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On Marxism As a Legal Practice

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Marx, like Hegel, denied that a rational order exists in the physical world and that human beings possess reason. However, he stood Hegel's philosophy on its head. Instead of the order of the physical and social worlds emerging from a transcendental ego, Marx believed that the material world is primary, and human consciousness emerges from experience. Most importantly, human consciousness emerges from the experience of producing the material means of existence.

The engine of social change, according to Marx, is class struggle. In a perfect world, all would freely choose when and how to participate in the cooperative effort to produce the material means of existence. Such a utopian society would be wholly voluntary and without conflicting interests; this is what he meant by "communism." However, according to Marx, throughout history some have compelled others to work in ways they have not freely chosen, and some are so compelled. These classes constitute the two elements of the class struggle. When an oppressed class becomes sufficiently conscious of its oppression and of the need for revolution, it attempts to overthrow the ruling class. If the revolution succeeds, the winners reconstitute society in accordance with their own interests. If their interests do not overlap sufficiently with the interests of the whole people, the class struggle is renewed.

The class struggle and periodic revolutions constitute "dialectical materialism," Marx's account of the "objective laws of social development." Only those whose consciousness reflects the objective laws of social development correctly understand human events and act responsibly in human affairs. Marx's successors, especially Lenin, decreed that only members of the Communist Party have a consciousness that correctly mirrors the objective laws of social development. Therefore, only Party members should make decisions that significantly affect human survival and welfare. This explains the monopoly on decision making that the Communist Party enjoys, and zealously protects, in the Soviet Union. But the doctrine that only Communist Party members have true consciousness has extremely important implications for international discourse.

The Soviet government is organized so that the "false consciousness" of non-party members cannot direct and control any significant actions. Because of the "false consciousness" of the masses, the Party cannot reason with them. Therefore, all non-members of the Party must be deceived and manipulated for their own good. Of course, non-Communists in foreign lands are assumed to have "false consciousnesses." Therefore, members of the Soviet Communist Party and those under their control do not commu-

nicate in good faith with such persons. An outsider seeking to understand law in a Communist country must look beyond what Communists say it is, to what it does in practice. Professor Sundberg, Director of Studies, Institute of Public and International Law, Stockholm, discusses what that practice is.

ON MARXISM AS A LEGAL PRACTICE

JACOB W. F. SUNDBERG*

Introductory Note

Participating in a number of international conferences during the 1970s and 1980s, I have always been disturbed by how easily intelligent and articulate Communists, usually from Cuba or the German Democratic Republic, have succeeded in controlling their audiences. In contrast, very distinguished, American delegates, often members of the high judiciary, have observed this phenomenon helplessly, uttering respectable yet totally irrelevant legal observations. Many of our Western colleagues do not take the Communists seriously. They believe that they are merely facing a facade that a few observations by a few sincere and honorable individuals can explode.

I know that Gray Dorsey has been as disturbed as I by a certain lack of insight among Western lawyers into the thinking of Marxist lawyers in general and Communist lawyers in particular. In this contribution to his *Festschrift*, I have attempted to patch together a picture for Western lawyers that depicts what the Marxist message in law really means. This picture is based on typical statements made by our various Communist colleagues and their predecessors regarding what has taken place, legally speaking, in their environments.

Patching the picture together in this manner requires drawing largely upon second hand sources. My defense for doing so is two-fold; first, the amount of literature is enormous—after all over a billion people on this globe today proclaim their adherence to the Marxist faith. Second, the impact on the contemporary world of these teachings has resulted from innumerable secondary interpretations of the original sources. Rather

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than getting lost in a morass of detail, generalization will make the discussion intelligible. So this is a sketch, omitting most of what has been produced for the benefit of the billion or so people in Communist countries. This sketch, however, preserves the essence of the message, making it relevant to Western lawyers' normal way of thinking. In this manner I hope to contribute something that Gray Dorsey will find useful and stimulating.

I. INTRODUCTION

Marxist legal teaching is hard put to find much basis in what Marx and Lenin wrote. Much confusion arises because they did not construct a theory of law. Indeed, they did not develop a concept (theoretical definition) of Law. Both Marx and Lenin voiced numerous viewpoints that, with some luck, may be puzzled together to result in some kind of implicit legal theory. Neither, however, ever produced a major work on the matter united by theory. The best one can do is to wring something out of the meaning of one or two statements taken from their day-to-day polemics, mostly of an ephemeral nature. The level of intent is easily overvalued. Those writings are obscure, full of contradictory and doubtful passages. Certainly, they may be read in different ways. Clarity does not always prevail.

Treating the basic texts of Marxism as holy scripture is therefore not the most productive method of handling them. To me it seems better to concentrate on some of the main features of Marxism that are capable of influencing decisively what Marxism means when it is put into operation as a legal practice.

Even if one is prepared to accept the possibility of a revolutionary mutation of the strange, specifically Marxist kind, certainly one is entitled to an advance look into the society to which the supposedly inevitable Revolution should lead. How will this society look after the ultimate victory of Socialism? Late-Marxists seem strangely disinterested in discussing more closely the alternative society into which the Revolution shall lead. Apart from general phrases they disclose very little. It is therefore interesting that such homogeneous Marxist societies exist. Marxism should be studied in such societies, but not as grey theory. In concrete situations and actual environments where Marxism is practiced or at least receives homage, the difference between Marxism and non-Marxism becomes visible. Looking at Marxist societal philosophy con-

fronted with the legislative task is especially elucidating. Here, comparative law may demonstrate what bizarre legislative principles result from this philosophy.

The collection of ideas that underlies every Marxist view of the Law is indeed rather odd.

II. DARWINISM AND THE FORMATION OF PERIODS

Today many of us have difficulty understanding how enormously revolutionary Darwinism has been to our thinking. When Charles Darwin proclaimed during the 1850s his thesis of the "survival of the fittest", he introduced something completely new: nature was not only nature but it also pursued a purpose. This idea was immanent in the times and was contagious. People came to think that this purpose existed and that it could be researched in all types of activity — from the evolution of the animal species to the interpretation of statutes. Karl Marx cultivated one sprout of this tree. Just as the evolution of the animal species was bound to a purpose, so was the evolution of human societies. Societal evolution was predetermined, foreseeable, and researchable.

Marx was a great admirer of Darwin as a scientist, and he assimilated Darwin's doctrine of evolution in support of his own theories. In fact, Marx wanted to dedicate the first volume of *Das Kapital* to Darwin but Darwin refused.¹ In *Anti-Dühring* Marx compliments Darwin, inasmuch as Darwin's "Origin of Species" is addressed as a dialectic work.² Among the Darwinists, Marx's own teaching was given a preferred reading as reflecting a Law of Nature. Karl Kautsky, one of the most influential Darwinist interpreters around the turn of the century, gives Marxism such a preferred reading. According to Kautsky, Marx's class struggle theory increasingly acquires a deterministic stamp and develops into a kind of inevitable Law of Nature, much like Darwin's "survival of the fittest."³ The Law of Nature brings progression. Marxism stays with the cultural optimism of the Enlightenment. The Marxist is "progressive."

In the 18th century, some began studying societal forms hoping that they could derive from that study general rules about these societal forms. Montesquieu looked for laws about how government should be organized so he could determine how the form of government affected

1. BROMANDER, AFTONBLADET, March 11, 1972, at 5.

2. JOHN SOMMERVILLE, THE SOCIAL-SCIENCE METHOD OF MARX AND ENGELS.

3. BROMANDER, AFTONBLADET, March 11, 1972, at 5.

the people governed, their land, and life. He used the method of comparison over time and space.⁴ Marx also tried to discover through historical research the laws determining the development of societies. Marx wanted to explain the ideological phenomena by examining the historical and societal conditions from which they stemmed and in which they operated. From the middle of the 1840s it is possible to identify a definitive model of explanation. Marx sees all phenomena as conditioned by the general progressive societal evolution in conformity with the "law of nature." The objective "law" that determines the total societal development is of an economic-materialistic nature: the dialectics of the forces of production and the conditions of production. This meant the birth of historic-economic determinism.

Marx enumerates the historical development of the methods of production. History advances from clan-society to slave-society to feudal society to capitalist society and finally to Socialist society. As an end station one finds Communist society — the Marxist utopia. The orthodox line in the Second International saw this as a unilinear picture. Its "historical truth" was eventually canonized by Stalin.

The Marxist therefore opines that the advance of history is bound to laws. History advances from clan-society to slave-society to feudal society to capitalist society and finally to Socialist society. Ultimately, as the end station of world history, Communist society will arise. It is essential that society's development follow this order and that the march forward can and should be supported by armed violence — "World Revolution." The Revolution is as natural for society as Darwin's "survival of the fittest" is for the Species. The Revolution brings the dictatorship of the proletariat.

This determinism provides the Marxist with a very dynamic view of his world and his times. He finds himself in the world as one would find himself in a car, travelling between New York and Washington, D.C. As the car runs at 55 miles per hour, one can sit and chat peacefully in the car, reading and smoking. It is a perfect bliss. The aggressor is the one who suddenly brings the car to a standstill, say, by throwing himself at the brakes. People fly around in the cabin, hurt themselves, and scream. The culprit is easy to find: it is the one who brought the car to the standstill. Similarly, once one knows that history is advancing at great speed, that its advance is predetermined and foreseeable, those who insist on

4. M. RICHTER, *THE POLITICAL THEORY OF MONTESQUIEU*, 84 f. *et passim* (1977).

stopping the advance, leaving things as they are, are the aggressors and the evil people. Good people are progressive. They want to let history run its course and perhaps speed it up a bit. They are the peaceful ones.

Marx's own historical schedule was not so unilinear. He found place for still one more type of society, the Asiatic form of production. During the 1850s, Marx was struck by an insight into the peculiarity of Asiatic society with the force of a great discovery.⁵ John Stuart Mill spoke about Oriental Society, and Richard Jones about Asiatic Society.⁶ Customarily one points to Engels as the one who made the Asiatic interpretation of India and Russia materialize for Marx. As from 1853, Marx used the Asiatic model. In a famous 1853 *New York Daily Tribune* article, Marx called Russia a semi-Asiatic country. The special features of Asiatic Society were the enormous capital accumulated by the Oriental despot and his totally arbitrary government which tended to strangle both commerce and industry.

This economic world explanation becomes more significant when one considers its pretensions on exclusivity. The primacy of material life over the spiritual is a cardinal point. Idealists who say that the world is governed by ideas are wrong. The law, like the morals, is built on economic ground and nothing else. Law is only a part of the superstructure.

When the legal system is characterized as a superstructure that is determined by the basis, i.e. by the conditions of production that make up the economic structure of society, a Marxist legal theory evidently can only be a partial theory within the more general Marxist theory. It is not a notion of Law, but only part of an overriding notion of Power. The various partial elements are insolubly tied to each other.

III. THE CLASS STRUGGLE

"The history of all hitherto existing society is the history of class struggles" is the opening statement in the *Communist Manifesto*. The idea recurs time and again in the works of Marx and Engels. Class struggle is indeed, writes devoted Marxist Arnold Ljungdahl, "the shibboleth separating in the deepest sense the bourgeois view of history from the Marxist one."⁷

5. K. WITTFOGEL, *ORIENTAL DESPOTISM — A COMPARATIVE STUDY OF TOTAL POWER* 372 (1957).

6. *Id.*

7. A. LJUNGDAHL, *MARXISMENS VÄRLDSBILD*, 216 (1947).

Although the class concept occupies a central place in the structure of ideas, Marx, surprisingly, never defined the concept. Marx often expressed his impressions of social classes and their mutual relationships. When he finally did attempt to systematically analyze the concept, however, he gave up after only a few pages.

In reality, Marx ignored the whole problem. He wrote as if his class theory was correct. So if one desires to understand the meaning of "class," one must try to reconstruct Marx's thinking. He, or at least his successors, seem to have been possessed with the idea that the legal relations of men to the means of production so dominated their experiences and their feelings of identity that Society was split into two antagonistic classes — the bourgeoisie, which owned them, and the proletariat, which used them but owned nothing. Thus, a simplistic division exists between (using Marxist polemic terminology) the exploiters and the exploited. The contours appear, however, of the strange circle that the class notion rests on the assumption that antagonism exists, while, in Marxist ideology, the antagonism apparently results from the class notion.

At this point, however, the enormous role that Marxists must ascribe to the legal system becomes evident, because the legal system provides the method for controlling the means of production. A means of production is "controlled" immediately only by the person working with it — for instance by possession resulting from lease. The means of production is only indirectly "controlled" by the individual holding title to it. To consider control as resulting from the latter notion rather than the former, presupposes some kind of legal hierarchy. This assumption probably came naturally to Marx, who worked in the shadows of Art. 544 of Code Napoléon (reflecting the absolute ownership notion of Roman law). This hierarchy, however, could hardly be transplanted to half-feudal England where the King was deemed to own all land and the holders of the land were held to have no more than a right of possession.⁸

In the Marxist Utopia, this understanding is driven to a point. When ownership of the means of production has been transferred to the people the antagonism should cease, having been a concomitant to the conflict between forces of production and conditions of production. This occurs when, according to Marx's thinking, a societal order that has done away

8. W. GELDART, *ELEMENTS OF ENGLISH LAW*, 96 (W. Holdsworth & H. Hanbury rev. 4th ed. 1948).

with classes prevails. Because no antagonism exists in a classless society, law as the superstructure over the economy will wither away.⁹

Thus, control of the means of production and the class struggle are two central elements. They are so central, they force Marx's Asiatic form of production to be discarded in favor of the unilinear model.¹⁰ For a while, Lenin accepted the term, "the Asiatic form of production." In 1899, he called the conditions in Russia "an Asiatic system." The Asiatic form of production, however, became uncomfortable. The more central the class notion became in Marxist ideology, the more provocative the Asiatic form of production became, because under the Asiatic form no "class" owned the means of production. At times Marx said that the means of production were owned by the ruler, i.e., the Oriental despot. At times they were owned by the State. But given the Russian Czar's absolute power, ownership conditions were of secondary importance to the despotic character of the empire. At the congress of the Russian Social Democratic Party in Stockholm in 1906, the course shifted. Lenin's lecture of 1916, "The State and the Revolution," only referred to the unilinear model and did not discuss the Asiatic form of production.¹¹

The outcome of the class struggle is predetermined once and for all in the Darwinistic way. One cannot change the course of history, only speed it up. Foreseeing the inevitable and expediting its occurrence was the art of the Statesman, according to Talleyrand. This maxim also appeals to those who have been trapped in the Marxist network of ideas. The role of the Marxist lawyer in bourgeois society, therefore, can only be that of the *hylotrupes bajulus*, which removes unnoticed the timber of the house until the building collapses.

With those of a Marxist orientation, law becomes essentially an instrument of combat for carrying out the class struggle. Indeed, militarist forms of speech enjoy much favor among the Marxists. References to "struggles" and "fronts" are commonplace. Marxists are also of the opinion that one cannot compromise about Revolution. The bourgeois class must surrender to the revolutionary proletariat or be liquidated. The way of teaching is constructed, genocide is required, and as we all know, is carried out by convinced Marxist regimes that have ascended to power.

9. D. TARSCHYS, *BEYOND THE STATE. THE FUTURE POLITY IN CLASSICAL AND SOVIET MARXISM* (1971).

10. K. WITTFOGEL, *supra* note 5, at 5, 383, 394.

11. *Id.*

IV. IMPERIALISM

In 1916, Lenin put the label of "imperialism"¹² upon an epoch in the development of capitalism. This epoch was characterized by limitless power struggles that were ultimately resolved through armed conflicts. The explosion was War. "Is there," asked Lenin, "any other instrument than war available under capitalism in order to eliminate the discrepancy between the development of the forces of productivity and the accumulation of capital, on the one side, and the finance capital dividing up colonies and 'spheres of interest,' on the other?"

Whether a more profound motive lay behind this contemplation or not, it eventually became sacrosanct and was applied in simplified paraphrase. States that had not passed into the Socialist phase in their predetermined evolution were characterized as imperialistic. Even Sweden of the 1920s, an almost completely disarmed state, was considered an imperialistic state.¹³ The Marxists believed they had shown that all these states had an immanent tendency towards armed conflict. This tendency, they believed, had nothing to do with the choice of political government.

A Marxist's built-in perspective of the future governs his thinking. People having arrived at the higher, Socialist, form of civilization are under a duty to defend their superior civilization. Consequently, if a Socialist power enters a war, it is a defensive war. This conclusion follows from nature itself. Contrastingly, the other side in the war is always imperialistic, and therefore engaged in a war of aggression.¹⁴ Similarly, an attempt to retain the legal state of affairs in a non-Socialist state becomes aggression between Marxists. This criticism hits everything that denies the class character of state, law, and morals. Such theories are

12. Lenin, *Der Imperialismus als Höchstes Stadium des Kapitalismus* (1916) in 1 AUSGEWÄHLTE WERKE, 848 (1946). See generally T. KEMP, THEORIES OF IMPERIALISM (1967).

13. In 1929, the Executive Committee of Komintern decided that Sweden "was an imperialistic country" and consequently incapable of being "neutral." The story about the efforts of some Swedish Communists to fight this fateful classification is told in K. KIHLOM, CIRKELN SLUTES — UR MITT LIVS ÄVENTYR III, 184, 145 f., 162, 181 (1955).

14. The Marxist teaching on war originates with Lenin. Marx and Engels do not seem to have developed any systematic analysis of the matter. Lenin taught that "Socialists cannot be against every war without ceasing to be Socialists" (1 AUSGEWÄHLTE WERKE, 465 (1946)). Cf. TRAININ, HITLERITE RESPONSIBILITY UNDER CRIMINAL LAW 37 and n. 1 (A. Rothstein trans. 1946). For a study in depth, see Schroeder, *Die Rechtsmässigkeit des Krieges nach Westlicher und Sowjetischer Völkerrechtsauffassung*, in VÖLKERRECHT UM OST UND WEST 185 (R. Maurach & B. Meissner ed. 1967).

reproached for conserving the antagonism that supports the formation of classes and the class struggle.¹⁵

V. THE MAGIC BORDER

This is the way the theory looks. Obviously the law is subjected to a veritable mutation depending on which side of the magic border in the pattern of periods the society in question finds itself. The dialectic relationship between law and morals differs significantly depending upon whether one looks at "imperialistic" or "socialistic" conditions. One must therefore always seek this borderline, preferably by looking for the class contents of the specific legal order and concrete moral in question.¹⁶ If a society has not progressed sufficiently in its development, e.g., a capitalistic society, it finds itself faced with the assumption that antagonism exists between the legal order and the morals of the working people. The legal order must axiomatically be in conflict with the legal consciousness of the working people. Between the legal imperatives of the imperialistic state and the moral imperatives of the working people there must be antagonism! No legal consciousness can exist that is common to both the supposedly antagonistic classes! Commonality would be against nature. But if a society has progressed beyond the magic border, it will experience a politico-moral unity between the state and the people.¹⁷

Does this not offend common sense? The magic border builds ultimately on the assumed antagonism, and the antagonism creates the class which in turn creates the antagonism. Isn't there room for some kind of realistic test with normal scientific apparatus such as sociological inquiries, political science analysis, etc.?

The Marxist answer is "No." People in societies that have not passed the magic border are so manipulated that they cannot hold a correct opinion, neither concerning their own interests nor as to what is right. Members of a capitalistic system can not take any position as to the defects of this system as rational, well-informed individuals because their

15. Schulz, *Zu aktuellen Fragen der Rechtstheorie und des Klassenkampfes*, 23/70 NEUE JUSTIZ 689-93. Professor Schulz of Sektion Marxismus-Leninismus der Humboldt-Universität Berlin (DDR) here reviews an article by F.C. Schroeder (*Die neuere Entwicklung der Strafgesetzgebung in Deutschland*, JURISTENZEITUNG 393 (1970)). The transparency that goes with a common language (German) makes the exchange particularly elucidating when spurred as in this case by comparative law type surveys.

16. Schulz, *supra* note 15, at 690.

17. *Id.* at 690-91.

evaluations and information are determined within that very system. Therefore, such members arrive at erroneous conclusions in relation to the Marxist perception of their true interests. Their legal consciousness fares no better.

The class-indifferent description of morals and law contributes substantially to the denial and the suppression of one's own moral imperatives and one's own legal consciousness among the West German working class. To describe (in rational but class-indifferent terms) is a form of manipulation of the worker's consciousness done in the interest of the ruling monopolistic bourgeoisie.¹⁸

VI. MARXISM AS LAW IN FORCE

Testimony as to what this all means is available from the Soviet Union. The Bolshevik Twenties was a golden period. Having destroyed their enemies by fire and sword, the Marxist revolutionaries started to study in earnest what a Marxist ideology meant when it was applied to practical legal matters. This study had been a very subordinate interest to Marx and Lenin. The task fell upon P. Stuchka, the People's Commissar for Legal Affairs. He may be seen as the precursor to today's Soviet Marxist-Leninist "legal science."¹⁹

His was a virgin task. Suddenly the Bolsheviks possessed a country, an enormous country, of which they were the absolute masters. Suddenly the inflated polemical defamatory rhetoric should be reduced to a practical reality.

The magic border had been passed, the mutation must have occurred. The conclusion was the *principle of discontinuity*.²⁰ The Bolshevik conception of the mutation was intensified to the thesis that the Marxist state was something completely new in history. All bonds with the past were denied. The Soviet state had no more to do with the old Czarist Russia than if it had fallen from the moon and by chance landed at the place where the old Russia was located. This also colored the attitude regarding the law of Czarist Russia. No one in the new state was bound by the

18. *Id.* at 689.

19. Bruun, Book Review, *JURIDISKA FÖRENINGENS I FINLAND TIDSKRIFT* 94 (1979).

20. By not repealing the rights — vested or not — which originated before the Revolution but simply depriving them of legal protection, the Bolsheviks found under this principle of discontinuity an elegant solution to all sorts of problems relating to conflict of laws and vested rights. On vested rights, see e.g., Kaeckenbeeck, *The Protection of Vested Rights in International Law*, *BRITISH YEAR-BOOK OF INTERNATIONAL LAW* 1-18 (1936).

laws of the Czar and no one was bound by his treaties.²¹ This attitude only stopped short at the doorstep of marriage: old marriages were allowed to continue.²² But all existing judicial institutions were dissolved and replaced by people's courts. No court or authority could entertain disputes concerning the rights of individuals that had arisen before November 7, 1917. For them there was no judicial protection.²³

However, the mutation failed to occur. People still quarrelled with one another and disputed all sorts of things. Many realized that a transition period was necessary and that something had to be created to replace the law that had been thrown out.

But a Marxist legal structure requires considerable contributions from the one who erects it. Room existed for many Marxist law theories. Ten law faculties and one Communist Academy²⁴ were created. Until 1928, Marxists taught that Socialism and Law were irreconcilable. In the society of transition, however, the necessity to reconcile socialism with some law, whatever the lease of life for that society, arose. How long? According to official teaching, Lenin originally said 40 years, later 50 years. "Nowadays [1926] in leading Soviet circles you speak about several generations' ".²⁵ After this, the idea that law would wither away dominated. But in 1936 it was proclaimed that the Soviet Union was a Socialist state

21. Whether the Soviet Union considered itself bound by the Hague Conventions of 1907 on the laws of War remained as a result unclear until March 7, 1955, when upon a precise question from the Dutch, the Soviet Union through its Ministry of Foreign Affairs declared that the Union did consider itself bound by all the Hague Conventions of 1899 and 1907 which [Czarist] Russia had ratified to the extent that they were not in conflict with the U.N. Charter or were superseded by later treaties adhered to by the Union.

22. A.E. Rodhe, *Rysk äktenskapslagstiftning* SVENSK JURISTTIDNING 75 (1923).

23. In May, 1922, the Soviet government made a decree in the form of a program concerning rights in matters of private law. The Presidium of the All-Russian Central Executive Committee (an FSFSR body) and the council of the People's Commissars were charged with the task to propose pursuant to this program a Draft Civil Code for the Soviet Republic. It was produced in half a year and entered into force on January 1, 1923. Art. 2 of the Law enacting the Civil Code read: No court or other authority of the republic shall take cognizance of disputes of private rights arising out of relations that originated before November 7, 1917. Compare *infra* note 41. See also A. FOGELKLOU, *DEN ORÄTTFÄRDIGA RÄTTEN* 18 (1978).

Note that until 1918, Russia followed the Julian Calendar which differed from the modified Gregorian Calendar in the Western world by 13 days. The change was made on February 1, 1918, which became February 14, 1918. November 7, 1917 is consequently, according to the Julian Calendar, October 25, 1917, and the Bolshevik Revolution is still called the October Revolution.

24. ZETLITCH, *SOVIET ADMINISTRATION OF CRIMINAL LAW*, 51 (1931). On the Communist Academy, see A. Fogelklou, *supra* note 3 at 21 and *infra* note 39.

25. Nils Stjernberg, *Sovjetrikets nya straff— och straffprocesslagar* SVENSK JURISTTIDNING 216 note 2 (1926).

without antagonistic classes.²⁶ Later on it was taught that the law's function is essentially education and that law is here to speed the development.²⁷ The law is the motor!

Under such circumstances a number of Marxist theories were to be mirrored in the Soviet legislation. I will limit myself to three of them: the dictatorship of the proletariat, the class nature of law, and withering away of the law.

VII. THE DICTATORSHIP OF THE PROLETARIAT

Article 590 in the Fundamental Principles of Criminal Law of 1919 laid down a definition of Law: "Law is an order of social relations, which corresponds to the interests of the ruling class and which is protected by its organized power." This definition attributed to Stuchka,²⁸ obviously does not define "law" in any specific way. For example, no distinction exists between the military and the judicial system. Both turn out to be nonextricable elements in the same order of power.

The practical meaning of this "law," however, is determined by the dictatorship of the proletariat. Lenin explained what this dictatorship meant in "The Proletariat Revolution and Kautsky the Renegade": "Dictatorship signifies, notice once and for all, gentlemen, unlimited power, which rests upon force and not upon law."²⁹ The dictatorship found its instrument in the *general clauses*. The people's courts were to take guidance from government decrees and from their own "socialist consciousness." Art. 1 in the Civil Code of 1922 provided the connection: "The civil rights are protected by the law except for the cases in which they are exercised in a way that contravenes their social or economic purpose."³⁰ The meaning of "social consciousness" and the "social and economic purpose" could at any given moment be determined by the supreme party authorities or by Lenin himself.³¹ The purpose was to level the road for the dictatorship and to open up the possibility of mak-

26. The point is discussed in I. LAPENNA, *STATE AND LAW: SOVIET AND YUGOSLAV THEORY* 37 (1964).

27. Fogelklou, *supra* note 24 at 26.

28. *Id.* at 16 & 44 n. 8.

29. I. LAPENNA, *SOVIET PENAL POLICY* 24 (1968).

30. The Soviet General Clauses and their potentials are surveyed in the famous little book by JUSTUS WILHELM HEDEMANN, *DIE FLUCHT IN DIE GENERALKLAUSELN — EINE GEFAHR FÜR RECHT UND TAAT* 72 (1933) which otherwise addresses the situation in Germany at the doorstep of the Nazi era (takeover occurred 1933). As to the Civil Code, see *supra* note 23.

31. LAPENNA, *supra* note 29 at 47.

ing illusory all legal provisions that stood as obstacles. This served as the model for the infamous German general clause in Art. 2 of the *Reichsstrafgesetzbuch* as amended by the Nazi *novella* of 1935.³²

VIII. THE CLASS CHARACTER OF THE LAW

The new Criminal Code of the Russian Soviet Republic, that came into force in 1922, was intended to “establish solid bases for the revolutionary consciousness.”³³ In 1924, Fundamental Principles of Criminal Legislation of the USSR followed, and on that basis the Criminal Code of 1926 was enacted. Art. 1 of the Soviet code stated that the task of the criminal legislation was to protect “the socialist state of workers and peasants” from “socially dangerous acts.” Art. 6 defined a socially dangerous act as an action or omission directed against the Soviet system or violating the legal order established by the worker-peasant authority for the period of transition to communist organization.³⁴

We are here dealing with what has been called the *material definition of crime*. This was, it was emphasized, “a real Marxist, materialistic definition of crime that showed its true class character.”³⁵ The substance of this concept is that the action or omission that the criminal law formally forbids does not constitute a criminal offense. Rather a criminal offense is every “socially dangerous” act or omission directed against the Soviet state, its economic, social, or political system.³⁶

Using the material definition of crime meant that the vague descriptions of specific crimes in the special part of the criminal law were of little importance. Aside from the material definition, an analogy was prescribed. It was maintained — justly so according to Lapenna — that the special part of the Criminal Code simply became a listing of examples of crime.³⁷

The material definition of crime prevailed until 1958, at which time it could be said:

[I]n Soviet practice the material definition of crime has been transformed from the very beginning into the converse of what it was claimed to be in

32. Cf. Hamburger, *L'Analogie Dans le Droit Pénal Allemand* REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ 182-94 (1937).

33. Stjernberg, *supra* note 25, at 210, 218-19 and n. 1.

34. LAPENNA, *supra* note 29, at 32.

35. *Id.* at 38 (referring to A.A. Piontkovsky).

36. *Id.* at 33.

37. *Id.* at 34.

theory: it became a legal device which could be invoked at any time for justifying any arbitrary action. This principle together with that of the so-called "socialist legality", in Soviet political conditions meant in fact and in law a legalization of illegality.³⁸

IX. THE WITHERING AWAY OF THE LAW

The belief that the law would wither away once socialism had been established called for some kind of tribute. Accordingly, a start occurred in family law. It was taken for granted that the family should be liberated from state intervention. Furthermore, history should be fulfilled first in family relations. In marching towards communism it was obviously logical to deprive family law of as much of its contents as possible.³⁹

On October 22, 1918, Laws regarding Status, Marriage, Family and Guardianship were published in the "Collection of Laws and Ordinances of the Workers' and Farmers' Government." The preface by the chairman of the legislative committee explained

that those laws at first glance may not seem to be Socialist in the strict sense of the word but that they, of course, are proletarian laws which shorten the road towards socialism. Registration of marriage, this 'legalized forging together of man and woman', is said to be a form which must, unfortunately, during the transitory period the duration of which the Proletarian Power wants energetically to cut short, be employed because a jump right into the future will mean a standstill and possibly a retrograde step.⁴⁰

The aversion to marriage increased. The individual was encouraged to seek the full development of his personality as he saw best. The new relationship between man and woman was to provide all the blessings of free love, nobilized by real social equality between man and woman. As a phenomenon, changing partners was more useful to society than family stability. The requirements of a general turnover were honored in a kind of sexual Manchester Liberalism.

In 1926, this philosophy was reduced to statutory form for the Russian Soviet Republic by the Act on Marriage, Family and Guardianship, a brainchild of A. Goikbarg. Neither the entry into marriage nor its disso-

38. *Id.* at 34.

39. A. Goikbarg, who initiated a great many of the 1926 family law provisions, emphasized "a trend toward the factual abolition of marriage" and S. Wolfson explained in 1929 that Socialism puts an end to the family." See GUINS, SOVIET LAW AND SOVIET SOCIETY, 428, note 17 (1954).

40. RODHE, *supra* note 22, at 78.

lution required any legal manifestation worth mentioning. Nor did they entail any particularly burdening legal consequences for the parties. The Law had paid tribute to theory.⁴¹

X. CLOSING REMARKS

These testimonies as to what Marxism means when made into Law in Force stem from the Soviet Union. Looking for the evidence there comes naturally. Kremlin rulers always claimed that the social-economic and political organization of the Soviet state was based on Marxist principles. This was an axiom. Within and outside of the Soviet Union this axiom provided Marxists with a quasi-religious certainty regarding their perception of the world. In today's world of television and mass charter traffic, Soviet society clearly displays few of the good qualities predicted of the post-revolutionary Marxist society. Many Later Marxists therefore tend to coldshoulder the Soviet Union.

But for lawyers, the main point does not concern these qualities. Rather it concerns issues of predictability. We in the West are easily given to ethnocentricity which identifies much of our culture with the *rule of law*. In fact, lawyers tend to be proud of that identification. The identification brings along a great many inhibitions. Things cannot be done because they are irreconcilable with the rule of law (or law is the science of inefficiency, to use a perceptive book-title). The Marxists harbor no such identification, and this makes them, in one way, completely unpredictable when dealing with a legal system. In another way, however, they too are predictable but only if one uses their own body of teachings to set a framework for what can be done and what is to be expected. Using examples to show how laws, statutes, and practices develop within such a framework opens up this world to our insight. It may help lawyers to understand how the same people can organize genocide on the scale of the Nazis (not to mention earlier generations of rulers hiding in the darkness of history) and yet believe in the arrival of the

41. A.E. Rodhe, *Sovjet-rysk familjer ätt* SVENSK JURISTTIDNING 398 (1928). Compare Jacob Sundberg, *Recent Changes in Swedish Family Law: Experiment Repeated* 23 AMERICAN JOURNAL OF COMPARATIVE LAW 34-49 (1975).

Recall that in 1924, the Soviet Union adopted its second Constitution which regulated more closely the separation of powers between the Union and the republics of the Union. Thus, while the first general decree that was promulgated by the new Soviet regime concerned the making and the dissolution of marriage (1917), family regulation belonged after 1924 to the union republics, most important among them the RSFSR.

Utopian Socialist Man who does everything good simply because he is Socialist Man. Marxists are certainly difficult clients but even difficult clients must be handled.
