University Press, 1963)]

discussed, nor are questions regarding the development of Soviet legal theory.<sup>7</sup> The purpose of this chapter is not to critique the works presented,<sup>8</sup> but rather examine them for further contributions to a theory of regulation.

Undoubtedly, E. B. Pashukanis<sup>9</sup> is the most influential post-Marx legal theoretician and his work *The Theory of Law and Marxism* (1924) is still regarded by many as *the* text on Marxist legal theory. The first Soviet work on jurisprudence (*A General Doctrine of Law*) however, was produced by P. I. Stuchka<sup>10</sup> in 1921.

<sup>7</sup> As mentioned in the introduction, this thesis will examine no more Soviet theorists in depth due to the exclusive focus of legal theorists from Stalin and beyond on law in the transition period. Works dedicated primarily to regulation in a communist society (as opposed to the transition period) were not produced (though they may have been written) during the Soviet period. Although the claim that law would wither away was always maintained, there was a marked decrease in any works analysing law in and of itself. It can also be argued that the Soviet Union never fully recovered from the academic stultification of Stalinism. Even after Khrushchev's Secret Speech and his attempts to "open" Soviet society, it is doubtful that academics were free to produce theoretical works that would fundamentally question the authority of the state.

<sup>8</sup> The critical literature is noted in the footnotes.

<sup>9</sup> Pashukanis served as a People's Judge in Moscow, was a member of the presidium of the Moscow Soviet of People's Judges and the Appeals Tribunal attached to the All-Union Central Executive Committee of the Party. He worked in the Commissariat of Justice from 1920-1924. He then transferred to the Communist Academy and became vice-president of the Academy in 1927. He also served as director of the Institute of Soviet Construction and Law. In 1936, he was appointed Deputy Commissar of Justice of the U.S.S.R. Pashukanis disappeared in 1937. His fate was unknown for some time, but it has now been established that he was shot shortly after his arrest. [Biographical information taken from Hazard, p. xxv and Kamenka and Tay, pp. 72-73 and Chris Arthur, Introduction to E. Pashukanis, *Law and Marxism*, trans., Barbara Einhorn (London: Ink Links, 1978) p. 10 and Robert Sharlet, "Stalinism and Soviet Legal Culture" in *Stalinism*, ed., Robert Tucker (New York: W.W. Norton, 1977) p. 169].

Pashukanis's most influential work was *The General Theory of Law and Marxism* (1924). Other theoretical works include *The Marxist Theory of Law and the Construction of Socialism* (1927), *Economics and Legal Regulation* (1929), *The Marxist Theory of State and Law* (1931), and *State and Law Under Socialism* (1936). Several English translations of Pashukanis's works are quite good, notably Piers Beirne, et al., *Pashukanis: Selected Writings on Marxism and Law* and *Law and Marxism*, trans., Barbara Einhorn. See also in Russian *Uchenie o gosudarstve i prave* (Moscow, 1932) and *Izbrannye proizvedeniia po obshchei teorii prava i gosudarstva* (Moscow: Nauka, 1980).

<sup>10</sup> Stuchka was an active revolutionary from the 1880's. He served as Commissar of Justice from March-August, 1918, and then took a leading part in the Latvian Revolt. He also served as Deputy Commissar of Justice, Chairman of the Supreme Court of the R.F.S.F.R. and played an organising role in the legal theory section of the Communist Academy (this institute became the Institution of Soviet Construction and Law of the Communist Academy in 1929, then changed again in 1937 to the Academy of Sciences of the U.S.S.R.). [Biographical information taken from John Hazard, Introduction to *Soviet Legal Philosophy*, trans., Hugh Babb (Cambridge, MA: Harvard University Press, 1951) pp. xxii-xxv and Eugene Kamenka and Alice Ehr-soon Tay, "The Life and Afterlife of a Bolshevik Jurist", *Problems of Communism*, Vol. 19, No. 1 (January-February, 1970) p. 73]. His main theoretical works include *A General Doctrine of Law* (1921), *The Marxist Concept of Law* (1922), *Notes on the Class Theory of Law* (1922), *Culture and Law* (1922), *In Defence of the Revolutionary Marxist Concept of Class Law* (1923), *Materialist or Idealist Concept of Law?* (1923), *Legal Relationships and The State* (1925-1927), *The State* (1925-1927),

Although the two authors often criticised one another, their basic analyses were similar in many respects.<sup>11</sup> Although there were other notable writers during N.E.P. (such as Krylenko and Kurskii), it was Stuchka, and more so Pashukanis, who laid the foundation for a socialist school of legal theory. Stuchka's fundamental role in the early development of the court system and his continued work on the practical tasks of the early Soviet legal system placed him in an obvious position to generate a theory of law. Although his writings possess the insight of the lessons learned from practical problem solving, it was Pashukanis who was to become the authority in the theoretical realm. Pashukanis placed more emphasis on a logically cohesive theory than Stuchka; his thoughts on the matter bore the training of a philosopher rather than a lawyer. Pashukanis's *The Theory of Law and Marxism* (1924)<sup>12</sup> became the essential juridic work during his period of influence.<sup>13</sup>

Another theorist of the time, M.A. Reisner,<sup>14</sup> also deserves examination. His emphasis on legal consciousness and the intuitive nature of proletarian law was a clear break from the thoughts of Stuchka and Pashukanis.<sup>15</sup> Although his work never received wide recognition and was criticised vehemently by Stuchka,

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and *Revolutionary Legal Perspectives* (1929). The best collected English translation of Stuchka's works is Piers Beirne, Peter Maggs and Robert Sharlet's *Selected Writings of Soviet Law and Marxism* (New York: M. E. Sharpe, 1988).

- <sup>11</sup> And in fact their similarities became even more evident after Pashukanis's replacement by Vyshinskii (1937) as the cornerstone of Soviet legal thought. For a brief commentary on their differences see Robert Sharlet and Piers Beirne, "Pashukanis and Socialist Legality" in *Marxism and Law*, eds., Piers Beirne and Richard Quinney (New York: John Wiley and Sons, 1982) pp. 318-320.
- <sup>12</sup> Ronnie Warrington points out that the *General Theory* "always remained a preliminary draft" due to the turmoil of the time; but that "the limitations of Pashukanis's work do not vitiate his whole enterprise." "Pashukanis and the Commodity Form Theory" in *Legality, Ideology and The State*, ed., David Sugarman (London: Academic Press, 1983) p. 44. [This article is also found in *International Journal of The Sociology of Law*, Vol. 9, No. 1 (February, 1981) pp. 1-22.]
- <sup>13</sup> Although Pashukanis's sphere of influence lasted until 1937, he first came under attack in the late 20's and began to recant some of his theories as early as 1930.
- <sup>14</sup> Reisner served as Chief of the Section for Legislative Drafting under the Commissariat of Justice until the Civil War. His work examined in this thesis, *Law, Our Law, Foreign Law, General Law*, was published in 1925. He suffered under the label of idealist for his attachment to the theory of the known idealist Petrazhitskii most evident in his work *The Theory of Petrazhitskii: Marxism and Social Ideology* (published in 1908). It is for this label that he was not taken as seriously as some of his comrades. [Biographical information taken from Hazard, pp. xxv-xxvi]
- <sup>15</sup> Other theorists in the intuitive camp were Ia. Berman, M. Rezunov and A. Popov, to name the more familiar ones.

Pashukanis and Vyshinskii, he nevertheless posed a plausible variant of a Marxist analysis of law.

### STUCHKA<sup>16</sup>

Stuchka's analysis law begins with Marxist class theory.<sup>17</sup> In capitalism, classes are locked in a struggle of interests. The interests of the working class are in direct conflict with the interests of the ruling, bourgeois class. Stuchka uses the example of the profiteer who wishes to lower working wages contrasted to workers who desire an increase in wages.<sup>18</sup> In more general terms, it is in the interest of the bourgeois class to control production for the procurement of profit, where as the interest of the working class lies in control over production to procure control over living conditions. These interests, however, are not simply determined by the free will of every individual, but conditioned by the mode of production. It is here that Marx made a decisive radical contribution towards sociology. As Marx states himself, many bourgeois historians recognised society in terms of class interests.<sup>19</sup> It was distinctively Marxist, however, to root these interests in the mode of production *itself*. The relationship between will (class interest) and the concrete circumstances (mode of production) is dialectical; that is, will can effectuate changes in the mode of production, but only within the boundaries of the particular historical periods. Capitalist production can change only so much. Once these options are eliminated, revolution must occur for further development. Marx also established that the "conflict of interest" could only be resolved in socialism because of the contradictory position of the bourgeoisie, who need the working class for profit, yet at the same

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<sup>16</sup> For a brief summary and background of Stuchka's work, see Robert Sharlet, *et al.*, "P.I. Stuchka and Soviet Law", *Revolution and Law*, ed., Piers Beirne (New York: M.E. Sharpe, 1990) pp. 45-60. See also his life and work (in Latvian) P. Dauge, *P. Stucka Dzive un Darbs* (Riga: Latvijas valsts izdevnieciba, 1958).

<sup>17</sup> Stuchka's emphasis on class can be found throughout his works. The clearest view of his general concepts of class are set out in *A General Doctrine of Law* (Moscow: State Publishing House, 1921). English translation in *Soviet Legal Philosophy*, pp. 42-52.

<sup>18</sup> Stuchka, *A General Doctrine of Law* (1921) in *Soviet Legal Philosophy*, p. 45

<sup>19</sup> Marx, K., (specific work uncited) quoted by Stuchka, *Ibid.*, p. 42

time seeks to destroy it. For this reason resolution of class interests in capitalism was not possible.<sup>20</sup> Law in the class theory is a tool to protect the dominant class interest via state coercion. Specific laws are codified in statutes.

Within the Marxist class theory, Stuchka framed his discussion of law in three sets of terms: (1) form and content;<sup>21</sup> (2) subjective and objective aspects;<sup>22</sup> and (3) reality and consciousness.<sup>23</sup> All of these terminological approaches revolve around the notion of base and superstructure.<sup>24</sup> Stuchka describes the superstructure as a mirror reflecting the actual relations occurring in society. "Real" relations are those which are dictated by the process of production (referred to as the base). For instance, when a borrower incurs a debt s/he is obligated to repay the debt, *not necessarily* due to the presence of a statute codifying that obligation (although a statute regulating this exchange is invariably present), but rather because of the nature of the situation itself. In a society organised along capitalist lines, value and labour are measured in things (commodities) and capital (profit) is the key

<sup>20</sup> The class theory is highly debatable, as is my quick summary of it. However, it is not our duty here to analyse its merits or demerits, but rather to *accept* it as a starting point for Stuchka's theory of law.

<sup>21</sup> The form and content analysis is present through most of Stuchka's theoretical works, the most direct explicatory passage is found in Stuchka, *Materialist or Idealist Concept of Law?* (1923) in *Selected Writings of Soviet Law and Marxism*, pp. 72-73. In original, "Materialisticheskoe ili idealisticheskoe ponimanie prava," *Pod znamenem Marksizma*, 1923, No. 1, 160-178 (entire work).

<sup>22</sup> References to the objective/subjective arguments are found in Stuchka, *The Marxist Concept of Law* (1922) in *Selected Writings of Soviet Law and Marxism*, pp. 27-29, original "Marksistkoe ponimanie prava," *Kommunisticheskaiia revoliutsiia*, 1922, No. 13-14; *Notes on the Class Theory of Law* (1922) in *Selected Writings of Soviet Law and Marxism*, pp. 45-46, original "Zametki o klassovoi teorii prava," *Sovietskoe pravo*, 1922, No. 3, pp. 3-18 (in total); *The State* (1925-27) in *Selected Writings of Soviet Law and Marxism*, pp. 144-145, 151-152 and *passim*, original "Gosudarstvo," *Entsiklopediia gosudarstva i prava* (Moscow, 3 vols., 1925-1927) vol. 1, p. 655. A general discussion is found in Stuchka, *A General Doctrine of Law* (1921) in *Soviet Legal Philosophy*, pp. 22-24, 29-34, esp. p. 31.

<sup>23</sup> The clearest discussion of the description of consciousness as opposed to concrete circumstances and how these are related to form and content can be found in Stuchka's *Notes on the Class Theory of Law* (1922) in *Selected Writings of Soviet Law and Marxism*, pp. 48-52.

<sup>24</sup> The base/superstructure analysis appears virtually in all of Stuchka's theoretical works, the most concentrated passages can be found in *Notes on the Class Theory of Law* (1922) in *Selected Writings of Soviet Law and Marxism*, pp. 47-50, *In Defense of the Revolutionary Marxist Concept of Class Law* (1923) in *Selected Writings of Soviet Law and Marxism*, pp. 81-88, in original "V zashchitu revoliutsionno-marksistogo poniatiiia klassovogo prava," *Vestnik sotsialisticheskoi akademii*, 3 (1923) pp. 159-169 (in total), and *Law* (1925-27) in *Selected Writings of Soviet Law and Marxism*, pp. 149-50, in original "Pravo," *Entsiklopediia gosudarstvo i prava*, vol. 3, pp. 415-30 (in total).

motivator in production organisation. This situation of the obligation to repay debts *arises* out of what is prioritised in the economic sphere. Stuchka cites Marx at length on this point in his *Materialist or Idealist Concept of Law*. It is useful to repeat the quote here:

In order that these objects may enter into relation with each other as commodities, their guardians must place themselves in relation 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. This juridical relation, which thus expresses itself in a contract, *whether such a contract be part of a developed legal system or not, is a relation between two wills, and is but the reflex of the real economic relation between the two* [original emphasis]. It is this economic relation that determines the subject matter comprised in each such juridical act.<sup>25</sup>

The reflection (superstructure) of these relations is embodied in "law" (statute).

Stuchka warns, however, that the base/superstructure relationship is not strictly hierarchical, but dialectic. Laws do not *only* rely on the mode of production. Laws can in turn create an active force to regulate and induce changes in economic relations; for instance, laws decreasing working hours. This active force is used to perpetuate the aims of the dominant class.<sup>26</sup> On one hand, there is active will effectuating change through the coercive force of the dominant class (superstructure), on the other this power is limited by the scope of the concrete economic situation (base) which cannot be *completely* altered by sheer will. For example, laws regulating universal public ownership of land *could not* arise in capitalism. This dialectical relationship between base and superstructure is summed up by one of the most famous quotations of Marx: "Men make their own history, but they do not make it just as they please."<sup>27</sup> It must be stressed here that from a

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<sup>25</sup> Marx, K., *Capital* (1867, vol. 1, p. 84) as cited in Stuchka *Materialist or Idealist Concept of Law?* (1923) in *Selected Writings of Soviet Law and Marxism*, p. 72.

<sup>26</sup> A decrease in working hours may seem contrary to capitalist interest. However, it is in the interest of the ruling class to compromise at times to avoid direct confrontation with the working class. In this way, the working class can achieve better circumstances in capitalism, but again only to a certain extent. This line of thinking relates to Marx and Engels's discussion on how political rights are the highest the working class can achieve in capitalism.

<sup>27</sup> Marx, *The Eighteenth Brumaire of Louis Bonaparte* in *The Marx and Engels Reader*, ed., Robert C. Tucker (New York: W. W. Norton, 1978) p. 595

Marxist perspective *will is not completely free*.<sup>28</sup> Any theory of law proceeding from that assumption has a false or abstract basis.

Stuchka's treatment of form and content arises from the base/superstructure model. He explains that a Marxist approach to law assumes the content of law evolves from actual social relations (the base). The form (superstructure) that the expression of these relations takes is the statutes, the will of the dominant class upheld by a coercive state apparatus. He contrasts this approach to the bourgeois one which in effect reverses form and content. Content becomes not actual social relations but (1) statutes themselves (formalist); (2) an immutable *a priori* principle (natural law, whether based on reason, God or the inalienable rights of man); or (3) the totality of norms (expressed in statute) of a given society (positivist, normativist).

The sin bourgeois theorists commit is that, by focusing only on the form of law (totality of norms, statute), the actual content of law, social relations, is ignored. Whilst equality may prevail in form, for instance, in the notion of contract (between two mutually consenting equal wills), in actual relations (content) people are not equal. "Mutual consent" is impossible, for example, when a manager contracts with a worker, for the economic power basis of these two parties is completely unequal. The only way this notion of mutual consent could take place is in completely *abstract* terms (which is what occurs when primacy is placed on form rather than content). For bourgeois law, "economic inequality is completely irrelevant."<sup>29</sup>

The subjective and objective approach follows much the same path as the form and content argument. The objective element is not, as bourgeois theory states, the "due process of law", and the subjective element the particular case to which this is applied, but rather the reverse. The particular cases are the objective content (they are the relations taking place), whereas the legal system (the will of the

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<sup>28</sup> A good discussion of this appears in Stuchka's *The Marxist Concept of Law in Selected Writings of Soviet Law and Marxism*, pp. 30-31.

<sup>29</sup> Stuchka, *Legal Relationship* (1925-27) in *Selected Writings of Soviet Law and Marxism*, p. 155, original "Pravootnoshenie," *Entsiklopediia gosudarstva i prava*, vol. 3, pp. 440-446 (in total).

dominant class codified in statutes and enforced by coercion) is the subjective element. Stuchka makes the point by citing Marx: “what is the use of an unprejudiced judicial decision if the law is prejudiced?”<sup>30</sup> (The law is prejudice because, as defined in the class theory, the legal apparatus protects the over-all interests of the ruling class.)

Stuchka speaks of the bourgeois perception of a totality of norms (reflected in a given set of statutes) as being the objective *definition* of relations; hence, actual relations adhere to them. In reality, norms arise from the economic situation of commodity fetishism; that is people are equal only in pure abstraction (due to the state of alienation).

The reality/consciousness arguments use similar logic. Reality (content) is what is actual relations, law is the consciousness of what is *perceived* as actual relations (form). Bourgeois theories take the superstructure, the consciousness, as the reality and virtually ignore the economic base. While Stuchka acknowledges that bourgeois theorists from the sociological school had at least recognised the role of economics and interests,<sup>31</sup> he asserts there are still major differences between a sociological school of law and a Marxist one. The former fails to recognise conflicting interests as class interests, and that these interests are irreconcilable (in the capitalist environment). Writers from this genre also fail to recognise that interests are not completely products of free will but are determined in the last instant by an individual’s position in the classes engaged in struggle within the concrete boundaries of the economic system.

Legal consciousness does not always match real social situations. In bourgeois theory, “norms” become part of the abstract realm, for they have no identifiable basis in the actual social relations in a class society. The failings of a bourgeois legal system lies in the contradiction between legal ideology (consciousness) and actual

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<sup>30</sup> Marx, uncited, as found in Stuchka, *The Marxist Concept of Law in Selected Writings of Soviet Law and Marxism*, p. 25

<sup>31</sup> Notably Jhering (Ihering), who states that society is a conglomerate of conflicting economic interests, and law’s role is to resolve or at least stabilise those interests.

relations. For instance, the idea of "mutual contract" ignores the innate difference in the economic power structure between labourer and employer. Similarly, the concept of "equality before the law" neglects the social fact that the law protects property owners, and that most citizens do not possess property. "Due process" then becomes a formula for equality which fails to consider the inherent unequal positions of participants in the system.<sup>32</sup>

In summary, Stuchka defines law as an order of social relations (content, objective, real) in which the determinate element is the interest of the ruling class.<sup>33</sup> The form (subjective, consciousness) that this takes is that of sanctioned norms expressed in statutes (by the coercive state) which preserve and regulate these class relations.

From this framework, law in the transition period retains basic elements of bourgeois law—the society remains a class society, law still reflects the will of the dominant class, and this will is enforced by a coercive state power. The transition period law differs in two major ways, however: (1) its social base (content) reflects social relations created by principles of common property (mutuality) rather than private property (individuality); and (2) it protects the proletarian class interest (to produce a classless society) rather than bourgeois class interest (to procure profit). As a result, there are changes in the specific form that these relationships take (statute).

It is important to remember that when Stuchka discusses class will—in the case of the transition period, the proletarian goal of a classless society—he is referring to a will that is conditioned by economic circumstances. It is accepted as fact that production is a social process (therefore a theory based on individuality would not work), and that common ownership is the only non-contradictory production form. The goal of the working class to create a classless society is not chosen by the working class, it arises out of historical necessity. What *is* in the realm of class will is to further this process (socialism) or impede it (a retreat to

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<sup>32</sup> Marx makes these similar arguments in *On The Jewish Question* (see Chapter one).

<sup>33</sup> Stuchka, *The Marxist Concept of Law* in *Selected Writings of Soviet Law and Marxism*, p. 22

capitalism). Because classes still exist in the transition period, and there is still a coercive state apparatus, there is still law. Statutes, however, will manifest a protection of public ownership rather than private property.

By Stuchka's own definition, law, which relies on coercive protection of class interest, will not exist in communism. The question then becomes paramount: in communist social relations, what form does law take? None in the modern sense of law, for there is no dominant class will that needs to be enforced by the state (indeed there is no state). Stuchka declares:

We may speak of the proletarian law itself only as the *law of the transition period*, of the period of the proletarian dictatorship...Alternatively, we may speak of law in the socialist society [post-transition], *using an entire new meaning of the word* [my emphasis]. With the elimination of the state as an oppressive mechanism in the hands of one class or another, social relations and the social order will be regulated not by coercion, but by the conscious good will of the working people, i.e., of the whole new society.<sup>34</sup>

The paragraph indicates that regulation supersedes law. While Stuchka often refers to the withering away of law, he does not indicate that, with it, all sense of regulation will cease. The "conscious good will of the people" replaces the phenomenon of law. Stuchka hints that law becomes entirely new in meaning. Does this mean that it disappears?

What might help us answer this question is to examine Stuchka's analysis of pre-class society, specifically primitive communism. If a form of law existed in pre-class society, than logically there can be one in post-class society. Stuchka avoids this question:

Law, like the state, its authority and justice, can only have a *class nature* in a class society. The debatable academic question of whether law existed in pre-class society and whether it will exist in post-class society, I leave untouched.<sup>35</sup>

Stuchka emphasises that law assumes his definitional characteristics in *class* society; what of regulation in pre-class society? He does address this question to an extent in *A General Doctrine of Law*. In the section titled "Social Relationships and

<sup>34</sup> Stuchka, *Proletarian Law* (1919) in *Selected Writings of Soviet Law and Marxism*, p. 9, original, "Proletarskoe pravo," *Oktiabr'skii perevorot i diktatura proletariata: Sbornik statei* (Moscow: Gosudarstvennoe izdatel'stvo, 1919) pp. 210-220 (in total).

<sup>35</sup> Stuchka, *Notes on the Class Theory of Law* (1922) in *Selected Writings of Soviet Law and Marxism*, p. 53

the Law", he discusses the fact that the *gentes* (clan unions) possessed no knowledge of private property and lived in primitive communism. He describes this society as not only preserving the individual, but as also preserving the *gens*, the blood kinship. He continues:

In this *gens*-union there is a certain plan of economy—although it be a weakly organized plan—and there is also a division of labor: *but there is no law*...In their mutual relationships, the kinsfolk are guided by *mores* (habits) and by customs.<sup>36</sup>

Stuchka then describes these mores as "only the technical modes which are suggested by experience and instinct."<sup>37</sup> He accuses Reisner of equating custom and law in this type of society:

But to confuse every 'custom' (i.e., that which is usually done) and 'habit' (that which has turned into something familiar) *with law*, as with a concept connected with inequality, is obviously wrong.<sup>38</sup>

Stuchka does cite, however, Professor Akhelis in a footnote which reads: "In the primordial (primitive) stage of development, *law and custom*—(or more accurately "*mores*": *Sitte*) in general coincide."<sup>39</sup> Is this sort of merging of law/custom similar to regulation by "the conscious good will of workers"? While similar, there is an important difference. In Marxist terms the consciousness of people in communism is at a much higher level (through historical development) than that of primitive communism. These "technical modes of experience and instinct" become a far more encompassing experience. Social custom becomes something not blindly followed, but actively developed. Stuchka suggests this when he discusses why one must feel obligated to proletarian law:

...the concessionary laws of the revolutionary government are obligatory both "externally" and "internally" ("not by fear, but by conscience"); from its internal side, it must be based largely on revolutionary legal consciousness (persuasion, and not just coercion).<sup>40</sup>

This development of consciousness will lead to a new culture; culture according to proletarian priorities (rather than bourgeois ones). He states:

<sup>36</sup> Stuchka, *A General Doctrine of Law* (1921) in *Soviet Legal Philosophy*, p. 33

<sup>37</sup> *Ibid.*

<sup>38</sup> Stuchka, *In Defence of the Revolutionary Marxist Concept of Class Law* (1923) in *Selected Writings of Soviet Law and Marxism*, p. 87

<sup>39</sup> Stuchka, *A General Doctrine of Law* in *Soviet Legal Philosophy*, p. 33, note 26.

<sup>40</sup> Stuchka, *Notes on the Class Theory of Law* in *Selected Writings of Soviet Law and Marxism*, p. 54

For us law and culture are not identical concepts. The conquests of culture will survive the transition into the future society (of course, not in 'pure' i.e., in current form), but law will not survive the transition: it must 'wither away'. The culture of the future is a new way of life, new habits, *without any* legal coercion.<sup>41</sup>

The idea of social habit evolves directly from proletarian law. The transition period was expected to progress towards a "definite revolutionary moment when a new class consciously comes forth asserting claim to authority and to its new law, law (entering the consciousness of human beings and becoming second nature thereof) is carried out in actual practice in the vast majority of cases without constraint of any sort."<sup>42</sup>

Proletarian law was to become second nature through the development of consciousness in the masses. As discussed above, in the consciousness/reality model, consciousness is the reflection of social relations. In the socialist revolution, the withering away of bourgeois law was possible because the means of production had been revolutionised. In the broader Marxist picture, the inherent contradictions of social citizens existing as isolated individuals when economic production was actually a social operation, would be corrected in a socialist production method. Due to the actually socialised means of production, social relations would be accurately reflected in law (hence the eventual disappearance of the need for law in statute form and eventually coercion). Consciousness and actual relations would "match" and the need for law would wither away or, more precisely, consciousness and reality would be one. For Stuchka (and others), the first step, socialisation of economic productive production, had occurred. There can, however, exist a "lag-time" between a change in social relations and a change in legal consciousness. He explains:

This transitional period requires a special law of the transition period—partly because this system does not change in one stroke and partly because the old, traditional order continues to exist in consciousness.<sup>43</sup>

<sup>41</sup> Stuchka, *Culture and Law* (1922) in *Selected Writings of Soviet Law and Marxism*, p. 199, in original "Kul'tura i pravo," *Revoliutsiia prava*, No. 2, 1928, pp. 15-20 (in total)

<sup>42</sup> Stuchka, *A General Doctrine of Law in Soviet Legal Philosophy*, p. 53

<sup>43</sup> Stuchka, *The Marxist Concept of Law* (1922) in *Selected Writings of Soviet Law and Marxism*, p. 11

Stuchka, as well as others, assumed that social relations would be simplified once a communally operated mode of production was introduced.<sup>44</sup> This simplification would facilitate change in that many laws would become unnecessary. Bureaucratisation and codification in the transition period were to be reduced to such a degree that the average citizen could participate in the legal system. Simplified relations would allow the direct participation in administrative matters by the broad masses so essential to the development of consciousness.<sup>45</sup> Citizens would learn first hand the needs and demands of a legal order and would respond with innovation. "The proletarian revolution demands creativity. It had to be bold in destructive work and in the law creation role."<sup>46</sup> In 1922, Stuchka suggested that proletarian legal theory itself was only a delayed reaction to the actual situation:

The history of our understanding of law after the October Revolution has shown us that life was more clever than the theorists, and that theory only found *post factum* the correct motivation and formulation of the basic answer to the fact that *all law in class society is class law* in the interest of the ruling class, i.e., the class in power. It follows that in the future we must maintain a proximity between the revolutionary theory of law and the bearer of the revolution, the broad masses.<sup>47</sup>

### Summary

Stuchka presents a basically clear, but nonetheless rather general portrait of regulation in the future society. It would be non-coercive and necessary rules would become habit. This development would occur via direct mass participation in the current transition period, and by party/state-guided education until consciousness (culture) was developed to such a degree where coercion and law became unnecessary.<sup>48</sup> The development of consciousness was to reflect the progress of the socialisation of production means, though perhaps not in exact linear fashion.

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<sup>44</sup> Stuchka mentions the importance of the simplification of law in many works; one of the most condensed discussions is found in *Revolutionary Legal Perspectives* (1929), in *Selected Writings of Soviet Law and Marxism*, pp. 201-205 in original "Revoliutsionno-pravovye perspektivy", *Revoliutsiia prava*, No. 2 (March-April, 1929).

<sup>45</sup> *Ibid.*, p. 203

<sup>46</sup> Stuchka, *The Marxist Concept of Law* in *Selected Writings of Soviet Law and Marxism*, p. 11

<sup>47</sup> Stuchka, *Notes on the Class Theory of Law* in *Selected Writings of Soviet Law and Marxism*, p. 53

<sup>48</sup> Stuchka, *Proletarian Law* in *Selected Writings of Soviet Law and Marxism*, p. 15

Much of Stuchka's material is directly from Marx and involves the transition period far more than regulation in communism. His distinction lies primarily with his development of Marxist class theory into a theory of law, and his focus on law as a system of relations. He was really the first to attempt a coherent Marxist theory of law. These arguments were later to be attacked by Vyshinskii and others (largely due to his disregard for law as an actual original *source* of regulations rather than a protector of economic relations<sup>49</sup>). Pashukanis, however, claims that while Stuchka was correct in focusing on the class basis of law, he failed to explore the legal form far enough.

### PASHUKANIS<sup>50</sup>

By far the most significant work of Pashukanis is his *The General Theory of Law*, which first appeared in 1924.<sup>51</sup> It is a work that has gained much attention in the West, and it had considerable impact on Soviet legal practices and theory during N.E.P. and the first two Five Year Plans.<sup>52</sup> Until the 1930's, law school academics and practising jurists adhered to the thesis laid out in 1924. Pashukanis came under major attack and underwent his first session of "self-criticism" in 1930.<sup>53</sup> Much of Pashukanis's subsequent work was obviously written under political pressure,<sup>54</sup> and it is difficult to establish whether the eventual changes he made to his general

<sup>49</sup> Such interpretation was needed to implement party policy from above.

<sup>50</sup> By far Robert Sharlet has done the most extensive work on Pashukanis. See *Pashukanis and the Commodity Exchange Theory of Law, 1924-1930: A Study in Soviet Marxist Legal Thought*, PhD thesis, Indiana University, 1968; "Pashukanis and the Rise of Soviet Marxist Jurisprudence" in *Soviet Union*, Vol. 1, Part 2 (1974) pp. 103-121 as well as articles mentioned throughout this section.

<sup>51</sup> Subsequent editions appeared in 1926 and 1927 with minor revisions. For a translation of the third edition see *Soviet Legal Philosophy*.

<sup>52</sup> For an assessment of Pashukanis's impact on the development of legal theory in the U.S.S.R. see Robert Sharlet's "Pashukanis and the Withering Away of Law in the U.S.S.R." in *Cultural Revolution in Russia 1928-1931*, ed., Sheila Fitzpatrick (Ontario: Fitzhenry and Whiteside, 1978) pp. 169-188. For his impact on the West see Arthur, pp. 9-31 and Peter Binns, "Law and Marxism" in *Capital and Class*, Issue 10 (Spring, 1980) pp. 100-113.

<sup>53</sup> See Rudolph Schlesinger, "Recent Developments in Soviet Legal Theory" in *The Modern Law Review*, Vol. 4 (December, 1942) p. 25.

<sup>54</sup> Piers Beirne, and Richard Quinney, "Law and Socialist Construction" in *Marxism and Law*, eds., Piers Beirne and Richard Quinney (New York: John Wiley and Sons, 1982) p. 303. See also Steve Redhead, "Marxist Theory, The Rule of Law and Socialism", pp. 338-339 in the same volume.

theory were actual logical reconsiderations or acts of political survival.<sup>55</sup> Accordingly, I rely heavily on *The General Theory* as a representation of the thoughts and theoretical tendencies of Pashukanis. Pashukanis's later works are for the most part not discussed.<sup>56</sup>

### The general theory

For Pashukanis, previous works on a Marxist theory of law produced only "... 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>57</sup> While materialists had correctly embraced a definition of law founded on the struggle of class interests as opposed to abstract ideals of objectivity and equality, he concluded that "many comrades" made the erroneous assumption that they had established a "Marxist theory of law." Pashukanis criticised Stuchka in particular for focusing purely on the "the class content of the historical development of legal regulation in comparison with the logical and dialectical development of the form itself."<sup>58</sup>

<sup>55</sup> Such attempts were unsuccessful as he was executed in 1937. In regards to Pashukanis's rehabilitation see Hazard, "Pashukanis is No Traitor" in *American Journal of International Law*, Vol. 51, No. 2 (April, 1957) pp. 385-388, esp. p. 386.

<sup>56</sup> Any scholar interested in Pashukanis should read his later writings. Taken in context, they provide a clear testimony to the political influence of the Soviet regime during the time. They also address some specific problems of the transition period and form a gateway from the "withering away" thesis to the foundations of later Soviet legal theory. Pashukanis is not only of fundamental use for his more detailed account of the regulative means of the classless society, but also as an example of the effects of Stalinism. Throughout his works both a change in rhetoric and language, and a transformation from academic debate to political unity is evident. Robert Sharlet points out that this forced synthesis can be seen in the trend towards collective scholarship rather than individual theorising. (*Pashukanis: Selected Writings on Marxism and Law*, pp. 273-274)

His notable later works include *The Marxist Theory of Law and the Construction of Socialism* (1927) in *Pashukanis: Selected Writings on Marxism and Law*, pp. 198-199; *Economics and Legal Regulation* (1929) in *Pashukanis: Selected Writings on Marxism and Law*, pp. 237-272, in original "Ekonomika i pravovoe regulirovanie", *Revolutsiia prava* (1929), No. 4, pp. 12-32 and No. 5, pp. 20-37; *The Marxist Theory of State and Law* (1931) in *Pashukanis: Selected Writings on Marxism and Law*, pp. 9-44 in Pashukanis, (ed.), *Uchenie o gosudarstve i prave* (1932), Partiinoe Izd., Moscow; and "State and Law under Socialism" (1936) in *Pashukanis: Selected Writings on Marxism and Law*, pp. 348-361 in original "Gosudarstvo i pravo pri sotsializme", *Sovetskoe gosudarstvo* (1936) No. 3, pp. 3-11.

<sup>57</sup> Pashukanis, *The General Theory of Law and Marxism* in *Selected Writings on Marxism and Law*, p. 42: original (in total) *Obshchaia teoriia prava i marksizm: Opyt kritiki osnovnykh iuridicheskikh poniatii* (1924), Sotsialisticheskoi Akademii, Moscow, 1st edition.

<sup>58</sup> *Ibid.*, p. 125 note 3

Pashukanis's goal, therefore, was not to analyse law in its *specific* form and content in different stages of history,<sup>59</sup> but to examine *the form of law itself*. He attempted to go beyond the, by then well-established, doctrine that law stemmed from economically-based social relations by defining exactly what a legal relation was and analysing why one social relation was legal and another not.<sup>60</sup>

His methodology revolves around historical materialism, which in essence dictates that a full analysis of law (or any other category) cannot take place unless that particular form is in a state of deterioration (such as capitalist production relations). Following Marxist economic arguments, Pashukanis asserts that just as capitalism had reached its "peak" (if it had not, a socialist revolution would have been impossible) and historical circumstances now allowed full analysis of capitalist forms (such as value, exchange, commodity, etc.), so law had similarly reached its fully developed form. Through concrete social relations, history reveals what forms are, and by studying both the concrete relations (base, economics) and the abstractions which explain them (superstructure, ideology), one can deduce the essential form of law.

Pashukanis agreed with Stuchka's definition of law in capitalism and socialism. He did not dispute that the socialist legal form is qualitatively different from that of capitalism (in that a law based on social property instead of private property would give rise to different statutes which would protect proletarian class interests rather than bourgeois ones); nor did he contest that law reflects class interests and that those interests are guaranteed by a coercive state. They also concurred on the matter of the eventual "disappearance" of law. For Stuchka, this disappearance represented the absence of classes in general, but for Pashukanis the withering away of law was a matter of the withering away of the commodity form.<sup>61</sup>

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<sup>59</sup> As regards this he accepted Stuchka's general definitions for the phenomenon of law in that content is material relations and form is the body of normative statutes reflecting the interests of the ruling class which are coercively protected by the state.

<sup>60</sup> Pashukanis, *The General Theory of Law and Marxism*, p. 42

<sup>61</sup> For a critique of this position see Hugh Collins, *Marxism and Law* (Oxford: Clarendon Press, 1982) pp. 108-111.

Pashukanis carried the class argument back to its roots—economics. For him, the definitions of law hitherto put forward by Marxist legal theorists lacked depth and historical perspective, for they characterised law *only* in terms of class interests and, therefore, reduced the importance of the fact that class interests are social relations which are determined by the mode of production.

Hence Pashukanis makes economy his starting point: "Man as a social producer is the assumption from which economic theory proceeds. The general theory of law must proceed from the same basic assumption."<sup>62</sup> Since historically, law had reached its fully developed form in capitalism, Pashukanis focused on the evolution of the most developed stage of capitalist economy, commodity exchange. From this economic base, he extracted the corresponding social relations and explained how the evolution of law mirrored the development of commodity fetishism and the social relations it entailed.

### **Commodity fetishism and its social relations<sup>63</sup>**

Pashukanis begins with Marx's theory of commodity fetishism. In brief, economic individuals function as both commodity owners and commodity producers. Society, in economic terms, is thus an aggregate of commodity owners

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<sup>62</sup> Pashukanis, *The General Theory of Law and Marxism*, p. 67

<sup>63</sup> For a discussion of Pashukanis's conception of social relations and law and his roots in the German theorists Jellinek and Laband see S. Dobrin's "Soviet Jurisprudence and Socialism" in *Law Quarterly Review*, No. 52 (July, 1936) pp. 402-424, esp. pp. 408-419. Issac Balbus uses Pashukanis's commodity form theory to defend his position on the relative autonomy of the law in his article "Commodity Form and Legal Form" in *The Sociology of Law*, eds., Charles Reasons and Robert Rich (Toronto: Butterworth, 1978) pp. 73-90. The article originally appeared in *Law & Society Review*, Vol. 2 (1977) pp. 571-588. See also Bernard Edelman's *Ownership of the Image* (London: Routledge and Kegan Paul, 1979). Edelman uses Pashukanis's commodity theory to develop his own Marxist analysis of law. For a critique of the economism in Pashukanis see Colin Sumner's *Reading Ideologies: An Investigation into the Marxist Theory of Ideology and Law* (London: Academic Press, 1979) esp. Chapter 8, "The Ideological Composition of Law", esp. pp. 249-253 and *passim*. Kamenka and Tay interestingly compare Pashukanis's views of law as a "product of commercial relations" to Tönnies' *Gellesschaft* (the society based on commerce) and Weber's notion of the legal-rational quantification of qualitative relations in Kamenka and Tay's "The Life and Afterlife of a Bolshevik Jurist", pp. 77-78. For a general defence of Pashukanis's position see Bob Jessup, "On Recent Marxist Theories of Law, the State, and Juridico-Political Ideology" in *International Journal of the Sociology of Law*, Vol. 8, No. 4 (November, 1980) pp. 15-368, esp. 343-351.

and producers. Individuals inter-relate to each other via commodities through the act of exchange. Exchange is not a property of commodities themselves, but rather requires the external volition of commodity owners. Simultaneously, individuals producing commodities become commodities themselves (by selling their labour power). Thus, commodities in capitalism assume an abstract quality of value regardless of their use values for they assume a *social* role of relating one individual to another. Individuals in capitalism assume the role of commodities by the sale of their labour and also exert their will through commodities via the act of exchange. Individuals are then equalised through commodities (things) and become objectified. Commodities then perform a social role while individuals become “things” in that we are essentially universalised and objectified—we are commodities and exert our will via commodities. This is in essence commodity fetishism.<sup>64</sup>

In reality, however, humans are social producers. The contradiction of social producers acting as things is reflected in the categorisation of our roles in civil society. In economic terms, we are equalised and objectified through the act of exchange. As members of civil society we are equalised and objectified through our categorisation as possessors of free will; equalised in that our wills theoretically have equal effect, objectified because we exert our wills through commodities. In legal terms, when an act of exchange occurs, there is assumed a relation between two *equal* free wills (contract); and the ramifications of the effectuation of free will entails certain rights and obligations. We are therefore categorised as bearers of equal rights and concomitant obligations, which is the basis of the capitalist juridic form. Pashukanis thus linked the commodity form directly to the development of the category “juridic person”.

To summarise, exchange equalises *all* forms of labour through the abstract notion of value embodied in commodities. The social condition accompanying the

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<sup>64</sup> Pashukanis, *The General Theory of Law and Marxism*, pp. 75-77

development of the commodity form is depicted as an abstract unification of individuals who possess independent, equal, free and egoistic wills which bear certain rights and obligations (juridic persons). These individual free wills are abstractly united in the ideological notion of civil society. Law assumes the ideological role of an objective, independent force operating to ensure individual rights and enforce obligations, protected by a state whose duty is to provide for the "common interests". Pashukanis, as most Marxists, saw a fundamental contradiction between the characterisation of *social* producers as *individuals*, and unequal persons possessing equal rights. Since individuals are, in reality, *not* equal (i.e. one owned property, one did not; one is a manager, one is a worker; one is smarter, one produces more than another, etc.), the only way this equality could be achieved was in the abstract. Pashukanis refers to the universalisation of individuals through commodity exchange and through the concordant ideological categorisation of "juridic persons" as equivalence. The notion of equivalence appeared in fully developed form only in advanced capitalism. While the exchange of goods and the development of rights occurred long before capitalism, only developed capitalism unifies *all* of society in a universally abstract form through exchange and its corresponding relations.

Pashukanis acknowledged that rights existed before developed capitalism, but not in a universally abstract form. He uses examples of feudal rights, which referred to certain privileges of specific groups. These privileges did not apply to all in an abstract universal way, but were differentiated by social roles (e.g. estate owners in comparable estates, or of guild participants in like guilds).<sup>65</sup> Similarly, while exchange existed before capitalism, it was only in capitalism that exchange takes place in the universal abstract form of "value". All commodities become "equal" (including labour) in that a certain amount of them may be universally exchanged for a certain amount of something else (regardless of use value). This equivalence

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<sup>65</sup> *Ibid.*, pp. 79-80

also takes place in exchange relations,<sup>66</sup> all become “equal” in that they have perceived equal rights and free wills. In reality, however, commodities are not “equal”, nor do persons possess equal rights or free will. The essence of the phenomenon of equivalence in social relations is the basis for Pashukanis’s approach towards law. Contract, then, becomes the kernel of the legal relation.

Only with the full development of bourgeois relations 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 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.<sup>67</sup>

### The legal relation

Law, for Stuchka, was not a specific relation but one of a general system of relations that perpetuates the interests of the ruling class. Pashukanis criticised this approach for portraying social relations and law in general as indistinguishable.<sup>68</sup>

Pashukanis posed the question: what makes a social relation “legal”? He indicated that exchange relations in general were not necessarily legal; and that laws regulating contract are not generated by objective norms:<sup>69</sup>

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.

...Law as an objective social phenomenon cannot be exhausted by a norm or 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.<sup>70</sup>

<sup>66</sup> The thrust of the argument lies with Marx’s analysis of civil society (*On the Jewish Question*) and the development of commodity fetishism (*Capital*).

<sup>67</sup> Pashukanis, *The General Theory of Law and Marxism* in *Pashukanis: Selected Writings on Marxism and Law*, pp. 81-82

<sup>68</sup> *Ibid.*, pp. 61-62

<sup>69</sup> “In material reality a relationship has primacy over a norm,” *Ibid.*, p. 63

<sup>70</sup> *Ibid.*

It is clear from this passage that a contract-type relation preceded the legal category of "contract". And while the argument is made that the necessary ideological reflection of actual contract relations was the perception of equal individuals possessing free will, as is demanded by commodity fetishism, we are still nevertheless missing the "legal" element in the contract relation.

### **Law as a resolution of conflicts**

As we have seen, a prerequisite for the legal relation is that we must be ideologically categorised as atomised individuals possessing equal rights. Pashukanis asserted that without an objectified force classifying humans as such (arising, of course, from the economic conditions of exchange), these relations simply would not be legal. He makes two arguments to this extent. The first appeared in his critique of Karner (Karl Renner). He argued that Renner erred when assuming that legal property is the mere fact of the power of person A over object N. Pashukanis contends that this is not a legal quality, the relation is a factual one.<sup>71</sup> This is a simple point of logic, if one has power over an object (property) then it is not a *social* relationship; and no notion of contract is involved. Since the social element is absent, the relationship is not a legal one. The case then arises that only when A's possession of object N *conflicts* with the interests of person B, is a *possibility* of a legal relation established.

He states, "The basic assumption of legal relation is thus the opposition of private interests."<sup>72</sup> In a fully developed legal form, this conflict is reflected in an individual as a bearer of rights: "the *a priori* assumptions of legal thought are clothed in the flesh and blood of two disputing parties, defending their own 'rights'..."<sup>73</sup>

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<sup>71</sup> *Ibid.*, p. 84

<sup>72</sup> *Ibid.*, p. 60

<sup>73</sup> *Ibid.*, p. 59

Pashukanis then proceeds to describe how conflicts of this nature arise. Three ideological elements allow exchange in capitalism to take place: the party must be egoist, must possess free will, all human personalities must be equal.<sup>74</sup> First, since production is a social phenomena, man cannot be an egoist. Second, our will is not free. "People enter these relationships not because they have consciously chosen to do so, but because the conditions of production necessitate it."<sup>75</sup> Third, all personalities are *not* equal. Yet in order for exchange to occur, we must be categorised as such. If exchange did not exist in commodity form, that is if production relations resolved the contradiction between egoist and social actor, free will and necessity and equality and inequality then a conflict of the above nature *could not* exist:

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 observation (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.<sup>76</sup>

Logically, this would indicate that law did not (and would not) exist in any non-capitalist societies where the concept of universal bearers of rights was absent. Pashukanis argues, however, that historically law appears in various stages of development. For instance, in primitive societies it is in embryonic form and is barely distinguishable from what he terms as neighbouring spheres (mores, religion).<sup>77</sup> In feudal society because notions of rights (privileges) in no way reflect a notion of "universal" rights for each and every individual; and society had not developed universal exchange, the contrast between public and private were all but hidden in feudal forms of law. The contradiction between an individual conceptualised as a private person and as a member of political society found in capitalism was absent. Hence law was not fully developed.<sup>78</sup>

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<sup>74</sup> *Ibid.*, p. 102

<sup>75</sup> *Ibid.*, p. 51

<sup>76</sup> *Ibid.*, pp. 64-65

<sup>77</sup> Similar to Stuchka's allusion to primitive society.

<sup>78</sup> Pashukanis, *The General Theory of Law and Marxism*, pp. 44-45

It is here we arrive at the crux of Pashukanis's entire argument. In order for a relation to be legal it must reflect a conflict of *private* interests; without the category of individual private interests represented in rights, the category of law disappears. Law, in its ideologically mature form, classifies man as: (1) equal; (2) possessing free will and rights; and (3) an egoistic individual. The concrete relations that produced this superstructure is the process of exchange where: (1) all commodities are equal in terms of abstract value; (2) all labour becomes socially useful labour; and (3) all individuals are equal.<sup>79</sup> Law historically arose because of the contradiction between the *perception* of individuals as isolated beings who are equal and possess free will and the *concrete reality* of individuals as social beings, unequal and responding to necessities created by the act of living (directly reflected in the mode of production).

While ideologically individuals are egoistic and isolated, their interests are really social. "Free and equal commodity owners meeting in the market place 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."<sup>80</sup> The dynamics of capitalist relations cause class conflict rather than a clash of individual private interests. Law in the abstract realm becomes a standard for arbitration between clashes of individual interests. In the concrete realm it is the protection of the subjective interests of the ruling class enforced by the state.

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<sup>79</sup> Bob Fine criticises Pashukanis for epitomising legal relationships in the process of exchange rather than production in "Law and class" in *Capitalism and the Rule of Law*, eds., Bob Fine, et al. (London: Hutchinson, 1979) pp. 29-45, esp. 33-37 and also *Democracy and the Rule of Law* (London: Pluto Press, 1984) pp. 155-169. Also Paul Q. Hirst, *On Law and Ideology* (New Jersey: Humanities Press, 1979) pp. 106-122 for a summary of Pashukanis's argument and pp. 153-176 for a critique. Along similar lines see also Sol Picciotto, "The theory of the state, class struggle and the rule of law" in *Capitalism and the Rule of Law*, p. 170 and Warrington's "Pashukanis and the Commodity Form Theory" in *Legality, Ideology and The State*, pp. 51-53. Warrington also criticises Pashukanis on other points, namely that his theory of commodity and law only applies to petty commodity production (pp. 53-54); he excludes coercion from his definition of law (pp. 54-55); legal systems *have* tried to address imbalances in social relations, e.g. in landlord/tenant relations (pp. 55-57); he misinterprets Marx (pp. 57-58); and Pashukanis argues for a penal system when he appears to be advocating its abolishment (pp. 61-62). For a response to Warrington see Alan Norrie, "Pashukanis and the 'Commodity Form Theory': A Reply to Warrington" in *International Journal of Sociology*, Vol. 10, No. 4 (November, 1982) pp. 419-437.

<sup>80</sup> Pashukanis, *The General Theory of Law and Marxism*, p. 98

## Law and the state

Pashukanis questions how, if the state arises from class struggle and the ruling class is in power, it is that the state appears "above" society as an objective force? Ideological forms can indeed mask concrete forms but, nevertheless, real social situations lie at their foundation. The ideological form of objectivity relies upon the abstract notion that wills are free. If they are not regarded as free, then the entire foundation of the "free and equal market place" is undermined. State authority *must* appear as "collective will" because otherwise it is a blatant contradiction of free will. Authority is thus expressed in the objective legal norm.<sup>81</sup>

The categorisation of individuals distinguishes a legal norm from any other norm:

...the norm itself, as a prescription of what is required, constitutes the elements of morality, aesthetics and technology as much as law.

The legal order is distinguished from every other social order in that it comprises isolated, private subjects. A norm of law acquires *differentia specifica*...because it presupposes a person endowed with a right and actively asserting it.<sup>82</sup>

According to Pashukanis, bourgeois jurists focus solely on the independent parties represented in court, and ignore economic relations.<sup>83</sup> They omit the concrete relations that produce the corresponding superstructure, and consequently ignore the fact that equality does not exist in social reality:

The personality of the 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.<sup>84</sup>

In accordance with Marxist legal theorists of this time, Pashukanis asserts that all bourgeois legal theory falls into two large categories, that of natural law and that of positive law (normativists, formalists, functionalists, etc.). Both types of theorists analyse law only from an abstract perspective. The natural lawyers wrongly envision law as a perpetual form of regulation whose norms stem not from social

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<sup>81</sup> *Ibid.*, pp. 94-96

<sup>82</sup> *Ibid.*, p. 72

<sup>83</sup> *Ibid.*, p. 67

<sup>84</sup> *Ibid.*, p. 105

relation, but some *a priori* source (nature, God). He praises the positivist approach which at least acknowledges an abstract connection between the norm and the society from which it arose. The positivists, however, mistakenly classify the totality of norms as an “objective” force. In reality, Pashukanis argues, the actual relation of two parties is the objective element, not the norm which categorises it. For this reason, “law as a totality of norms is no more than a lifeless abstraction”.<sup>85</sup>

Pashukanis’s antagonism toward the normative/formalist school (e.g. Kelsen) resembles Stuchka’s claim: namely that it is a method of formal logic completely divorced from reality. Similarly, the psychological school reduces law to individual perceptions, ignoring any real relations that give rise to it.<sup>86</sup>

Since bourgeois jurists formulated definitions of law only on the superstructural level, they arrived at a definition of law which required an objective source for adjudication. This source was encompassed in the state and legal institutions. Coercion by the state, therefore became legitimised as enforcing objective norms. These norms, however, actually emanate from the unequal and alienated relations of economic subjects. In reality, objective norms were not being reinforced, but the production relations themselves. Theories of punishment, therefore, encompassed the principle of equivalence as well.

### **Equivalence and punishment**

Pashukanis maintains that, historically, the equivalence principle in punishment evolved with the practice of retribution.<sup>87</sup> He asserts that, although retribution existed long before capitalism, only in commodity fetishism is the principle of equivalence realised to its fullest degree.<sup>88</sup>

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<sup>85</sup> *Ibid.*, p. 62

<sup>86</sup> *Ibid.*, p. 57

<sup>87</sup> *Ibid.*, pp. 111-112

<sup>88</sup> Recall that only in capitalism is society in a state where individuals are universally and abstractly equal (as opposed to secularised as in feudalism).

Pashukanis depicts crime in two aspects: (1) the harm done to the victim; and (2) the breach of a norm. It is easy to see the principle of equivalence in the first case, but what of the latter? He classifies "the breach of norms" as the abstract violation of public interest. Therefore, punishment is meted out according to the harm done to the individual victim and the general public. This dual nature of punishment reflects the dual nature of capitalist society: namely isolated individuals placed in an abstract whole.<sup>89</sup>

The process of retribution contradicts the goal of punishment: that of protecting society.

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 protect society from him—and the very meaning of the word punishment evaporates.<sup>90</sup>

Pashukanis points out that in modern criminal law, responsibility is a key factor; punishment is heaviest for pre-meditated intent, less heavy for negligent actions and lenient towards those who bear no responsibility (e.g. insane people). He suggest that if punishment is replaced with *Behandlung* ("method of influence"), a legally neutral medical-pedagogical concept, very different results are reached. The "criminals" with no sense of responsibility would require the most attention. Punishment seeks to determine the *proportional* compensation rather than the *corresponding* measures taken towards the goal of protecting society. Proportional payment for crimes occurs in two forms, that of monetary remuneration and that of loss of freedom, but they are both equalised in terms of labour time (in the case of money, the loss of the labour time expended earning money; and in terms of deprivation of freedom, denial of labour time in general). Under circumstances where this universal measure of equivalence is absent, punishment ceases to be legal.

The criminal answers for the crime with his freedom which is *proportional* to the gravity of what he has done. This idea of responsibility is unnecessary when punishment is

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<sup>89</sup> Pashukanis, *The General Theory of Law and Marxism*, p. 117

<sup>90</sup> *Ibid.*, p. 117

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.<sup>91</sup>

Although some bourgeois jurists have recognised the contradiction between imprisonment and fines and the goal of protection of society, they cannot change the material circumstances from which punishment arose:

...the contradiction between the rational goal of the protection of society—or the re-education of the criminal—and the principle of equivalence of punishment, exists not in textbooks 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.<sup>92</sup>

Principles of crime and punishment, as well as ideologies of law arise from commodity fetishism; in this economic system, law, crime and punishment can only be defined in terms of equivalence.<sup>93</sup> In order to alter them, one must alter material conditions.

### Law in socialism

The primary goal of the socialist revolution was to change the mode of production and consequentially the accompanying social relations. As has been stated, theorists realised that there would be a delay before “the old ways” were completely changed. Pashukanis was no exception.

Marx assumed that during the transition period human relations would be limited by the “narrow horizons of bourgeois laws”. Pashukanis interprets this statement to mean that in socialism the means of production will be owned by the proletariat and there will be no exchange of products for profit. Hence products will not be in commodity form. Labour will not be embodied in individual commodities but will produce for society as a whole.<sup>94</sup> Distribution of these goods, nevertheless, will still be determined by labour contribution. The equivalence

<sup>91</sup> *Ibid.*, p. 119

<sup>92</sup> *Ibid.*, p. 121

<sup>93</sup> Peter Young critiques Pashukanis’s arguments on punishment in “Punishment and Social Organisation” in *Essays in Law and Society*, eds., Zenon Bankowski and Geoff Mungham (London: Routledge and Kegan Paul, 1980) pp. 114-118.

<sup>94</sup> See Marx’s *Critique of the Gotha Programme*.

principle will still permeate social relations as long as products are distributed in direct proportion to labour time.

Since social relations initially will correspond to the distribution principle of commodity exchange (equivalence), law exists *in bourgeois form* in socialism. In the final stage of communism, however, labour time is not exchanged directly for an equal amount of another form of labour (products), but the old adage of working to one's ability and receiving what one needs evolves. At this stage, the form of equivalence desists and consequently, the legal form vanishes.

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 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.*<sup>95</sup>

By linking the development of rights and law to the emergence of the commodity form which embodies exchange relations and the principle of equivalence, Pashukanis shifts the emphasis of law from class interests to the commodity form itself. Once this conclusion was drawn, the belief in socialist law as a "new" form of law was an impossibility. He firmly made the claim that Soviet law was indeed of the same essence as bourgeois law, differing only in specific form and content.

Since the mode of production enabling commodity fetishism was being eliminated in Russia, law was also in the processes of decay. As long as the principle of "equal labour for equal products" was still in operation, however, the legal form would endure. The total absence of the commodity form—both in production and distribution—will precipitate the disappearance of law. "The withering away of the categories of bourgeois law will under these conditions signify the withering away of

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<sup>95</sup> Pashukanis, *The General Theory of Law and Marxism*, p. 47

*law in general* [my emphasis], i.e. the gradual disappearance of the juridic element in human relationships."<sup>96</sup>

As products cease to be commodities, relations no longer assume a legal form.<sup>97</sup> If there is no legal relation in communism, what form will regulation assume?

### Regulation in communism

Pashukanis places the distinction between law and regulation in terms of technical rules. In general, technical rules reflect a unity of purpose and are derived from necessity, laws reflect a premise of opposition of interests. He uses the example of medical treatment. While "norms" are involved in the roles of the patient *and* the medical personnel, they are technical in nature, for both doctor and patient aspire towards recovery—which requires certain necessary measures; *even to the point that coercion is used.*

But so long as this coercion is considered from the perspective of the same single purpose (*both for rulers and ruled*) [my emphasis], it remains solely a technically expedient act. Within these limits the content and rules is established by medical science and is altered by its progress. There is nothing here for the lawyer to do.<sup>98</sup>

Pashukanis's differentiation between state/legal coercion and other types of authoritative regulation indicate the possibility for coercion in communism, although probably not termed as such. The key factor is a unity of purpose based on necessity. He also indicates that *both* parties must be *in agreement* to the goal and requisite necessary steps. In this case, authority is one of necessity (rather than force).<sup>99</sup> Rules become the requirements to achieve an agreed upon goal. Pashukanis does imply, however, that coercion may be necessary in the event that society is threatened by a "dangerous member":

Coercion, as a measure of defense, 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

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<sup>96</sup> *Ibid.*, p. 46

<sup>97</sup> *Ibid.*, p. 55

<sup>98</sup> *Ibid.*, p. 60

<sup>99</sup> Engels makes the same argument in "On Authority". See Chapter four.

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 society has set itself.<sup>100</sup>

Coercion, in this sense, is not connected to the element of punishment, and implies agreement by all parties.<sup>101</sup> "Force" is to be used only in the case of protection and does not involve the notion of retribution. He recognises that some progressive bourgeois criminologists portray crime as a "medical-pedagogical task" the solution of which does not require the jurist. He points out, though, that the actual transcendence to effectuate the elimination of judges and criminal codes cannot take place in capitalism for the necessary material relations are absent.<sup>102</sup>

Pashukanis contends that social relations in communist production will be simplified: "Attempts to depict a social function as it really is, i.e. simply a social function, and a norm merely as an organising rule, mean the extinction of the legal form."<sup>103</sup> We have seen that for Pashukanis the pivot point for a legal relation is the categorisation of an individual as an egoistic legal subject who possesses certain rights and obligations. In order for a law to become a regulation this categorisation and the economic relations that produced it must be absent. Under these conditions, the legal conflict between individual and social evaporates.<sup>104</sup> He illustrates this point in describing primitive societies as societies where only with difficulty can legal form be separated from normal social forms.<sup>105</sup>

In a society where production priorities rely solely on need and not profit, relations revolve around a unity of purpose, not a struggle for private interests. The regulation necessary for production to continue will not assume an externally coercive form (the state), but will be a matter of technical expediency.

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<sup>100</sup> Pashukanis, *The General Theory of Law and Marxism*, p. 124

<sup>101</sup> Pashukanis does not address what would happen in the event that the "dangerous member" would not agree to "mechanical elimination" from society (or to any other proposed course of action). This issue is discussed in Chapter four, COMPLEXITIES OF REGULATION, Violence.

<sup>102</sup> For a critique of Pashukanis's penal theory see Warrington, pp. 62-63 and for a response see Norrie, pp. 430-434.

<sup>103</sup> Pashukanis, *The General Theory of Law and Marxism*, p. 73

<sup>104</sup> *Ibid.*, p. 74

<sup>105</sup> *Ibid.*, p. 44

Although it can be seen in Pashukanis's theory that socialist production relations would create a large amount of "unity of purpose" and therefore engage not conflict but technical expediency, there still remain areas where individual conflict would arise. It is also not clear exactly which social practices would become necessary to maintain cooperation to the degree that the society can function, nor, exactly, how social goals are to be determined. Of these issues, Pashukanis, as the others, speaks rarely. He does indicate, however, that conflicts are not necessarily legal matters; and a society that retains equivalence notions of law and all that it entails is compelled to preserve the category 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.<sup>106</sup>

What is important here is *actual* personal conflicts of interests are different from the *ideological forms* of private conflicts of interests and their resolution (law and the legal process). In capitalist society, real conflict was fought in terms of class conflict. Pashukanis emphasises that individual "rights" are an abstract concept—a notion that could only arise where in fact citizens were *not* individuals, but things operating in an environment where all were equalised. What is not abstract is the social bond in which humans engage during production. In communism, where ideology and concrete circumstance are not contradictory, individual rights solely as an abstract concept no longer exists. This point is made most clear by Pashukanis in his discussions of bourgeois morality.

### **Morality**<sup>107</sup>

Pashukanis also relates bourgeois morality with commodity fetishism. "...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

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<sup>106</sup> *Ibid.*, p. 48

<sup>107</sup> *Ibid.*, pp. 101-109

in the same social relationship."<sup>108</sup> He connects the principle of equivalence to Kant's categorical imperative, in that it is strictly vindicated because of its universality. He explains that because the categorical imperative disregards any natural or organic ties between humans, moral law appears to be above individuals.

When individuals have close emotional ties which erase the boundaries 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 cow and the calf, or between the tribe and each of its members, but from the condition of alienation.<sup>109</sup>

Ethics assumes the superstructural representation of commodity fetishism. Pashukanis suggests that ethics, like law, will lose its distinctiveness in socialist production relations.

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.<sup>110</sup>

The above would seem to indicate a penchant towards utilitarian principles. But for Pashukanis, this inclination is only a moral one in egoistic society. Measures of harm and benefit become *practical rational* solutions to given problems. Keeping in mind previous points of unity of purpose and agreement of method, utilitarianism really loses its distinctiveness. Actions that become necessary are *not* moral choices.<sup>111</sup>

As regulation transcends the legal form; consciousness transcends morality:

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 fulfilment of moral duty. In general, the phenomena of morality is then absent.<sup>112</sup>

During the transition period, Pashukanis maintains that there will be a "proletarian morality" much as there is "proletarian law". The collective will exert

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<sup>108</sup> *Ibid.*, p. 102

<sup>109</sup> *Ibid.*, p. 104

<sup>110</sup> *Ibid.*, p. 105

<sup>111</sup> Andrew Fraser makes the point that Pashukanis ignores the moral content of consciousness in "The Legal Theory We Need Now", *Socialist Review*, Vol. 40, No. 1 (July-October, 1978) pp. 154-159.

<sup>112</sup> Pashukanis, *The General Theory of Law and Marxism*, p. 106

moral pressure on members in order to motivate them in their moral duty. But these duties are categorised as “moral” only in the absence of an external force (e.g. a statute). Pashukanis distinguishes morality/ethics from law in that morality requires an “inner obligation” whereas it is immaterial to bourgeois legality whether this internal obligation is present. As long as the law is not broken, the law is satisfied, regardless of internal deliberations. Therefore, bourgeois legal obligation does not necessarily require moral obligation.<sup>113</sup> In the event that there is no law and no external motivating factor (force), Pashukanis points out that the category of “ethical” would lose its meaning. In a society where there only was internal obligation, the distinct category of “moral” would be superfluous.<sup>114</sup>

### Summary

Pashukanis’s arguments lead to the conclusion that the forms of morality/law/custom/norm simply lose their separate character when the ideological need for abstract, equal individuals disappears. If, in concrete relations, rights become irrelevant, then it becomes unnecessary to have laws enforcing them. Add this to the fact that there is no external force and bourgeois jurisprudence becomes even more irrelevant. Pashukanis does indicate that the contents of some morals/laws/norms/customs may become rules if they are deemed necessary to social organisation. Regulation thus reflects the notion that rules are dictated by necessity. As to the further details of regulation, Pashukanis did not elaborate them. He did indicate, similar to the theorists examined thus far, that: (1) there will be no external force; and (2) no separate and objective body meting out punishment in a retributive sense; (3) conflict of class interests is replaced by unity of purpose; (4)

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<sup>113</sup> Of course much of the positivist debate focuses exactly on this problem. Attempts have been made to formulate some type of minimal qualifications on the legitimacy of law (notably Hart).

Pashukanis is only referring here to law in operation. Once a law is established, it is immaterial *why* the law was obeyed, whether it be internal conviction or external force.

<sup>114</sup> Pashukanis, *The General Theory of Law and Marxism*, pp. 107-109

regulation does not assume a coercive role but one of necessary authority; and (5) personal conflicts are no longer expressed in legal form.

The description of such a system stimulates a plethora of questions, but Pashukanis never reached the circumstances that demanded further development of these notions. In fact, elements of his theory posed major obstacles to the path along which the Soviet state was proceeding.

The depth of analysis present in Pashukanis's *The General Theory of Law*, contributes greatly to Marx and Engels' initial arguments. By focusing purely on the legal relation as derived from economic ones, he elucidates clearly by derivation of the equivalence principle how the two are related through the theory of commodity fetishism. Because of his theoretical acumen and depth, he has gained wide recognition in the West as *the* Marxist legal theorist and few look beyond him for contributions in this area of study.<sup>115</sup> One other theorist, however, deserves examination.

#### REISNER—AN ANOMALY

M. A. Reisner reiterates many of the themes already explored in depth by Stuchka and Pashukanis. He does present, however, an interesting variation of the theoretical premise of the previous two writers in that he emphasises the intuitive quality of law and contends that because of this intuitive quality, law may be present in communism. The fact that he was willing to admit to the existence of law in communism (hence, to the perpetuity of law) earned him the title of idealist, and cast him out of the mainstream of legal thought at the time. His argument is, however, worth a brief examination.

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<sup>115</sup> See previously mentioned articles such as: Arthur, Introduction to *Law and Marxism*; Fraser, "The Legal Theory We Need Now"; Beirne and Sharlet, "Pashukanis and Socialist Legality", Warrington, "Pashukanis and the Commodity Form Theory", Robert Sharlet's "Pashukanis and the Withering Away of Law in the U.S.S.R."

Reisner approaches law from the intuitive/psychological basis expressed by Petrazhitskii.<sup>116</sup> Although by no means accepting Petrazhitskii's analysis, nor counting it as part of the revolutionary heritage, he accepts the premise that law is an experience and becomes incorporated in the "emotional life of man," which, according to Reisner, largely develops from ideological forms that are derived from environmental conditions. Law, therefore, becomes not a product of rational discourse, but rather is subordinate completely to external circumstances that are beyond the control of any organisation. Positivistic classification reflects such a phenomenon only to a small degree. Because Petrazhitskii places law in the realm of individual experience, and individual experience depends on a host of circumstances (age, disposition, social environment), he reaches the conclusion that

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<sup>116</sup> Alexander Peczenik sums up Petrazhitskii beautifully. I quote at length. (The variance in spelling is due to different transliteration methods.):

Petrazycki's psychology was based on a new classification of psychical phenomena. Apart from feeling, knowing, and willing, there exist so-called impulsions. They are active-passive. An example is hunger: it is felt (passively), while at the same time one wants to eat (actively). Especially interesting are the so-called ethical impulsions, which are further divided into moral and legal ones. Moral impulsions consist of the "feeling" that one has a duty, combined with an active, let us say, "readiness" to do one's duty. Legal impulsions consist of the same "feeling" and "readiness", combined with the "feeling" that some one else has a right to the duty being done. If I feel that I ought to give a beggar a dime, this is a moral impulsion. If I feel that I ought to give my creditor one hundred dollars and that my creditor has a right to receive one hundred dollars, this is a legal impulsion. One can thus experience two kinds of legal impulsions: one's own rights in connection with another person's duties, or vice versa: one's own duties in connection with another person's rights.

...Legal impulsions are the only legal phenomena upon which an adequate theory can be built. Therefore, a correct legal theory must be a psychological one. Petrazycki also infers a terminological conclusion from this: legal impulsions are the only real phenomena which may be called "the law" in the scientific meaning of the word. If the term "the law" is extended to apply to something else, for example, the statutes, then the term cannot be used in an adequate theory of law.

Legal rules and norms are nothing more than "impulsive phantasmata" which serve to express legal impulsions without actually describing anything else.

Legal impulsions can be studied and described by means of introspection. This implies that an observer can only study his own legal impulsions. With regard to the legal impulsions of others, he can offer an opinion only by means of analogy to his own.

...The official "valid law" has the same psychical nature as the rules of games and various other social rules. The theory of the so-called valid law can thus be a part of the broader theory of the so-called attributively imperative impulsions, that is, the impulsions of rights and duties. Gangsters' impulsions concerning their "rights" in a gang, as well as children's impulsions concerning their "rights" in a game, are "law" by Petrazycki's definition and should thus be studied within the same legal theory as the "official law" as understood by the lawyer. ["Leon Petrazycki and the Post-Realistic Jurisprudence" in *Sociology and Jurisprudence of Leon Petrazycki* (Chicago: University of Illinois Press, 1975) pp. 83-84.]

law is not static, but malleable in form. As a Marxist, Reisner naturally dismisses the premise that law is the experience of an *isolated individual*, but embraces the notion that law might be a *collective* experience. He then proceeds from the premise that law is adaptable to the given circumstances of a particular group (from a Marxist perspective these groups are of course classes) and is directly embraced by the consciousness of this particular group. Thus Reisner's theory melds intuitive law with class law to arrive at intuitive class law. The existence of intuitive class law explains directly the notion of "revolutionary legal consciousness" that was used to such a great extent by revolutionary legal policy makers.<sup>117</sup>

Reisner argues that law, in essence, exists even before any statutes may reflect such a reality (as was the case in the early days of Bolshevik power).<sup>118</sup> Society is thus comprised of classes, who possess separate legal consciousnesses.

The appearance of class society places a sharp imprint upon the legal structure. *Law develops into the separate ideological systems of class groups*, and thereafter each of them takes its own separate course. Accordingly as long ago as the division of society into feudal classes, we find the building of as many laws as there are feudal classes—and not the construction of a single law.<sup>119</sup>

Reisner then argues that as society evolved into the universality of capitalist production, so emerged a general legal order that incorporated varying principles arising from the classes of which it was comprised. For instance, Reisner suggests that the peasant law of communality can be seen in the structure of bourgeois economy via collective economic enterprises such as joint ventures. Similarly, Reisner claims the proletarian class already had class law under capitalism which can be reflected in the bourgeois superstructure in the form of labour legislation.

Despite the amalgamation of separate class laws, the law of the dominant class *overall* prevails. He describes a situation of competing legal systems where the victor is whichever class is in power. Elements from all these legal systems, however, can be present to some degree in the general legal structure.

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<sup>117</sup> Reisner, M.A., et al., *Our Law, Foreign Law, General Law* (1925) in *Soviet Legal Philosophy*, pp. 83-86

<sup>118</sup> *Ibid.*, p. 87

<sup>119</sup> *Ibid.*, p. 95

Under the cover of this natural law of the bourgeoisie, however, the development of a new grouping goes on, and even while private capital is still dominant, the *proletariat creates its own class law*, which is embodied to a certain extent in worker legislation. Thus the bourgeois legal order—under the covering of a single law of the bourgeoisie—embraces on the one hand the remnants of the old class law of vast holdings of land and peasantry, and on the other hand the new law of the worker class which is coming to take the place of the bourgeoisie itself and its legal order.<sup>120</sup>

For Reisner, the socialist revolution occasioned the elevation of proletarian class law to the dominant position. Components of other class laws, namely the peasants and the bourgeoisie, are also incorporated to some degree in the proletarian general legal system. Thus he explains how the socialist legal order may retain some remnants of the bourgeois legal order.

Reisner does affirm that there is a general definition of law that embodies all the varying types. First, the basis of law is economic: "Where there is no economy, there is no law..."<sup>121</sup> Class affiliation manifests itself through the roles of particular members in production. The relations generated here provide the groundwork for class consciousness to evolve. In this way he claims that, "*law is the result of economic relationships—and in particular production relationships.*"<sup>122</sup>

Reisner firmly claims that law exists in *all* societies. He cites a passage from Marx stating that each form of production has its own set of social relations. If law is based on economic relations then law exists wherever there is economy; and where there is no economy there is no society.<sup>123</sup>

Reisner seeks to further distinguish law from other ideological forms such as morality, philosophy, religion, etc. He states that what differentiates the legal form from other ideological forms rests with the fact that the legal ideology, as a component of the superstructure, reflects production relations in terms of inequality or equality (in essence, justice).<sup>124</sup> He then proceeds along familiar Marxist lines explaining that with the evolution of the principle of equality came the

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<sup>120</sup> *Ibid.*, p. 96

<sup>121</sup> *Ibid.*, p. 97

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*, pp. 98-99

<sup>124</sup> *Ibid.*, p. 103

development of law. He concurs with Pashukanis in that law reached its maturation with the apex of civil equality attained in capitalism. This civil equality, however, was a mirage. Economic disparity simply could not produce equality in reality. He argues that even in socialism this equality exists in terms of equal labour for equal products. In communism, however, individuality is fully reflected. He argues that for true equality to exist individuals must be "unequal." Only when society is at a stage when one works according to abilities and receives according to need, then equality in terms of individuality *in reality* exists. Hence the need for the *superstructural* definition of "equal" or "right" will vanish.<sup>125</sup>

The third factor distinguishing legal relations from others is that it pertains to conflict.

We have more than once already been capable of the conviction that the source of law and of legal regulation is the collision of interests embodied in a definite demand or importunity that is built upon an invocation of equality. Consequently, it is always a protest raised by a certain living social force which feels a pressure upon itself in the character of an injustice.<sup>126</sup>

In short his definition of law entails four principles: (1) it is an ideological form that is intuitive in nature; (2) its roots are in economic relations; (3) it is couched in terms of inequality and equality; (4) it is manifested in terms of conflict.

He then poses the question: "Does this mean that when the narrow horizon of bourgeois law is abandoned every sort of law will disappear as well?"<sup>127</sup> The ideological form of law in communism may be "from each according to his abilities to each according to his needs." However, by its own definition, this will not actually *be* law. It is at this point that Reisner returns to the intuitive premise. Law *is* an ideological form, not a technical objective form describing relations, which means that it is internalised, and becomes part of a person's emotional make-up. Because it is ideological in form and subject to conscious considerations, it contains the potential of perversion and distinction from material circumstances. Put more

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<sup>125</sup> *Ibid.*, pp. 103-107

<sup>126</sup> *Ibid.*, p. 108

<sup>127</sup> *Ibid.*, pp. 107-108

simply, the reality of economic equality requires also a consciousness which embodies that principle. The process is an active one. An ideological form is therefore necessary to reinforce what bound the proletarian class together in the first place, namely that a collective production system that provides for the individual and unequal interests of person x, y, and z is in their individual best interest. The development of planned economy is guaranteed by the subjective realisation that it is in one's best interest. Since communist production methods eliminate the material preconditions for conflict, law will disappear in the objective sense. What is left, however, is the subjective realisation of *why* law is not necessary.

Reisner does not provide a comprehensive theory of law; very little is mentioned of the role of law in the transition period, nor of what regulation might involve in communism. Even his small contribution to Marxist legal thought was ridiculed by Pashukanis and Stuchka. His critics focused primarily on the fact that his approach seemed encompassed by idealism; the importance he placed on ideology seemed contrary to materialism. From a Stalinist perspective, the acknowledgement of separate legal systems under Soviet authority directly threatened the monopolistic power of the state.

Reisner does provide a distinct contribution to this field of legal study in that his primary focus is the relevance of the internalisation of law. Also, Reisner assigns fundamental (as opposed to secondary) importance to the development of a legal consciousness. Without an attitudinal maturation, the execution of the principle from each according to his abilities to each according to his needs is not possible. Without the complete internalisation of "law", the possibility of a society without "law" becomes remote.

## ANALYSIS

The material surveyed in this chapter contributes much to a fuller picture of regulation both through direct exegesis and by enabling a more thorough theoretical

explanation of the operations of the People's Courts. A more comprehensive understanding of the notion of regulation, however, also draws attention to questions as yet unanswered. Thus the theorists provide both a deeper understanding of regulation and create a framework within which to address further theoretical issues.

### **The People's Courts revisited**

Stuchka bases his entire model on Marx's notion of class conflict. The roots of class conflict proceed from a production structure that embodies a contradiction in purpose (namely producing profit and providing for need). As a result, classes become representative of opposing interests which leads to: (1) an ideological need for an "objective" mediator; and (2) the need for one class to dominate another. Within this analysis bourgeois law and proletarian law are cut from the same cloth. Classes are extinguished through a complete revolution of the process of production because the conflict of purpose present in capitalism ceases. At this point the need for law, as defined by Stuchka, no longer exists.

Stuchka's rather basic explanation of the role and function of law can be observed directly in the People's Courts. While capitalist legal ideology may not portray courts as "class courts", Stuchka argues that in reality they *are*. The People's Courts were from inception conceived as class courts whose role was to rule society according to proletarian principles. Such a role directly mirrors the role of capitalist courts whose function is to sustain bourgeois values.

Although essentially the same institution in nature, the proletarian courts differ significantly from capitalist ones in that their ideological content changes. While capitalist courts perform their legal functions within the concept of "objective mediator", the People's Courts initially sought to perform their functions within the purview of total class bias. In essence, the courts sought to dismantle the notion that people are equal, and in doing so tried to remove the dichotomy

between “concrete” and “abstract”. Revealing the courts as what they actually are, mechanisms of class power, would allow concrete conditions to be reflected ideologically.

The courts however, developed *away* from the premise people are not equal. Such a development is observed through the gradual formalisation of legal procedure. The courts became more centralised and unified in terms of sentencing, case investigation, court procedures and personnel. There was a concerted effort from the Commissar of Justice to make procedures and sentencing consistent so that like cases should be treated similarly. Such developments caused the People’s Courts to resemble capitalist courts to a further degree by maintaining that people should be “equal” before the law. Stuchka’s theory would suggest that because classes still existed and because production had not been completed revolutionised, capitalist legal ideology, such as the principle of equality, would still exist, despite initial ideological efforts to change it. Without the concrete economic circumstances to accompany ideological elements, the courts were bound to fail. Such an explanation was taken up by Pashukanis in more detailed form.

Pashukanis’ greatest contribution to a Marxist legal theory was his formulation of the equivalence principle. All citizens are equalised and objectified in the production process via the role they fulfil through things (commodities). This role is mirrored in civil society through the creation of the classification of “juridic person”—an isolated individual possessing equal rights and obligations. When these individual persons come into conflict, “law” is used to decide which set of rights and obligations “wins”. Concomitantly, punishment takes the form of monetary compensation “paid” to the “winner”. This compensation principle applies both to civil law—in the form of fines, and criminal law—usually in the form of lost labour time (incarceration). People thus become quantifiable in that their “crimes” are evaluated strictly in commodity form. The contradiction of the classification of citizens as individual economic agents while in reality production is

social is also reflected in the legal realm. Law's stated purpose, to resolve conflict, contradicts its actual purpose which is in essence to determine compensation. He points out that law often does not *resolve* the conflict merely *compensates* for the *result* of certain actions. Hence for Pashukanis, when capitalist exchange relations are completely eliminated, the need for law is also eliminated.

Pashukanis admits that some bourgeois jurists recognise the treatment aspect of punishment, but he stipulates that as long as capitalist production relations still continue, punishment could only take the compensatory form. Any progress towards a treatment of criminals would have to be made in the environment of a new production system. Under a socialist production method capitalist economic relations would cease. If material survival did not proportionally correspond to labour time, as in communism, then the notion of compensation would become outdated. Treatment of the "criminal" or the solution of disputes would become the goals of a regulatory system in such an environment.

To provide an example to illustrate the difference between a compensatory system and a resolutive one: A man was riding a bicycle on a dangerous road. He was hit by a car. The driver was speeding, and faulty road construction made a quick stop difficult. Due to the structure of the road, visibility was severely impaired. He was hospitalised and the doctor declared he would be lucky if he ever walked again. The man was awarded \$12,000 by the courts. This money did not even cover his medical costs. When asked what he thought was fair compensation, he answered while nothing would take away his suffering, *at least* medical costs should be covered. He was further asked that if he did not lose any material wealth by either lack of time at work or by payment of medical costs, *then* what would be fair compensation? He replied that he would be satisfied if the woman was reprimanded for speeding and, most importantly, the road was fixed.<sup>128</sup> The two responses clearly exemplify the difference between compensatory and resolutive

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<sup>128</sup> Personal interview, May, 1994. Name withheld for privacy.

approaches to conflicts. In the first instance, material compensation was the primary focus of the legal evaluation; whereas, without the precept of reparation, the repair of the road became the priority.

Such an explanation sheds great light on the formation and development of the People's Courts. The courts were established in the transition period where capitalist distribution methods prevailed, thus law would still entail compensation. Pashukanis argues that it would be impossible for a legal system to break away from the equivalence principle as long as capitalist economic relations, either distributive or productive, remained. The Russian situation created an interesting problem: in one direction the People's Courts were trying to move towards conflict resolution; on the other hand, they were still entangled with compensation issues.

This dichotomy led to some of the difficulties the leaders in the Ministry of Justice faced, such as Stuchka's early concern regarding the lack of training of those involved in the courts. Lenin (and Marx and Engels) claimed that the demise of capitalist social relations would drastically simplify the legal process.<sup>129</sup> Stuchka agreed that the simplification of social relations (and consequently the law) was essential to a popularly controlled court. Until the time that socialist production relations actually had developed and been realised in the consciousness of the populace, he was reluctant to relinquish the powers of the court to the populace at large. If the sole purpose of the court, however, was to resolve conflicts (as opposed to deciding "fair" compensation), it can be argued that expertise may not be such a problem. For instance, the case of Nesterenko, where the railway was ordered to pay his wages until a social insurance system was introduced, would not arise as a legal matter under communist production relations. First of all, Nesterenko would sustain no material loss for his injury. The purpose of bringing the case before an arbitration institution would be only to aid in negotiation or confrontation

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<sup>129</sup> It must be remembered it was still "law" at this point.

between the attendant and Nesterenko. The laws regarding liability would be non-existent, and hence would require no "lawyer" to have knowledge of them.

Similarly, although Kurskii sought to preserve the freedom of the courts in dealing with citizen complaints, he was also disturbed by the lack of uniformity both in terms of punishment and decisions. Judges from different regions were prescribing widely-varying solutions for similar situations. It was thought that without more structure, the inconsistency problem would only increase. Inconsistency becomes a problem, however, primarily when compensation is involved. For instance in the case of the Red Guard, Poliakovich, who murdered another guard while drunk and whose punishment was 5 years imprisonment, it is assumed if the case was tried in another district under comparable circumstances, that 5 years imprisonment, rather than say 10, would be implemented. Because of the freedom of the judges, this was often not the case. Yet, if number of years imprisonment or the amount of fines was not an issue, than the uniformity factor may not be a major consideration. In the case of Poliakovich, if the goal was to ensure that such an incident would not recur, neither fines or incarceration would be applicable. The "solution" might involve treatment for the guard (if he had an alcohol problem), a promise that he would not carry firearms, a resignation from the post of guard (as in the case of Beliaev), etc. Assuming that all individuals are different, one set method or prescription for any given situation may not be required, and may even be disadvantageous.

Despite the fact that the courts were designed for the purpose of conflict resolution, they were actually dealing more with compensation (a capitalist phenomenon). This created a complex and contradictory situation. Most thought that socialist relations would form quite soon after the revolution.<sup>130</sup> The first major act curtailing some of the freedoms permitted earlier appeared in 1920, when leaders were beginning to acknowledge that Russia may perhaps be in the transition

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<sup>130</sup> As reflected by Stuchka's wish to retain experts temporarily until social relations were fully developed.

period for quite some time. The recognition that capitalist economic distribution principles would be part of soviet society longer than initially considered, and the incorporation of small-scale profit schemes during N.E.P. made the initial designs of the People's Courts an anachronism, causing the major restructuring of the courts in 1922. Although the People's Courts initially may have been the prototype of the regulatory institutions of communism, the economic situation forced a reconstruction of the courts that caused them to resemble their Western counterparts more than a revolutionary organisation (e.g., formal codification, more stringent control on the decisions of judges, the push for consistency and regulation).

If such an explanations for the theoretical development of the People's Courts is to be taken seriously, it is necessary to explore further theoretically some of the basic principles of regulation. Several issues arose at the end of Chapter two: (1) what is the exact nature of the relation between economy to law; (2) what would the purpose of a regulatory institution be in a society operating under "social" control; (3) if coercion is not to play a role, what is the nature of obligation?

### **The economic link**

Whilst Marx, Engels and later Lenin clearly established the link between economic relations and legal ones, Pashukanis provided a more detailed explanation of their interaction. By relating the logical outcome of regarding citizens as quantifiable (via commodities), equal entities to the results of the legal process—punishment, an overall understanding emerges that the process of law is an economic process *in itself*. Once this point is acknowledged, it can be understood why a system of law which relies on capitalist economic principles cannot emerge under a production process that is not reliant on quantification of individuals in *any* way.

Although “other” factors, such as morality, customs and social norms may influence the law, and to stress Reisner’s point, play a large role in the foundation of personality and behaviour, these values may remain despite the fact that the legal form vanishes. Thus certain relationships that are viewed as “legal”, such as marriage, may in the future not be regarded as “legal” despite the fact that the practice of marriage may continue. Individual conduct, then, ceases to be quantified through “law”, “norm” or “moral” but rather all that is entailed in these various classifications is melded to form “consciousness”. All the theorists emphasise that without *irreconcilable* differences in class consciousness (achieved through the development of a classless society), conflict will not assume economic form, and therefore, will not be a “legal” process. Pashukanis further explains that conflict ceases to be an economic form when it is not a result of *private* interests, private meaning the interest of individuals who are regarded as equal and isolated beings.

### **Institutions of regulation operating within social power**

Little comes from the theorists in regard to the issue of actual future institutions of regulation, nor any further explanation of social power save for a few descriptions that are common to all, namely that relations will be simplified and problems will not be legal. Nevertheless, they all acknowledge conflicts will be present, but do not suggest ways in which they may be resolved within the parameter of social power.

Pashukanis does stress that “technical rules” will arise from necessity, but does not explore how technical rules might be actually function in society (especially since they will not be enforced), or what their specific content might be. Implicit in his argument is the notion that necessity or mutual desire will dictate the content of technical rules as they reflect a “unity of purpose”. Other than mentioning that society must be in agreement as to the goal of the rules, though, he does not mention how the goal is to be chosen, or discovered. Nor does he address

organisational decisions which might be matters of preference rather than necessity. While he adheres to Engels' distinction between authority and coercion, he does point out that if all members consent to coercive measures to achieve an agreed upon aim, it may be used.

### **Obligation**

All three of the theorists surveyed assert that a consciousness developed through mutual experience will create a sense of "internal" obligation strong enough for social cooperation to be maintained.

Stuchka, Reisner and Pashukanis (also Lenin) suggest that the content of rules arise from "habits" or "norms" that become necessary to the functioning of communist society. They argue that as citizens become more "trained" (by party members at first) in areas of social organisation, consciousness and knowledge will develop over time and thus people will recognise, of their own accord, the need for certain rules. It is implied, but not specifically stated, that the content of rules, since they are necessary steps towards a mutual goal, will be somewhat self-evident. Whilst obligation to follow these rules stems only from the active desire of individuals, ("internal" obligation), the need for them is determined by the demands of the social system.

Reisner emphasises that the essence of obligation lies with the fact that while law does not assume material form, the active realisation of its ideological function must be maintained. That is, if citizens are to follow rules, they must *actively* recognise the necessity of them via a social consciousness.

### **A move towards definition**

Although each of the theorists offers various differences in the explanation of legal phenomena, they are cohesive, if somewhat incomplete, with regard to their notions of regulation in communism. The only major differences in the theoretical

premises of regulation seem to occur with Reisner's claim that law exists in *any* society and Pashukanis's claim that coercion might be used.

In examining Reisner's argument, his starkly radical claim (from a Marxist view) is not as conflicting as it first appears. Reisner states that the basis of "communist law" (from each according to his ability to each according to his need) is by definition *not* law. Therefore, he states, law in a material sense, will not exist in communism. But, he argues, law in an ideological form will exist which translates to the active realisation of *why* law is not necessary. Neither Pashukanis or Stuchka would take issue with the *outcome* of Reisner's argument, that citizens must be conscious that cooperation is necessary, but only with the classification of consciousness as ideological legal form. Reisner does maintain that there will be no legal system in communism, a statement in complete concordance with Stuchka and Pashukanis.

Pashukanis's claim that coercion might be necessary if all (including the recipient) agreed to its use undermines the notion of coercion which is defined as the use of power of individuals "over" other individuals. It is clear that coercion in this political sense is not Pashukanis's intention, especially in that an individual must agree to its use. Thus he clearly supports the claim of the other theorists, that coercion, in the political sense, will not be a factor in regulation.

Evident in the survey of Reisner, Stuchka and Pashukanis is a fundamental commitment to an explanation of a Marxist position on law. While differences are manifested in the analytic explanation of what law is, a coherent, general picture emerges as to what regulation would entail:

- (1) **Certain organisational "rules" are necessary.** Stuchka, Pashukanis and Reisner imply that these rules will emanate directly from the needs of society. With the elimination of irreconcilable class differences, rules will reflect, as Pashukanis directly states, necessary steps towards a unified goal. They would be devoid of any class interest (since there are no classes), and would not

incorporate the notion of conflict of rights and obligations, as laws currently do.

(2) **There will be no source of authority other than society itself** (absence of the state and legal apparatus). Following Marx and Engels' arguments outlined in Chapter one, the theorists indicate that the state and law will be replaced by an administration whose sole purpose is organisational necessity.

(3) **Authority will not take a coercive form.** Coercion generally ceases with the cessation of class conflict. For Stuchka and Reisner, the development of class consciousness replaces the need for external force. For them, only internal conviction will remain in this phase of economic development. Pashukanis carries this position one step further by asserting that with the disappearance of the equivalence principle, retribution (punishment) will cease as it only arose as a tool of compensation driven by the economic condition of commodity fetishism. While restraint *might* be necessary in some cases (for protection of society), it will not take the form of retribution.

(4) **The source for obligation will be internal rather than external.** With the absence of external source of power (namely the state and legal apparatus), obligation can only be internal.

(5) **Conflict will not assume a legal form.** Whilst none of the theorists spoke at great length about the types of conflict that remain in communism, they imply that these will not assume legal form. Law represents a conflict of private interests manifested in the "juridic person" which derives definition from social relations determined by the mode of production (capitalism). When capitalist social relations are absent conflict does not assume a legal form.

(6) **Laws/customs/morals will lose their distinction.** With the absence of external force, only internal obligation remains. Once the distinction is removed the necessity to differentiate between culture, custom and morality

will evaporate. Stuchka explains the transformation in terms of the development of a united class consciousness. Reisner describes the phenomenon as the internalisation of principles of conduct which in former societies assumed the content of law. Pashukanis stresses the historical development of the differentiation of these categories by tracing their roots to the continuing evolution of law. He argues that once the equivalence principle disappears with the cessation of the category "juridic person", there is no need to distinguish between "moral" and "legal".

The elements provided by these writers fit well within the premises of Marx, Engels and Lenin with regard to regulation in communism. Important differences do emerge as to *how* regulation might develop. For Marx and Engels, historical progress was measured by the emergence of working class power to the point where communism was achieved. Direct control of society by the whole of the population was the end goal of social revolution. The "training" of the working class was to occur through the organisation and maintenance of revolution itself. Lenin, Pashukanis and Stuchka varied from Marx and Engels in that the party provided the "training" necessary to the proletariat and peasantry initially. Reisner stressed that consciousness, in effect, was developed throughout history and this consciousness was *the* deciding factor in the maintenance of communist regulation. These differences are extremely important with regard to the transition period and the path of development towards regulation in communism. For instance, *methodologically* there is a difference between "consciousness" which arises from direct practical experience and those which are derived from prescribed party strategies enforced on a population. Nevertheless, in terms of the characteristics of regulation itself all the theorists are generally agreed.

Despite the general definitional consensus derived through theoretical survey and further defined through historical analysis, many key factors of regulation are

still not explained or explored. A general framework, however, *is* provided. It is within this framework that theoretical construction must take place.

## CHAPTER FOUR—THEORETICAL SYNTHESIS

### SUMMATION

Chapters one through three have surveyed relevant theories and historical evidence with regard to deciphering what kind of regulation would appear in communism, given the claim that law will “disappear”. Through this survey, the scope of a socialist analysis of law has been explored, as well as some theoretical premises as to the future of society in terms of regulation. The thorough examination of this body of work has led to a concrete statement of a theoretical basis for regulation. It is useful to review conclusions thus far.

Marx and Engels attributed the phenomena of law to the development of capitalist economic relations. Marx explained that through the process of commodity fetishism, human society had been falsely categorised into a sum of independent operating agents. In the legal sphere these agents are categorised as “juridic persons”. In actuality, however, humans are not individual producers but social producers, and in essence there is no bifurcation between individual and social, but rather this dichotomy arises from production relations themselves. Put simply, the fundamental contradiction of a capitalist economic structure is that the economy functions with the aim of procuring of profit, whilst society operates on the premise of providing for need. This contradiction leads to fundamental class conflict which is the basis for the rift in social relations. The legal category of rights and concomitant obligations has proceeded from the fundamental characterisation of individuals operating as isolated agents with conflicting interests. Although ideologically the function of law may be to decide objectively which rights and obligations are maintained in a certain set of circumstances, in reality law protects the dominant capitalist ideology. This phenomenon is directly observable in the language of rights itself which elevates private property and private interests above all else.

In socialist production relations, the economic system is designed in total to produce for need. Thus class conflict is eliminated. Individuals are no longer categorised as independent agents operating in an economic sphere to provide for their own interests, but rather individuals provide for their own interests by operating within a coordinated whole. As a result, the category of juridic person is eliminated with the dissolution of the concept of individuals operating as independent agents with certain rights and obligations. The phenomenon of law "dies out" as its ideological role is eliminated in that, if individuals are not operating as autonomous individuals with sets of rights and obligations, there is no need for an "objective" entity to determine which sets of rights prevail in a given set of circumstances. In material relations the need for law evaporates because the economic base that led to the categorisation of individuals as isolated beings with free will has been transformed. What replaces the concept "juridic person" is a concept that categorises individuals as part of a whole. Thus individuals can really exert power only through social action (rather than isolated individual action). If individuals are actually to have this power they must control production. If this direct control is in place, conflict becomes a social problem to which a social solution must be found. Under these conditions, conceptualisation of people as individual bearers of rights and duties cannot emerge.

Later theorists proceeded from this theoretical basis, as outlined by Marx and Engels. Pashukanis points out that punishment is a direct result of commodity fetishism. He makes the argument that punishment takes the form of compensation. Compensation assumes financial form in terms of fines or lost labour time (incarceration). Thus the law does not solve the problem, but merely determines compensation for the act of breaching rights or obligations. Once conflict is seen for what it actually is, a "social" problem, which can only happen when production relations are socialised, the compensation principle loses its foundation and cannot function. Thus in a socialised mode of production,

punishment will become irrelevant. Pashukanis then carries the argument further by indicating that retribution itself is an economic form, and, when things are no longer measured by the abstract value produced under conditions of commodity fetishism, the entire phenomenon of retribution becomes irrelevant. The process of law itself, then, is an economic process which directly embodies commodity fetishism.

Stuchka emphasises Marxist class theory by stressing that when class conflict is eliminated, there is no need for a state and legal system backed by force—for there is no longer one class pressing an opposing set of interests on another. Under communist production methods, *irreconcilable* conflicts of interests are eliminated in that the economy is geared in total to providing for needs.

Pashukanis stresses that when the class schism vanishes, the general direction of the production process is unified, in that it is geared towards solely producing for need. Rules emerge from the necessities of organisation. They are different in nature from laws. Engels explains that laws are, in essence, coercive, whereas rules are not. Because class domination must be maintained by political power, laws reflect the authoritative arm of the state. Rules, on the other hand, reflect organisational demands which arise by any process. The coercive state, then, is replaced by an administration whose function is *only* to organise rules; not to enforce them or derive them.

As rules arise from necessity, their content cannot be decided on, *per se*. Some organisational decisions must be made, though, the contents of which *are* in the realm of choice. None of the theorists specified *how* these decisions were to be made or what their outcomes may be. They did stipulate, however, that the process must involve society as a whole. What the theorists describe as social power indicates that no individual is to have power “over” another, either in making decisions or enforcing those decisions.

Through direct involvement of each individual in the derivation of decisions, the theorists argue that obligation will be "internal". Since there is no "external" source of obligation coercion becomes unnecessary. Reisner further stresses the internalisation of obligation by claiming that, in communism, internal recognition of the need for social cooperation is necessary in maintaining communist production relations.

In this state of affairs, where production relations are socialised and the corresponding social relations have evolved, there is no dichotomy between the "moral" and "legal" realm or a differentiation between "norm", "law" or "custom". The source for obligation is the same in that it can only stem internally from individuals participating in an active whole.

The theoretical basis above provides a plausible interpretation of the historical example of the Peoples' Courts. Despite the fact that official judicial policy exhorted the courts to proceed towards "social" resolution of disputes, economic and social conditions did not actually allow them to do so. This can be readily shown by the types of problems these courts faced, namely, accountability, consistency, predictability, due process, content of the law and level of expertise. As discussed in Chapter three, the root of these problems actually lies in determining compensation, or "fair punishment", not in trying to render a "solution" to the problem. The fact that capitalist distribution methods were still intact in the nascent socialism emerging in Russia precluded progress towards "social" resolution of problems as socialised *production* relations were not yet present. The point is further substantiated by the fact that when Soviet policy turned toward limited capitalism (N.E.P.) full codification of "socialist law" occurred. In this instance, not only were capitalist distribution methods in operation but, on a limited scale, so were capitalist production methods, causing the development of a full-blown court system much resembling its capitalist counter-parts despite varying content of statutes. The prime theoretical basis—that only when economic relations are revolutionised into

communist production relations can “social” solutions to conflict be sought—is supported by this historical example.

Although the survey of theorists and historical example has educed the theoretical basis of a theory of regulation, many questions—both theoretical and structural—remain unanswered. At this point a certain amount of interpretation is needed to explain key elements of the theory. Even while remaining in the general framework thus far elicited, it would be unfair to attribute the following arguments to the theorists themselves. The remainder of this chapter, and in fact, the rest of the thesis, is strictly the interpretation of this basis by the author.

### **THEORETICAL EXPLANATION**

There are several key theoretical elements of regulation unexplored or not fully explained by the theorists. The difficulty facing the teasing out of a full theory of regulation is that regulation by the above definition is intimately connected to the way society is organised as a whole. The theorists indicated that political power is to be replaced by social power observable in the transformation of the state to administration. The administration is described as an organisational institution devoid of political power. The decision-making process is represented by the phrase “direct control”. The exact *theoretical* nature of an administration and direct control, however, is not discussed in any detail, although it is directly relevant to developing a theory of regulation. Therefore, a more thorough theoretical definition of “direct control” is required.

Once the theoretical inferences of “direct control” have been discussed in more detail, other issues of social organisation that are directly relevant to regulation—namely coercion and obligation—must be described within this more detailed framework. Again once these elements have been more fully explored, the nature of conflicts and the process of conflict resolution can be examined in greater depth.

Certain practical, structural difficulties will no doubt come to the forefront during the following discussion. The purpose of this chapter, however, is to clarify and expand the core *theoretical* elements necessary to a viable theory of communist regulation. "Can such a system possibly work?" is quite a different question from "Is such a system theoretically possible?" The focus of this chapter is the latter. Structural suggestions shall only be offered in brief to illustrate theoretical points, and only where they are directly relevant to questions of regulation.

### **Direct control**

The theorists assert that the essence of social power is direct control over the production process and the administrative process. Their basic theoretical definition of direct control is that no individual has power over another individual, and, consequently, decisions could only be made and enforced by each individual (as opposed to a designated group of individuals).

In the economic process, direct control reflects the goal of producing for need. The premise of the critique of the capitalist legal system is that no two individuals can be regarded as "equal". Individuals are inherently different, reflected in their varying capabilities, needs and desires. In terms of production, Marx points out that only individuals *themselves* can define their "needs" (restricted of course by absolute physical necessities—food, water, shelter, etc.). What kind of shelter is needed, how much food, or what kind of "luxury" items one desires, can only be individually determined. The premise of communist production, then, is to allow individuals the control necessary to produce whatever they need or want. Under capitalism, production priorities are determined by the market.<sup>1</sup> The basic premise of capitalist production is that "market mechanisms" determine how much of one commodity should be produced above another. The goal of a capitalist economy is to procure capital, especially in the form of profit. Thus businesses make decisions

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<sup>1</sup> The question of whether the market is actually "controlled" as opposed to "free" will be left aside.

bearing in mind which choice will be more profitable than another. In needs-based production, society rationally chooses which products it wishes to produce. The goal of needs-based production is to provide for the needs (and desires)<sup>2</sup> of the population to the highest degree possible. These needs can only be determined individually. For this reason, there can be no “external” element or institution—such as a market mechanism maintained by a coercive state or a centralised body dictating the content of social needs—if social power is to be maintained. The initial step in construction of social power then, is that *only* individuals can determine their needs, wants, capabilities and desires.

Whilst individuals may determine their needs, wants, capabilities and desires, they also have to fulfil them. To do this, society must be organised without compromising the initial economic premise that only individuals can determine their prime wants, and through a decision-making method that does not rely on the exertion of “power” of one individual over another. “Power” over an individual can occur both on an economic level and on a organisational one. In fact, the theorists point out that if individuals are controlled by the economic system (rather than the other way around), political power of one individual over another *will* occur as a necessary outcome of the production system. Given the language within which the theorists speak, the term “political” conveys the meaning of organisational power of one individual over another—typically represented in the form of the “state” or its associated bodies (courts, police, departments, etc.). When individuals control the economic system, however, and no one other than themselves are determining what their needs/desires are, then the organisation of society does not necessarily have to be political. For this reason, “political organisation” is not used in the lexicon describing the future society because in the socialist tradition it implies a sense of coercion. Marx and Engels thus labelled the social organisation of communism an “administration”. They suggest that an

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<sup>2</sup> I proceed from the assumption that “needs” are not merely basic needs, but rather whatever is determined as “needs” at the time.

administration would differ from the state in that it would not be backed by coercion, nor would it represent the power of a class (whether proletarian or bourgeois) but, rather, it would be only a mechanism for organisation. The purpose of the administration would be to facilitate decision-making as opposed to actually *making* decisions, and these decisions would not be enforceable by coercion. As to who would actually *make* decisions, the theorists would answer, the whole of society.

The first issue that needs clarification is the meaning of "facilitating" decisions as opposed to "making" decisions. The facilitation of decisions reflects an organisational mechanism for allowing individuals to procure a decision on a given issue. In current society such a job might be represented by the Elections Commission which counts votes on an initiative. The commission does not determine the content of the initiative, nor does it decide whether the initiative shall be passed. At the same time the commission is necessary for the organisational purpose of counting votes. Another example might be the chairperson of a task force. The chairpersons do not decide the issues of a task force, nor the outcomes of discussions, but rather they perform the necessary function of allowing discussion to continue in a productive and organised manner. It would be misleading to say the chairpersons or the commissioners had power "over" all individuals involved in the decision being procured, especially in that their actions do not actually *produce* any decisions. Similarly, an administration would perform tasks that aid in orderly rendering of the decisions, but would not actually *make* decisions.

Structurally it is difficult to imagine how all the decisions involved in running a society might be made so that no one person had power over another. The key point however, is that there is a *theoretical* difference between a body that makes decisions, and one that facilitates them. The prime goal of an institution

becomes how to organise individual requirements, *not* to decide what the requirements *are*.

Needless to say, decisions will go well beyond the economic sphere. Not only do production priorities need to be decided, but literally the whole of social organisation. Since each individual must decide when to work and how much, what sort of clothes to wear and when, what products to produce, where to live, etc. the function of institutions clearly become the coordination of individual choices. Whilst the question of *how* such institutions might function immediately arises, it is only necessary at this point to accept the fact that *theoretically* that is what their roles are.

Within the function of coordination of individual choices, there also arises the question of management of individual choices. It is at this point that it becomes necessary to distinguish between coordination and centralisation. An institution may function to organise choices which then may be carried out by individuals or groups of individuals. It does not, however, *decide* matters and then instructs (or forces) individuals. Such a system would be labelled "centralisation". Most socialist and former socialist countries operate under such a presumption.<sup>3</sup> Coordination on the other hand, suggests that approaches are derived by individual cells and integrated to form an overall policy. In one case decision-making flows from the centralised and organised minority to the majority; in the other, from the sectionalised majority to the organisational minority. Coordination indicates that approaches are derived by individuals and integrated to form an overall policy. The theorists' emphasis on direct control by citizens and the absence of a state would clearly indicate that coordination rather than centralisation is required.

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<sup>3</sup> Local management is one of the most distinctive (and efficacious) features of the Chinese social structure. See Harold Pepinsky, "Reliance on Formal Written Law and Freedom and Social Control in the United States and the People's Republic of China" in *The Sociology of Law: A Conflict Perspective* eds., Charles Reasons and Robert Rich (Toronto: Butterworth, 1978) pp. 281-293.

Even if institutions only coordinate choices, the method of implementing decisions might also require coordination. Whether in deciding goals or the method of implementing those goals, it is clear that members of institutions would not be deciding goals or methods, but rather would provide an avenue for successful coalition of choices and methods of implementation. Using the example of committee chairpersons, they do exert some authority in conducting discussions. The *results* of those discussions, however, are beyond their power. Though it may be impossible to imagine how *every* individual may "participate", the distinction between political institutions and communist ones is theoretically clear. It might be useful, though, to discuss briefly how communist institutions might work to illustrate the notion of "facilitation" of decisions.

The theoretical concept of an administration developed by the theorists indicates a system that is fully participatory and under local control, yet at the same time coordinated enough to provide general direction. Such a system may be labelled decentralised coordination. Whilst certain areas need not be coordinated at all, some areas, especially economic production, would require a certain amount of coordination. Two issues arise from such a position: one revolves around the possibility of full participation; the other revolves around the method of coordination.

The desire for a more participatory society is not restricted to the theorists. Indeed, it has been a concern for conservatives, anarchists, liberals and socialists alike with regard to democratic structures.<sup>4</sup> Many have reached the conclusion that full participation is simply unrealisable. Given the complexities of the modern world, the growing need for specialists and the sheer amount of information

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<sup>4</sup> Much work has been done in regards to empowerment through increased democratic participation, for example: Carole Pateman, *Participation and Democratic Theory* (London: Cambridge University Press, 1970); Benjamin Barber, *Strong Democracy* (Berkeley: University of California Press, 1984) and Peter Bachrach and Aryeh Botwinick, *Power and Empowerment* (Philadelphia: Temple University Press, 1992). See also: Edward Greenberg, "Industrial self-management and Political Attitudes" in *American Political Science Review*, Vol. 75, No. 1 (March, 1981) pp. 29-42; Frank Cunningham, *Democratic Theory and Socialism* (Cambridge: Cambridge University Press, 1987) and John Keane, *Public Life and Late Capitalism* (Cambridge: Cambridge University Press, 1984).

pertinent to informed decision-making, complete participatory decision-making is far beyond the scope of any practical programmes.<sup>5</sup>

Any attempt at mitigating the requirement of complete participation, however, would severely undermine many of the theorists' key points in terms of successful non-coercive regulation. It would be damaging to assume the view that direct participation is "impractical" and other methods must be sought.

The following are suggestions are intended *only* to demonstrate, *in principle*, that social organisation of an administration is not beyond all imagination. If they are even slightly plausible, the requirement of theoretical possibility is met. The function of institutions is to "gather" decisions and compile them in order to form some kind of policy. The problem is thus by nature broken down into two tasks. The first is the practical collection of data, the second is the derivation of policy from that data.

In regard to collection of data, one possible solution might involve a system much like the internet. Populations could be broken down into sectors of say 150 people. The sectors could then be coalesced into larger areas, for example quadrants, which incorporate four sectors. Quadrants can then be gathered into areas which cover say ten quadrants, and so on and so on. People could express their needs in computerised form to be sent to a main centre, at first sectors, then quadrants, then areas, etc. The duty of those manning the centres would be to manage the computers as the machines calculate how many shoes, tables, gallons of milk etc., are required in a given area as input is received. Eventually the lists will be coalesced until a "master list" is generated. While current computer programmes are limited in informational processing, it is not beyond reason to expect that they can be improved. Most problem equations can be broken into sub-equations. Data input can be staggered so as not to overload the system. Reducing production

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<sup>5</sup> See especially Paul Hirst, *Law, Socialism and Democracy* (London: Allen and Unwin, 1986) pp. 4-5, 112-113.

questions into multiple sets of variables reduces the complexities of programming to a degree that might eventually be handled.

Once data is gathered, policy formation decisions could be made in each sector. These decisions could then be relayed to the quadrants, and from the quadrants to the area. At each step the policy could be referred back to members until a decision is reached. For instance, say in sector five, 140 people desired individual cars and 10 people decided public transport should be developed to the point where they do not have to drive. Sector six decides that public transport should be so accessible that people will not need cars. In fact, only two people in this sector want cars. An obvious solution is to provide 142 cars and develop public transport. But say the information gathering committee indicates that for whatever reasons (environmental, relative scarcity) only 120 cars could be provided. This information could be relayed back to the individuals involved and each individual could choose what to do. Some individuals could voluntarily wait for their cars. The individuals could communicate (via e-mail, conference phone, teleconference) and try to negotiate a compromise. The problem could be solved locally by car-sharing, or perhaps some other alternative. This decision could then be relayed back to the centre. Such a system of decision-making would involve providing information to individuals and using a method where individuals could negotiate solutions, most probably through compromise rather than consensus.

The process may also work for "general" policy such as environmental matters. Say, for instance, the "master list" indicated that 106 trillion tons of white paper were needed. The information committee on environmental affairs estimated that the amount of trees needed for this amount of paper would dangerously reduce oxygen in the world environment. This information is sent back to the areas, quadrants, sectors, individuals. Individuals in sector 309 decided that they could reduce their paper use by one third (the sum total of what each or some individuals decided to sacrifice). Members of sector 415 relay there is nothing

they can do, they need the paper. Citizens of sector 660 question whether recycling would be an alternative. This information would then be sent back to the information committee on environmental affairs who would then evaluate whether the actions from individuals in various sectors took care of the problem. If they did not, the information committee would relay this information back to the sectors. Individuals in sectors, quadrants and areas thus negotiate until a some sort of solution arises. Thus instead of "market mechanisms" dictating production priorities and parameters within the goal of profit, individuals via mechanised input dictate production priorities and parameters directly. Much as production priorities "arise" from the supply and demand mechanism of the market, so do production priorities "arise" from the calculated input of individuals.

Once a policy decision is reached, the fulfilment of its aims could occur in whatever manner is decided by local areas, or those responsible for carrying out tasks at a given time. Such an approach is readily understandable in areas that can obviously be considered under "local" control, such as local transportation schedules, work duties, litter control, snow removal, education, recreational team sports, community entertainment, etc. Larger implementation plans, however, might involve the situation where wood in what is now Africa is needed for production of tables in what is now Canada. After these tables were produced they would have to be transported to the persons that required them. For example, let us assume the method that was derived with regard to distribution was that every 50 people or so in a geographical area would have "pick-up" stations. There could be a pick-up station for food, clothes, furniture, tools, etc. Most goods would be transported by air. It was decided that an airport would be built for every 200 persons. From the airport the goods to each delivery station could be conveyed by underground conveyor belts built along the same lines as subway systems.

It was calculated from computerised input that 5 million tables of type Z were needed and 120 million tables of type B were required. The production of these

tables required 175 million square feet of wood. Production mills, or perhaps synthetic wood factories, or satellite forests, were distributed in 3,000 areas around the globe (or space). Orders went to each factory in rotation. The current "production" committee, with the recent order would then contact the wood production mills in the order of rotation. For this shipment factories in what is now currently Canada, Timor and Benin were contacted via e-mail. The production committee at these stations would send the order to the table producing factories in current day Turkey, Eretria and Iceland. Local work committees in these areas would coordinate who was to fulfil these orders. After construction was completed they were loaded on cargo planes and distributed to the local stations that required them.

In other words, with the removal of fiscal considerations, the mechanical systemic organisation of transporting goods and raw materials is decided mainly by matter of efficiency, expediency and necessity.

The next question that arises is who is to send these orders, who is to make sure orders arrive and who is to carry out which tasks? Again such questions can be decided on a local level. (Or, given that we can already travel from New York to London in a hour, locality may not even play such a role.)

It is obvious from above discussions on the decision-making process and production organisation that a *vast* number of "committees" and people to staff them would be necessary. If such tasks were divided among a huge population, it is conceivable that these committees would only demand a small time commitment from each individual. For instance, say one committee member of some sort is needed for every 30 people at all times. If each individual were to serve one day a month, the requirement would be satisfied. If each individual were to serve for two weeks, it would be approximately one year and four months before that same individual would have to serve again. This of course assumes that making orders, checking shipments, scheduling transport arrivals, etc. requires no skill that the

“average” person cannot handle. Given that these committees do not make decisions or enforce them, it is not beyond reason that organisational matters are within the capacity of a majority of individuals. (The issue of specialisation will be discussed in the section “DIFFICULTIES WITH NEEDS-BASED PRODUCTION”, “How production is organised” in this chapter.)

Of course suggestions such as the ones above presume universal education, access to information, universal computer access, future technologies and a vast array of other attendant problems to be sorted out. However, the purpose of this discussion is only to suggest how decisions *might* be made by each individual, and how institutions do not generate decisions but rather coordinate them. While such a process might be inordinately unwieldy, and perhaps inconceivable in our current historical frame of reference, it is, nevertheless, *theoretically* possible at some point in the future.

As is demonstrated by above examples, policy is formulated from the input of diverse ideas and interests. At each level, compromise, as opposed to consensus, will most probably emerge. It is important to remember that *each* individual determines what his/her compromise is. Hence, a policy that is generated *must* take into account diverse ideas by virtue of its original source (individuals). Thus by necessity, policy must provide for its members. The better it provides for its members' choices, the higher degree members will willingly participate. The more people support the system, the better able it will be to provide for its members. Thus individual fulfilment of individual desires are *directly* linked to the economic production process. Such a direct link between effective “political” decision-making and an effective economic production is the essence of socialism. It is what is meant by “direct control” of resources and assertions that superstructure and base will not be bifurcated. If policy fails, so does the economy. Motivation to participate in the economic system is generated by the desire of individuals to fulfil their own policy,

or more specifically their "part" of the policy which is reflected through the process of compromise.

This brings us to quite an important point. If the definition of "administration" intrinsically involves the economic production process, the theorists hostility to direct democracy becomes elucidated. Direct democracy is classified as a political phenomena because it involves the formulation of policy that may *not* be directly linked to the economy. The fact that "market forces" dictate economic priorities attests to this fact. Since the description of an administration is the description of a system where "politics" and "economics" are united, the basis for Marx's hostility to "direct democracy" (especially in the form of "peoples' states") becomes more defined. If policies are formulated by a select minority and "approved" by the general populace, the desires of *each* individual are not necessarily taken into account in the formation of the policy itself, which is the case if policy is determined through the *process* of compromise. Thus the nature of an administration reflects the concept of social power in that each individual acting together with others generates a coordinated effort and plan. The institution, then, is merely an organising body, not one that generates policy.

### **Coercion and obligation**

If the administration does not actually make decisions, then the related function of enforcing decisions is also beyond its scope. Similar to making decisions, the enforcement of decisions lies with society as a whole.

If no individual can have power over another, though, then how can decisions actually *be* enforced? The theorists assert that decisions can only be enforced internally. The theoretical point is that there is, in essence, *no* enforcement of decisions; hence the claim that such a society is "non-coercive". Given the above argument, the theorists' claim that there be no "external" source of obligation makes more sense. If there is no organisation making decisions, and if

no decisions are being enforced other than by individual or internal will, and hence logically there is no institution enforcing decisions, obligation *can only come* from individuals.

This “internal” obligation, however, is not sheer desire, or “free will” but is driven in large part by necessity. If for instance, person A, B and C wants to eat rice, then by necessity rice must be planted, watered and reaped. Therefore, certain actions must occur due to necessity. The statement “rice must be watered twice a day” is an authoritative statement derived from the desire of growing rice. One would not necessarily label such a claim “law”. The theorists have termed such necessities “rules”. The theorists carry the argument quite a few steps further. Not only is it necessary to water rice twice daily, but it is necessary to have a human, or more accurately in a technological society, a mechanism for watering rice. It then becomes necessary that someone must build the mechanism for watering rice. This in turn creates a necessity to have someone to maintain the mechanism, which creates further tasks. Eventually it becomes necessary to have a method for organising the delegation of tasks to individuals. Whilst the above steps in capitalist society involve legal implications, the theorists make the argument that authoritative necessities and the correlative demands that emerge from them, are not *in essence* legal. Engels makes the argument most effectively in “On Authority.” It is useful to repeat at this point. For clarity, rules reflect demands derived from necessities, and laws reflect promulgations by the state backed by coercion. (Note: the term, “rules” does not reflect any legal connotations present in the current context of modern jurisprudence.)

Engels described the theoretical foundations for the necessity of “rules” in his work “On Authority”. As discussed in the first chapter, Engels distinguishes “authority” from “force”. He argues that a certain type of authority is required by sheer necessity. Pashukanis later takes up this theme in his descriptions of technical necessity. In both writers, the fact that law is derived from force and rules from

authority give "law" and "rule" one of their most distinguishing factors. Engels maintains that force can be applied when it is not necessary and can be completely external. Authority (in Engels' sense of the word) is created by the necessity of the process itself. He uses the example of running a railroad station. There are certain tasks that *must* be fulfilled if this station is to function (e.g. train maintenance, scheduling, tracking, the gathering of necessary resources). Rules regarding this sort of operation are *predetermined* by the nature of the operation. The presence of such necessities intrinsically connects "rule" with "purpose". These type of regulations have no possibility of interpretation, caprice or malice. Contrarily, force does not necessarily have relation to whether or not an act is necessary; and hence it can be applied at the whim of some empowered individual or group.

The difference between authority and force can be discerned easily in such a technical matter as the operation of a railroad station. It is more difficult, however, to conceptualise the difference between force and authority in regard to the functioning of society. In short, can one really compare the organisation of society with that of a railway? This is exactly what the theorists try to do. A starting point for any operation is the determination and recognition of its purpose. Rules are designed to fulfil that designated purpose. In the railroad example, the purpose is clearly recognisable. Trains are used for transport. The basic purpose of society, however, is not so identifiable.

Marx makes the argument in terms of needs. It is a fact that humans need food, shelter and clothing and that these needs are socially met. The type of authority (rules) that would proceed from these needs would reflect that people are required to work and use their resources. Therefore, rules reflecting the necessity work are not in essence coercive (though they can be). In capitalism, however, the authority that dictates work is necessary is transformed into force. Pashukanis' specification of "unity of purpose" explains how. The goal of capitalism (to procure

profit) is contradictory to the purpose of economy (to satisfy needs).<sup>6</sup> Force (law) is needed to maintain a system that contradicts its own purpose.

In communism, now that the production forces are designed to meet social requirements directly, the purpose of society is unified and the necessity of force evaporates. Theoretically, only rules will emerge from this general unified purpose. The situation is obviously different from Engels' initial example of the railroad in that the running of society is far more complicated than the running of a railroad. The railroad has clearly defined and limited circumstances. Human society does so only in a very general sense—in that the purpose of the economy is to provide for needs. Though the need for social organisation is obvious, *how* this organisation occurs is not at all “determined”. It is clear that humans need housing, but who is to build the houses, where are they to be erected, etc., is not. Such decisions are conditioned by rules (necessities) but are not rules in themselves. Rather, they may be termed administrative suggestions reflected in the previous use of the terms policies, tasks, decisions in the above discussions. These suggestions are proposed possible methods for meeting requirements. Which of the various methods prevail is directly up to the individuals involved.

Placing the above argument in the context of previous discussions regarding decision-making, the following conclusion can be drawn. Certain requirements must be met for a production system to function in providing for the needs and desires of the populace. These necessary requirements have been referred to as rules. The obligation to perform these rules can only come from individuals themselves, conditioned by necessity. If individuals do not fulfil these rules, they are in essence rejecting the economic system and the system will fail. For instance, in a simple example, if the goal was to grow rice, the rule “rice must be watered” would, by necessity emerge. If individuals did not water the rice, they are in effect rejecting the initial goal of growing rice. The obligation to water rice comes from

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<sup>6</sup> Even though in capitalism need satisfaction may occur as a side-effect.

the individuals' desire to grow rice. If the individuals do not want to grow rice, then there is no rule to water the rice and no need to fulfil it. Obligation to the goal, comes only from each individual, and consequently the rule to water the rice must be followed. This obligation, however, does not emanate solely from the free will of individuals, but is also conditioned by necessity.

Other decisions, such as how to organise the task of watering the rice, reflect administrative suggestions. Obligation to follow these suggestions can only come from each individual, as each individual has determined their own role in performing tasks and there is no mechanism enforcing these decisions. Taking the previous example, 140 out of 150 in sector 78 chose to participate in growing rice. These 140 people divide the rice watering among them. In this case it happened to turn out that each individual was to water the rice two hours each month. If 4 of the 140 people had a change of heart and decided not to participate in rice watering, the fact that 8 more hours of watering per month were needed would be disseminated by the watering committee to the individuals in the sector. Negotiation would occur until the hours were met. Thus internal obligation reflects the fact that only each individual has the power to determine whether in fact an obligation exists.

Despite the emphasis on internal obligation, Marx does stress that individuals are part of society and *cannot be considered in isolation from that society*. By definition, internal obligation contains a social element as well. The presence of social consciousness reflects the larger social environs. The theorists assumed that social consciousness would have a large effect on the actions of individuals. Hence if a certain action was causing disruption in the cooperative environment, the individual would endeavour to end the action, or at least resolve the discordant situation. The social consciousness cannot be enforced, however, and although cooperation is necessary for socialism to function, as pointed out in the

discussion of rules, the individual has sole power in adhering to a rule or suggestion.

In sum, the responsibility for individual actions is in part determined by need which generates a social environment within which realm an individual can make a decision. In communism, where the actual interdependence and cooperation of humans to produce for needs is fully materialised in production relations, concordant social relations reflect interdependence and cooperation as well. Although obligation can only come from individuals, these individuals are inherently linked to a larger society completely dependent on cooperation. Thus individual responsibility incorporates social responsibility.

Social cohesion and cooperation emerge as a necessity of an economic system producing for needs. As individuals participating within such a system there is an intrinsic authoritative (in Engels' use of the term) demand for social cooperation and cohesion. Individual decisions take place within this reference frame. Thus individual actions are measured against the social need for cohesion and cooperation generated by the demands of the economic system. Is this "authoritative demand" "external" to individuals in the theorists arguments? It is not primarily so, in that there is no element of coercion to "force" individuals to cooperate and respect the social fabric to ensure social cohesion other than need itself (without cooperation and cohesion the system would fail). Presumably, if individuals wanted the system to function, they would cooperate—at least to a general degree—because it is necessary. There is also the point that it is not *only* the choice of an individual in isolation to follow the decision, but the choice of an individual operating within a fully integrated social realm, and one that operates under economic conditions which necessitate cohesion and cooperation. The social environment, then, can be said to condition individual responses. In the final analysis, however, the individual only can determine what his/her obligations are. The essence of social power is that individuals must have direct control over

society; which indicates as discussed above, that *each* individual must be able to make decisions and must be the sole source of obligation.

## DIFFICULTIES WITH NEEDS-BASED PRODUCTION

### Introduction

The literature is vast concerning both the theoretical and practical problems of socialism. For the most part, works dealing with socialism and legal philosophy leave the practicalities of the implementation of socialism aside.<sup>7</sup> Nevertheless, some consideration of the basic tenets of socialism must be involved, especially with regard to the topic of social power. Similar to the above section, these discussions will be brief and only explored in so far as they directly relate to the law question and are necessary to *theoretical* developments.

The very basis of social transformation relies on the theoretical possibility that an economy can actually be organised to produce for needs. Such an issue involves both practical questions, such as how will needs be calculated or whether abundance is possible, and theoretical ones, such as is "rational planning" theoretically possible. Practical questions will only be addressed so far as the *theoretical* possibility of socialism be established. If it cannot be, discussions of regulation are merely a mental exercise.

Alec Nove in *The Economics of Feasible Socialism Revisited*, asserts that a "marketless" economy is essentially not feasible. Nove's discussion proceeds from numerous difficulties posed by a position that asserts the viability of a non-market economy. Nove doubts the socialist assumption of abundance and questions whether at all times all products and services in demand could be produced at what he labels "zero cost". He then posits that at some point "mutually exclusive

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<sup>7</sup> E.g.: Tom Campbell, *The Left and Rights* (London: Routledge and Kegan Paul, 1983); Hugh Collins, *Marxism and Law* (Oxford: Clarendon Press, 1982); Bernard Edelman, *Ownership of the Image*, trans., Elizabeth Kingdom (London: Routledge and Kegan Paul, 1979); and Olufemi Taiwo, *Legal Naturalism: A Marxist Theory of Law* (Ithaca, NY: Cornell University Press, 1996).

choices" would have to be made.<sup>8</sup> Marx, he argues, did not indicate how such allocation could take place without a market mechanism, the reason being that "Marx did *not* say that, under socialism, there would be no conflicts over allocation of scarce resources (oil, fish, iron ore, stockings, or whatever), but that these and other resources would not be scarce."<sup>9</sup>

Nove also briefly refers to the fact that production at such a high level may not be environmentally sustainable.<sup>10</sup> Given already developed technological possibilities, it is conceivable that "more" could be produced with "less" harm to the environment. At some point, however, there is a possibility that production demands, either because of environmental concerns, lack of a technological process to develop such means or simple scarcity (even if temporary) would require some prioritising. Even if one were to accept that abundance might be possible, there perhaps would be a time lag between when new demands arise and when the technological means to meet them develop.

If needs are to be prioritised, Nove asks, how is value to be determined in an essentially valueless society? Who is to make priority decisions? How shall they be organised? How shall they be calculated?<sup>11</sup> F. A. Hayek in *Road to Serfdom*, suggests that such collective knowledge is impossible to ascertain given that the needs and desires of individuals are so varied.<sup>12</sup> Economy, then must be decentralised indicating that *some* market mechanism is needed, hence a "marketless" production process is unattainable. Nove and Hayek assume that there will be a centralised body trying to calculate the incalculable. Thus the conclusion is that such a system is simply impossible

Whilst Nove and Hayek assert that the answers to the above problems lie within some sort of market mechanism—capitalism in Hayek's case, and a limited,

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<sup>8</sup> Alec Nove, *The Economics of Feasible Socialism Revisited* (London: HarperCollins Academic, 1991) p. 19

<sup>9</sup> *Ibid.*, p. 18

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, p. 23

<sup>12</sup> F. A. Hayek, *The Road To Serfdom* (Chicago: University of Chicago Press, 1965) pp. 58-59

restricted market mechanism in Nove's,<sup>13</sup>—the theorists advocate replacement of the market by an administration based on institutions which do not make or enforce decisions. Rather than a centralised body *making* decisions, a decentralised system of *organising* decisions could develop. Such a system, they argue, would allow the greatest degree of fulfilment for the desires, both economic and otherwise, of individuals.

The general meaning of such a statement has been explored during previous sections in this chapter. Some of Nove and Hayek's problems have already been addressed, such as priorities of production and basic needs calculations. The position can further be explained by discussing, briefly, Nove and Hayek's unaddressed problems with such a model. These difficulties can be categorised under several headings: (1) straight forward concerns over abundance; (2) problems with how needs can be determined; and (3) problems with how to organise production. These problems, Nove and Hayek argue, are currently handled by market mechanisms.

Nove proceeds from the assumption that "feasible" indicates suggested changes must occur in the next 50 years or so. "I should like instead to include my own definition of 'feasible socialism' the notion that *it should be conceivable within the lifespan of one generation— say, in the next fifty years...*"<sup>14</sup> Such a definition of "feasible" is far more restrictive than one of theoretical possibility at some future point in history. Nevertheless, points raised by Nove and Hayek in this area are well representative of concerns regarding the option (or non-option) of a marketless production method and should be, at least briefly, discussed.

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<sup>13</sup> Nove, pp. 210-248

<sup>14</sup> *Ibid.*, p. 13

## Abundance

Nove expresses straight forward concerns over the possibility of producing the amount of goods demanded by society given the large population of the Earth.<sup>15</sup> Whilst a full discussion of abundance is well beyond the scope of this thesis, it should be at least considered whether it *may be* possible at some point in the future. Nove draws attention to the fact that the population of the world is ever-increasing and much of that population is in poverty. He asks "...have the 'limitless-resources' optimists ever tried to calculate the resource implications of China's millions eating as much meat as, say, even the East Europeans do today?"<sup>16</sup> While calculations like these cannot be made with any sort of accuracy given the market restrictions on production of food (e.g., the policies that pay farmers not to grow, destruction of products to maintain prices and monetary restrictions regarding full development of technology), basic calculations can be made with present statistics to see if there is even a slight *possibility* of abundance at some point. Figures show that the assumption of abundance might not be so far-fetched. In 1990 the United States *alone* produced (in actuality, not potential) enough to provide 1.6 lbs. of corn, 1.7 lbs. of rice and half a pound of milk *per week for every person in the world* (using 1993 population figures).<sup>17</sup> Such a diet would not meet the requirements of a "good" standard of living, but does suggest that perhaps at least feeding the world well is not beyond our potential technical grasp, as one country, under market restrictions, can currently at least nutritionally sustain the entire world.

As Nove acknowledges "none of us knows what new discoveries will be made."<sup>18</sup> It should be considered that such possibilities as genetic engineering, water management, mechanisation, plant breeding with regard to food production might increase out put. Abundant energy resources such as fusion might be developed to

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<sup>15</sup> *Ibid.*, pp. 18-19

<sup>16</sup> *Ibid.*

<sup>17</sup> Production figures taken from M.C. Hallberg, *Policy for American Agriculture* (Iowa: Iowa State University Press, 1992) pp. 37-40. World population figures were cited from *The World Almanac*, ed., Robert Famighetti (Mahwah, N. J.: World Almanac Books, 1993) p. 828.

<sup>18</sup> Nove, p. 19

the point of being able to be used effectively. On a broader scale, it is currently within our technological grasp to develop satellites that can produce products away from earth, and perhaps even provide an option as a place for people to live. Obviously such suggestions do not fall into Nove's definition of "feasible" if they are to occur in the next 50 years. They do, however, cause pause for thought in terms of eventual possibility.

It should be pointed out as well that individuals, given their variety, will not all want the same things at the same time. Not all individuals will want to eat meat every night, or live in a mansion, or own a car. Given the huge variety of possible living styles and the increased possibility of pursuing them without economic repercussions (for instance, many people live in the city out of economic necessity), it may be the case that there will not arise one product that is "over-demanded". Even assuming the possibility of abundance, however, does not answer problems regarding how needs are to be calculated.

### **The calculation of needs**

Hayek indicates that calculation of need by a certain body or institution is beyond reason given the variety of peoples' needs and the impossibility of perceiving a common good. He mentions in numerous works that individuals can only handle so much information and that it is literally impossible to consider all the information necessary to decisions that are made in capitalism by the market:

The point which is so important is the basic fact that it is impossible for any man to survey more than a limited number of needs. Whether his interests center round his own physical needs, or whether he takes a warm interest in the welfare of every human being he knows, the ends about which he can be concerned will always be an infinitesimal fraction of the needs of all men.<sup>19</sup>

As pointed out earlier in this chapter, one individual or group of individuals in a socialised production system are *not* required to calculate the *entirety* of need, but rather calculate their own needs. As previously suggested, these needs could be

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<sup>19</sup> Hayek, p. 59

input by each individual and calculated by computer programs. The task of a "calculation committee" would be to monitor the computers. It is clear that Hayek has in mind centralisation rather than decentralised coordination.

Nove's general point in this matter is that often needs simply cannot be calculated *before* production takes place.<sup>20</sup> It is false, he argues, to assume that individuals can even *know* what they need or want beforehand. Given that this is the case, how can needs be assessed without a supply and demand mechanism? He asserts "...there is no better way of enabling citizens to register their preferences than to allow them freely to spend their 'money'..."<sup>21</sup>

Though there may be certain sureties in the choices of goods individuals might want or need, Nove argues that some product choices, such as styles of shoes or cars, cannot be known in advance. Therefore, the entrepreneur takes a "risk" at producing a certain line of product and the market determines whether this choice was right. Is there a mechanism in communist administration would replace, in essence, "shopping"?

With current technology, there is no reason that "choices" could not be developed *before* they are produced. As with shoe, dress or house designs, for example, patterns, prototypes and simulation models of products are developed before the products are actually mass produced. If these choices could be made pre-viewable to consumers, in essence consumers could "shop" *before* products were produced. Such transactions are occurring via the internet and mail catalogues currently. Stores could also display a few items of each design so people may physically "see" it or try it on before they order it. The number of designs existing would be restricted only by the number of people who want to design things. There does not appear to be any *a priori* reason why such a method of "shopping" cannot occur.

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<sup>20</sup> Nove, pp. 42-46

<sup>21</sup> *Ibid.*, p. 59

## How production is organised

Nove's questions regarding the organisation of production focus on issues involved in industrial organisation of production facilities as well as questions regarding specialisation of division of labour.<sup>22</sup> The area of general organisation has already been addressed. Specialisation and division of labour, however, require further explanation.

Nove asserts that specialists will be needed, as well as some chain of command and that these two elements will bring effectively a "division of labour" and hence, by Marx's own arguments, create alienation in the work force.<sup>23</sup> Whilst "average" skills may be required in terms of some "management", others would require extraordinary skills or long-term training such as surgeons, loggers, computer programmers, etc.

The issue of division of labour is quite complex. Although a full discussion of the topic is not possible, three areas should be briefly discussed: (1) to what degree specialisation might occur; (2) what is the nature of the manager/worker relationship; and (3) is socialist organisation of labour comparable to the division of labour in capitalism?

As to the first point, Nove firmly rejects the notion that there will not be specialists. He cites Marx's famous passage in this regard:

There is in this connection a famous quotation from Marx: a person 'will hunt in the morning, fish in the afternoon, rear cattle in the evening and be a literary critic after dinner, without ever becoming a hunter, a fisherman, a herdsman or critic.'<sup>24</sup>

He clearly affirms that in the context of modernisation, such a formula is gibberish:

But let us rewrite Marx's sentence as follows: 'Men will freely decide to repair aero-engines in the morning, fill teeth in the early afternoon, drive a heavy lorry in the early evening and then go to cook dinners in a restaurant without being an aero-engine

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<sup>22</sup> *Ibid.*, pp. 33-55

<sup>23</sup> *Ibid.*, pp. 50-59

<sup>24</sup> *Ibid.*, p. 51

maintenance artificer, dentist, lorry-driver, or cook.' Then it does look a trifle nonsensical, does it not?<sup>25</sup>

While the first appearances of such a statement may seem ridiculous, it is not beyond all conception. Without monetary or social restrictions, professional training might become extremely accessible. Is it completely implausible that a person could be a driver, doctor and dentist? Training to be a doctor takes approximately eight years, five for dentistry and six months of heavy vehicle training—a total of 13.5 years. Given an average forty-year work span, it is not beyond all comprehension that a person can indeed acquire several professions. And in fact, Nove admits that such capacity is actually possible.<sup>26</sup> He argues, though, that at a given point in time there must be specialisation, a fact that Marx did not seem to acknowledge.<sup>27</sup>

For the sake of argument, let us assume that specialisation would exist. Such a statement should be qualified however. Specialisation would exist *completely* in the realm of choice. Whether individuals would be more comfortable having one profession their entire lives, serving one “committee” that requires specialists or several, or choose to do “untrained” jobs will be decided by each individual without threat of economic repercussions. As explained before, however, individual response would occur within a social whole that may affect the outcome of individual choice.

A “chain of command”, as admitted by all the theorists, would be necessary in any production system. At a given point in time, someone must be responsible for a certain realm of activity. Whether these may be what is current day managers of facilities, or supervisors of work schedules—coordinated activity is necessary. The point that the theorists raise, however, is that while authority is needed to carry out plans, such tasks need not develop into a centralised political bodies. As discussed above, “managers” who have no power privileges in the current political sense, no

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<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*, pp. 50-59

permanence, no direct control over resources, no economic benefit due to the fact they are managers and no systematic method to make or enforce decisions indicates that the "chain of command" is one that is informal, temporary and reflects organisational facilitation only.

Under such conditions, would "alienation" necessarily flow from specialisation and authority? While the answer is not, by any means, clear cut, division of labour by force—whether economic or direct coercion—is of clearly different character than one based on individual choice operating within a milieu of social coordination. Far more important to establishing whether the above system could function is the question of whether the desires of individuals will meet the needs of society. In other words, if society needs two million doctors, but only 500,000 individuals want to be doctors, will the system fail? Will individuals feel a greater responsibility to fulfil the demands of the system if they are not economically, or otherwise, forced to do so?

Such questions are simply unanswerable. There is nothing in the above arguments, however, that suggests a system organised as such would never be possible. The number of needed professionals could be estimated much in the same method as needs could be calculated. These needs could be conveyed to society and individuals would then respond with a sense of choice and social responsibility. I propose that with the vast, and currently untapped, potential of human labour and capability, that there might be enough trained and willing people to allow a needs-based economic system to function. There is nothing, *theoretically*, that indicates otherwise.

## **Conclusion**

The gist of the argument against needs-based production focuses on the impossibility of replacing market mechanisms in determining which products to produce, how to produce them and with what urgency. It has been proposed that at

some point in history with the aid of technology and the development of institutions that provide an avenue for full participation, needs can be calculated and production and social organisation can occur in a coordinated, decentralised fashion. Such a system directly links the fulfilment of individual choices to the economic system via the process of compromise. In policy formation *itself* all needs must be taken into account. Theoretically, a policy *could not emerge* where needs are not met if not fully, in compromised form.

Since policy takes into account all needs, individuals would most probably participate. The effectiveness of such a system would rely directly on whether the system is fulfilling its members. The greater the systems fulfils needs, the more society will partake. Taking into consideration that: (1) needs, through the aid of technology, could be calculated; (2) economic policy could theoretically emerge from the input of each individual; (3) the process directly links the fulfilment of individual choices to economic production; (4) motivation to partake in an effective economic process comes about as a result of this direct connection to policy formulation; it is conceivable that a market mechanism may not be intrinsically necessary to human society.

While the above brief discussions of the possibility of needs-based production by no means meet Alec Nove's concept of feasible, nor does justice to the volumes of work produced by Nove and Hayek, they seek *only* to suggest that such a system *might* be theoretically possible.

While many practical organisational questions are left unanswered, and further discussions of the possible issues in socialism are regrettably left untouched, it has been established that "direct control" and "needs-based production" may be theoretically possible at some point in history. The task then becomes to discuss the ramifications of such a system in terms of law.

## REGULATION

The basis of regulation revolves around the notion that institutions do not produce or enforce decisions, but that decisions are the results of the compilation of each individual's input. As pointed out, under such circumstances the policies and tasks derived through such a process are not binding in the traditional legal sense, but rather are adopted by individuals through a sense of internal obligation. Consequentially, these tasks and policies do not carry with them attendant expectations of rights and duties, thus the basis for law and legal enforcement is removed. Given the presence and role of social consciousness, however, it is evident that a kind of social norm might be generated by the administrative process. Also, the fact that necessity moulds policy to some degree reduces the role of individual choice, and lays basis for the establishment of rules.

As was born out by the above discussions, rules reflect necessity. The outcome of such a rule is more a statement of fact than a method of delineating duties, or more generally, modes of conduct. The function of rules becomes to define the necessary parameters within which decisions will be made. For instance, when planning for agriculture, rules designate certain requisites that cannot be omitted if the system is to function. By virtue of necessity, the plants must be watered if food is to grow. Who is to water the plants, in what manner and at what intervals is a matter of choice, and hence a matter to be "decided". While this concept is clear in such examples as "plants need water" or "aeroplanes need fuel", it is not so straight-forward in terms of social organisation. As a result, the rule that emerges directly from necessities generated by communist production methods is a very general one—that the social organisation must produce for need, and that, consequently, socially organised (cooperative) work is involved. *How* the system accomplishes this is in the realm of human choice. Thus in terms of social organisation, there is a tremendous amount of decisions to be made. Since the term "rules" define the reality within which decisions are made, the outcomes of

decisions have been labelled in the previous text “administrative suggestions” which include the terms “policies” and “tasks”. Such outcomes are not legally binding, carry no notion of attendant rights and duties and are adopted only if so chosen by each individual.

Social consciousness, however, suggests that individual choice is by no means devoid of social influence. The theorists argued that the power of social consciousness would be great, and implied that the communist citizen would feel extremely influenced by such consciousness. The implication is that social norms—and very strong ones—would be generated. Such an implication merits caution, however. In current jurisprudence lexicon, the term “norm” carries with it a strong expectation of compliance and as a result, non-fulfilment of a norm is viable grounds for social criticism. As has been pointed out, though, while the social environment *may* highly condition individual choices, theoretically the individual still has the final authority not to comply, and this decision can have no repercussions other than, perhaps, a re-negotiation of policy. The aim is to have actions be free expressions of individuality, rather than be judged by any normative standards. Chris Arthur aptly warns that a principle in communism should not be taken to mean a:

...principle enforced in order to realise ‘justice and equality’ even ‘actual equality’—because it is not enforced at all. It is clear, that both ‘ability’ and ‘need’ are to be determined by the possessor...it is clearly absurd to suppose that anybody could be accused of slacking, or of being greedy; rather all expressions of individuality will be just that—expressions of free subjectivity—not obedience to an objective norm.<sup>28</sup>

For this reason, “social consciousness” as opposed to “norms” is a more apt term. On the other hand, it is a reasonable expectation that there will be the possibility of negative social reaction—especially if one individual’s action stands out among many. While the results of communist social organisation might be successful in removing such judgmental reactions, it is a possibility that must be addressed. The theorists clearly indicate that social consciousness is not “external” to the

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<sup>28</sup> Chris Arthur, “Towards a Materialist Theory of Law”, *Critique* 7 (Winter, 1976/77) p. 41

individual. As previously pointed out, this implies that society has no power (economic or political) to enforce its “norms”. This diffusion of power is the grounds for regulation. Thus, even if an individual’s action generates negative social response, the individual can still choose to do such an action, and society has no power to force him/her to stop. Obviously the theorists believed that most individuals would be very responsive to their social environment, or responsive enough to let the system function. Theoretically, however, it is quite clear that the final authority rests with the individual. How responsive individuals are to social pressure is a matter of personality.

When speaking of organisation, then, the policies and tasks derived from a coordination of individual input produces only suggestions—suggestions which may or may not work. While these suggestions by nature imply anticipated compliance, the expectation is weak and lacks a strong normative (in the traditional sense of the word) component. If a large majority do not comply, the policy must be greatly changed. If a minority do not comply, the policy must be fine-tuned. The results of not fulfilling a task, then, is a stimulus for social change rather than an action that merits “approval” or “disapproval”. Although social disapproval may occur as a side-effect, the net result of non-compliance is a re-examination of policy and the generation of more suggestions.

For the most part, discussion has centred around organisation of production and social tasks. Such an organisation has been labelled administration and usually has reflected the same focus as political or legislative institutions in capitalism. Also under the purview of regulation, however, is what has been previously referred to as arbitration.<sup>29</sup> Given that the administrative institutions do not produce binding decisions (as they do not produce decisions at all), the goal of arbitration, contrary to its capitalist legal counterpart, is not to enforce decisions. Under the administrative description of the roles of institutions described above,

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<sup>29</sup> As mentioned in the Preface, the term arbitration as used here does not imply its current legal usage.

what would the role of an arbitration institution entail? Its primary goal would be to facilitate the resolution of conflict. Since the institution has no innate power by virtue of its being an institution and no power to enforce decisions, its role would be restricted to managing negotiations between parties, if those parties desired. Such a function might involve suggesting a compromise to a given situation, facilitating the derivation of compromise on an issue, further explaining the nature of conflict and the root of the problems involved, providing a third party through which involved disputants could more easily communicate to each other or providing input from an agent outside of the dispute at hand. The outcomes of such a process, as is the case with administrative institutions, are suggestions. Administrative institutions facilitate derivation of suggested policies and tasks, arbitration institutions facilitate derivation of suggested resolutions. Both processes, though differentiated in goals, proceed from the same theoretical basis—that individuals are the sole source of power in society.

The discussions above provided a general description of a society where: (1) individuals are highly integrated; (2) the need for cooperation and cohesion is fundamental to the fulfilment of individuals needs and wants; (3) there is virtually no “external” body deriving or enforcing decisions; and (4) no institutional mechanism to enforce a resolution of dispute (only a mechanism for facilitating resolution). Assuming such social organisation were possible, what sorts of conflicts would emerge?

### **The nature of conflicts**

One obvious source of potential conflict comes with the performance of tasks. Even though each individual determines his/her tasks, it could be presumed that at one point *some* individuals will not perform their specific tasks at a given moment in time. Such non-performance is one possible area of conflict.

On another level, day-to-day human interaction and disagreement would probably produce some conflict. All of the theorists assert that socialised production would eliminate many sources of crime (property laws, business regulation, complex tax structures, etc.). There nevertheless appears to be a realm of personal discord that would not simply “disappear” even under the best of circumstances. Examples might include separating from one’s partner, violent jealousy, envy that might result in assault. These situations are often labelled “crimes of passion.”

Another possible area of conflict can be categorised as a “clash of values”. One section of the population may embrace certain values that are opposed to values of another sector. Some examples might include drug use, religion, sexual expression and a host of other possible daily conflicts that can be categorised as “social behaviour”.

In sum, there are generally three areas where conflict may emerge: social organisation; personal disagreements and social behaviours.

### **Conflict resolution**

All of the above possible conflicts are generally regulated in a capitalist society by certain areas of law, namely, civil, criminal and administrative law. The general structure that guides legal decisions relies on the concept of juridic persons which reflect that: (1) individuals have sets of enforceable rights and duties; (2) individuals are completely responsible for their own actions; (3) breaches of any of the laws in the above areas involves some sort of punishment (fines, incarceration).

While social customs, norms and morality play a part in the capitalist legal system and some would argue in the formulation of the law itself,<sup>30</sup> it is generally accepted that the source of laws is the state and those laws are enforced by coercion. The legislature is responsible for making the law, the judiciary becomes responsible for interpreting the law and rendering its decisions according to internally derived

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<sup>30</sup> For an interesting discussion and examples of case law regarding this point see William Reynold’s *Judicial Process* (St. Paul, MN: West Publishing, 1991) esp. pp. 124-143.

legal principles. Theoretically all such action takes place with general input from society in some form of "democratic control" in the conventional sense. Thus legal rules and laws regulating organisations, personal conflict and social behaviour are objectively as possible enforced by a judicial mechanism.

The theorists reject virtually all of the above premises. Individuals are not guaranteed rights through a state mechanism, but rather can all exercise "rights" through direct control over society. With such control *only* individuals can determine what their needs, obligations and requisite actions are (both emotively and economically). Individuals are by nature, however, *not* completely responsible for their actions for these actions must operate within the confines of the economic system and social structure, which is dependent on cooperation, and are in part decided by necessity. Thus individual action intrinsically is connected to the social environment. Punishment does not actually rectify a conflict situation, but merely compensates in monetary form (either by loss of labour time or fines) for the perceived infraction. There is no institution that reflects the duties of the judiciary in communism.

Conflict resolution incorporates a entirely different set of principles. What emerges is a society with *no* enforceable mechanism for deriving what social behaviours are acceptable or not. There is no mechanism for enforcing one "right" or "duty" above another or for determining what social "needs" are. All become definable only by the individual, hence obliterating the legal concepts of rights, obligations and duties. Thus suggestions that emerge do not reflect enforceable principles, and do not intrinsically entail prescribed duties or rights.

Under such conditions, "conflict" does not take the form of deciding which values, duties or rights prevail, indeed it cannot, but rather indicates that social cohesion is disrupted and a solution must be sought. The solutions to these problems would bring some degree of social growth, or at least, social change. Conflict, then, no longer represents a clash of competing rights and duties in which case a "winner" must be decided, but rather becomes a method for social adjustment and possible growth.

Such a theoretical claim and its implications are difficult to grasp without concrete examples. Whilst such examples inherently involve structural elements which condition the situations, such elements have only been mentioned briefly. For the purpose of clarifying how conflicts would assume a different form than in capitalism, it is necessary to accept the theoretical premises of the previous discussion. Namely, that decisions have been successfully negotiated from individual input through the use of facilitating institutions.

The first area of possible conflict discussed involved social organisation. For example, individuals in a sector decided that garbage needed to be collected once a week. To accomplish this, all residents chose to contribute two hours per month to remove the garbage. It was Lila's turn to remove the garbage. Lila did not remove the garbage. Noticing that Lila did not remove the garbage, her neighbour, Larry, performed the task. In fact, this was the third time Larry removed the garbage for Lila. Larry did not want to continue doing Lila's designated task.

Under capitalism this conflict could be dealt with both in the civil and judicial realm. Larry could talk to Lila and try to get her to take out the garbage. If Lila had a sense of social obligation, that is if Lila felt she had an obligation to take out the garbage, Larry could probably talk her into it. If she did not, or felt that she should not take out the garbage, Larry's attempt would probably fail. Larry could then report Lila's actions to the city. The city would then most probably fine Lila for not removing the garbage. If the fine did not work the city might even imprison Lila for a time. It is hoped that the threat of these actions would prevent Lila from shirking her duties again.

If Lila did not feel obligated to remove the garbage, the consequences might be social disapproval (which could result in economic consequences) or legal retribution. Legally, *Lila's* sense of obligation is irrelevant. Since it is the law to take out the garbage, Lila has a legal obligation to do it. If she does not complete the task, she will be financially or physically punished. The effectiveness of the legal decision relies on whether the punishment is enough of a detriment to prevent Lila from

breaking the law. The possible outcome would be either that Lila removes the garbage or that Lila is punished. If Lila removes the garbage, the problem has been "resolved". If Lila does not remove the garbage, the problem has not been solved but it has been legally resolved through punishment.

Under regulation, Larry cannot report to the city to have Lila fined or arrested, what are his alternatives? The reason *why* Lila does not complete her task becomes paramount. Since Lila herself decided to contribute two hours to garbage collection, presumably she would carry out her decision unless: (1) she had a change of heart; (2) she had some problem with doing her task even though she wanted to. Since she has continuously not completed her garbage service it can be assumed the problem is long-term rather than a one-time occurrence. In the first instance, Larry could confront Lila and she could inform him that she has had a change of heart and will not be removing garbage anymore. Larry (or Lila) then reports this decision to the sanitation committee who then informs the other 149 people in the sector that two hours more time for garbage removal is needed per month. Each individual contributes what they feel they can. Most probably, some individuals from the other 149 possible participants will assume the extra two hours, or some compromise will have to occur. This could involve other people approaching Lila and trying to get her to contribute to garbage duty (if they knew it was she who was not collecting the garbage); or perhaps slightly changing the policy where those two hours could actually be eliminated.

In the second case, where Lila actually *does* want to complete her task but does not, the root of the problem must be discovered. Say, for instance, that Lila had a chronic time management problem, and she never was able to manage to complete garbage removal on time. Since Lila truly desires to change this behaviour, she could enlist Larry's help in telling her when to remove the garbage. She could go to an arbitration committee and ask for help from other members of the sector in

making sure she completes her tasks. If time management is causing her other problems in her life, she can enlist the help of a counsellor.

The possible outcomes of the situation is that garbage policy will be re-negotiated or Lila will change her behaviour if she desires. In either case the conflict for Larry has been resolved and the need for removing garbage fulfilled.

In capitalism, both social factors and legal ones may play a role in the possible approaches to the problem. In the legal realm, it did not matter whether Lila considered removal of the garbage her obligation or not. The fact is that the law states that it *was* her duty, which she did not fulfil. The result was punishment. The element of whether the law embodied a social norm or not is immaterial as the outcome is the same whether the law is “dictated” or socially derived. Thus while Lila’s obligation might be “internal”, —if she accepted that she should remove the garbage and hence might feel “guilt”—it does not matter in a strict legal sense whether she felt guilty or not. The situation in capitalism involves a theoretically “external” obligation (law) and an “internal” one (Lila). The end result of the legal system was punishment, which resolved the situation legally, but may not have deterred Lila enough to change her behaviour, leaving the situation in actuality, unresolved in that Lila did not change her behaviour and garbage was not removed.

The situation as described in communism is vastly different. If Lila feels that she has no obligation to participate in garbage removal, there is, in essence, no obligation. While society (in this case the sector) anticipates that Lila will contribute two hours because she indicated that she would, this expectation is not a *duty* (as duties can only be decided by individually determined obligation) and hence society cannot expect Lila to carry out garbage removal *as a right*. In theory, Lila’s decision not to participate in garbage collection will not be judged, either institutionally or socially. Institutionally it cannot be judged given the power structure of communism. Socially it is argued that actions will become, as Chris Arthur puts it, “expressions of free subjectivity”. Even in the event that negotiation over garbage

collection turned out to be very difficult and the sector *did* express resentment towards Lila for her change of heart, *only* Lila can determine her obligation as there is no social means to force Lila to change her behaviour if she does not desire to. It is clear the theorists would suggest in this case, that because of a heightened sense of the necessity of social cooperation, Lila, for the sake of social goals, probably would participate in garbage collection if her decision not to caused a lot of trouble, even if she did not desire to participate in this particular manner. Pashukanis implies, that if she did not, there might be “problem” and one that would have to be “treated”. The key theoretical point is, however, that *only* Lila can decide whether or not she is obligated to do the task. She can only be “treated” for this “problem” if *she desires it*, as would be the case if she thought time management was a chronic problem of hers. The only influence society can exert is social disapproval, which might or might not result in Lila resuming her collection of garbage. Such individually determined obligation may be highly influenced by the rest of society (or in this case, the sector) if the theorists predictions of the development of social consciousness are correct; nevertheless the ultimate *source* of obligation is *only* the individual, albeit one that is integrally linked to a more connected whole.

In capitalist legal structure a clear distinction can be seen between a “social” approach to the problem and a “legal” one demonstrating Marx’s claim that society is falsely divided into the “civil” and “political” realms. If the “social” approach to the problem does not work, force is then used, which does not always result in “resolution” of the problem. The goal of such a justice system would appear to be to mete out punishment fairly, which is rather different from one to provide as many avenues as possible to resolve the problem. Indeed, in a capitalist legal system there is no guarantee the problem actually will be resolved (as is the case if Lila continues to not remove garbage, despite punishment).

In regulation, if the situation is regarded as a conflict, something will change to actually resolve the core problem; either garbage policy will be re-negotiated or

Lila will change her behaviour willingly (for whatever reasons). In both cases garbage removal will occur and Larry's problem will be solved. There is no "legal" or "social" dichotomy.

The second realm of conflict discussed involved "crimes of passion". Such conflicts are approached in capitalism in a variety of ways, some through criminal law others through civil law, or both. Let us use as an example a case of murder. Leon and Joe are deeply in love with the same woman. Leon accidentally witnesses Joe making love to the woman with whom he is in love. In a blind fit of rage, Leon kills Joe. In capitalism Leon would face criminal charges. The family of Joe would also have the option of filing a civil suit, if it could afford one, against Leon for a variety of damages (e.g., non-economic, punitive, etc.). At the criminal level Leon would most probably face jail time or possibly death; on the civil level, Leon most probably would have to pay compensation.

Under regulation, the sector would have to decide whether Leon would kill again. The only way this could be determined would be if Leon felt remorse at his action.<sup>31</sup> If he felt guilt, presumably he would not want to kill again, and would try various methods to try to control his "blind rage". If he were not remorseful, he would fall under the classification of psychopathy and would be clinically mentally ill.<sup>32</sup> Pashukanis indicated that force might be used under the circumstances of "protection of society." Such a case seems to include the one above, in which case Joe's murder would not be one of a crime of passion, but rather a result of a mentally ill, violent person. Although such an issue is relevant and will be discussed subsequently,<sup>33</sup> it is beyond the purview of "normal" conflicts and will be left aside for the moment.

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<sup>31</sup> Bertell Ollman suggests that self-guilt will be at such a level that the community duty may be to console the offender. See "Marx's Vision of Communism: A Reconstruction" in *Critique* 8 (Summer, 1977) p. 32. For comments on the minimum need for coordination see pp. 30-34.

<sup>32</sup> See *Psychiatric Dictionary*, ed., Robert Campbell, M.D. (London: Oxford University Press, 1981) p. 507.

<sup>33</sup> See "COMPLEXITIES OF REGULATION", "Violence" in this chapter.

The aim of the legal system focuses primarily on determining the punishment of Leon which cannot have any affect on Joe. On the criminal level, Leon's jail term or death would not bring Joe back to life, and more importantly would not teach Leon how to control his rage. Whilst internment might remove Leon for a limited time from society (so he could not kill another, or rather kill another "free" citizen), he would still be a violent person upon leaving prison; and in fact, might even be *more* violent.<sup>34</sup> Death would not resolve the problem, but rather ruthlessly eliminate its cause in this one particular case. On the civil level, "damages" would have no relevance in a society where a monetary system is not in operation. Both for the victim (who is dead) and the assaulter (who has uncontrollable rage) neither fines, jail time or death addresses the problem. The root cause of the murder, jealousy, is not ever addressed in the outcome of the legal process, though it may play a limited role in determining the criminal's sentence.

In regulation, the approach to the situation would reflect the goal of preventing Leon from killing again by his *own* desire which would invariably focus on the root cause of the situation—jealousy, and its outcome—uncontrollable rage. It is important to note that despite the gravity of the situation, the source for obligation is the same, Leon.

The third area of conflict involves patterns of conflicting social behaviour or values. In capitalism, social behaviour is regulated by social, economic and legal mechanisms. Socially, certain behaviours are not acceptable even though they are not legally enforceable and have no economic repercussions. An example of such a social behaviour is sending wishes to one's mother on Mother's day. It is socially expected that children should contact their mothers in some way on Mother's Day. A similar example can occur in non-governmental social institutions. For instance, if some one is devoutly religious s/he is expected to go to church. Neither of these

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<sup>34</sup> See Thomas Mathiesen, *Prison on Trial* (London: Sage Publications, 1990) esp. p. 151; and for an examination of psychological stress in prison, Hans Toch, *et al.*, *Men in Crisis* (Chicago: Aldine Publishing, 1975).

examples are presently legally enforced. If son and daughters do not contact their mothers on Mother's Day and members do not go to church the only consequences they have to face stem from social, or institutional disapproval and self-guilt. Behaviour can also be controlled via statutes which explicitly make certain actions such as drug use or nudity punishable by law. In these situations, individuals may face social disapproval as well as legal consequences. Behaviour can also be controlled by the operating political and economic power structure. For instance, employees of a firm may be required to wear ties or dress nicely. Males may be expected to have short hair. Though there may be no law enforcing such dress codes (especially if such codes are not in the contract), and whilst social mores may not condemn casual dress or hair length, those that do not conform to the expectations of the firm may jeopardise their chances at obtaining a job or retaining employment at such a firm.

In regulation, this differentiation does not exist. Individuals face consequences of certain behaviours only on a social level, as an individual functioning in the context of a cohesive integrated whole. Certain modes of behaviour in regulation cannot result in punishment or loss of economic opportunity. Nevertheless, certain behaviours may be disruptive to the social fabric. Such disruptions are handled in a capitalist system by the outlawing of certain actions, the threat of economic repercussions as well as social disapproval. In regulation only the latter may be a factor. Such situations would most probably require the generation of some sort of compromise.

For example, Citizen Rastafarian moves into the neighbourhood where drug use is not common. It is part of his religion to smoke marijuana daily. Citizen Rasta grows his own marijuana and gives it to anyone who would like to use it. Citizen Mum has two children who constantly see Citizen Rasta smoking on his porch. Her children like Citizen Rasta and go to visit him often. She is nervous that he might offer them marijuana. Citizen Mum does not particularly care for

Citizen Rasta, and does not want herself or her children exposed to the drug *in any way* but Citizen Rasta smokes openly.

In capitalism, the situation would be handled in several ways. If marijuana was against the law, Citizen Mum could call the police and Citizen Rasta could be arrested the result of which would be jail time or a fine. If marijuana was socially unacceptable to a high degree she could call Citizen Rasta's employer and report his marijuana use in the hopes of using the threat of his loss of work to reform his behaviour. She could also talk to him about her concerns and try to derive some solution.

In regulation, only the third option would be open to her. They both could also go to arbitration to gain help in trying to resolve the situation. Citizen Rasta could make sure not to smoke in front of Citizen Mum's children. A certain park could be designated for the purpose of smoking marijuana. Citizen Rasta could construct a more protected area by his house that he could use. Citizen Rasta could move to an area where there were other Rastafarians or where marijuana use was more prevalent. Citizen Mum could move to another area.

In a capitalist legal system, jail time might solve the immediate situation in that Citizen Mum would not witness his use of marijuana. It does not, however, address the larger problems of how two dichotomous social values can operate together in relative peace. The fining of Citizen Rasta would not guarantee either the immediate or long-term outcome, nor would the loss of Citizen Rasta's job.

The theory of regulation suggests that given the social disruption caused by parties with opposite lifestyles, some sort of solution must be sought by virtue of the need to preserve the cooperation necessary for the social system (including the economy) to function. In this way a regulatory system does not proscribe certain behaviours, but rather tries to manage social discord. Thus obligation does not involve adherence to prescribed behaviours, but rather proceeds from individual choices made within an economic system that must maintain cooperation, even in

light of vast differences. In fact, with regard to the above example, if marijuana use in Citizen Rasta's immediate vicinity was wide-spread, the "problem" would not exist.

### **General description**

While these examples are simple and their explanations equally so, such comparisons begin to elucidate the theoretical differences between regulation and law (as defined by the theorists). Whilst the law assumes objective form in determining the rights, duties and obligations of people, regulation relies on the principle that individuals are the ultimate authority. Lifestyles, needs, wants, work style, behaviour, sense of productivity and accomplishment, etc. can not be measured in any concrete way (e.g. economic rewards, institutional definition of rights and obligations).

This raises interesting implications in terms of responsibility. If society has no mechanism for determining, evaluating and enforcing responsibility, how could it possibly function as a society? As explained previously by the theorists, individuals are not completely "free" in terms of their actions. Their actions take place within definitive economic and social relations which are generally governed by the necessity of cooperation. Actions and goals are also conditioned by necessity itself (e.g., food must be produced). It is evident the theorists believed that this sense of cooperation, operating within the realm of necessity, this consciousness, would condition individual choices so that cooperation could still be maintained. If cooperation were not maintained to the degree that communism could function, then individuals would be making active choices which reject this goal. Thus, if it is desired to maintain communism, cooperation must be operative.

The purpose of institutions of regulation cannot be to decide which sets of rights and duties prevail, as in essence there *are* no defined rights and duties. Individual actions involve *both* the individual and the rest of society. A conflict

involves either a change in the individual, a change in social organisation or both. For instance, with Citizen Rasta, he is not expected to stop smoking marijuana, nor is Citizen Mum expected to accept marijuana usage. There is no one individual responsible for this situation. The solution involves either a restructuring of their immediate social circumstances (relocation), or a compromise where both must change their behaviour in some way. Regulation focuses on the *cause* of the situation rather than the outcome of a situation.<sup>35</sup>

Pashukanis states that in communism various concepts such as laws, social norms, culture or morals become unnecessary. Since the source of all authority is, in the final analysis, the individual operating in a cooperative whole; ethics, culture, law and social norms are melded, and lose distinction. This is not to say all moral, legal and social values will disappear. Indeed, through social consciousness many values which have developed through the history of human civilisation—in legal, social or moral form—might be carried through to socialism (hence Reisner's claim that in one way, law will not "disappear"). Other practices might be weeded out. Their various forms, however, become unnecessary.

It is apparent that the theorists considered the socialist human to be a vastly different creature from the capitalist one. The theorists imply that given the far healthier state of the society, conflict will not, for the most part, assume emotively dangerous levels (as in the case of Leon murdering Joe). They argue that if people are engaged in generally fulfilling work, are not suffering from any substantial economic difficulties, and feel a sense of parity with fellow members in a cooperative venture, that the conflicts would not be irreparably divisive, and would be approached with an eye to generating an acceptable resolution.

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<sup>35</sup> Such a dichotomy manifests itself in current legal systems. In jury trials, lawyers often stress the cause of an accused's actions to ameliorate the possible consequences of that action. While such methods, so far, have not had direct affect on legally proscribed punishments, it does play a role in plea bargaining. The "legally insane" defence is an extreme example of an individual not being held responsible for actions at a given moment. Such considerations also come into play in determining premeditation.

The theorists also seem to imply that "social consciousness" will create a certain social unity in individually determined senses of social obligation, at least in basic ways (such as following policies that work, treating each other with respect). Such descriptions by the theorists have led to some rather odd conclusions that "social unity" implies "no diversity". Given that the premise of socialism is that no one is equal and authoritative values can only stem from individuals, such a statement hardly seems the case. What evolves is a social order that needs cooperation as desperately as a capitalist one needs individual competition. With this development of group inter-reliance, it is difficult to predict how diverse or similar human behaviour would be, especially given that choices would have no coercive or economically punitive repercussions.<sup>36</sup> It is also impossible to know whether this diversity can be managed enough to produce a viable economic and social system. Only history might be able to answer such questions. There are a few difficulties, however, that should at least theoretically be addressed.

### COMPLEXITIES OF REGULATION

Despite the fact that individuals cannot be coerced into following policies, completing tasks or behaving in certain ways, the theorists stress that social consciousness will be more highly developed and individuals will thus be greatly influenced by their fully integrated social environment. Whilst it was discussed how this social consciousness was not external to the individual, the fact that it could be a persuasive force was also raised. Could such a force ever approach the theorists' definition of political power (power of one individual over another)?

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<sup>36</sup> Current research suggests that socialisation greatly conditions human behaviour. See Robert Heiss and Judith Tourney, *The Development of Political Attitudes in Children* (Chicago: Aldine Publishing, 1967) pp. 217-220. Also, Stanley Moore, *et al.*, *The Child's Political World* (New York: Praeger Publishing, 1985) esp. pp. 134-137. Beatrice White and Carolyn Edwards, *et al.*, conduct an interesting cross-cultural comparison of what affects children's behaviour with specific regard to gender. Although they do not state that cultural socialisation is the *only* factor in behaviour, they do stress its importance. See *Children of Different Worlds* (Cambridge, MA: Harvard University Press, 1988) esp. pp. 267-279.

Though the theorist indicated that it could not, the issue should be discussed in more depth.

Similarly, the theorists indicate that diverse individual choices will not be disruptive enough to destroy the social structure. Such a claim should be investigated more thoroughly. The question of whether compromise is *always* a possibility should be addressed; for if it is not, it is possible there are some situations that might involve coercion.

## Violence

The examples presented above illustrate problems that might occur in everyday communist life many of which are legal issues today. What of more tragic "conflicts" such as murder, rape, or assault? As stated before, the theorists respond to this question by claiming that most violent crime is caused by the social conditions and coercive authoritarian structure produced by capitalism and that with the advent of socialist production relations, these crimes will simply not occur.

The idea is well-represented in the school of critical criminology (some of which are Marxist based, some of which are not).<sup>37</sup> William Chambliss in "Toward a Political Economy of Crime" argues that crime has become a "rational response of some social classes to the realities of their lives."<sup>38</sup> Along these lines, Taylor, Walton and Young in *The New Criminology*<sup>39</sup> maintain that the label "criminal" is strictly conditioned by the social environment in which it arises. "Crime," they

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<sup>37</sup> For a survey of critical criminology see *Radical Issues in Criminology*, eds., P. Carlen and M. Collison (New Jersey: Barnes and Nobel Books, 1980); especially useful is Pat Carlen's "Radical Criminology, Penal Politics and the Rule of Law", pp. 7-24. See also *Critical Criminology*, eds., Ian Taylor, Paul Walton and Jock Young (London: Routledge and Kegan Paul, 1975). For an analysis of class and crime see Richard Quinney, *Class, State and Crime* (New York: David McKay, 1977). For an overview and critique of the class factor in crime see Joseph Weis, "Social Class and Crime" in *Positive Criminology*, eds., Michael Gottfredson and Travis Hirschi (Beverly Hills: Sage Publications, 1987) pp. 71-90. For a critique of radical criminology from a Marxist perspective see Paul Hirst, "Marx and Engels on law, crime and morality" in *Economy and Society*, Vol. 1, No. 1 (February, 1972) pp. 28-56.

<sup>38</sup> William Chambliss, "Toward a Political Economy of Crime" in *The Sociology of Law: A Conflict Perspective*, p. 209

<sup>39</sup> For the effects of these arguments on penology see Gordon Hawkins, "The new penology" in *Law and Society*, pp. 108-127.

argue, "is ever and always that behaviour seen to be problematic within the framework of those social arrangements: for crime to be abolished, then, those social arrangements must also be subject to fundamental change."<sup>40</sup> They call for a society where "the facts of human diversity whether personal, organic or social, are not subject to the power to criminalize."<sup>41</sup> Robert Brown sums up the conclusion of the New Criminologists:

They believe that the sorts of behaviour which are made subject to the penalty of the criminal law in Western industrial societies are those that threaten the property rights and privileges of the power-holding groups...Working-class offenders are treated as serious threats to the social order whereas middle-class criminals are treated as being mischievous. Thus it is no mystery, the indictment concludes, why criminals come to be thought of as predominantly young, working-class males.<sup>42</sup>

Such arguments as these indicate that there is no essential "criminal" character, and with the radical social changes procured in communism, "criminals" will vanish.

Supporting their claims are the psychologists who assert that violence is a learned behaviour. Though this school of thought does not make the connection to economics, they do assert that if children are raised in a violent environment, regardless of their economic standing, they will emulate adults and respond with violence in certain situations. Hence, if children are raised in a "non-violent" environment, violent response would be severely lowered.<sup>43</sup>

Opposing the sociological view is the psychological or biopsychological approach to criminal behaviour. Hans Eysenck and Gisli Gudjonsson point out that while "victimless" crimes may be subjectively subordinate to the desires of the state, "victimful" crimes (resulting in direct injury to others) might be considered

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<sup>40</sup> Ian Taylor, Paul Walton and Jock Young, *The New Criminology* (London: Routledge and Kegan Paul, 1973) p. 282

<sup>41</sup> *Ibid.*, p. 282

<sup>42</sup> Robert Brown, "The new criminology" in *Law and Society*, p. 84

<sup>43</sup> See Wilfried Belschner, "Learning and Aggression" in *The Human Making of Aggression*, ed., Herbert Selg (New York: St. Martin's Press, 1971) pp. 61-103, cf. p. 100. Also, John Gardner and Moira Gray, "Violence Towards Children", *Developments in the Study of Criminal Behaviour* (vol. 2), ed., Philip Feldman (Chichester: John Wiley and Sons, 1982) pp. 1-43, esp. pp. 17-18, 38. For an integrative approach to violence see Marvin Wolfgang and Franco Ferracuti, "The Subculture of Violence" in *The Sociology of Crime and Delinquency*, eds., Marvin Wolfgang, et al. (New York: John Wiley and Sons, 1970) pp. 380-391.

"objective".<sup>44</sup> They then explore this objective element of crime from a psychological perspective. Whilst accepting the premise that social conditions are not to be ignored, they stress that any social changes "*can only influence conduct along psychological pathways and are hence subject to psychoanalysis.*"<sup>45</sup> Approaching "victimful" crimes from a psychological basis, there does seem to be some evidence to suggest that biological, psychological and genetic factors play a role in criminal behaviour.<sup>46</sup> Although their conclusions in no way assure that violent behaviour will continue in a non-violent environment, they do suggest that even in a society where aggression is severely discouraged, a potential might exist for violent behaviour.

The regulation system seems ill-equipped to deal with some one who acts violently. There are several examples that might be expected to arise even in a cooperative environment. The first example would be one of mental illness, as was the case with Leon, who killed Joe out of rage, but was not remorseful (psychopath). A second could involve "random acts" of violence. For example, Citizen AK-47, for some unknown reason (even to himself) killed several people walking in the park. Whether the killings had a "motive" or not, problems would arise if there was a strong possibility that Leon or Citizen AK-47 would kill again.

Pashukanis was the only one of the theorists to address this issue at all. He suggested that the "unity of purpose" principle is obvious in this case in that the survival of society's members is at stake. Hence coercion, most probably internment

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<sup>44</sup> Hans Eysenck and Gisli Gudjonsson, *The Causes and Cures of Criminality* (New York: Plenum Press, 1989) p. 2

<sup>45</sup> *Ibid.*, p. 8

<sup>46</sup> *Ibid.*, biological influence, pp. 109-140; genetic, pp. 91-108; psychological, pp. 17-89. See David Lykken, "Fearlessness" in *Psychology Today*, Vol. 16, No. 9 (September, 1982) pp. 20-28 for a genetic vs environmental assessment of psychopathy. See Bill McGarvey, *et al.*, "Rearing, Social Class, Education, and Criminality: A Multiple Indicator Model" in *Journal of Abnormal Psychology*, Vol. 10, No. 4 (August, 1981) pp. 354-364 which ties educational performance with criminal behaviour and Terrie Moffitt, *et al.*, "Socioeconomic Status, IQ, and Delinquency" in *Journal of Abnormal Psychology*, Vol. 90, No. 2 (April, 1981) pp. 152-156 who relate IQ to delinquency directly. See also a collection of essays regarding genetic and biological factors in criminal behaviour, *The Causes of Crime*, eds., S. A. Mednick, T. E. Moffitt and S. A. Stack (Cambridge: Cambridge University Press, 1987).

and treatment (if possible), could be used without the implication that this force is external and political. He does stipulate, however, that the "patient" must also be in agreement to the use of this coercion. In other words, Leon or Citizen AK-47 must agree to be interned and treated in order to protect society. If the killer feels no remorse, the likelihood of this happening may be minimal. Such "agreement" would also indicate that parties were capable of making this decision. If they were mentally ill such ability might be in question. It is clear that mental illness would be defined by science as much as possible. It is possible that many mentally ill patients would seek treatment voluntarily. For those who do not seek treatment and physically threaten society, regulation provides no predetermined solution.

One point that could be made is violence due to mental illness is, even today, the exception not the rule. The rare occurrence of a violent situation does not necessitate a standing police force, and that as situations arise, a citizen committee can be discharged to handle it. Coercion would be used only in the most extreme of circumstances and would not generally characterise the decision-making process, nor would it assume institutional form.

### **Undue influence**

Given that there are administrative organs which gather input, manage negotiations, provide information and facilitate derivation of policies or policy choices (much like the role of a committee chairperson), at some point a person would have to act as chair or manager. Would these managers gain undue influence to the point of threatening direct control?

Marx suggested several direct steps to prevent these managers from gaining undue control: (1) any and all citizens could serve as managers; (2) the positions would be rotated often; (3) citizens could remove managers at any time and; (4) the managers would not receive any direct economic benefit for serving. The requirement that all general policy is dependent on individually determined

commitment would also reduce abuse concerns. It should also be pointed out that managers are not making decisions, and their function is merely to facilitate policy discussion or fulfilment. By the nature of the task, their "power" is limited and retains more of an "authoritative" quality.

Paramount to participative decision-making is awareness of the subject at hand. Much information may be required to make decisions in certain fields such as environmental policy. Presumably, there would be specialists with superior knowledge of environmental dangers. Information committees could be organised to present data applicable to specific issues. Control over information, as pointed out by Weber, could be a potential source of power abuse. A specialist could withhold certain facts, or not clearly present information. Since specialists are not actually making policy, but providing information to individuals so that they can make policy, it is in the self-interest of the environmental specialist to present facts as clearly and fully as possible in order to generate a "good" policy. After all, the effects of decisions would be experienced by specialists as well. This being the case, deliberate sabotage would not be in a specialist's self-interest.

If plan A simply did not work, perhaps due to the incomplete job of the environmental specialist, then another strategy would have to be devised by virtue of necessity. Eventually the alternative that produced the best possible result would be sought. With this being the *sole* motive in operation, then, although certain individuals would possess information, this information must be disseminated in order for policy to be made. By nature of the decision-making process, they could have no inordinate long-term control over information.

Although some talented managers or information specialists might gain more personal influence in the polity, they could not gain economic control over anyone else, nor exert coercive authority over another. Obviously, many mistakes will be made, but as the theorists argue, the mistakes would be the responsibility of all and would have to be directly responsive to individual desires and needs. The

case of one citizen being more respected than another, or more admired may arise, but there are no political or economic ramifications of this influence. It is also quite possible, the other citizens would regard a particularly organisationally minded individual as simply that—a particularly talented individual with regard to management, as opposed to citizen B who is musical, or citizen C who is good at cooking. Citizen A, B, and C have the same privileges, hence their differences are not grounded in “power”, but personality.

Such a system might not avoid hierarchy all together. Some citizens would participate in more committees than others. Some might not be interested in *any* decision-making. Those with greater knowledge, more talented articulation, more self-confidence might be able better to persuade others and exert control this way. Given these possibilities, perhaps a hierarchy would develop in such an administrative system, but one that would not physically or economically coerce individuals.

If an overall policy is not accepted by *all* those involved, say if a minority changed their minds with regard to a previous decision, will de Tocqueville’s “tyranny of the majority” emerge? Given the nature of the decision-making process, it would be impossible for a majority to gain power over a minority. Administrative suggestions are not “voted on” *per se*,<sup>47</sup> because they are not derived *by* institutions. If individuals disagree with policy, they are not forced, either economically or legally, to follow it; and by virtue of the decision-making process, policy *must* include their input. Thus “tyranny of the majority” could not arise by nature of the process itself.

Nevertheless, the prevailing opinions of the majority might influence individuals. Whilst all actions might become “expressions of free subjectivity”,

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<sup>47</sup> Michael Albert and Robin Hahnel raise the excellent point that a “yes” or “no” vote would be difficult in some general policy issues, e.g. the environment. Given only a yes/no option, important opportunities to compromise might be missed. See *Socialism Today and Tomorrow* (no place: South End Press, 1981) p. 275. They also discuss a “network” approach to organisation similar to the one I have postulated (p. 271).

there might be cases where an individual choice conflicts with the feelings of a majority of people in the sector (or area). Certain "public pressure" may arise in some situations. It is important to note, however, that although this pressure may influence individuals, especially if they are sensitive, it cannot assume political power by virtue of the decision-making process itself. Since power is completely diffused, the degree that public pressure influences individuals is determined only *by* the individual.

Given that all policy is an outcome of compromise, hence an individual's desire must be accommodated *in some way*, it is implied that mutually exclusive choices would not arise. Whilst all desires may not be met in full, they can at least be met in part. This is dictated by virtue of policy formation itself in that *all* input determines policy.

### Diversity

The motive of a needs-based production basis and the social organisation which accompanies it is improvement of society through meeting the desires of individuals. What is defined as "improvement of society", or "desires of individuals" however, may be extremely diverse, even to the point of mutual exclusion. Though it is not beyond all possibility that there is a basic human character (perhaps what Finnis suggests in his seven basic goods)<sup>48</sup> *what* environment would provide a condition where this character could develop or the exact way in which needs are met may be extremely different for various individuals. As Peter Binns points out, if decision-making is to be direct and not controlled centrally, conflict, debate, disagreement will actually *increase*. He writes, "Socialism will eliminate *irreconcilable, class* conflicts, but at the same time it will foster and nurture the articulation of *other* human conflicts because only through such a conflict can our social goals become rational and conscious."<sup>49</sup> In such a

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<sup>48</sup> See John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980).

<sup>49</sup> Peter Binns, "Law and Marxism" in *Capital and Class*, Issue 10 (Spring, 1980), p. 111

system a variety of solutions might be required to fulfil the distinct demands of different areas.

The theorists provide little help in this respect. Whilst they argue that the need for social cooperation would be enough to regulate a society that was dedicated to human freedom (that is a society relieved from the burden of survival and able to “work” for advancement only), they did not address how diversity was to be handled. The point is an important one. A definition of a “unity of purpose” may be impossible to derive (even given a rational framework).<sup>50</sup> Whilst the “technical rules” offered by Pashukanis’s approach may be effective once the goal is decided, this approach does not help much in deciding what the goal *is*. Pashukanis’s (and to some degree Lenin’s) assumptions that social goals are readily discernible leads him to the conclusion that rules (necessary actions) will arise by nature of the goal itself; and thus would be, for the most part, determined by science. Rational options for the achievement of goals, and even the goals themselves, however, might be too diverse to gain any unity of purpose. Hence, the critics argue, the concept of technical rules is inadequate.<sup>51</sup> With the amount of potential diversity, the need for strong regulation for the smooth functioning of society seems to be all the more necessary.

Part of the problem stems from the misperception that “social unity” must reflect *complete* social unity. The inference that common values will emerge in socialist society is present in many of the theorists’ writings. All they explicitly require, however, is unity in the basic goal that the economic system should provide for needs. Given that the foundation for Marx’s critique of law is that individuals are inherently *unequal and different* and can only be categorised as “equal” in the abstract, the perception that Marx might be implying that all individuals will evolve to the point of complete similitude is well off the mark. Marx’s concern with the

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<sup>50</sup> For problems of rationality and choices see W. L. Morison, “Frames of reference for legal ideals” in *Law and Society* eds., Eugene Kamenka, *et al.* (London: Edward Arnold, 1978) pp. 18-42, esp. 33-34.

<sup>51</sup> See Binns, pp. 110-111.

unfettered development of individual achievement and the need to be released from an economic system that *equalises* individuals in the form of things does not lend itself to the assumption that all people will eventually be unified in their needs and goals. In fact, the very premise of needs-based production is that *only* individuals can establish what they need or want or desire. The motto to each according to one's need from each according to one's abilities seeks to abandon social judgements of individual traits (e.g., "lazy" or "productive" or "greedy"). One of the tenets of regulation is to exclude subjective categorisation of some behaviour as "criminal". The theoretical premise of regulation is that *only* individuals can determine obligations. These points clearly indicate recognition of diversity is the underlying principle behind relegating life choices *solely* to individuals.

Since consensus is not demanded, but rather compromise is, the inquiry regarding the diversity question has to be reformulated to address the possibility of situations where compromise or *some sort* of solution is absolutely unattainable. Given that the general rule emerging from a communist economic system is a commitment to a production for needs, the only mutually exclusive choice would appear to be production for profit. In order for communism to exist a vast majority of society must support a system that produces for need. Thus it can be safely assumed that individuals in a communist society who would *want* to compete for resources<sup>52</sup> would be a small minority. The theorists assumed that given the opportunity of guaranteed economic sustenance and a method for pursuing individual interests unimpeded by ideological or economic restrictions, *no one* would *want* capitalism; indeed after a millennium or so people might not even emotively know what it *was*. If, however, a *minority* of individuals would want to

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<sup>52</sup> It is important to recognise that systematic competition for *resources* is different from the quality of competitiveness in individuals. There is no reason to believe that competition between individuals would cease in communism. This competition, however, would not assume economic or political form.

establish an exploitative economic system, there is no reason why a certain suitable area of the world could not be donated for this purpose.<sup>53</sup>

Other questions of diversity would not necessarily rupture the social fabric to the point that the economy would fail. Alan Hunt in, "A Socialist Interest in Law", questions whether a regulation based on a Marxist position could succeed in managing diversity. He sums up the Marxist position:

...the transcendence of class antagonism would create conditions conducive to natural and spontaneous cooperation, under which the external constraints of state and law would wither away. The resulting set of social relations would exhibit a fundamental *simplification* of the problems of social coordination.<sup>54</sup>

He critiques this position:

The drawback is that this vision ignores all other sources of structural social conflict; after all, are we not only too aware today of the intractability of conflicts generated by ethnicity, gender, religion and nationalism? But perhaps it is the projected simplification of social coordination that has the most dangerous ramifications. The disappearance of class antagonisms is presumed to leave only non-antagonistic conflicts that are resolvable through consensual mechanisms of democratic participation. But is this a warrantable assumption? I would suggest not.<sup>55</sup>

Hunt seems to misinterpret the notion emanating from Marx and reiterated by the Russian theorists that with the demise of capitalist production relations, *social relations* will become more simplified. Marx spoke little of the construction of communism, hardly mentioning how, exactly, socialist institutions would be *coordinated*. The premise that relations will be simplified stems from the fact that there will no longer be the dichotomy between public and private, between citizen and juridic subject, between individual and society. Varying forms of rules such as "law", "norm", "moral", etc. will become redundant. In *this* way social relations will be simplified. The *method* of social coordination, however, *may be* more complex, but this does not affect the fact that social functions are integrated.

Hunt is mistaken in assuming that the Marxist position ignores differences of "intractable" conflicts caused by ethnicity, gender, religion and nationalism. The

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<sup>53</sup> Timothy O'Hagan in *The End of Law?* (Oxford: Basil Blackwell, 1984) discusses the problem of preserving diversity of lifestyles.

<sup>54</sup> Alan Hunt, "A Socialist Interest in Law", *New Left Review*, No. 192 (March-April, 1992) p. 113

<sup>55</sup> *Ibid.*

point that regulation brings to the forefront is *what form* would these differences assume in a society where race, religion, ethnicity and nationality have absolutely no economic ramifications and where the decision-making process excludes political power and occurs in an economic environment which requires cooperation? Would they then be considered “intractable”?

Hunt claims that with the disappearance of class antagonisms all conflict can be resolved by “consensual mechanisms.” To reiterate an earlier point, the process of decision-making would most likely involve compromise rather than consensus. Also, the ceasing of class antagonism ends *irreconcilable* conflicts (primarily the dichotomy of economic purpose that exists in capitalism). This is not to say that all conflict will be resolved or disappear. Even if a future society rendered the differences between race or gender non-antagonistic, no doubt other problematic situations would arise. The fact that a cooperative productive society establishes the framework where the resolution of fundamental differences is possible does not assume that all of them will be resolved; but they must be resolved to the point where society can adequately function.

How this might occur is not apparent . It is conceivable that those with similar values will end up living in areas which support their particular behaviours. Similarly, various religious cults, races and ethnicities might “naturally” group together. Undoubtedly this question—whether outright embracement of diversity or segregation would prevail—simply cannot be answered. It is clear however, that individuals with vastly different values will have to co-exist.

### **Rights and obligation**

Problems of diversity and conflict have been traditionally addressed through the concepts of rights. Christine Sypnowich in *The Concept of Socialist Law* explores the rights argument from the socialist perspective. She concludes that

rights have a place in socialism.<sup>56</sup> The position seems in direct contradiction to Marx's complete contempt for the notion of bourgeois rights, even though he realised that rights were the apex of development in non-socialist period of history.<sup>57</sup> If discussion is to remain firmly grounded in Marxist legal theory, a theory of "socialist" rights is indefensible.

Sypnowich seeks to "refute the idea advanced by socialists, and particularly Marxists, that an ideal socialist society would have no need of law."<sup>58</sup> Sypnowich is rightly concerned with the absence of a Marxist response to what the ideal socialist society would actually entail and what sort of socialist polity would develop. She begins with the assertion that legal and political spheres will not be dissolved, but rather radically reconstructed.<sup>59</sup> Sypnowich argues that while the critique of capitalist law has merit, there are certain positive aspects of the institution of law, namely that it can be a mediator of conflict and a protector of individual rights, that are necessary in socialism. Given that conflict is possible in socialism, as a mediator, law seems to have a place. "Regulation" may fall prey to an overwhelming social pressure that might abuse individual interests. She is concerned that "anti-social" citizens may be forced into "behavioural correctional" centres and an abuse of freedoms may take place (she uses ample examples of the Soviet Union on this matter). Hence what arises from Sypnowich's argument is a desire to eliminate capitalist exploitative economic relations, yet retain the liberal concern for individual rights that evolved in capitalism.

Sypnowich avers that the antagonism of socialism and rights is a result of the conceptual evolution of rights under capitalism. Human rights that emanate from private property seem to have no place in a set of socialist principles.<sup>60</sup> Rights,

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<sup>56</sup> As do Alan Hunt, Tom Campbell, Alice Ehr Soon-Tay and Eugene Kamenka. Paul Hirst calls for the preservation of law, but not in terms of rights.

<sup>57</sup> Alice Ehr-Soon Tay makes this point in "Marxism, Socialism and Human Rights" in *Human Rights*, eds., Eugene Kamenka and Alice Ehr-Soon Tay (New York: St. Martin's Press, 1978) p. 105.

<sup>58</sup> Christine Sypnowich, *The Concept of Socialist Law* (Oxford: Clarendon Press, 1990) p. vii

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*, p. 109

however, that are derived from what Sypnowich identifies as “a conception of human dignity”<sup>61</sup> could easily be assimilated into the socialist paradigm. She defines human dignity as requiring a minimum of material well-being, as being self-determining and as having realised individual “potential as a creative social being.”<sup>62</sup> Sypnowich generalises this sense of human dignity with the notion that we are free to develop our capacities. Inherent to this freedom is not only negative liberties (assembly, freedom of speech) but also positive ones as well (adequate income, education, medical care, etc.). “Socialist rights” would, therefore, incorporate both the negative liberties (developed through capitalist liberalism) and the positive liberties (incorporated in socialist production principles).<sup>63</sup> Sypnowich further stipulates that the source of rights is in accordance with socialist philosophy. The term “rights,” she argues, “while seemingly constant and eternal (thus ‘natural’), changes in its meaning from one society to the next. Because human rights are historically conditioned, they are capable of expansions and enrichment as human beings in societies imagine new ways of living and acquire the resources to translate these imaginings into practical accomplishments.”<sup>64</sup> Thus it should be noted that Sypnowich’s suggestions as to the characteristics that define human dignity are considerations that are subordinate to human development during a certain historical period.

Sypnowich asserts that protection of rights will take the form of socialist laws. Whilst she shies away from creating a “blueprint” for the institutions of the future, she does outline what she considers a minimalist requirement for legal institutions to protect socialist rights. Sypnowich assumes that some sort of socialist state (albeit a radically different one from a capitalist state) must arise given the political needs of society.<sup>65</sup> She writes:

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<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*, p. 110

<sup>64</sup> *Ibid.*, p. 112

<sup>65</sup> *Ibid.*, p. 157

I shall assume (indeed, I have assumed) that there will be a political apparatus for public decision-making of some kind in a socialist society, first because many of the reasons that tell against the withering away of law tell equally against the withering away of the state; and second, because the kinds of liberal legal institutions a socialist society must retrieve are difficult to imagine without a state.<sup>66</sup>

For Sypnowich, the rule of law is an inherent quality of an institution that would call itself legal.<sup>67</sup> She sums up what a minimalist view of the rule of law would entail:

The idea that law must be framed in a way that makes it a fair and rational guide for citizens' behaviour requires, to give just a few examples, that the severity of punishment be determined by the seriousness of the crime, that the system distinguish between intentional and unintentional crimes, that the rights of the defendant to a fair trial be honoured, that what counts as illegal be known, prospective, and consistent with the rules of the legal system as a whole, and that there be no political interference with legal cases or any attempt to jeopardize the consistency of the law.<sup>68</sup>

She further requires the judicial to be separate from the legislative and executive arms of the state, so as to avoid the obvious political usurpation of the courts during the Soviet era in the former U.S.S.R. Sypnowich emphasises that the role of the judges not be subject to the will of the people, nor the state, and be completely, as she states, "*intellectually independent*".<sup>69</sup> Though she advocates more grass roots participation in the state to avoid corruption, she stipulates that participative control is not enough with regards to the administering of law.

If judges were simply to follow the dictates of popular sovereignty, they would be conforming to the rule of law no more than if they decided cases according to paternalistic or authoritarian conception of the common good. The rule of law requires that judges be motivated in their judgements by reasons derived from the law alone and not from any other source, be it the public interest or the will of the majority...<sup>70</sup>

Sypnowich also advocates a legal profession, though she admits that procedures should be open and fathomable. Her fears of a grass-roots justice system emanate from the example of the Comrade's courts in the former Soviet Union which "wreaked havoc on juridical standards of due process."<sup>71</sup> She implies that lawyers

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<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*, pp. 157-158

<sup>68</sup> *Ibid.*, p. 57

<sup>69</sup> *Ibid.*, p. 159

<sup>70</sup> *Ibid.*, p. 160

<sup>71</sup> *Ibid.*, p. 161

would assume the role of the moral guardians of due process and by virtue of their role might reduce chances for the legitimacy of the process to wane.<sup>72</sup>

With regards to obligation, Sypnowich rejects the thesis that because "all citizens fully participate in the making of law, and all citizens enjoy maximum economic and social equality"<sup>73</sup> that an intrinsic<sup>74</sup> obligation to obey the law will arise.<sup>75</sup> Interfering with a sense of obligation derived from participation are several possible situations. The first involves the cases where a minority dissents from the majority view.<sup>76</sup> Second, a situation might arise where even if an individual supported the enactment of a law, in a given set of circumstances this individual may choose to break the law.<sup>77</sup> The third difficulty Sypnowich has with the participation-obligation link is the phenomenon of non-participation. Even in a situation where all citizens *could* participate, does not indicate all of them *would*. She surmises that those that do not participate would not feel intrinsically obligated to respect the law. Hence, she concludes that an intrinsic obligation is insufficient for a socialist legal system.<sup>78</sup>

Although she does not state it forthrightly, Sypnowich implies that the insufficient intrinsic sense of obligation generates the need for a legal system. She does not address the question of punishment directly, but implicates its presence in her definition of the rule of law and the concern that "popular justice" might end in "unfair punishment."

Proceeding from the assumptions that: (1) conflict will remain in socialism and there is a need for mediation and (2) the mediation process must protect against individual abuse in the name of society, Sypnowich retains the legal institutions developed in capitalism and asserts the need for the rule of law in socialism. The

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<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*, p. 133

<sup>74</sup> Sypnowich defines intrinsic as "an obligation to obey the law because *it is the law.*" *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*, pp. 144-148

<sup>77</sup> *Ibid.*, pp. 148-150

<sup>78</sup> *Ibid.*, p. 154

content of law, however, will reflect the changes evoked by socialism, especially in terms of rights which will assume the meaning of what are currently labelled positive and negative rights.

The first problem with Sypnowich's analysis is the framework of discussion itself. Her initial premise is readily admitted by all the theorists: conflict will exist in socialism and requires arbitration. Her second premise: that individual rights will be abrogated in favour of the total society norm is not borne out by Marxist theory. The assumption that the social "norm" will prevail to the point that an individual's "rights" are abrogated is contradictory to the very position the theorists are trying to defend. First of all there *is* no enforceable social norm. Only individuals can determine their "norms", and, as Chris Arthur emphasises, these norms will be regarded as "free expressions of individuality". Whilst the theorists implied that "social consciousness" would most probably create some sense of general norms, the authority of these "norms"—if they can even theoretically be called that—arises only from the individual.

Her fears of "forcing" individuals into "correctional" centres stems from a misinterpretation of Pashukanis. It should be pointed out that behaviour is only changed when an individual desires that change.<sup>79</sup>

There are also some internal problems with Sypnowich's argument. If rights are not a "natural" phenomenon, as Sypnowich points out, but products of social development, then the right to the rule of law must be a "social" development as well. How, then, can she call for the protection of the rule of law, which according to her has emanated from society itself, from "grass-roots" influence? This objectification of a social relation is exactly what socialism is trying to extinguish. The entire point of the Marxist critique is that rights are only abstract unless they are operating in *actual relations*. What the theorists argue is that these rights require coercion in capitalism because of the economic relations that prevail. They assert

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<sup>79</sup> Except, possibly, in the case of mentally ill, violent individuals.

that with socialist production relations the *contradictory* need for external coercive protection of rights will be eradicated. In socialist structures, power is diffused to the point that rights do not *need* to be protected. Without the *incorporation* of rights into actual individual relations which can only occur through social power and direct control which completely nullifies *political* power, a system of regulation would simply not work.

To claim that socialist regulation would revolve around the protection of rights by an institution above society in the political sense, contradicts the very assumption of socialist production relations. The question is *not* whether rights will be protected or not in a codified socialist constitution upheld by a socialist state and whether such a constitution could be reconciled with Marx's critique of bourgeois rights, but rather will *socialised production relations diffuse political power to the extent that the concept of rights becomes unnecessary thus allowing regulation to function?*

Viewed in this light, the obligation question assumes a different form. The question of obligation would not apply to the *law* (or rights) itself but to individuals operating within a cooperative society. Citizen Rasta was not in any way obligated to abstain from drugs; he was, however, aware that social cooperation must be preserved by virtue of his being a member of a socialist society. In communism, it is not a matter of obligation to norms, laws, values or rules, but rather an obligation to individual choices operating in the scope of social cooperation necessitated by the economic system. Such a demand for cooperation is not a norm in itself, but rather a necessity.

Given the absence of external coercion, social pressure could not *force* an individual to do anything. The rights issue becomes irrelevant not because of the *complete* elimination of conflict between individual and society, but because the entire language of rights becomes unnecessary in a society which has no need for them. Bob Fine aptly writes:

For Marx, the withering away of the juridic forms signified a process of democratization of the juridic sphere in its entirety; rather than counterposing its democratization to its withering away, Marx saw one as a culmination of the other.<sup>80</sup>

Leszek Kolakowski correctly points out that Marx's hostility towards rights goes deeper than a rejection of claims to an everlasting moral order or the immutability of rights; but he misleadingly argues "communism ends the clash between the individual and society; each person naturally and spontaneously identifies himself with the values and aspirations of the 'whole' and the perfect unity of the social body is recreated..."<sup>81</sup> Indeed, the antagonism between individuals and society vested in a capitalist economic structure is eliminated, but this is not to claim that *all* conflict in every form is absent (as all the theorists readily acknowledge). What occurs is that conflict takes the form of social change. In this sense, the entire *meaning* of conflict changes, propelling it even farther from the rights paradigm. The occurrence of conflict and its accompanying method of resolution actually *reaffirms* cooperation in that intolerable situations are socially resolved, *and* individual choices are accommodated. In this way, the social diversity so important to Marx's position can be maintained while social order is still preserved. Alan Gilbert sums up the argument well:

Marx did not seek to abolish natural differences among individuals in a dull uniformity but envisioned the vast flowering of distinct capacities, the 'richest flourishing of individuality...'

The social element in this individuality would consist in cooperation in the production of necessities, in the regulation of conflicts between man and even a 'humanized' natural environment, in the creation of a varied pattern of social relationships, and in the solution of conflicts among individuals.<sup>82</sup>

Sypnowich indicated that rights were intrinsically moral.<sup>83</sup> As expressed earlier, the necessity of classifying values as characteristic of "legal", "moral" or "social" origins becomes unnecessary when the sole authoritative source of these values are individuals. Nevertheless, Sypnowich's call for the retention of some

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<sup>80</sup> Bob Fine, *Democracy and the Rule of Law* (Leichhardt, Australia: Pluto Press, 1984) p. 211

<sup>81</sup> Leszek Kolakowski, "Marxism and Human Rights" in *Daedalus*, Vol. 112, No. 4 (Fall, 1983) pp. 81-92, esp. p. 85

<sup>82</sup> Alan Gilbert, "Historical Theory and the Structure of Moral Argument in Marx" in *Political Theory*, Vol. 9, No. 2 (May, 1981) pp. 173-205

<sup>83</sup> Sypnowich attaches moral meaning to human rights by virtue of its definition. Sypnowich, p. 85

liberal legal principles may occur in socialism. As discussed before, certain values may be retained in the “social consciousness” developed over time. Perhaps, some embodiment of “human rights” in the social conscience would emerge. It is clear the theorists assumed certain similitudes among humans. Theoretically, however, the authority of these values strictly lies with the individual.

The “role of socialist law” according to the theorists, clearly does not, or rather could not, involve, as Sypnowich indicates, the protection of rights or the generation of duties. First, in a society where power is diffused to the extent that it is in communism, the need to “protect” rights evaporates. Second, administrative suggestions, while they may anticipate compliance, do not intrinsically generate obligation. Obligation is individually determined. Whilst regulation serves to help negotiate differences and changes, whether this function is considered law *in any sense*<sup>84</sup> has, as yet, not been discussed. What is clear is that a model for socialist law based on rights is incompatible with the theoretical tenets of regulation.

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<sup>84</sup> Discussion regarding law so far has proceeded from the theorists’ definition of law in capitalism, namely that it embodies principles determined by the state and its institutions and are enforced by those institutions. Law seeks to maintain capitalist relations. Other definitions of law, such as the concept of “non-coercive laws”, will be addressed in Chapter six, under the section “IS REGULATION LAW?”.

## CHAPTER FIVE—TOWARDS A MODEL

### INTRODUCTION

The theory of regulation is one that is based upon an extreme form of individualism, conditioned by an atmosphere of a high degree of social interconnectedness achieved through a revolution of economic and social relations. Such a revolution involves the replacement of the political apparatus by an administration. An administration differs from the political apparatus of a state primarily in that its institutions are used for the organisational purpose of facilitating decisions. Decisions are actually made and enforced by each individual operating within the larger context of an economic structure that is designed to produce for the needs of its components through the efforts of those individuals. Such an economic system is cooperative by nature, as irreconcilable class conflict caused by the inherent contradiction of an economic system producing for profit is eliminated.

Although authority is required for the functioning of the social system, this authority stems from *each* individual. Thus “political power” is eliminated, meaning that no individual has power over another individual, and “social” power emerges. When this occurs, capitalist legal structures are also transformed. A system of regulation, then, does not involve notions of rights, duties, equality and objectivity, but rather focuses on maintaining a cooperative environment in the event of conflict, *without* such constructs.

Whilst the theoretical basis for regulation has been explored to the point that the concepts in the above brief summary have been explained, a model of regulation should involve both the theoretical principles involved and the structural elements that accompany them. Though both aspects have been discussed to some degree, the theoretical elements have claimed the most attention. Structural elements of a

system of regulation should be discussed to some extent in order to draw a fuller picture of "regulation".

Once structural elements of regulation are clarified, an opportunity for an overview of what is meant by regulation, theoretically and structurally, arises. In order to address further questions, such as whether such a system can be considered "legal" (in any sense) or whether it creates the need for a separate socialist jurisprudence, a concise summary of discussion proves useful.

The theorists indicate that the authority operating in a system of regulation within the parameters of a social consciousness developed through the emergence of communist production relations enables such a social system to work despite conflict. Although there is no historical example that completely fulfils the theorists description of regulation, such a claim must be evaluated as much as possible in order to ground the theory of regulation within the realm of possibility.

Thus the purpose of this chapter is three-fold: (1) to clarify structural elements of regulation; (2) to present a concise overview of the theoretical and structural components of regulation; and (3) evaluate, as much as possible, how regulation might function.

## **STRUCTURAL COMPONENTS OF REGULATION**

### **The purpose**

The general purpose of regulation is to aid in the maintenance of a cooperative social environment. As previously discussed, ruptures in the potential cooperative functioning of society would probably occur on three general levels: (1) social organisation; (2) outbursts of uncontrollable behaviour; (3) differences in values. A more specific definition of the purpose of regulation, then, is to: (1) negotiate difficulties with regard to social organisation; (2) facilitate in the self-restraint of "uncontrollable" behaviour; and (3) manage diversity.

The methods for accomplishing the above tasks are vast. So vast, that it is difficult to imagine a regulation system akin to a legal system, with defined parameters and internal procedures. The theorists spoke little of the actual construct of a system. Engels mentioned that conflict could be solved by arbitrators. Lenin suggested that "people themselves" will solve conflicts. Pashukanis mentions the fact that the resolution of conflict may be a "medical-pedagogical" task. These various descriptions actually demonstrate that the "system" of regulation is one that is not necessarily differentiated from the fulfilment of any other need in society.

The lack of any discernible element of social interaction that can be labelled "regulatory" is the key structural element in the claim that law and legal relations will "disappear". As was discussed before, the authority to make and enforce *any* decisions comes from individuals. Institutions become passive structures to be used for organisational purposes and cease to be *authoritative* (in the political sense) sources for social direction. The source for *all* actions and behaviours becomes each individual regardless of the nature of the task. Thus, as the theorists explain, social relations are "simplified" in that they are not categorised as "legal" relations, "social" relations, "business" relations, "political" relations etc. Interactions are simply that, interactions, and do not carry, *by definition*, any expectation of prescribed rights and duties. How then, is regulation to actually *function*, if there are no discernible rights and duties and no method to enforce them? Theoretically this question has been discussed and covered by the explanation of internal obligation and the development of social consciousness. What structural form regulation might assume, however, has not been suggested.

### **Structural form—the institutions**

The function of institutions in an administration is to facilitate decisions. This being the case, the purpose of an arbitration institution would be to facilitate

conflict resolution, in whatever form it may assume. This is not to say that *all* conflict must be handled by an arbitration institution. For instance, conflict with regard to policies and tasks would most likely be handled by the relevant administrative committee (as in the case with Lila). With regard to personal discord, an arbitration committee might be used; or, if the two disputants and their associates can solve the conflict themselves, such a committee would not be used. As the theorists suggest, conflict could be handled by a variety of methods depending on its nature. As the purpose of an institution is only to facilitate results, there is no reason to be "helped" by an institution if a solution is easily derived by parties involved. In fact, if conflict is effectively handled by the individuals involved there may not even *be* a need for an arbitration institution. Let us assume, however, that there will be such a need.

These institutions could function much like other institutions in communism. Members could serve for, say, a two-week term every two years. Structure might include a panel of however many arbitrators, for instance, five. A chairperson could be selected to conduct sessions of arbitration. Arbitration committees could meet on a needs basis. More arbitration committees could be organised if the demand for services was greater than that which one group of people could provide.

The tasks of arbitration committees would probably involve some of the following: managing negotiations between two parties; suggesting a compromise to a given situation; further explaining the nature of the conflict; suggesting explanation of the root causes of problems involved; providing a third party through which involved disputants could more convey opposing points of view; or simply providing input from an agent outside of the dispute at hand.

None of these suggestions would be "binding" in the legal sense of the word; but since negotiations are dependent on the genuine desire of participants to resolve

the situation, or at least arrive at some sort of compromise, suggestions from the arbitration committee would probably be taken seriously.

Such a process hardly resembles the "legal process" in capitalism or even the "legal process" used in the People's Courts. By examining such institutional issues such as specialisation, accountability, due process and consistency, the different nature of regulation is illuminated.

The theorists indicate that "anyone" could participate in the arbitration committee. Such a statement, however, does not imply that certain skills would not be beneficial. Problem-solving and reasoning capabilities might be useful. Creativity might also aid immensely, as would communication skills. It is quite clear in Marx and Engels' writings that they thought the ability to reason was an innate quality in human beings. However, someone's reasoning, like any other skill, can be better or worse than another's. Problem-solving, however, does not only require the ability to reason. In fact, the more diverse the problem solvers and their skills the more diverse the possible resolutions. One arbitration committee member may possess oratorical skills, one may possess a personality that lends itself to stabilising heated situations, another may excel at rational deduction. An informal system would actually breed a need for greater variety of people to be involved. Even if citizens possessed none of the above mentioned skills, their personal experiences might shed light on a situation. It is therefore not beyond reality to suggest that every citizen could participate in some way in arbitration.

Nevertheless, it is probable that some citizens might acquire a reputation as a "great" arbitrator. Given the structure of the system, such a "great" arbitrator may only serve on the arbitration committee once every so often. Would it be possible, if all affected were in agreement, for someone to remain as a "permanent" arbitrator without accumulating "undue influence" over the process? In other words, is it possible for someone to be a professional arbitrator without danger of gaining "political power" over other individuals?

It is difficult to imagine a situation in communism when an arbitrator, even a permanent one, may abuse power as the decisions of arbitrators are not enforceable by institutional authority. With the enforcement factor residing in individual internal conviction, abuse, in terms of political power would be near impossible.

Individual arbitrators could gain charismatic "power" over people. History has demonstrated that charisma can be quite persuasive and sometimes dangerously controlling. As mentioned before, there is possibility for hierarchy in communist institutions, including arbitration ones, by virtue of the possible greater influence of some individuals on the opinions and actions of others. Power derived solely by personality, however, is different in nature from political or economic power in that it is not systematically, or more specifically, institutionally derived. Abuse could not occur on a procedural level because there is, in essence, no prescribed procedure for arbitration.

Since the goal of the arbitration committee is to find a solution to a problem, (as opposed to determining guilt or innocence), procedural methods would depend on each individual situation and the circumstances and personalities involved. Participants in arbitration would be presumably provide as much information as possible. Participants themselves could propose certain methods to follow, or perhaps "experts" could be consulted in determining the best approach. There appears to be little reason why the process of arbitration need be formalised.

Similarly, consistency is not all that relevant to arbitration facilities. In fact, consistency in suggestions of arbitrators would not even be a concern. Assuming that no two people or situations are exactly alike, solutions to problems would assume a myriad of forms. The variety of results that could emerge given the vast array of possible conflicts and personalities virtually precludes any "regularity" in results.

## Authority and institutions

The functions of various institutions (or committees) may be differentiated by purpose. One committee may arbitrate, another gather information, another produce work schedules, etc. In this way, they resemble various institutions in capitalism. The authority of these institutions, however, stems completely from individuals. Therefore, no decision derived through the use of an institution has authority by virtue of its derivation in this way. Indeed, institutions, in themselves, do not assume *any* authority.

Although institutions may increase organisational capacity, there is theoretically no difference between a resolution or solution derived by aid of an institution and one that has arisen as general practice. Thus the contrast between "law" and "social norm" is non-existent (hence the theorists' claim that such differentiation disappears).

Interestingly, there is no theoretical authoritative difference either, between a practice that has been derived through the use of an institution, one that has arisen from majority use, *or* one that has been strictly individually derived. The theorists do claim, however, that individual values will be conditioned by their social environment (social consciousness). Individuals may not make some choices due to the fact that not many other individuals are behaving in such a manner. Authoritatively, however, there is no method of "dictating" social behaviour or choices other than the parameters determined by the degree of cooperation necessary to organise society to produce for needs.

## A CONCISE OVERVIEW OF REGULATION

The essence of the theory of regulation can be summed<sup>1</sup> up in the following points:

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<sup>1</sup> The explanation and logical interconnection of concepts have been covered and discussed already. The list is a *summary* of characteristics rather than a restatement of arguments in full.

- (1) Regulation emerges when the irreconcilable conflict present by two diversified class interests procured in the capitalist production system ends and is replaced by an economic system that produces solely for need.
- (2) With the subsequent dissolution of commodity fetishism, individuals are no longer classified as egoistic, equal, independent and objectified agents operating in isolation and under the premise of free self-will (juridic persons), but rather are regarded as operating in an integrated social environment where cooperative efforts are demanded in procuring for their own needs.
- (3) When individuals are no longer classified as isolated, independent beings, the false contrast between "social" and "individual" ceases causing the bifurcation between civil and economic to end.
- (4) With dissolution of the ideological classification of "juridic person" individuals are regarded as they are in actual concrete circumstances—unequal and operating within the constraints of a social-economic environment.
- (5) Under such premises, *only* individuals determine what their needs, wants and desires are, as everyone is unequal and cannot be objectively quantified.
- (6) In part, however, individual choices are restricted by need, and by the fact that they must produce via a production process that is social and cooperative by nature.
- (7) In order to produce for individual choices, society must be organised.
- (8) Such organisation requires that decisions be made and suggested policies and tasks be derived.
- (9) Since the goal of society is unified in a basic sense—to produce for needs, and *only* individuals can determined what needs, desires, goals are, the

institutions that arise serve to aid in the coordination of individual choices.

- (10) Such an institutional structure is referred to as "administration" whose defined goal is to facilitate decision-making.
- (11) Since only individuals can determine needs and goals, an administration has no political power, in that one individual does not have the power of decision-making over another. (social power)
- (12) In order to coordinate policy and production, compromise may be required. This compromise, however, is only determined by the individuals themselves.
- (13) The generation of social policy (tasks, production priorities, environmental matters, etc.) comes from each individual contributing towards a comprehensive whole. (decentralised coordination)
- (14) Each individual has self-interest in carrying out decisions in order to fulfil their own needs and desires.
- (15) Administrative suggestions are organisational tools to be used for fulfilling an individual's own interest. They are not generated *by* an institution (which is designed only to facilitating decisions), but rather *by* individuals. (direct control)
- (16) Enforcement of decisions, then, lies with each individual as in actuality each individual is the one *making* decisions. (non-coercion)
- (17) Obligation, then, can only be internal. (internal obligation)
- (18) Since the content of decisions and source of authority for them rest *solely* with individuals, differentiation between sources of principles ceases. Categories of "moral", "legal", "social" "political" norms disappear.
- (19) Whilst various classifications of norms disappear, the content of them may be preserved in the social consciousness, which in essence, is generated by

the common experiences of those engaged in the construct and conduct of all aspect of their lives via power over society.

- (20) Although *all* power rests with individuals, choices take place within an economic system that necessitates cooperation and within the social consciousness developed through experience. Thus individual actions take place within parameters determined by need and are intrinsically connected to the social environment.
- (21) Rules reflect factual necessities and administrative suggestions do not explicitly involve a definition of rights and duties, and do not assume the fetishised form of "damages" when those rights and duties have not been fulfilled.
- (22) Conflict does not assume the form of a conflict of private interests measured by individual rights and duties, but rather indicates a rupture in social fabric or an area of social organisation that needs to be changed.
- (23) Conflict resolution then does not involve determining which set of rights and duties prevail and determining a retributive amount reflective of damages (equivalence principle), but rather involves a compromise or solution where a "problem" can be resolved or a needed social change can occur.
- (24) There are no structural institutions implicit to regulation whose responsibility is to resolve problems. Such a task can only be accomplished by individuals.
- (25) Arbitration institutions may develop in order to facilitate the generation of a comprise or solution to a given conflict.
- (26) The goal of such institutions would be to generate alternatives, negotiate compromise, and provide insight and advice.
- (27) Though all could serve as "arbitrators" some cases may need experts or specialists (especially if psychological problems are involved).

- (28) As arbitrators and arbitration committees have no political power to enforce their decisions, resolutions which arise as a result of the use of arbitration committees do not carry any authority due to the fact that they have been derived through the aid of an institution.
- (29) It can be claimed, then, that these arbitration committees, or any other administrative institution, have no "institutional" (political) authority.
- (30) Given the goals and processes of arbitration, due process, consistency and accountability are not relevant issues.

**Summary description:**

Authority to make and enforce decisions can only come from individuals. In order for such a goal to be met, the process of decision-making *must* involve each individual. Such a process has been labelled decentralised coordination. It is reflective of social, rather than political power. In the act of producing for needs, individuals must cooperate. Thus cooperation is necessary to the functioning of the social-economic system. Individual authority is conditioned by the need to produce cooperatively. In the act of producing cooperatively, social consciousness develops. Individuals then also operate within social consciousness. Regulation is the management of conflict to the point that individual authority can be balanced by social consciousness to the point that a system of cooperative production can function.

It is theoretically plausible that the sense of cooperation demanded by the economic system *might* be effective *enough* to manage diversity even if it were not 100% effective—as no system is. There is evidence to show that a higher sense of integration produces a stronger sense of social connection,<sup>2</sup> and the efficacy of social

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<sup>2</sup> Henry Maas, *People and Contexts* (New Jersey: Prentice-Hall, 1984) esp. pp 12-15 and Peter Smith and Michael Bond, *Social Psychology Across Cultures* (Needham Heights, MA: Allyn and Bacon, 1994) esp. p. 96

influence is well-researched.<sup>3</sup> Such evidence, however, could not adequately support the claim that in a society where capitalism has been eradicated and replaced with communist production and its corresponding social relations, conflicts will not reach the point where the social system cannot function. It also cannot be proved that political power could be diffused sufficiently that the concept of rights would become unnecessary. Unfortunately, the inquiry is at a severe disadvantage, as there is no example to analyse to see if such transformations would actually take place. There is one historical example, however, that is worth examining.

## THE KIBBUTZ—AN HISTORICAL<sup>4</sup> EXAMPLE

### General description

The first kibbutz, Degania, was established in 1910 by a small group dedicated to communal living and socialist ideals. The movement spread quickly, especially as the interest in Zionist-socialist youth movements heightened. By 1947, the kibbutz movement was at its peak, with 7% of the Jewish population involved. In 1986, membership was about 120,000 persons (about 3.6% of the Jewish-Israeli population) spread among 260 kibbutzim.<sup>5</sup> As of 1996, the combined population of

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<sup>3</sup> See Janusz Reykowski, "Two Approaches to the Development of Morality" in *Social and Moral Rules*, eds., Nancy Eisenberg, et al. (New Jersey: Lawrence Erlbaum Associates, 1989) pp. 23-44. See also Charles Antaki and Guy Fielding, "Research on Ordinary Explanations" in the *Psychology of Ordinary Explanations of Social Behaviour*, ed., Charles Antaki (London: Academic Press, 1981) pp. 27-55, esp. 45-55 and Jean Piaget, *The Moral Development of the Child*, trans., Marjorie Gabain (New York: The Free Press, 1965) esp. 395-406. Bem Allen in *Social Behaviour* discusses the results of Stanley Milgram's famous shock tests. (The subject was told by the lab technician to "shock" respondents if they gave wrong answers. The shocks increased with every wrong answer to the point of death. The respondent was working in conjunction with the lab assistant to assess how far people would obey authority. The shocks were fake.) The results of Milgram's test showed a shocking 65% total obedience (to the point of causing the respondent enormous pain or even death). However, when two other control subjects were placed with the subject and they exhorted the subject not to go any further when the shocks appeared distressing to the respondent, only 10% obeyed. The experiment showed the effect of "group" pressure (direct social influence) compared to an anonymous authority. Bem Allen, *Social Behaviour* (Chicago: Nelson Hall, 1978) pp. 33-63.

<sup>4</sup> While the kibbutz exists in modern times, most of the pertinent research to this study takes place before 1990. For this reason, I refer to it as an "historical" example.

<sup>5</sup> Plural of kibbutz

270 kibbutzim was 129,300. The average population of a kibbutz was about 500 persons.<sup>6</sup>

Although specific policies are not identical in all kibbutzim, Joseph Blasi defines the basic principles of a kibbutz as they were defined by the first kibbutz federation formed in 1925: (1) small communities based on economic cooperation and social understanding; (2) democratic assemblies; (3) refusal to give leadership to any one person or group; (4) collective rearing of children; (5) concern for all members of society; (6) work; (7) relinquishing of individual property; and (8) cooperation with neighbours and communities.<sup>7</sup>

The economic structure of a kibbutz revolves around socialist principles. The means of production are owned by members. All resources are "collectively coordinated".<sup>8</sup> No one receives a salary or any other type of monetary reward. Specialists may be assigned a "permanent" job due to expertise, while others may change positions more often.<sup>9</sup> Kibbutzniks<sup>10</sup> when trying to decide which career to pursue, are encouraged to take into account the demands of their kibbutz, but are not forced into certain needed professions. The kibbutz is interested in having members feel fulfilled in their jobs.<sup>11</sup> All kibbutzniks, regardless of profession, are rewarded the same economically. Medical care, housing, energy resources, food, clothing, education and vacation expenses are provided by the kibbutz in their entirety.

The earlier kibbutzim were extremely committed to the principles of communal life. Members shared clothing, ate together, worked together, showered together and in some even slept in communal rooms. In modern times, members "own" their clothes, have separate apartments and can eat in private.

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<sup>6</sup> Christopher Warhurst, "High Society in a Workers' Society: Work, Community and Kibbutz" in *Sociology*, Vol. 30, No. 1 (February, 1996) p. 5

<sup>7</sup> Joseph Blasi, *The Communal Future: The Kibbutz and the Utopian Dilemma* (Pennsylvania: Norwood Editions, 1980) p. 12

<sup>8</sup> Warhurst, p. 5

<sup>9</sup> Eliezer Ben-Rafael, *Status, Power and Conflict in the Kibbutz* (Hants, England: Averbury, 1988) p. 2

<sup>10</sup> Member of a kibbutz.

<sup>11</sup> Blasi, pp. 93-94

The decision-making process in the kibbutzim resembles decentralised coordination to some degree. All adult members belong to the highest institution, the general assembly, which decides major policy matters. Various committees (e.g. culture, housing, education) are elected as well as the leaders of these committees and the general assembly itself. Committee work is conducted during leisure time, and therefore is not a "profession".<sup>12</sup> Leadership positions are rotated every two or three years.<sup>13</sup> Giora Manor, a kibbutz member and journalist, writes, "...the kibbutz does not function according to rules or laws imposed by some constitution or external authority. The kibbutz is the expression of the will of its members at any given point."<sup>14</sup>

There are no courts, police or political bodies. There are no sanctions—either physical or economic.<sup>15</sup>

Most kibbutzim fall in the realm of the norm of living standards. Members have spacious apartments, ample furniture and clothing, radios, televisions, etc. An increase in the standard of living accomplished through a cooperative economic system and participative institutions is the basis of the kibbutz organisation.<sup>16</sup>

### **The usefulness of the example**

Although the organisational principles of the kibbutz do not fit the description of communism in full, there are present the major characteristics of a social organisation in which regulation could operate.

Economically, the kibbutz operates under socialist principles and produces for the needs of its members. The mode of production is owned by all the members. Capitalist production or distribution methods are not used. The kibbutz has no monetary system.

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<sup>12</sup> Ben-Rafael, pp. 3-4

<sup>13</sup> *Ibid.*, p. 22

<sup>14</sup> Giora Manor, "The Kibbutz as an Onion" in *Kibbutz Trends*, No. 9 (Spring, 1993) p. 24

<sup>15</sup> Warhurst, p. 5

<sup>16</sup> Ben-Rafael, p. 4

Structurally, *all* members decide policy (via participation in the general assembly). Various committees exist to carry out decisions. All can serve on these committees intermittently. Leadership positions are rotated. There are no police, courts or political "heads" of the kibbutz and no economic or physical sanctions.

The kibbutz does not resemble communism in some important ways, however. First, these communities still operate within a capitalist environment. Individuals are relieved from worries of profit, but the kibbutz as a whole is not and seeks to strengthen its position economically in the capitalist environment with which it interacts.<sup>17</sup> As a result, making a profit is still a large concern of all kibbutzim. Technological development is restricted by the equipment the kibbutz can purchase; therefore, all tools of advancement are not available. To sustain its place in the capitalist market, a kibbutznik works an average of six days a week. There is also a large degree of "scarcity", a situation thought to be non-existent or at least alleviated in socialism.

The size of most kibbutzim is small (500 people). Such a small organisation might not be a representative sampling of the variety of individual interests that will have to be managed under regulation. Also such a number does not provide the vast array of human skills that may be necessary for communism on a larger scale. The derivation of decisions is made easier by a set number of participants.

Nevertheless, given that the organisation of the kibbutz fulfils the basic pre-requisites for regulation to operate, it does provide a chance to assess whether the social cooperation demanded in producing for need is strong enough to handle individual diversity. It also provides an opportunity to assess whether regulation can effectively negotiate conflicts.

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<sup>17</sup> *Ibid.*, p. 22. For a discussion of the interaction of kibbutzim and Israel's national economy, see Reuven Cohen, *The Kibbutz Settlement*, trans., Sharry Statman (Tel-Aviv: Hakibbutz Hameuchad Publishing House, 1972) pp. 20-67. Also interesting is Ivan Valler's article "Structural Differentiation, Production Imperatives and Communal Norms: The Kibbutz in Crisis" in *Social Forces*, Vol. 40, No. 3 (March, 1962) pp. 233-242 which examines the tension between the kibbutz's communal social structure and the demands of its production system.

Whilst research of kibbutzim is rich and varied,<sup>18</sup> few studies examine in-depth, day-to-day operations of kibbutz life or provide a *full* description of relations between members and the methods for resolving problems within the scope of their unique social organisations. Such a full description of the operation of at least one kibbutz is needed as regulation involves virtually *all* elements of social organisation.

Joseph Blasi conducted such a study (1980) of one kibbutz in depth and tried to rectify the problem he saw in other studies that did “not portray sufficiently the total and organic nature” of life on the kibbutz.<sup>19</sup> Through personal interviews, questionnaires and comparative analysis of other studies, Blasi addressed some of the most pressing questions regarding kibbutz life and social relations.

### **The kibbutz Vatik<sup>20</sup>**

This kibbutz presents an example of a group of people diversified in age, race and ideological tendencies living under a regulation system very much similar to the one described by the theorists. Given the importance of the effects of social structure on the success of regulation, a general description of the structure of this kibbutz is in order. I shall restrict the discussion of Blasi’s findings to those most relevant to the element of regulation.

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<sup>18</sup> E.g.: Israel Sheper, *The Kibbutz: An Anthropological Study* (Darby, Penn: Norwood Editions, 1983)-analyses of the independence of individuals; Henry Near, *History of the Kibbutz Movement*, 2 vols. (Oxford: Oxford University Press, 1992)-an historical overview; Eliezer Ben-Rafael, *Crisis and Transformation: The Kibbutz at Century’s End* (New York: State University of New York Press, 1997)-general analysis; David Mittelberg, *Strangers in Paradise* (New Brunswick, NJ: Transaction, 1988)-reviews attitudes to “outsiders” (visitors, volunteers, etc.). See also collections of articles: *Democracy, Equality, and Change: The Kibbutz and Social Theory* by Menachem Rosner (Darby, Penn.: Norwood Editions, 1982) and *Integrated Cooperative in the Industrial Society: The Example of the Kibbutz*, eds., Klaus Bartölke, Theodor Bergman and Ludwig Liegle (Netherlands: Van Gorcum, 1980); and case studies: Paula Rayman, *The Kibbutz Community and Nation Building* (Princeton: Princeton University Press, 1981) and Leonard Mars, *The Village and the State* (Farnborough, England: Gower Publishing, 1980). The journal *Kibbutz Trends* (Israel) provides enjoyable articles written, for the most part, by members with regard to kibbutz life, issues and problems.

<sup>19</sup> Blasi, p. vi

<sup>20</sup> “Vatik” is a pseudonym.

Vatik was founded in 1936 and was comprised mostly of Polish Jews who emigrated to Israel before founding the kibbutz. The initial group comprised about 20 adults of primarily lower middle or middle class (many of the kibbutzim founders were upper class) and 50 youths that had been in the leftist Zionist youth movement in Galitzia (Poland).<sup>21</sup> The first members were described as revolutionary and extremely communitarian. Couple and family relations were de-emphasised, communal showers, beds, clothes, etc. were encouraged, and a fundamental mistrust of higher education was present.<sup>22</sup>

Beginning in 1948 about one hundred new members joined. These members had been severely persecuted in the war. Despite their socialist leanings, the founders felt they came "less out of ideology and more out of survival."<sup>23</sup> In the 1950's and 1960's, groups from Austria, Italy, Switzerland and the Orient joined Vatik. The background of members was becoming extremely diverse. The growth of the group's population, the revelation of the reality of Stalin's Russia, and the difficulty in maintaining an intimate connection between all members of Vatik led to a lessening of ideological ties and social connectedness. The fact that the economic growth of Vatik required specialists also took away from the "everyone being competent to do all" philosophy that was evident in the early times.<sup>24</sup> Blasi describes the change in Vatik:

In short, being an individual and being different, and having separate interests coexist alongside each other was becoming affirmed. The general assembly meeting minutes for the period of 1950-1965 show an increasing concern for making norms clear...Life was becoming too complex to have the whole community examine every activity. So norms governing the distribution of clothes, food, the use of transportation facilities...were established to encourage development of a diversified society, cut down the possibility of conflicts, rationalize administration, and offer the use of hard-earned economic development as a resource for greater choice and freedom for individual members.<sup>25</sup>

Vatik had a total population of 480 persons. Forty-eight percent were age 50 and over (23% were founding members), 42% percent were between ages 26-49 years

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<sup>21</sup> *Ibid.*, pp. 4-7

<sup>22</sup> *Ibid.*, p. 16

<sup>23</sup> *Ibid.*, p. 17

<sup>24</sup> *Ibid.*, pp. 18-19

<sup>25</sup> *Ibid.*, p. 20

(32% of which were married), and 5% were 25 years and younger. The other 5% were temporary volunteers, Ulpanim,<sup>26</sup> and candidate members, and 5% of the population were in the army.<sup>27</sup>

The relationships between people were governed by a commitment to living as one kibbutznik stated "in a democratic way." Emphasis on the interconnectedness of the social fabric was accepted, but as Blasi points out, the demand for intimate communality was absent. As in a majority of capitalist societies, most kibbutznik turned to their partners, families or friends for support.<sup>28</sup>

As Blasi writes:

Almost all members asked to describe the ideal relationship between two members not friends agreed with this assessment: relationships would be friendly and cordial, but one does not confide in this person or visit his house unless at a birth or death; if there is business to settle one should deal kindly with another member; extreme insults are out of the question.<sup>29</sup>

It is interesting to note, that even without intimacy amongst *all* members of the kibbutz, mutual respect was seen as necessary to the maintenance of the social cooperative fabric.

A social web not based on personal intimacy was maintained through the interdependence of members both in economic sustenance and administrative organisation. In Vatik, approximately 32 committees required members and coordinators.<sup>30</sup> As pointed out earlier, participation on committees was voluntary and took place in a member's spare time. Out of the 158 members Blasi surveyed, since 1950, 42 had been coordinators of committee; 41, branch coordinators; and 62,

<sup>26</sup> Ulpan is a Hebrew language intensive programme. It involves part-time work and the kibbutz hopes to gain Ulpanim as members.

<sup>27</sup> Out of the total membership, there were 152 valid case studies (out of 158 total) Blasi uses in his questionnaires. Of these, 71% of the over 50-year-olds participated (32% of the founders, 39% others), 40% of the middle-aged married couples, 62% of the unmarried middle-aged group, 25% per cent of those in the army, 10% of guests and candidate members, and 15% of the younger group (all from high school age) participated in the survey. Blasi, p. 30

<sup>28</sup> *Ibid.*, pp. 32-37

<sup>29</sup> *Ibid.*, p. 36

<sup>30</sup> Committees include Education, Further Education, Consumption, Members, Culture, Health, Work, Youth Counsel, Music, Young People, Absorption, Outside Members, Housing, Vacation, Building, Newspaper, Nomination, Security, Sport, Farm Economy, Industry, Youth Camps, Political, Furniture, Wedding, Army Returnees, Consumption Points, Human Relations, Personal Problems. Blasi, pp. 39-40.

members of committees. Within a 25-year span, members of this group recalled serving on a committee 194 times cumulatively.<sup>31</sup> Some 75.9% surveyed said they were concerned about kibbutz problems and were at least somewhat involved (15.9% said they were very involved).<sup>32</sup> If a member serves on a committee, takes a role in the work place and participates in cultural activities and meets other parents at the children houses when they visit, a high degree of interaction and consequently, integration on various levels takes place. Blasi writes "The social arrangement of...the kibbutz contributes to a form of interpersonal alliance and administrative consanguinity that is hard for inhabitants of less interdependent communities to imagine."<sup>33</sup>

The interconnectedness of members was also reflected in the economic sphere. Blasi sums up the economic principle of Vatik as follows:

...the kibbutz economic system is based on the premise that the complicated, social, personal and economic factors balance each other out, when members, whether the lazy ones or the aggressive ones, at least accept the principle of cooperation and try as best they can.<sup>34</sup>

Type of work, training, family background, age, sex or beliefs did not affect what members received economically. The first priorities were to cover the basic needs of all which included: daily welfare, health, education, transportation, cultural activities, communal facilities, and investment for production expansion. After these priorities were met, other desires were considered (such as television sets for all members, which Vatik had). The family or a couple was not treated as an economic unit and distribution was according to individual members (including children).<sup>35</sup>

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<sup>31</sup> *Ibid.*, p. 40

<sup>32</sup> *Ibid.*, p. 42

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*, p. 66

<sup>35</sup> *Ibid.*, pp. 67-68

## Work cooperation

Vatik's work structure reflected a priority of social welfare as over half of the work force was involved with community services.<sup>36</sup> Twelve percent of the population worked outside the kibbutz and about 5% was engaged in higher education at universities outside the kibbutz.<sup>37</sup> Most kibbutznik worked in teams (51.8%), especially those involved in agriculture, education, mechanics, and cooking. Only 10% of the work force worked alone, although 36% worked around others but completed their task alone (such as members in the laundry, plastics, metal shop and administrative branches).<sup>38</sup> A majority of the population was involved in blue collar work (67.2%), while 32.8% of the community was involved in white collar work. Several tasks such as, watching the baby house, washing pots, serving Saturday dinner, sending the turkeys to market, were considered too undesirable for one person to do all the time. In these cases duties were rotated.<sup>39</sup>

The general structure of work was determined by the needs and resources of the kibbutz. Various branches were organised to meet these requirements (such as education, agriculture, industry, etc.). Each branch had a work coordinator (a rotated position that received no "extra" benefit). A work committee, along with the economic committee and branch coordinators, drew up a general yearly plan. Considerations included economic needs, production ceilings, availability of work force, personnel problems, worker satisfaction, concerns of individual branches, etc. The duties of the work committee were extremely time consuming and difficult. As a result, the job was unpopular and often rotated. Once the plan was pieced together (and it was constantly re-evaluated), the branch coordinators tried to meet the requirements. Blasi denies that they operated in a managerial way. The general attitude at a job was to work at one's own pace. It was not the responsibility of the

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<sup>36</sup> Eleven point five two percent labour in agriculture, 20% in industry, and 62.63% work in community services (e.g. education, kitchen, laundry, etc.). *Ibid.*, p. 89

<sup>37</sup> *Ibid.* The figures were calculated for 356 out of 360 work members.

<sup>38</sup> *Ibid.*, p. 91

<sup>39</sup> *Ibid.*, p. 51

coordinator to "supervise" work speeds, but rather to make sure workers could operate effectively together. For instance, one may like to listen to music while another cannot concentrate. One worker may appear to be emotionally disturbed and working hyperactively to the point where others are annoyed. One worker may be extremely unsatisfied in the branch s/he is in. Another worker may desire more training in the area. The coordinator's job was to try to negotiate a good and efficient working environment.<sup>40</sup>

Blasi describes the workplace as informal. Regular breaks were scheduled, and sometimes informal ones were taken.<sup>41</sup> Work relationships generally were described as "friendly, but not oriented towards friendship."<sup>42</sup> The fact that the coordinator's position was rotated avoided the feeling that this particular person was "above" other workers. Branch meetings were held for the discussion of plans, problems and requests. In some branches these meetings were held almost daily, in others weekly, in some monthly. The structural aspects of work organisation and emphasis on member input caused compromise and negotiation to be the prime paradigm of operation. Blasi stresses that the free flow of information and discussion combined with the rotation of managers (coordinators) encouraged informal solutions.<sup>43</sup> While the coordinator's duty was to facilitate compromise, often workers handled the situation themselves. One worker, a young female who worked in the kindergarten, described her situation:

There is tension at work when one says one thing and the other thinks the other way (in the education of children), and sometimes when there is friction, when it seems that one of us did not speak properly to the children, we discuss it among ourselves, not during work usually, but after work, and together we reach a common denominator, or we try to know the direction of things...We really try to reach a uniform way of thinking because, look the child can get confused when one says this and the other says that, and the child needs to know where he stands.<sup>44</sup>

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<sup>40</sup> *Ibid.*, pp. 91-98

<sup>41</sup> *Ibid.*, p. 91

<sup>42</sup> *Ibid.*, p. 95

<sup>43</sup> *Ibid.*, pp. 101-102

<sup>44</sup> *Ibid.*, pp. 95-96

With the increase of technology and the degree of differentiation in kibbutz activities, a need for specialists arose. For example, the metal factory required an engineer. Whilst specialists were well respected for their knowledge, they could not "dictate" policy. Often several members were trained for the speciality and were rotated (as was the case in the metal factory). Also, many other committees were involved with the ultimate decision of a branch's work plan and the fulfilment of that plan. Specialists were not economically rewarded more than any other member. Despite the diffusion of power, Blasi notes that specialists often explained to branch members the technical aspects of a proposal or decision and because of their greater knowledge were listened to more than other members. At the time, Blasi assesses that a "take-over" by specialists was not really a concern of the kibbutz. Given the diffuse decision-making process, and the fact that members were integrated in so many other ways than work, the specialist did not gain undue power.<sup>45</sup>

The sense of cooperation and compromise operating within the workplace is summed by Yoram, a middle-aged male member:

I do not think that you can really say that someone is not suited for work in the kibbutz. There is really no such thing. You can say that the person who is in charge of the garage, or the field crops is not the best person or maybe not doing his best. It really is a matter of the whole branch working together. Maybe the organization is weak or there is not a high level of planning; no one can ruin it by himself...So if you are responsible for the branch this year well, there are others who directed it before you and they will come and tell you if what you are doing is no good. There are other responsible people and they can see.<sup>46</sup>

Most of Vatik's workers enjoyed their work. When asked to what degree, 30.9% said very much, 58.3% said a lot, 5.0% said never, and 2.2% said they hated it. Blasi furthered questioned workers to elicit *which* part of work appealed or did not appeal to them. Fifty-three percent of the respondents stated they enjoy the work itself, 13% said they did not enjoy the work itself; 58% declared they achieved something, 4% said they did not achieve anything; 38% had a professional feeling, 8% did not; 40% enjoyed personal relations at work, 3% did not; and 5% listed other

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<sup>45</sup> *Ibid.*, p. 97

<sup>46</sup> *Ibid.*, p. 88

reasons. A majority felt their talents were used (39% responded a lot, 41.9% responded somewhat, 13.2% said very little, 3.7% stated never). Seventy point one percent enjoyed the responsibility they had at work. Whilst the general appraisal of individual work situations seemed positive, there were a number of dissatisfied workers. The point is relevant to the discussion of the social relations in operation at the kibbutz, and the effect of dissatisfaction on possible conflict.<sup>47</sup>

### General relations

Despite the structural restraints against hierarchy, Blasi, as well as many others, concluded that some members had more influence than others.<sup>48</sup> Age, sex, race and family status affected how the community regarded the individual, but prestige was the overwhelming factor in social differentiation.<sup>49</sup> A member gained prestige through, skill, past achievements, effective leadership, regular participation, higher responsibility, good communication skills and hard work. Although all members voted on important issues, some members definitely sensed that they had less influence than others. These prestigious members were not granted better housing, education, or a better standard of living; nor could they acquire a monopoly of power due to the structural controls set in place (e.g. rotation of leaders, direct participation, the role of leaders as coordinators more than persons of authority). Whilst 70% of the members felt they had much or somewhat influence over kibbutz life, 21.6% said little, and 14.4% said none. As a comparison Blasi asked

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<sup>47</sup> *Ibid.*, pp. 104-106

<sup>48</sup> Most studies on stratification acknowledge that despite economic equality, hierarchy does develop. The "top" of the hierarchy, while not receiving any material rewards, receives emotional ones. See Ben-Rafael, *Status, Power and Conflict in the Kibbutz* for an in-depth study establishing hierarchy and discussing its effects on the social structure in general. See also Y. Talmon-Garber, "Social Differentiation in Cooperative Communities" in *British Journal of Sociology*, Vol. 3, No. 4 (December, 1952) pp. 339-354; Amitai Etzioni, "Functional Differentiation of Elites in the Kibbutz" in *American Journal of Sociology*, Vol. 64, No. 5 (March, 1959) pp. 476-487; Eva Rosenfeld, "Social Stratification in a 'Classless' Society" in *American Sociological Review*, Vol. 16, No. 6 (December, 1951) pp. 766-774. Talmon-Garber concluded that elites had not crystallised into an upper stratum (pp. 356-357) and Etzioni claimed that elites had not become sub-collectives in themselves (p. 487). Rosenfeld suggested that emotional rewards were of particular importance. (p. 774).

<sup>49</sup> Blasi, p. 118

how much people felt in control of their personal lives, 81.1% said much or somewhat, 12.6% said little and 6.3% said none.<sup>50</sup> It is important to note that while a political hierarchy may be structurally and normatively most unlikely, some members did *feel* "less" influential and involved in the community than others.<sup>51</sup>

## Conflicts

Vatik, as most other kibbutzim, was virtually devoid of "crime".<sup>52</sup> Murders, suicide or violent incidents had not occurred during Vatik's entire history.<sup>53</sup> Also absent for the most part was mental illness, drug and alcohol abuse.<sup>54</sup> The absence of crime, however, does not indicate the absence of conflicts.

As stated before, there were no police, courts or judges. For the most part, problems at work were handled by coordinators or workers themselves. If a personal conflict could not be resolved by members themselves, they could take the issue to the social secretary or the personal problems committee. Blasi uses the example of a sexual affair, or the insult of another member. In such cases of conflict a *Berur* (clearing up) must be sought. There was no punishment or tampering with economic rewards. Blasi, as would the theorists, ascribes the absence of crime to the economic security provided by the kibbutz and the system of interdependency established by the administrative and economic structures. He stresses that the social environment had much to do with the regulatory aspects of kibbutz life.<sup>55</sup> Blasi points out the incidents of conflict were not usually viewed as isolated from

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<sup>50</sup> *Ibid.*, p. 130 and Ben-Rafael, pp. 34-42

<sup>51</sup> Blasi discusses the importance of this sensation on pp. 120-124.

<sup>52</sup> Michael Fischer studied the Kibbutz Resocialisation Programme where 26 offenders (non-kibbutznik) were sent to separate kibbutzim in lieu of the final part of their prison sentences. Fischer concluded that the offenders were found "significantly less likely to recidivate and be reincarcerated than a control group." Abstract, *Reform Through Community: Resocializing Offenders in the Kibbutz*, PhD Thesis, State University of New York at Albany, 1989. (Published as a book by the same title: New York: Greenwood Press, 1991). Virtually all previously noted works do not mention crime.

<sup>53</sup> Joseph Shepherd pointed out that a murder occurred (not in Vatik) in 1975 by an outside visitor, and several suicides have occurred. Blasi, p. 50

<sup>54</sup> There has been drug use, but not to the point of addiction. *Ibid.*, pp. 66-67

<sup>55</sup> *Ibid.*, p. 50

the member themselves. For instance, if a member does not wash pots when required, but is quite active in committees and has been a generally good worker; or if a member argues incessantly but has just been divorced, confrontation of the isolated incident is weighed against the disruption of the social-individual relationship. In short, confronting members on every problem may not be beneficial in the long term.<sup>56</sup> It is interesting to survey the types of issues that arose.

A large source of tension was the situation where other members did not feel someone was doing a fair share of work. As mentioned above, members were encouraged to work at their own pace, but if a member was exorbitantly slow, or refused to do one of the undesirable tasks, it was resented. A work organiser explained that one of the most common sources of tension in the work place was the refusal to take a turn in the kitchen or a similar task. For the most part, the number was small enough that the incidents were simply overlooked. If the problem was recurring, the member may be confronted as is what happened when one member refused to coordinate supplies in the kitchen (his assigned task). This particular member had been conducting research and been granted time off work. The community felt the member was shirking his responsibility, exacerbated by the fact that the kibbutz had provided research opportunities for him.<sup>57</sup>

The kibbutz's unique, but isolated position as a communistic economy operating within a capitalist world caused tension in the personal relations of kibbutz members. For instance, kibbutz members who were university professors worked outside of the kibbutz since Vatik had no university. The lecturer had to have a car to get to work and was paid a salary by the university, yet all his social needs were met by the kibbutz. Also, family members who lived outside Vatik sent their kibbutz relative money or presents. If the presents were substantial (like a new car or extra vacation money) economic disparity would develop. Sometimes kibbutz members wanted to travel for a few years. The tension between those who

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<sup>56</sup> *Ibid.*, p. 94

<sup>57</sup> *Ibid.*

stayed to work and those who left the kibbutz for a while was sometimes evident. Also, since the kibbutz budget was restricted by how much profit it could make, certain restrictions on members' expectations occurred. For instance, if there were 25 people that wished to go to university that year, but the kibbutz could afford to pay for only 20, some sort of compromise had to be arranged.

Other sources of conflict were individual members' disagreements with general policy. For example, some parents did not want their children to live in the children's houses; or a family wanted a two-month vacation instead of the usual one month. While the members of Vatik saw effective policy as not favouring either the individual *or* the community exclusively,<sup>58</sup> conflicts between individual interest and the community interest occurred regularly. One woman refused to let her new-born sleep with the other babies in the children's house. The community did not like her stance and hoped that eventually she would be persuaded to comply in the future.<sup>59</sup> Another incident involved a member who was raising dogs and selling them to the outside for profit. Members gossiped about him incessantly and at last he was confronted by the executive committee which simply told him it was against the ways of the kibbutz and really had to stop.<sup>60</sup>

Simple personality clashes also caused tensions. One member may annoy another in discussions, at work or in debates. Dissatisfaction with a certain coordinator's or committee member's approach to situations or attitude may also be problematic.

### **Other kibbutz studies in conflict**

Ben-Rafael conducted a survey of conflicts in 1982. Forty-three kibbutzim were randomly selected and 90 informants in total were asked about the "most grave conflict that had taken place in their kibbutz during the last four years."<sup>61</sup>

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<sup>58</sup> *Ibid.*, p. 58

<sup>59</sup> *Ibid.*, p. 111

<sup>60</sup> *Ibid.*

<sup>61</sup> Ben-Rafael, p. 28

Ben-Rafael divides the results into three major categories: (1) individual demands (periods of leave, job placement); (2) new social arrangements (kibbutz policy vs individual wants as in the case where the mother wanted her child to sleep at home); and (3) ideological disputes and symbolic values (question of hired labour,<sup>62</sup> outside membership/school children). Individual demands constituted 50% of the conflicts, social arrangements, 40% and ideological matters 10%.<sup>63</sup> "Crime" was not mentioned by any of the informants. Ben-Rafael concludes that conflict is an important tool for social transformation.<sup>64</sup>

Melford Spiro in *Kibbutz: Venture in Utopia* (a study of the kibbutz Kiryat Yedidim) addressed the problem of aggression. As he puts it:

It is highly doubtful that any society, no matter what its culture, can abolish the existence of aggressive impulses in its members, and it is equally doubtful that if any society can prohibit all external expressions of those aggressive impulses which their members experience.<sup>65</sup>

He goes on to say that aggressive interpersonal expression must be kept to a minimum if cooperation is to be preserved. He noted that in Kiryat Yedidim, aggression took the form of petty gossip, criticism and sometimes personal slurs.<sup>66</sup> Quarrels frequently broke out in town meetings or other gathering places. Spiro writes, "These arguments may assume serious proportions, and the author not infrequently saw *chaverim* [comrades] burst into rages and become blue with anger..."<sup>67</sup> The arguments, however, remained on a verbal level.

Spiro noted that aggression/criticism often appeared in the form of skits. An influential kibbutznik, while talented, was disliked for some of his personal qualities. He was satirised in several skits where members responded uproariously to the drama, hence releasing the tension against this official.<sup>68</sup> Spiro suggests that

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<sup>62</sup> At times, kibbutzim will hire outside labourers for work they cannot do themselves, especially during harvesting periods. The concept is not liked by any kibbutz, but sometimes need overrides ideological distaste. The issue is constantly hotly debated.

<sup>63</sup> *Ibid.*, p. 114; actual incidents, pp. 115-124.

<sup>64</sup> *Ibid.*, p. 125

<sup>65</sup> Melford Spiro, *Venture in Utopia* (New York: Schocken, 1970) p. 103

<sup>66</sup> *Ibid.*, pp. 104, 108-109

<sup>67</sup> *Ibid.*, p. 105

<sup>68</sup> *Ibid.*

other aggression is channelled through the ability to discuss issues in committee meetings (it was characteristic that the "leaders" of committees that dealt with the most controversial issues were rotated often because of the intensity of the job), through writings in the newspapers and through everyday conversation.<sup>69</sup>

### Observations

The kibbutz obviously differs from the communism envisioned by the theorists. No doubt they would not agree with Spiro's implication that humans are "naturally" aggressive. The occurrences of petty gossip and criticism, elements of racism<sup>70</sup> and sexism<sup>71</sup> or shouting at a fellow being were considered characteristics that would be outgrown, as would the objective evaluation of individuals (lazy, hard-working, etc.) The suggestion by the kibbutz data that hierarchy and some degree of alienation is retained even under a communistic economy and administrative system might also be disturbing to our theorists. Many of the conflict sources in the kibbutz stem from a relative scarcity of resources (e.g. educational budgets, vacation times, etc.) and the isolated situation of the kibbutz social system (e.g. "outside" gifts, work on the "outside"). These problems would not exist in a totally communist society (about half of the incidents in Ben-Rafael's study falls under these causes). The principles of communist production and administration, nevertheless, were being utilised.

What is most striking about the kibbutz example is that despite the numerous sources for social unrest—conflicts as mentioned above, personal failures or feelings of alienation, dissatisfaction with compromises or decisions, racism, sexism,

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<sup>69</sup> *Ibid.*, pp. 107-109

<sup>70</sup> *Ibid.*, pp. 108-109

<sup>71</sup> Despite the attempt of the early kibbutzim to have complete equality between the sexes, there is still much to be improved in this area. For a discussion of the issue in terms of the "nature" of men and women see Lionel Tiger, and Joseph Shepher, *Women in the Kibbutz* (New York: Harcourt, Brace, Jovanovitch, 1975). For different approaches to the issue see Alison Bowes, "Women in the Kibbutz Movement" in *The Sociological Review*, Vol. 26, No. 2 (1976), pp. 237-262 and Yaffa Schlesinger, "Sex Roles and Social Change in the Kibbutz" in *Journal of Marriage and the Family*, Vol. 39, No. 4 (November, 1977) pp. 771-779.

judgmental personality traits—it did not assume an “unmanageable” form and there did not appear to be a need for an “external” institution. Even though the kibbutzniks were not of the communist character envisioned by the theorists, a communistic regulatory system worked for the most part. Informal solutions to conflict was the norm in solving problems. Conflict usually resulted as an avenue for social change.

Also noteworthy is that although a situation of restricted abundance and its accompanying problems existed, an informal regulatory system was still adequate. In short, the need for external force was absent *even in a situation where a great degree of conflict was present and the full criteria for communism were not met.*

The fundamental question, of course, is *why* this regulation was effective. Nancy Terjesen suggests that “common ideology leads to unification of the group” and is an important factor in the longevity of communes.<sup>72</sup> A sense of belonging will foster the mutual respect so fundamental to regulation. This sort of unification is most evident in religious communes such as the Hutterites or the Amish, which are, like the Kibbutz, virtually “crimeless”.<sup>73</sup> According to this view, the absence of crime in the kibbutz is due to the unification produced by the commitment from the members to certain principles.

Numerous studies have shown, however, that despite the socialist commitment of the founders, ideology was not a strong factor in kibbutz life.<sup>74</sup> Blasi

<sup>72</sup> Nancy Terjesen, “Longevity Factors in Past and Present Communal Societies” in *Communes*, eds., Ruth Cavan and Man Singh Das (New Delhi: Vikas Publishing House, 1979) p. 277

<sup>73</sup> See John Bennett, “Frames of Reference for the Study of Hutterian Society” in *Communes*, pp. 25-43, esp. pp. 31-36 and John Hostetler, *Amish Society* (Baltimore: Johns Hopkins University Press, 1993) pp. 28-29, 34-35, 85-87, 106, 154-155.

<sup>74</sup> Blasi, pp. 45-50; Ben-Rafael, p. 141. Alan Arian discusses the general move away from kibbutz ideology in “Ideology and Administration: A Case Study in Israel” in *Empathy and Ideology*, eds., Charles Press and Alan Arian (Chicago: Rand McNally, 1966) pp. 181-196 and *Ideology and Change in Israel* (Cleveland: Case Western Reserve University, 1968) esp. pp. 117-143. Helen and Aron Antonovsky studied the concept of commitment and alienation in kibbutz life in “Commitment in an Israeli Kibbutz” in *Human Relations*, Vol. 27, No. 3 (1974) pp. 303-319. They concluded that “commitment is associated with a sense of satisfaction in terms of...fundamental social needs as well as in terms of one’s major social roles, interpersonal relations and values.” (p. 317). Melford Spiro studied Kiryat-Yedidim, which officially endorses Marxist ideology; hence ideology plays a more important role in his analysis. Kibbutzim which officially endorse Marxism are an extremely small minority. Spiro, pp. 168-200.

concludes, "There is no uniform attitude towards social cooperation. Possibly this stems from the lack of ordained spiritual or radical political notion about the meaning of the kibbutz community."<sup>75</sup> He describes kibbutz life as one trying to assimilate differences rather than exclude them:

While the kibbutz in question has a distinct effect on persons through its unique arrangement of their lives, the fact that the community is organized to accept a wide diversity of attitudes, personalities, and philosophical styles without the control of a rigid religious or philosophical system is viewed as a quality of life advantage...<sup>76</sup>

Ben-Rafael suggest that the "psychological" factor of a Jewish identity replaced a strong allegiance to an ideology.<sup>77</sup> He writes, "The revolutionary conceptions, which endowed the kibbutz with its legitimacy at the beginning, have gradually been forgotten; Judaism was called in as an alternative basis."<sup>78</sup> He does stress, however, that "for the kibbutz, the 'togetherness' of the members is based on comprehensive associative social structures, and is still of crucial importance."<sup>79</sup>

Blasi claims that the integration of society administratively and economically provided the environment for an informal resolution of conflicts. Despite suggestions of a Jewish national identity and Spiro's emphasis on brotherhood,<sup>80</sup> none would deny that the social and economic structure are of key importance in maintaining the social fabric. Richard Schwartz in his article "Democracy and Collectivism in the Kibbutz" concludes that "...the economic system requires a high degree of solidarity which in the *koutza* [kibbutz] depends on the members' belief that they are ultimately in control of the economic decisions affecting every aspect of their lives."<sup>81</sup>

The example of the kibbutz seems to support the theorists' notion that with the implementation of participative institutional structure and communist

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<sup>75</sup> Blasi, p. 59.

<sup>76</sup> *Ibid.*, p. 165

<sup>77</sup> Charles Erasmus also emphasises the nationalism factor in the kibbutz movement, see *In Search of the Common Good* (New York: The Free Press, 1977) pp. 167-169.

<sup>78</sup> Ben-Rafael, p. 141

<sup>79</sup> *Ibid.*, p. 127

<sup>80</sup> Spiro, pp. 90-91

<sup>81</sup> Richard Schwartz, "Democracy and Collectivism in the Kibbutz" in *Social Problems*, Vol. 5, No. 2 (Fall, 1957) pp. 137-147 (quote p. 146).

constitute law? Campbell answers in the affirmative. He thus defines law as “a system of behavioural norms associated with institutional procedures for the administration and application of behavioural norms to which recourse may be had to settle disagreements about how social interactions are to be ordered.”<sup>17</sup> This definition, however, may be too broad. For instance, the Catholic church has very rigid rules not essentially upheld through coercion; and it has a hierarchy of legislative bodies with persons of authority supervising the obedience to rules that prescribe certain behaviours. Similarly, a social club in a secondary school, or for that matter a family would meet the same criteria. If this is the case, however, there seems to be no method for distinguishing law from any other sort of rules (mores, customs, morals). Granted, all social rules could be considered “law”, but by the same logic there is no *reason* to call them laws. The term seems to have lost all meaning.

Clearly, the type of “informal” institution referred to above (e.g. the family) is not what Campbell had in mind, nor Hart. Whilst Hart implies that second order rules pertain to the judicial and legislative branches of the state; Campbell, given that he is trying to accommodate his arguments to the socialist perspective, does not. It can then be asked, what sort of institutions does Campbell have in mind for the socialist society? He does not address this question directly; however, he does indicate that they will be of a highly democratic, participatory nature.<sup>18</sup> Given the absence of a description of the actual structure of what Campbell assumes to be political institutions, but which the theorists argue have “lost their political character”, it is difficult to assess whether his term “uncoercive law” carries any real meaning. Seemingly there is nothing to distinguish the custom of greeting each other with a wave from personal disputes from failure to remove garbage; which proves the theorists’ point that law will be indistinguishable from other social interaction and hence will “disappear.”

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<sup>17</sup> *Ibid.*, p. 27

<sup>18</sup> *Ibid.*, pp. 158-170

Also, as explained earlier in this thesis, the function of a regulatory system is not to make binding decisions, nor authoritatively enforce them. We are not, as Campbell implies “positing a system where there are clear ‘second order rules’, that is, legislative procedures for creating binding rules and various judicial and administrative agencies for authoritatively applying the rules in disputed cases” and so we do not “have a system which is far closer to existing legal systems than to any set of societal rules which lack any such explicit logical structures and jural agencies.”

### **The institutional distinction and norms**

Despite Campbell’s misconception of communist institutions, there may be a valid point in placing the “legal” distinction in the institution rather than the element of coercion. Since the role of regulatory institutions is devoid of any politically authoritative judgements, and involves only suggesting compromises or solutions, it seems apparent that they cannot be “legal” (by Campbell and Hart’s own definition). Nevertheless, if there *is* an authoritative difference existing between a compromise suggested by an individual, or a group of individuals, and one suggested by an institution, then this would imply that institutions might have a distinct “authority”, even if it is not political, different from an individual or group of individuals, and hence provide an avenue through which regulation might be considered legal.

The question is more complicated than it first appears. In one way, it is already answered. Theoretically institutions have no authority by virtue of their being institutions. The theorists have argued that, theoretically, only individuals have “authority”. Say, though, that the members of the arbitration committee thought that one solution was the best. They pleaded with and cajoled the individuals involved to act on their suggestion, despite the fact that one of the individuals involved did not really want to. Although they cannot enforce this

decision, will it *authoritatively* have more weight because it is five people organised for the purpose of suggesting compromise?

The situation involves what was earlier referred to as social consciousness. The theorists emphasised that social consciousness will play a large role in conditioning an individual's actions and responses. Without any formal institutions determining and enforcing norms, individuals are made aware of social practices only through direct social interaction. As mentioned before, the use of the term "norm" when speaking of communism merits caution. It is not clear whether recognisable social norms will actually arise. Let us assume, however, that certain common practices will arise. Recall that theoretically these practices arising from the compilation of individual actions have no intrinsic authority. Hence labelling them "norms", which imply a strong expectation of compliance, is misleading. That is not to say, though, that common social practices may not have *any* influence. While these practices are reinforced *only* through individual practice, individual choices are greatly conditioned, as they are today, by the social environment. As explained before, whilst the effects of social consciousness are not considered external to individuals, this does not indicate that individual choices will never conflict with the social practices emanating from the development of social consciousness. Although the theorists indicate that eventually all behaviour will be considered free expressions of individuality, there is a possibility that a minority of individuals behaving one way will conflict with the way the majority is behaving and a certain amount of public pressure may be involved.

If an arbitration committee made a recommendation that supported the general social practice, and the committee used its influence to persuade individuals to follow the general social practice, would the institution be, in fact, enforcing general social principles? If we are to accept Campbell's argument that law is "a system of behavioural norms associated with institutional procedures", we must consider whether these institutional procedures, no matter how informal they may

be, actually define or more likely articulate general social practices. If the regulatory institutions might "pressure" individuals within the scope of these practices and hence have influence over them, non-political institutions might have distinct qualities from individual authority. If this were indeed the case, then general social practices might become norms, that is, would possess intrinsically a high degree of anticipated compliance by virtue of their institutional reinforcement. On this basis, regulation might possibly be distinguished as "legal".

The first logical question, then, is are regulatory institutions different authoritatively in *any* way from individual authority or public pressure? And secondly, if institutions do have a different kind of authority, what is the nature of this difference? A useful approach to this question requires a return to the kibbutz example. The kibbutz organised society on a "non-political" basis. Whilst there were no courts, police or state authority, conflicts arose and were resolved with the help of various committees. If *these* committees could be considered to have *institutional* authority there is a possibility they may be considered "legal" institutions. The same arguments, then, could be applied to regulatory committees.

Alan Shapiro in his article "Law in the Kibbutz: A Reappraisal",<sup>19</sup> submits that while there appears to be no discernible political or legal institutions in the kibbutz, the weight of a general assembly decision has greater ramifications than the opinion of society at large. Within this dichotomy, it would seem that the institution (in this case the general assembly) acquires some sort of higher power by virtue of it being an institution. Such a conclusion might dispel the theorists' belief that institutions in communism would not acquire a distinct authority from that of society at large. If this were the case, Campbell's assertion that the institutional element of regulation distinguishes it from other social phenomena might prevail.

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<sup>19</sup> Shapiro's article ["Law in the Kibbutz: A Reappraisal" in *Law and Society Review*, Vol. 10 (1976) pp. 415-438] was in response to an article by Richard Schwartz, "Social Factors in the Development of Legal Control", *The Yale Law Journal*, Vol. 63 (1954) pp. 471-491. Schwartz argued that the kibbutz had no legal institutions and maintained "control" through public pressure.

Shapiro acknowledges that the kibbutz has no specific legal institutions; nevertheless the general assembly<sup>20</sup> performs what can be considered "judicial functions". Judicial functions are defined as "enunciating the local law and passing judgement on offenders."<sup>21</sup> Shapiro uses the example of a member that received a teakettle as a gift. No other members had kettles, and tea was generally taken in the communal tea room. Thus two issues were at stake, the first was the fact that one member had something that no others had; the second being that this member's absence from break would affect the communal interaction of the kibbutz as a whole. It was expressed by the general assembly that most felt the member should not keep the kettle. The member acquiesced. He compares this example to a similar case which was not taken to the general assembly. In this instance the member retained the teakettle despite public pressure. Shapiro makes the point that whether one decides to sustain public displeasure or not is a personal decision. Had the matter been taken to the general assembly in the second case, however, and the member chose not to obey, s/he might have been confronted with possible expulsion. Although this sanction is rarely used (in the kibbutz studied by Shapiro, only once in its history), the *possibility* of expulsion is always a consideration.<sup>22</sup> Since the power of ultimate sanction is vested in the general assembly and cannot be enforced by public opinion, Shapiro concludes that the institutional decision is more significant than general public opinion. Hence institutional authority rather than public opinion is the ultimate factor in social control. Shapiro categorises the general assembly as a legal institution.

The situation provides a very simple but useful example. The general practice in the kibbutz at the time was not to have teakettles. In one instance, the individual chose to retain the teakettle, in another not. In both instances the member did not have to follow the decision made. In both situations the

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<sup>20</sup> Recall that the general assembly consists of all adult members of the kibbutz and is headed by a committee whose positions are rotated.

<sup>21</sup> Shapiro, p. 423

<sup>22</sup> *Ibid.*, pp. 424-425

consequences were the same, public displeasure. Shapiro argues, however, that the general assembly *would have had* more influence because it possessed power over the ultimate sanction, expulsion. This would suggest that the general assembly was considered legal because it had power over a sanction, not because it was an institution. What if, as in the case of communism, the "general assembly" had no ultimate sanction? Would the decision have carried any more weight? It seems Shapiro's attempts to distinguish public influence from institutional authority revert back to the coercion factor. As Shapiro himself points out, it is up to the individual whether or not to live in the presence of an unencouraging community. Since no coercive measures would be used towards this individual, a more organised declaration of dislike promulgated by an institution or a general public ambience of dislike would produce essentially the same results, namely that if the person chose to remain, the environment would be socially disagreeable. Shapiro does, however, provide more examples of "legal" decisions that do not rely on the coercion factor.

Shapiro draws attention to the fact that other committees in the kibbutz perform what he considers judiciary functions. He uses the example of a group of youths who damaged a tractor during the course of an April Fool's prank. They were confronted by the educational committee who asked the farm manager to be present during the meeting. The adolescents admitted their action and expressed regret. The youths themselves decided to help the farm manager in their spare time. Shapiro acknowledges that since the tractor was kibbutz property, there was no "injured party" per se, nor could the youths or their parents be financially responsible for damages caused, since financial responsibility falls to the kibbutz as a whole. He proposes, nevertheless, that a compensatory principle was still in operation since the youths felt they "owed" something to the kibbutz.<sup>23</sup> This "sanction" was authorised by an institution (the education committee). The

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<sup>23</sup> *Ibid.*, pp. 425-426

incident was not made public, and hence public influence played no role in the authority of the decision. Given that a compensatory "penalty" was administered by an institution with the authority to do so, he reasoned the decision was a legal one.

In this case, the youths damaged community property, admitted they did so and *voluntarily* decided to help the farm manager. Shapiro claims this all happened on the authority of the education committee, whereas it is obvious that the authority came from the youths themselves. Despite the fact that the compensation principle is inoperable in a socialist economic system, Shapiro seems to argue for some sort of *emotive* compensation principle. The youths (not the institution) may have felt they "owed" something to their kibbutz for destroying its property (which is in fact their own property as well), but this in no way can be equated with the *legal* notion of compensation. On the contrary, they might have wanted to help the farm manager to make themselves feel a little better about their mistake, which supports Bertell Ollman's claim that the sense of guilt of the "offender" in communism would be so sharp that the community's duty might be to *console* them.<sup>24</sup>

Shapiro also argues that the "basic norms" of the kibbutz are highly ambiguous and therefore require institutional specifying. He uses the example of the principle "from each according to his ability, to each according to his need." Circumstances in the kibbutz have forced the general assembly to determine the limits of "need". Although socialists argue that abundance will preclude the necessity of limiting "need", the possibility has important effects on one essential feature of communist production—that no one can objectively determine what one's needs entail. If however, the possibility of any scarcity exists, some sort of restriction of needs may be required. If this is institutionally determined, as Shapiro argues, then a distributive policy becomes "legal".<sup>25</sup>

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<sup>24</sup> Bertell Ollman, "Marx's Vision of Communism: A Reconstruction" in *Critique* 8 (Summer, 1977) p. 32.

<sup>25</sup> Shapiro, pp. 430-431

In terms of determining distribution, it is unclear why the general assembly, which is comprised of all adult individuals involved, is charged with this determination rather than each individual. There are two steps to fulfilling needs. The first is determining need. As stated before, an institution *cannot* determine need, but rather each individual determines his/her needs. The second step is providing for the need. A need may not be able to be met due to some sort of scarcity. Shapiro asserts that institutions decide whose needs to fulfil, and hence “objectively determine need.” The individuals, involved, however, negotiate whose need to fulfil first. For instance, ten kibbutz members may want to pursue higher education, but the kibbutz can only afford to send eight to university that year. The decision does *not* pertain to whether all ten actually need an education, but rather to determining who goes when, a decision that must be worked out among the individuals involved (by virtue of the decision-making process). The general assembly’s role in this process is facilitation—an organised forum where negotiation can take place. In this manner the subjectivity of values is maintained and Shapiro’s claim that institutions participate in the “objective determination of needs”<sup>26</sup> is not supported.

Shapiro’s examples do not demonstrate that the purpose of institutions is to “enunciate local law and pass judgement on offenders.” Both the general assembly and the education committee performed regulatory tasks in that they aided in the derivation of solutions to diverse problems ranging from the results of pranks to who should attend university first. The examples demonstrate that a situation is handled through whichever committee or by whichever individuals the situation demands. This illustrates the theorists’ point that there is no distinction between a “legal” decision and any other kind of decision.

It should also be noted that the general assembly did not *enunciate* local law, per se. In the teakettle example, it was known *beforehand* that the general practice

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<sup>26</sup> *Ibid.*, p. 430

was not to possess private kettles. The role of the general assembly was not to promulgate law, but rather was used as a vehicle through which public displeasure could be expressed. Similarly, the youths did not require the education committee to establish that "members should not destroy tractors"; nor was it necessary beforehand for the general assembly to promulgate, "when there are shortages needs will have to be compromised." In each of these cases the institutions were engaged to negotiate confrontation, not to define law.

It is doubtful whether any of Shapiro's examples could be viewed in terms of "judgements" and "offenders". He openly admits that the resolution of the damaged tractor incident was not considered "punishment" but "penance" (a penance determined by the youths themselves).<sup>27</sup> This incident also illustrates how the equivalence principle cannot function in a socialist economy. In essence, there could be no retribution as the "damage" could not be assigned to one person, but only the entire community (including the youths). The fact that only 8 members could attend university at that time was not a "judgement" but was rather dictated by concrete circumstances (lack of money). As to who was to go, the individuals involved would have to decide. Thus an institutional "judgement" did not occur.

Similarly, the member with the teakettle was not being "punished" for having a teakettle. At the time, the primary issues involved were equality and privacy vs communality, not the material fact that so and so had a teapot. Analysed in the sense that conflicts are a rupture in the social fabric that requires reconsideration or change, the teakettle incident called attention to the fact that perhaps the structure of the kibbutz needed to accommodate privacy more than it did (which eventually resulted in a change in the general kibbutz practice).<sup>28</sup>

One must considered seriously, however, the difference between resolving conflicts through an institution and reaching a resolution without one. Though it

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<sup>27</sup> *Ibid.*, p. 425

<sup>28</sup> As a result, eventually, everyone had a teakettle. Likewise, the first television in the kibbutz induced similar debates as the "teakettle incident" and presently, most kibbutznik have televisions.

was not clearly proved by Shapiro's discussions, it would seem logical that a more organised handling of conflicts (either through a general assembly-type organisation or an arbitration committee) would have more influence than other informal attempts. The question is, why? Most probably, the help of an arbitration committee (or general assembly) would be required if other attempts at compromise failed. The situation, at this point, would probably be a "serious" one. For this reason, a compromise derived with the help of an institution may appear more influential because the situations involved would be more serious. For example, in the first instance of the teakettle, the community thought the issue was important enough to bring before the general assembly. The second community did not. Therefore, when the public collectively expressed its displeasure through the general assembly, it may have had more impact on the individual. A similar situation might have occurred with the youths involved in the tractor prank. An organised vocalisation through the education committee that members were "displeased" with their actions might have more influence than, say, if they heard displeasure only from the farm manager and a few others.

The distinguishing factor between public input and more organised public input, however, is *not* the fact that the situation has been handled through the use of an institution, but rather the situation has become, for want of a better term, more focused. If situations cannot be resolved personally, or within a work unit or within a committee, then perhaps a more organised method may be called for. The important factor, however, is that whilst an institution may influence an individual, it has no authority over that individual. It cannot be ignored that, although an institutionally derived decision may be differentiated from a non-institutionally derived decision by virtue of its degree of focus, this differentiation has no authoritative basis. It should also be pointed out that whilst committee recommendations may affect individuals, they do not influence individuals by virtue of their institutional derivation, but rather by virtue of, "more focused"

public pressure. It should also be noted that if a particular individual is not affected at all by public pressure, than the use of an institution to express public sentiment will have *no* effect, suggesting that authority strictly rests with the individual.

It seems that the general social practices cannot in actuality be enforced other than through individually determined obligation to comply. For this reason, such practices lack a strong normative component and are best considered in a similar manner as administrative suggestions. The theorists *do* indicate that social consciousness will play a strong role in conditioning individual choices. It is clear theoretically, however, that individual actions are to be considered free expressions of subjectivity, the compilation of which creates a social consciousness. Since individuals are the source of all power, public pressure, if it does arise, can only be one element of influence rather than any definitive criterion of judgement. Similarly, suggestions produce by regulation institutions do not enunciate any binding decisions akin to rules or norms, but rather provides a method for coordination of individual action.

The above argument illustrates that, in essence, social organisation reflects coordination of individual choices. Through this methodology, individuals become the only source of power—even though they are influenced by public pressure and social consciousness, and must make choices within the parameters of necessity. Critics of this position argue that since conflict is always possible, the potential for conflict between “individual” and “society” will always remain, and the “public pressure” must be restrained in order to protect individual liberties.<sup>29</sup> This position is the foundation for those that support the preservation of the rule of law.<sup>30</sup> Even if values are no longer objectified, the *process* of arbitration and general decision-making must be guaranteed. They argue that the rule of law becomes even *more* important in socialist society as the participatory element is so central to its

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<sup>29</sup> Virtually all affore-mentioned authors that call for law in socialism express this concern.

<sup>30</sup> Paul Hirst excluded.

organisation. Individuals, therefore, must be *guaranteed* the process of participation, thus creating a need for the “rule of law”.

### The procedural distinction

Alan Hunt’s well-written article “A Socialist Interest in Law”<sup>31</sup> defends the socialist need for a rule of law on a procedural basis. Hunt’s thesis is designed to protect the notion that:

...law will play a part in any form of defensible socialist society; two, constitutions are important in providing some degree of protection to the democratic arrangements of public life; three, civil liberties, human rights and the rule of law (legal mechanisms and devices developed within capitalist societies) are essential preconditions for a defensible socialism.<sup>32</sup>

The crux of his argument reads:

The contention that politics,<sup>33</sup> as an expression of the clash of interests, must continue under socialism, and that complex social arrangements require coordination and regulation, is not—or should not be controversial. The more important issues are whether this implies a continuing necessity for law, and whether the development of a specifically socialist law should be pursued.<sup>34</sup>

Hunt argues that given the increased demand for higher social coordination produced by a more democratic organisation of decision-making, a non-legal social order would prove inadequate. He defines a non-legal social order as that “which envisages the displacement of the formal structures of law by direct or ‘popular’ justice.”<sup>35</sup> He argues that this vision of regulation fails to take into account “the

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<sup>31</sup> Hunt, “A Socialist Interest in Law”. Hunt’s article was in part a critique of Christine Sypnowich’s *The Concept of Socialist Law*. She responds to his specific points in “The Future of Socialist Legality: A Reply to Hunt” in *New Left Review*, No. 193 (May-June, 1992) pp. 80-88. Hunt’s position on rights is also explored in Amy Bartholomew and Alan Hunt, “What’s Wrong With Rights” in *Law and Inequality*, Vol. 9, No. 1 (1990) pp. 1-58. For a general discussion of law see Alan Hunt, “The Politics of Law and Justice” in *Politics and Power*, eds., Diane Adlam, et al. (London: Routledge and Kegan Paul, 1981) pp. 3-26. See also, *Explorations in Law and Society* (New York: Routledge, 1993) esp. Chapter 11, “Marxism, Law, Legal Theory and Jurisprudence”, pp. 249-266.

<sup>32</sup> Hunt, “A Socialist Interest in Law”, p. 105

<sup>33</sup> Why Hunt chooses politics to represent clashes of interest is not explored by him. Obviously in the context of this thesis, it would be safer conceptually to assume that Hunt merely meant in some instances “interests” would be in conflict.

<sup>34</sup> Hunt, “A Socialist Interest in Law”, p. 113

<sup>35</sup> *Ibid.*

problems of coordination between units and the need to take account of the dispersed and divergent interests inherent in complex interdependence."<sup>36</sup>

The need for law he argues, does not come from what he labels the typical liberal position—that complex social arrangements require the “predictability and certain of rules,”<sup>37</sup> but rather “socialism needs law because its commitment to democracy requires extensive guarantees of participatory and procedural regularity.”<sup>38</sup> The rule of law, then, in its role of a protector of procedure, becomes the foundation for a socialist concept of law. Hunt makes the point that such a focus on the nature of law would allow the socialist to move away from substantive law, which he defines as explicit rules of conduct, to one focusing on procedural law, a framework of how decisions are to be reached.<sup>39</sup>

With the emphasis on law as procedure as opposed to the substantive results reached through this procedure, Hunt maintains that law can then retain its autonomy. There is a mechanism for citizens to differentiate between *how* decisions are made and the decisions themselves. Hunt regards this as a “viable separation between law and politics,”<sup>40</sup> —language rather confusing given the context of this thesis. Nevertheless, his emphasis on procedural rather than substantive law would not seem antagonistic to the way a socialist society would function.

Hunt stops short in justifying who, exactly, “guarantees” what he labels “democratic rights” (e.g., right to information, participation, etc.).<sup>41</sup> He does suggest that only a representative form of democracy is viable and that a constitution would play a fundamental role in organising authority in a future society.<sup>42</sup> He does not

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<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*, p. 114

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*, pp. 114-115

<sup>40</sup> *Ibid.*, p. 117

<sup>41</sup> *Ibid.*, p. 114

<sup>42</sup> Hunt defines the role of a constitution as concerning “...the importance of formal delineation of spheres of competence, scope of jurisdiction, modes of accountability, and the interrelationship between social institutions.” *Ibid.*, p. 119

defend explicitly, however, why a procedure for decision-making would necessarily be considered law. Since he does not elaborate on the mechanism to preserve “procedural rights”, but advocates a constitution, a form of representation and a preservation of legal mechanisms, it can be assumed that some sort of legal body with the power of enforcement would exist. This legal body would be responsible for ensuring democratic rights in the form of a regulated and enforceable participatory process.

As is obvious by now, such a position of is incompatible with the principles of regulation. As discussed in Chapter four, the “enforceable rights” argument—even if these rights are procedural rather than substantive—would lend itself to one of Marx’s initial critique of rights; and that is, if law is created by legal institutions,<sup>43</sup> than it is contradictory to assert that the law itself is “above” the institutions that create it. The point applies even if “law” only represents enforceable procedure. Paul Hirst sums up the position well:

Law is always the product of specific agencies of decision and yet is supposed to be subordinate to itself. This ‘fiction’ is a condition of its action: it *is* a fiction (1) because laws and regulatory instances are not a homogeneous sphere of legality (Law)—there is no ‘Law’ in general, only specific bodies of rules and definite apparatuses regulating particular spheres of activity...(2) because the rules of procedure that legal agencies follow are specific constructions of other agencies of decisions, legislatures and higher courts. The notion of the ‘rule of Law’ embodies this fiction...<sup>44</sup>

Since communist institutions have no power above individuals, then rights would not need to be “protected.” Indeed, if individuals themselves *are* the institutions, than who is protecting whom against what? And who determines which elements of the procedure are to be enforced? If the legal institutions determine the “rights” of democracy and have the power to enforce them, then the separation of citizen and institution becomes imminent.

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<sup>43</sup> By created, I mean that law becomes law through its institutional codification. Much akin to Hart’s or Campbell’s position, norms may be established by morals, mores or customs, but once these behaviours are codified by what is considered a legal institution, they then become laws.

<sup>44</sup> Hirst, “Law Socialism and Rights”, p. 67. Hirst advocates a role for law in socialism, but strictly on an institutional level, rather than a rule of law based argument.

Moreover, if one restricts the role of enforcement to method only, but not to the substantive results of this decision process, than the inadequacies Hunt sees in “non-legal” social organisation would equally apply to a system based solely on procedural legal rights as well since this system could not enforce any of its actual decisions. If a decision *were* enforced, than in effect a procedural rights-based legal system *would* enforce substantive law.

Despite these problems, Hunt’s argument does expose a pertinent point to assessing whether regulation may be considered law. Hunt’s makes a distinction between the *process* of decision-making and the decisions themselves, indicating the distinction of law lies primarily with the procedure associated with it rather than, as previously considered, on an institutional basis. Hunt suggests that decisions are binding because they were created by a process enforceable by legal mechanisms. In communist administration, however, such decisions lack enforcement mechanisms. Is there another distinguishing characteristic, however, that indicates the decision-making process in communism could be considered “legal”?

What is of paramount importance in the decision-making process in communism is that it is designed explicitly to diffuse all political power. By relegating institutions to the passive role of “facilitation”, power cannot be concentrated in them—including the “power” to enforce “rights” (either procedural or substantive). *Only* with the complete de-politicisation of institutions can coercion be averted and rights be rendered irrelevant. Such de-politicisation of institutions can occur *only* when the goal of economic production is not competitive and diversified (i.e. needs vs profit) but rather is unified in the goal of fulfilling need. Institutions become a *method* of organisation rather than a *source* of enforceable decisions. There is nothing in the negotiating process itself that would indicate that it should be considered a “legal” process. In theory, the process does not create binding rules and does not enforce them. Whilst Hunt suggests that

the process of coordination and regulation in socialism requires law in that the decision-making procedure must be enforced by legal mechanisms, the theorists make no such claim. Hunt's question as to whether coordination and regulation in socialism of "complex social arrangements...implies a continuing necessity for law" seems to have been answered in the negative.

### **Conclusion**

The above arguments suggest that the core elements of regulation remove it from a legal paradigm. Such a conclusion can be demonstrated by comparing a modern law and a practice which is not legally enforced. In some states in the U.S.A. spitting is illegal. In the U.S.A. it is customary to give a present to a loved one on Valentine's Day. One is a law, one is not. Why? In both cases not following the practice is against the majority social behaviour (most people do not spit; most people give loved ones something on Valentine's Day). In the case of spitting the law is: (1) derived through a representative "democratic" process (the legislative mechanism) which is a function of the state government (2) enunciated through a state institution (3) enforceable by a political power (the state); (4) enforced through a judicial body responsible for interpreting the boundaries of the law and consequences of breaking it. The Valentine's Day practice is: (1) derived from common social behaviour; (2) is not enforceable. Obligation to follow the spitting law may stem from individual desire to follow it, or social pressure to follow it, but also has an "extra" obligation to follow it by virtue of it being derived and enforced through certain processes. The obligation, if not fulfilled, is punishable by the state. Obligation to follow the Valentine's practice stems from individual desire influenced by society. The obligation, if not fulfilled, does not result in punishment, but may result in social pressure. The similarities of the two cases rest with the facts that: (1) both arise from a social base; (2) both involve obligation; (3) both involve a negative response if not followed. The distinction between the two cases stems

from: (1) enforceability; (2) promulgation through a state institution; (3) the process of creating the practice; (4) the process of enforcing it; (5) multi-faceted obligation (e.g. individual, social, legal).

Campbell seeks to remove numbers 1, 2 and 4 as distinguishing factors of law, leaving only the process of creating "rules" (in Campbell's sense of the word) and the legal obligation to follow them. As he states, law, then, is "a system of behavioural norms associated with institutional procedures for the administration and application of behavioural norms to which recourse may be had to settle disagreements about how social interactions are to be ordered." As stated before, however, such a definition places the entirety of social interaction within the legal realm. For instance churches, choirs, theatre groups, businesses, children's clubs, rock bands, sports teams and family units could be considered "legal" if the meaning of "institution" is to be taken loosely (which Campbell indicates it should be by proposing that a legal institution is not necessarily a function of the state). One could label all social interaction "law", but the concept then loses all meaning. Consequently, since Campbell does not address what kind of institutions would arise in communism it is difficult to assess whether there is a legal obligation associated with the decisions they procure. It is clear that the communist institutions discussed in this thesis would *not* produce decisions that are binding.

Shapiro, in analysing the kibbutz institutions, de-emphasises the specified nature of "judicial mechanisms" and indicates that *all* institutions perform legal functions if they are "enunciating the local law and passing judgement on offenders." He thus focuses on elements 2 (state institutional articulation of practices) and 4 (process of enforcement) of the distinguishing factors between law and a non-law. He failed to demonstrate, however, that the kibbutz institutions, and consequently communist institutions, *were* actually enunciating laws and passing judgements. Moreover, Shapiro failed to demonstrate how the authority

involved in the resolution of those conflicts came from the institution itself, as opposed to the individuals that comprised the institution.

Hunt stresses that a democratic decision-making process had to be enforced in socialism, hence "law" would still have a role as a "protector" of procedural rights. Hunt thus stresses elements 1 (enforceability) and 3 (process of creation) of the distinguishing factors enunciated above. According to the theorists, however, such an element of enforcement is unnecessary and contradictory. Without the element of coercion, there seems to be nothing in the decision-making process in communism that would indicate it should be considered legal.

Whilst the arguments have focused on various elements in what can be considered distinguishing legal factors, none seem to make a strong argument for why regulation should be considered a legal phenomenon; and, more generally, why the organisation of social relations would necessarily involve law. In reality, regulation fits none of the distinguishing factors of law. It is important to reiterate why, in brief, a law differs from a non-legal practice.

The first distinguishing element mentioned is enforceability. Whilst an argument may be made that practices are "enforceable" in communism through the use of public pressure, it should be recognised that such "enforcement" is non-coercive in that the *results* of not following a socially common behaviour are not threatening (either physically or economically) in any way. Admittedly, though public pressure *may* play a role in influencing individual decisions, the decision-making process prevents such pressure from assuming coercive form. Hence, in reality, principles widely practised can not in actuality *be* enforced by any person or institution other than individuals themselves. It is worth noting as well that since all actions and decisions by individuals were to become free expressions of subjectivity, it *is* a possibility that the use of public pressure may not develop.

The second element involves the promulgation of rules by an authoritative institution. Practices in communism will arise much as the Valentine's practice

became recognised in the U.S.A. How is such a practice articulated? And with what authority? Social behaviours are passed on through social interaction. The "authority" stems from each individual operating within the social environment. In much the same manner, general practices may arise in communism through the process of social interaction. The input of individuals is coordinated, negotiated and re-coordinated until a practice, or in a wider sense, a policy virtually *arises* from the various input of participants. Such decisions are not promulgated *by* institutions but derived *through* the use of them. Their authority does not stem from the institution, but from individuals who create the decisions, then choose to comply.

The third factor focuses on the process of the creation of decisions. As with social practices in capitalism, there is no *institutional* process in communism that *creates* decisions. Administrative suggestions are negotiated and changed through the active input of individuals. Practices *arise* through social interaction and not from institutional authority. This process is one of "decentralised coordination", which differs from "democratic" decision-making in that there is no institutional authority.

The fourth factor deals with the process of enforcement. In capitalism, such a process involves judicial procedure with regard to defined legal bodies whose duty is to carry out various functions (e.g. judgement, punishment, arrest). Since in communism there is no enforcement of decisions, such mechanisms become unnecessary. There may, however, be a need for an arbitration institution whose task is to facilitate conflict resolution. This institution is not charged with enforcing law or defining the parameters of legal jurisdiction but rather is used as a method for negotiation. Thus, its purpose is singularly different than the purpose of legal institutions in capitalism.

The last distinguishing factor is that of obligation. While obligation both to the law and the non-legal practice have elements of individual conviction conditioned by the social environment, *only* the law, which has been derived

through a prescribed process and institution and is enforceable via sanctions, carries an extra "legal" obligation which is *independent* of the feelings of obligation generated by the individual operating in a social environment. Obligation in regulation is absent of such an external, independent obligation.

Regulation clearly falls from the purview of the realm that is considered legal. First, decisions and practices are not institutionally determined and can *only* arise from the coordinated input of individuals. Second, they are not binding by virtue of their institutional source. Third, they cannot be coercively enforced. Fourth, they do not carry obligation that is "external" to a sense of individually determined obligation. Fifth, regulatory institutions are not charged with making, articulating or enforcing decisions and social practices, but rather assisting in derivations of solutions to social problems.

Those that propose the need for law in socialism do so as a concern over the possible abuse of power. What this genre of thought fails to recognise, though, is that communism seeks to diffuse power completely so that no legal mechanism is needed to "control" it. The term regulation, then, does not indicate a method of control over power because "communism" indicates that power is completely decentralised and de-politicised. The function of regulation becomes to negotiate solutions to conflict, conflict that arises *not* due to power usage and abuses, but rather to the difficulties of the social coordination and organisation of a vast array of different human personalities.

E.P. Thompson in his book *Whigs and Hunters*, which is an historical examination of the circumstances surrounding the Black Act, best sums up the justification for the general support of the eternity of the rule of law. Despite the overwhelming evidence presented through his historiography of the eighteenth century which indicates that legality often was subject directly to state power and largely affected by economic circumstances, he concludes that the rule of law is an

unqualified human good.<sup>45</sup> He justifies this position by asserting, in his words, an "obvious point that some modern Marxists have overlooked, that there is a difference between arbitrary power and the rule of law."<sup>46</sup> And that while "[w]e ought to expose the shams and inequities that may be concealed beneath this law," we must also strive to preserve "the rule of law itself, the imposing effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims."<sup>47</sup> Thompson concludes:

In a context of gross class inequalities, the equity of law must always be in some part sham. Transplanted as it was to even more inequitable contexts, this law could become an instrument of imperialism. For this law has found its way to a good many parts of the globe. But even here the rules and rhetoric have imposed some inhibitions upon the imperial power.<sup>48</sup>

Thompson's verdict that the fight against unmitigated power in the *form* of the rule of law should be considered an "unqualified" human good contrasts sharply with the Marxist position that at best the rule of law is slightly better than complete arbitrary power. Pashukanis' point that the *form* of the rule of law directly results from the economically defined social relationships of capitalism is pertinent to Thompson's claim. Thompson's de facto definition of the rule of law as a tool against unrestricted power side-steps the point that there are other methods to battle unrestricted power such as a decentralised coordination and direct control over resources. He does not address why the rule of law, even under the disparity of economic relations, would be a more successful tool than decentralised coordination and control of resources in the battle against power's "all-intrusive claims." Nonetheless, Thompson has captured the sentiment of those that reject the notion of "non-legal" regulation which abandons the concept of the rule of law. Marx himself acknowledges that rights, such as the rule of law, developed in capitalism were "the final form of human emancipation within the hitherto existing world

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<sup>45</sup> E. P. Thompson, *Whigs and Hunters* (NY: Pantheon Books, 1975) p. 266

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

order,"<sup>49</sup> but that society must move *beyond* capitalist production and *beyond* rights.<sup>50</sup>

Regulation does *not* call for the demise of the rule of law only for it to be replaced with arbitrary "public" power. The conclusion to be drawn from theories examined in this thesis is not the result of a choice between the rule of law and arbitrary power; but rather a move towards a third choice, one of non-legal regulation under a system that completely *diffuses* power. Krylenko's words seem all the more fitting, call it "*anything you like, but not law.*"

### A SEPARATE JURISPRUDENCE?

Despite the fact that there seems to be no substantive or theoretical grounds to label communist regulation law, there *is* reason to distinguish the communist theory of law (as derived from Marx, Engels and the early Russian theorists)<sup>51</sup> from other realms of bourgeois jurisprudence. Although regulation is not law, it has developed through the progress of legal systems and therefore is intrinsically linked to the achievements of these systems.

Whilst there is a distinct socialist critique of law in capitalism, the theory of a communist regulatory system would seem to fall beyond the scope of jurisprudence, which is after all a study of the theory of *law*. The relation between regulation and law, nevertheless, requires an analysis of capitalist law to derive communist regulation. Tracing the connection between the two illuminates both. Discussing the "future of law" further delineates how different the communist theory really is from other paradigms of law. While one classification (such as "positivist" or "naturalist") may appear to apply to a socialist theoretical analysis of law in

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<sup>49</sup> Marx, *On The Jewish Question* in *Marx and Engels Collected Works* (London: Lawrence and Wishart, 1975) vol. 3, p. 155

<sup>50</sup> Engels, in an article completed by Kautsky, re-emphasises this argument. See "Juridical Socialism" in *Politics and Society*, Vol. 7, No. 2 (1977) pp. 203-220, esp. pp. 219-220.

<sup>51</sup> When referring to a communist theory of law in this discussion, I am referring to the conclusions and arguments presented from the selection of theorists chosen. It does *not* include official legal ideology of the former Soviet Union or any other "communist" nation.

capitalism, such a label may prove misleading when further carried to the theory of communist regulation.

There is a plethora of theories of law. I have reduced the scope of discussion, however, to those prominent in modern legal discourse: positivist (including the normative approach), naturalist and sociological jurisprudence. Most approaches to law can be classified *broadly* under one of these three headings. The single most distinctive element in the communist concept of law is the assertion that law cannot be analysed apart from the social relations produced by the concrete realities of the mode of production. The theorists addressed both the source, content *and* function of law, as well as analysed the various forms legalism assumed during certain stages in history. Through examining the source, content, form and function of law and regulation, the characteristics unique to communist theory are revealed.

### **Positivism**

Materialism would appear to lend itself to the positivist tradition, in that analysis must begin with observable phenomena. The association, however, is quite weak. Although there are obvious difficulties with trying to define legal "positivism", several characteristics can generally apply. The Austinian model indicates that the source of law can be traced directly to the sovereign (whether this be a parliament or a king) and hence the content of law is essentially the command of the sovereign. For the modern positivist, the source of law is vested in legitimate legal institutions. The content of law is what is encoded and validated by those institutions, regardless of its "moral" properties. Whilst the two positions have obvious differences, they are similar in that the content of law is determined *solely* by an institution or sovereign. Though the function of law in the Austinian sense would be to carry out the demands of the sovereign, a more general description of the function of positive law is to regulate relationships and disputes (both between

individuals, institutions and within the legal institutions themselves). Laws assume the form of statutes.

The first conflict a communist theory of law has with the positivist tradition is the source of law itself. Legal institutions, for the most part, are regarded as a facade. The *source* of law stems from production relations in general, and for Pashukanis, the commodity form in specific. Legislators cannot "create" law, law itself arises from given situations. This is not to say that the content of specific statutes are not determined by those that write them, but rather laws must take shape within the scope of the development of production relations. The relationship, however, is dialectic rather than linear. The connection of law to the economic realm is one of generality. Pashukanis stressed that the *form* law assumed was directly determined by the form of production relations (which was determined by commodity fetishism). The *content*, while restrained by economic conditions, can also affect those very conditions, albeit in a limited fashion. For instance a law can be passed increasing wages or reducing the work week or empowering unions, thus affecting the management/worker relations somewhat, but the *fundamental* relationship has not been changed. Whilst the source of law is economic relations and hence legal institutions cannot "determine" laws, they *can* determine the specific codification of these laws and even carry the power to "fine tune" those economic relations. The content of law, then, *is* determined by the legislative and judicial bodies, but only within the general restrictions imposed by economic relations.

The function of law from the theorists' perspective is actually not to resolve "conflicts" but to perpetuate them. Law is a tool of the class war, both substantively and ideologically. Behaviour which is determined by economic relations is controlled by criminalisation of certain acts. For instance, as the critical criminologists pointed out, white collar crime is treated as mischief, street robbery is

threatening the very moral fibre of society, despite the fact that the overall cost of the two types of crimes is enormously larger in the realm of "white collar" crime.<sup>52</sup>

Ideologically, law functions to legitimise the power of the ruling class and legalise capitalist social relations. The dichotomy between isolated individuals and integrated ones which is created by capitalist production relations causes a need for law to regulate the realm of isolated individuals. In this way, law "mystifies" actual social relations. The theorists argue economic principles, rather than legal ones, govern relations. Law is essentially a reflective form of this regulatory function. As far as criminal law is concerned, they clearly thought that law could not resolve behaviours such as murder or assault; only a drastic change in social relations could manifest conditions where these acts would decrease.

The form law assumed in capitalism was, in one sense, codification but in a larger sense a culmination of legality in total. The transformation to a non-legal regulatory order could only occur when the form of law had reached its peak. The theorists emphasise that regulation of relations can occur in other forms, but they did not see this regulation as necessarily entailing law. The prime function of law for them, was a legitimisation of the ruling class.

The fact that the theorists reject in total the fundamental significance of legal institutions propel them far from the positivist model. The assertion that relations give rise to law rather than the reverse would seem to place them in a natural law or a sociological paradigm far more than a positivist one. Also significant in the differences between the two is that the basis for legal phenomena does *not* occur in the legal realm, but in the economic one; and that the regulatory requirement of society does not demand law. A legal system cannot be examined outside of its

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<sup>52</sup> Johnson and Douglas point out that the 1970's managerial fraud in Equity Funding involved losses between two and three billion dollars, which was more than the *total* losses caused by *all* street crime in the U.S.A. during one year [*Crime at the Top: Deviance in Business and Professions*, eds., J. Johnson and J. Douglas (Philadelphia: J B Lippincott, 1978) p. 151]. The U. S. Chamber of Commerce in 1974 admitted that even the short-term, direct cost of white-collar crime was a least 40 billion annually [James Sorenson, *et al.*, "Detecting Management Fraud: The Role of the Independent Auditor" in *White Collar Crime*, eds., Gilbert Geis and Ezra Stotland (Beverly Hills: Sage Publications, 1980) p. 246].

economic context. This fundamental rejection of the autonomy (or semi-autonomy) of law places them at severe odds with the positivists.

The differences are magnified when carried to the context of communist regulation. The positivist position assumes the continuation of law in all societies, whereas the theorists argue that regulation will supersede law. With the reordering of production relations, the mystifying role of law is unnecessary. The absence of legal institutions in communist regulation renders the positivist viewpoint inoperable.

Though the normativist approach to law operates for the most part within the positivist framework, the emphasis is slightly different. The importance of legal institutions to the normativist view resembles the positivist one to a large degree. The primary difference lies with the source of law. Whilst the source of law for the positivist is clearly legal institutions (and legislative ones), for the normativist the source of law is the norms emanating from society itself. Thus the content of the law is directly reflective of societal norms. The form the laws take are codes enacted by valid legal institutions, but the personnel of these legal institutions must take into account and interpret societal norms. The function of law—also similar to the positivists—is the regulation of relations.<sup>53</sup>

The normativist approach has some similarities with our theorists, namely that they turn to already existing relations as a basis for law. Pashukanis criticised the normativists in that they regarded norms as objective rather than as a reflection of production relations. Normativists would not necessarily commit themselves to the position that norms directly emanate from production relations. It could be argued, however, that perhaps the socialist theorists could be labelled “materialist normativists”. Such a categorisation, however, disregards the fact that, as discussed above, the socialist does not connect the need for regulation with the phenomenon of law. While normativists see law as regulating relations via a formalisation of

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<sup>53</sup> Or in Kelsen’s case, the regulation of relations via the prescriptions for the administration of sanction.

norms, or in Kelsen's case a hierarchy of norms (and this is where legal institutions become significant),<sup>54</sup> communists see the source of social regulation emanating from production relations. For them, there is no intrinsic connection between law and norms; and this is directly borne out in their concept of non-legal social regulation.

### Natural law

As surprising as it may seem, some of the theorists' assessments of law bear similarity to Aquinas, essentially in that law is bound to the needs of human nature.<sup>55</sup> Although the metaphysical framework within which Aquinas categorises various aspects of law is obviously completely unacceptable to them, the fact that Aquinas relates the validity of law to the fulfilment of human needs strikes a similar chord with the theorists. Carried to a broader sense, the claim that the fundamental content of law is not determined by lawmakers might place the theorists loosely in the naturalist realm. In examining the other elements of law, however, it becomes clear that the theorist fall well outside the naturalist umbrella.

The naturalist is unwilling to divorce law from its validity, or to state it simply, law and "good" law should not be as separate as the positivist would advocate. The source of law entails an "external" measure of validity. For Aquinas the ultimate measure of the goodness of human law was the natural law. Human nature has certain universal aspects; laws that forsake human nature are at best a corruption or debasement of law.<sup>56</sup> For modern naturalists like Finnis, this external validity appealed to a sense of "human good" discernible through practical reason (not, after all, that much different from Aquinas).<sup>57</sup> Fuller's naturalist approach stipulates that laws are valid only if they fit certain internal logical requirements,

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<sup>54</sup> See Kelsen's *Pure Theory of Law* (Berkeley: University of California Press, 1967).

<sup>55</sup> See St. Thomas Aquinas, *On Law, Morality and Politics*, eds., William Baumgarth and Richard Regan (Indianapolis: Hackett Publishing, 1988) esp. *Summa Theologiae I-II* (qq. 90-96); pp. 11-76.

<sup>56</sup> Or, in the worst case, not laws at all.

<sup>57</sup> John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980)

what he labels the “internal morality of law” (e.g. they are not self-contradictory, they must be made understandable to affected parties, there must not be a lack of congruity between rules and the administration of them, etc.).<sup>58</sup> Although this measure of validity is intrinsic to the legal sphere itself, the more encompassing principle of “rationality” might be the “external” validator.

Whilst economic relations are deemed the source of law by our theorists, this has no effect on the validity of the law. The theorists arguments, for the most part, are not concerned with the “goodness” of laws. As Alan Gilbert writes:

As a defender of historicism might note, Marx often warned against substituting moral outrage at injustice and an accompanying inaccurate social theory for a materialist analysis of social and political forces and of realizable alternative courses of development.<sup>59</sup>

Paul Phillips rightly points out, however, that Marx’s earlier writings on law—notably “Debates on Freedom of the Press”<sup>60</sup>—have a “distinctly Natural Law cast,”<sup>61</sup> given especially that Marx discusses the difference between “real” law and only a “form” of law. In this instance, he was contrasting censorship with the press law. The first censored material *before* publication, the latter criminalised the publication of “sensitive” material. Marx proclaimed that the press law was a “real” law because it at least recognised that the press was inherently free (even though an act of exercising that freedom may be punishable); and criticised the censorship law as it did not recognise that the “true” nature of the press was to be free. Despite the obvious natural law elements, Marx did not state either law was “good” or “valid”. It also must be remembered that these articles were written before the theory of materialism was fully developed and during a time that Marx was writing for *Rheinische Zeitung*—where censorship was, to say the least, menacing. Given the context of Marx’s entire works, it would be unjust to classify him as a “naturalist” based on these writings alone.<sup>62</sup>

<sup>58</sup> See Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969).

<sup>59</sup> Alan Gilbert, “Historical Theory and the Structure of Moral Argument in Marx” in *Political Theory*, Vol. 9, No. 2 (May, 1981) p. 174

<sup>60</sup> *Marx and Engels Collected Works* (London: Lawrence and Wishart, 1975) vol. 1

<sup>61</sup> Paul Phillips, *Marx and Engels on Law and Laws* (New Jersey: Barnes and Noble Books, 1980) p. 7

<sup>62</sup> See Phillips, esp. pp. 6-13 and Wojciech Sadurski, “Marxism and legal positivism” in *Essays in*

Hans Kelsen asserts that because Marx made his arguments for socialism in terms of justice, he should be considered a naturalist:

The means for the solution of the class conflict: the just social order of communist society, is immanent in the social reality of production and hence, can be discovered by an examination of this reality. This is genuine natural-law doctrine.

Since according to the natural-law doctrine reason or justice is immanent in nature as a creation of God, and especially in the nature of man (as the image of God), man is by his very nature good, that is, just; and since justice means freedom, man is by his very nature free.<sup>63</sup>

He contends that Marx proclaimed communism to be just because man could be truly free.

First, to equate "justice", "goodness" and "freedom" is to over-simplify the phenomenological implications of such terms. Marx's argument (as opposed to rhetoric) stated that communism would eliminate contradictions that capitalism contained *within its own order* (e.g. that "all men are equal" when in reality they are not). Thus these contradictions arise not from man's *nature*, but are created by man's nature *as determined by capitalist production relations*. Whether these contradictions are "unjust" or not is a separate question. As Robert Tucker points out, Marx and Engels' condemnation of capitalist exploitation "has nothing whatsoever to do with justice and injustice."<sup>64</sup>

Piers Beirne sums up an article written by Engels and Kautsky against Austrian jurist Anton Menger who argues that the injustice of capitalism must be overcome by a legal programme which incorporates the right to full compensation for work:

Engels' and Kautsky's reply to these demands was premised on the notion that capitalist societies are neither 'just' nor 'unjust'. All modes of production give rise to particular concepts of right and justice.<sup>65</sup>

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*Legal Theory*, ed., D.J. Galligan (Melbourne: Melbourne University Press, 1984) esp. pp. 195-198.

<sup>63</sup> Hans Kelsen, *The Communist Theory of Law* (London: Stevens and Sons, 1955) p. 21

<sup>64</sup> Robert Tucker, *The Marxian Revolutionary Idea* (New York: W.W. Norton, 1970) esp. Chapter two, "Marx and Distributive Justice", pp. 33-53. Quote is from p. 44. Leszek Kolakowski supports the assessment that Marx abandoned the moralistic approach to social change—see "Marxism and Human Rights" in *Daedalus*, Vol. 112, No. 4 (Fall, 1983) esp. p. 86.

<sup>65</sup> Piers Beirne, Introduction to "Juridical Socialism" by Engels and Kautsky, p. 200

Engels describes justice as “but the ideologised, glorified expression of the existing economic relations, now from their conservative and now from the revolutionary angle [in reference to Proudhon].”<sup>66</sup>

Even if Kelsen’s case for classification of Marxist theory as natural-law cannot be won through the justice aspect, it does have merit in another regard. Kelsen draws attention to the fact that just as natural law doctrine categorises law as a phenomenon not completely determined by man (e.g., God, nature, Reason), Marx places the source of law in production relations, which Kelsen asserts is also beyond man’s control.<sup>67</sup> Although there is divergence over the naturalist concern with the “goodness” of the content of law, and the socialists indifference to it; there is in common the notion that the content of the law cannot be determined solely by lawmakers.

Though there is some validity to the point, it does ignore the operation of dialectical logic. As stated before, the fundamental content of law cannot be altered. For instance, laws against theft *cannot* be repealed in a capitalist economic system. Yet the specificities of laws can be altered greatly. In the theft example, thieves may be executed, fined a minimal fee, incarcerated for one day or ten years. Theft due to circumstances of poverty may be treated more leniently than theft for malicious reasons. Corporate theft may be treated more leniently than “street” theft, or more severely. The ideological changes these laws generate may in effect lead to the alteration of the economic structure itself. After all, the entire point of communist production relations is to gain control over social forces. The dialectical relationship between the base and superstructure is not deterministic. The fact that legal

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<sup>66</sup> Engels, “The Housing Question” in *Marx and Engels Selected Works*, Vol. 1, pp. 624-625 as cited in *The Marxian Revolutionary Idea*, p. 42.

<sup>67</sup> Olufemi Taiwo in *Legal Naturalism* (New York: Cornell University Press, 1996) makes a similar argument. He asserts that “The natural law of a mode of production is that regime of law which is essential to its constitution...” (p. 59.) While Taiwo argues that “every mode of production comes with its own natural law,” (p. 165) he also states that “Law is not always a constitutive of modes of production, only some.” (p. 166) Taiwo suggests that law, according to Marxist theory, will whither away as the needs it fulfils will be better met by other elements of social organisation.

structures *can* influence economic ones fades the naturalist colour of the socialist position. Kelsen could not argue that laws may effectuate change in God, nature or reason. Finnis, or Aquinas, could not maintain that the legal system can re-direct the needs of human nature; nor could Fuller contend that the legal system can alter its internal demand of rationality.

When the function of law is examined, the socialists fall further from the naturalist paradigm. The function of law from the naturalist point of view is to aid in promoting human welfare. The position leads directly to the notion that the law, in whatever form, is perpetual. Law, as long as society is concerned with human welfare, will not "disappear". This cannot be further from the theorists' position. In fact, they assert that law must "wither away" in order for human welfare to progress.

The dialectical nature of legal phenomena, the rejection of the need for law for the furtherance of human welfare, and the rejection of the perpetuality of the legal form firmly places the theorists position well outside of the naturalist boundaries.

### **The sociological school**

The theories that are included in this very broad paradigm may be considered too diverse to be of much use. Both the American and Scandinavian Realists have been placed under its umbrella as well as the vast literature from critical legal studies, the economists and the functionalists. Such a categorisation would place Holmes and Jhering in the same arena. Despite the broadness, there are several identifying factors in this particular field. It is perhaps the most important one to the question of a separate jurisprudence, for Marxism has often been considered part of the functionalist or realist paradigm and a direct inspiration to the critical legal studies. It is the sociological aspect of jurisprudence that seems to closely resemble the communist position.<sup>68</sup>

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<sup>68</sup> Maureen Cain draws attention to Marx's influence on Durkheim and Weber as well as his implied critique of Parsons in "The Main Themes of Marx and Engels' Sociology of Law" in *British Journal*

Because the sociological school may incorporate both a positivist perspective *and* a naturalist one, the analysis of source, content, function and form would be difficult to apply. It is a school of thought, rather than a particular brand of theory. What generally separates sociological jurisprudence from other approaches is that its *primary* concern is with what role law plays in society, rather than the specific form or content it assumes. The form and content of law should be determined by the social purpose it serves. Thus the effectiveness of a legal system may be evaluated by how readily it serves its ends. The title, itself, of Jhering's work *Law as a Means to and End*<sup>69</sup> is indicative of this position.

Within such a framework a variety of positions can be adopted. Jhering argued that the purpose of law was to protect interests (although Stuchka criticised him for ignoring the fact that these interests were class-based).<sup>70</sup> One could claim that the purpose of law was to protect human good or maintain a hierarchy of norms. From a sociological standpoint, the form and content of law is moulded by the *specific social environment*.

Such a position fits well the analysis of law in capitalism presented by the theorists. The content and form of law directly reflects the function of law—the sustaining of class power both materially and ideologically. The primary importance of law for the theorists (especially illuminated by Pashukanis), however, was not the function of law in its social environment, although this certainly a large part of their analysis, but rather *why* the legal formed evolved at all. Such an approach logically led Marx back to economic structure. Once the function of law was directly attributed to economic relations, the path towards a non-legal regulatory system became clear. Whilst most in the sociological school would

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*of Law and Society*, Vol. 1, No. 2 (Summer, 1974) pp. 136-148. For a commentary on Cain's work see Piers Beirne, "Marxism and the Sociology of Law: Theory or Practice" in *The Sociology of Law*, eds., Charles Reardon and Robert Rich (Toronto: Butterworth, 1978) pp. 471-475. Dobrin draws attention to Jhering's influence on Pashukanis in "Soviet Jurisprudence and Socialism" in *Law Quarterly Review*, No. 52 (July, 1936) pp. 405-406.

<sup>69</sup> Actually in German *Der Zweck im Recht* (Purpose in Law).

<sup>70</sup> See Rudolf von Ihering, *Law as a Means to an End*, trans., Isaac Husik (New York: Augustus M. Kelley, 1913, 1968 reprint).

acknowledge that law can change with the alteration in societal circumstances and attitudes, none maintains that law could be completely superseded with non-legal regulation brought about by the change in economic circumstances. Once the socialist analysis of law in capitalism is taken in context with the historical progression towards a non-legal regulatory system, placing the communist theory of law in the realm of sociological jurisprudence would be misleading.

### **Conclusion**

The theory of regulation explored and developed through this thesis falls outside the general paradigms of Western jurisprudence, and therefore, deserves a separate category of jurisprudence. This conclusion may seem at odds with the fact that communist regulation cannot be considered law. Indeed, is it not contradictory to call for a socialist jurisprudence whose logical conclusion is that law will be superseded by other forms of regulation? Not at all. First, the socialist analysis of law in capitalism taken in conjunction with its supersedence by regulation proves to be a unique interpretation of law. Second, according to the materialist perspective, the intrinsic link between regulation of human and institutional interaction and principles of societal organisation can be developed through direct observation of history. The capitalist legal form is one such observable development and will *always* be of historical relevance, regardless of what the future of law may be. In these ways, a socialist jurisprudence proves invaluable.

Other general benefits of a socialist jurisprudence occur at several levels. As mentioned in the Introduction, the “withering away of law” has long been a cornerstone of Marxist theory. Surprisingly, however, discussions as to what will replace law and the theoretical basis of its replacement have long been ignored. This lacuna has led to much confusion, and even to positions that assert a “socialist law” is a viable theoretical position within the Marxist paradigm. A socialist

jurisprudence provides a viable framework for socialists to discuss further the essence and future of legal phenomena.

Exploring what is actually meant by regulation and its dependence on a non-political decision-making structure refocuses the legal discussion by calling into question the perception of law itself. Even those not interested in socialism would find of interest the suggestion that perhaps law is not needed in the organisation of social relations, that perhaps a radical social restructuring would replace the function of law with other mechanisms. Such a suggestion stimulates other fundamental jurisprudential questions: What exactly *is* law? How is it interconnected to social organisation? What are the merits and demerits of such a system? Could the function of law actually *be* replaced with other mechanisms that perhaps avoid some of a legal system's shortcomings? Whilst the Marxist interpretation of capitalist legal phenomena and the future of law offers a perspective that some may reject, or that can be critiqued at various levels, it *does* pose a significant alternative to other paradigms of jurisprudence which can only add to the further delineation of those paradigms. Thus a socialist jurisprudence contributes also to current Western paradigms of jurisprudence.

Finally, if a socialist jurisprudence incorporates the notion that non-legal regulation might at some point evolve on an economic basis, questions such as how it might work, is it possible or is it desirable must be explored—opening a new realm of study in the field of legal theory.

## **FURTHER WORK**

The central contribution of this thesis to the field of jurisprudence is to define what is meant by regulation in communism and explore its theoretical principles through the use of historical example, philosophic works and theoretical constructs. Such a definition, to this date, has not been put forward. In defining such a system, it became evident that regulation could not be considered law. With such a

conclusion the traditional Marxist position that law will “wither away” has been greatly illuminated by the exploration of regulation.

The clarification of the withering away of law, and the discussion a system of regulation hopefully relieves the pressure in the socialist debate to either be “for law” or “against law”, and propels the discussion *forward* towards exploring how to progress towards regulation, or further expanding on the concept of a “non-legal” regulatory society in general. In these regards this thesis, as with any initial inquiry, has only been a first step.

Essential in the search for the definitional principles of regulation was the need to develop a decision-making process that was “non-political”. Such a process is fundamental to the development of a regulatory system. Without it, power will not be diffused and its abuse and misuse become imminent. Although this process was theoretically described in the thesis, questions regarding its viability must be addressed. Whilst the kibbutz example suggested the possibility of such a decision-making structure and confirmed the theorists’ conclusions that a socialist economic structure would bring about “non-political” institutions and allow regulation to function, this example is not by any stretch conclusive. Further exploration into the possible establishment of such a system is demanded, as is further evaluation as to whether such a system could handle the number and complexities of decisions that must be made in a modern industrial world. A discussion of the organisation of socialist economics must be included in this discussion. Only then can criticisms posed by F. A. Hayek and Alec Nove be given their full scope of discussion.

Another area of inquiry essential to the further study of regulation is one that has long plagued socialism. As Alan Hunt most correctly asserts, “...it is important to keep the question of transition on the agenda. It remains one of the more difficult problems that confront any contemporary socialist project.”<sup>71</sup> Part of the reason that the transition period poses such a problem is the fact that more work

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<sup>71</sup> Hunt, *A Socialist Interest in Law*, p. 116.

needs to be done with regard to defining, even generally, *how* communism might meet its theoretical aims. A discussion of the transition period seems premature when what society is being transformed *to* remains so vague. Whilst this thesis attempts to clarify what *law* was being transformed to, other elements, such as non-political institutions and economic structure must be explored before any serious progress can be accomplished regarding transition period analysis.<sup>72</sup> With respect to law, many transition period questions would arise: What strategies might be used to evolve towards regulation? How are the problems that the People's Courts faced to be avoided? How can a transfer of power from highly trained legal specialists actually occur? What steps can be taken to abolish punishment yet maintain order? Will the rule of law need to be maintained for a period of time? If not will "proletarian" state power grow unwieldy? The experiment of the Soviet Union was a valuable lesson. The next steps involve using the concrete lessons of history and the possibilities of theoretical analysis to move towards a clearer understanding of socialism, its regulation, decision-making process and economic structure in order to fruitfully engage in strategies and suggestions for the transition period.

During the course of such work, no doubt new issues regarding regulation and its principles will arise as will new challenges to our current legal system. Only through rigorous inquiry and analysis can such issues be addressed, allowing other ones to rise to the surface. The results of such a process are a constantly developing degree of clarity accompanied by a growing precision of inquiry. This thesis is but one step towards that process of clarification.

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<sup>72</sup> Such a statement is not meant to denigrate the efforts of those that have attempted to address the question of a transition period such as Martin Buber's *Paths in Utopia* trans., R.F.C. Hull (Boston: Beacon Press, 1958) or G.D.H. Cole's *Guild Socialism Re-stated* (London: Leonard Parsons, 1920).

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