CHAPTER 5
The Soviet Concept of Law in General

I. BEGINNINGS

1. Introductory

The variety of principles to be found in modern legal systems may be reduced to two chief methods of legislation and legal reasoning: the method of codified statutes, employed in Continental European countries or, as we usually call them, the countries of civil law, and the method of the common law.

For one trained in the civil law tradition, the statute is the basic source of law and the final authority. He interprets the statutory law in accordance with rules developed through learned doctrine, a tradition of legal reasoning that may be traced back to the law of Rome. For him, court decisions are not a body of case law but merely a collection of interpretations of the true meaning of the statutory provisions, which, at least in theory, cannot be challenged but must be followed by the courts. He takes these interpretations as a guide, but they are not, strictly speaking, binding. Behind the entire legal system stands the body of legal theory, whether referred to by the statute or not.

This approach of the civil law lawyers may be contrasted with the high authority of judicial precedents in the doctrine of stare decisis and the related principles of the common law. Case law appears not merely the important source of law but is also the means by which
the interpretation of the statute is fixed. Here the statutory provision has to go through a test in court to be established as law. It is of interest to inquire whether the soviet legal system is to be classed with one or the other type, or is *sui generis*.

2. Early Soviet Attitude Toward Law

There were no common-law lawyers among the framers of soviet laws and soviet judges; the only legal system known to them was the civil law. However, there was no desire on the part of the soviet jurists to join any legal tradition. The soviet leaders have cantidly admitted that, when they seized power in 1917, they had no definite idea on the status and operation of law under their rule. As a matter of fact, the first decrees of the soviet government were not designed to possess serious binding force, even in the eyes of their authors. They were, according to the definition of Trotsky, "the program of the Party uttered in the language of power" and, as such, "rather a means of propaganda than of administration." In 1917, Lenin thought:

> It does not matter that many points in our decrees will never be carried out; their task is to teach the masses how to take practical steps. . . . We shall not look at them as at absolute rules to be carried out under all circumstances.

No less contemptuous was the attitude of many soviet jurists towards law and legal formulas (see *infra*, II, 1). However, the desire to see the new social order established pressed the recognition of law as a potent instrument in reaching the goal. The immense diversi-

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1 Stuchka, 1 Course 36; Goikhbarg, Economic Law (in Russian 3d ed. 1924) 6; Krylenko, The Judiciary of the R.S.F.S.R. (in Russian 1923) 203; Vyshinsky, 1 Course (2d ed. 1936) 171 passim.

2 Trotsky, 2 My Life (Russian ed. 1930) 65.

3 Lenin, 16 Collected Works (Russian 1st ed. 1924) 149.
fication of practice in the execution of the orders of the central government was a too obvious menace, especially in the face of armed rebellion of the populace and foreign intervention. After some experience in government, Lenin changed his attitude toward law and stated in 1919 that, "in order to put an end to Denikin and Kolchak [commanders of the anti-bolshevik armies], it is necessary to observe strictly our revolutionary order, to observe religiously the statutes and instructions of the soviet government, and to see that they are observed by all."  

With the same aim, the Decree of November 8, 1918, provided as follows:

To call all the citizens of the Republic, all authorities and officers of the soviet government, to a strict observance of the laws of the R.S.F.S.R. and the enactments, resolutions, statutes, and ordinances issued by the central government authorities.

Thus, to the soviet decrees was attached a binding force which, nevertheless, did not imply the supremacy of law as a principle. The same decree stated also that "measures not complying with the laws of the R.S.F.S.R. or exceeding them are allowed," if they are "provoked by the extraordinary circumstances of the civil war and the combat of counterrevolution." Since the combat of counterrevolution in one form or another was thus far not a transitory emergency measure but a paramount proposition, this clause of the decree justified arbitrary departures in individual instances from a strict observance of law. Thus, this decree was the first manifestation of two divergent trends that are constantly evident in the soviet jurisprudence. These are the recognition of the full authority of law, or rather, of statutory

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4 Lenin, 24 Collected Works (Russian 2d ed. 1926) 433-434.
legislation, on the one hand and the admittance of executive freedom and extralegal considerations on the other.

The soviet theorists and practitioners, while never defining the situation in so many words, sought new ideas and new terms in determining the specific role of law in the soviet State. Instead of an outright recognition of the full authority of the soviet law, the principle of "revolutionary legality" was declared (Revolutsionnaya Zakonnost in Russian, translated also "revolutionary enforcement of law" or "revolutionary observance of law"), and the decree quoted above is regarded as the first expression of this principle. However, in too many instances so-called "revolutionary expediency" was upheld against "revolutionary legality." Finally, at the beginning of the soviet regime, the courts had been instructed to follow the dictates of a "socialist concept of law" or "revolutionary concept of law" in rendering their decisions. Thus, these three unusual terms were designed to express the new, specifically soviet principles of the operation of law. Let us now analyze what they mean in the eyes of soviet jurists and in practice.

3. The Revolutionary Concept of Law

In the early days of the soviet regime, all the pre-soviet administrative authorities, the agencies of the central government as well as the democratically elected organs of municipal and other local self-governments (Zemstvo), were dissolved. The local soviets took their place. Decree No. 1 on the Judiciary of December 7, 1917 (November 24, old style calendar), dissolved all

the hitherto existing judicial institutions en bloc and set up a restriction, though moderate, on the application of the old laws. The newly created people’s courts were instructed to apply “the laws of the overthrown governments only insofar as they were not abrogated by the Revolution and did not contradict the revolutionary conscience and revolutionary concept of law.” However, the compilers of the decree were aware of the fact that no definite concept of law would be in the mind of coming soviet judges, so a note was added to this section, explaining that those old laws “are considered abrogated” which contradict the decrees of the central organs of soviet power (the Central Executive Committee of the Congress of Soviets and the Council of People’s Commissars) and the “program-minimum of the Russian Social-Democratic Party and Party of Socialist Revolutionaries.”

For obvious reasons, the next decree on the judici-

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7 R.S.F.S.R. Laws 1917-18, text 50, Section 5:

The local courts shall decide cases in the name of the Russian Republic and shall be guided in their decisions by the laws of the overthrown governments only insofar as these laws are not abrogated by the Revolution and do not contradict the revolutionary conscience and the revolutionary concept of law.

Note: All laws contrary to the decrees of the Central Executive Committee of Soviets of the Workers’, Soldiers’, and Peasants’ Deputies and the Workers’ and Peasants’ Government, as well as to the program-minimum of the Russian Social Democratic Party and the Party of Socialist-Revolutionaries, are deemed abrogated.

8 Stuchka, 1 Course 37. Professor Reisner, a prerevolutionary exponent of Marxism in law, claimed to be responsible for the reference to the revolutionary concept of law in Decree No. 1 on the Judiciary. Reisner, Law, Our Law, Foreign Law, Common Law (in Russian 1925) 21. He asserts that he inspired Lunacharsky, the Commissar for Education, who simultaneously with the decree published an article, “The Revolution and the Court,” in Pravda (1917) No. 193, in which he advocated the idea of the creative power of legal conscience with reference to the non-Marxian legal writers, both Russian (Petrazicki) and German (Jellinek, Anton Menger, Knapp).

ary, issued in February, 1918,\textsuperscript{10} omitted the reference to the "program-minimum." This program contained a declaration of principles of advanced democracy, some of which, such as universal suffrage and secret ballot, were denied at that time by the soviets. The same decree substituted the words "socialist concept of law" and "concept of law of the working masses" for "revolutionary concept of law."\textsuperscript{11} However, the instruction of the Commissar for Justice again referred to "the revolutionary concept of law" as an obvious synonym for "socialist concept."\textsuperscript{12}

Finally, the Statute on the People's Courts of the R.S.F.S.R. of November 30, 1918,\textsuperscript{13} definitely prohibited the citation of any prerevolutionary law in a court decision. Section 22 of the statute reads:

When rendering a decision in a case, the People's Court shall apply the decrees of the workers' and peasants' government and, in the absence of an appropriate decree or if a decree is incomplete, the court shall be guided by the socialist concept of law.

Note: Any citation of the laws of the overthrown government in a court decision or sentence is prohibited.

As the acts of the soviet government of that time almost invariably were called "decrees" (\textit{dekret}), this section in fact declared the soviet statutory provisions to be the primary source of law and the "socialist concept of law" an auxiliary source. The formula in a way was reasonable and, except for the word "socialist," was not out of line with the traditional jurisprudence of

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\item \textsuperscript{10} Decree No. 2 on The Judiciary, R.S.F.S.R. Laws 1917-18, text 347 (erroneously marked 420 in the 2d ed.), Sections 8, 36.
\item \textsuperscript{11} For purposes of procedure, reference was made to the imperial Judicial Statutes of 1864, and the courts were required to state the reason for which "the court abrogated one or another law as obsolete or capitalist."
\item \textsuperscript{12} R.S.F.S.R. Laws 1917-18, text 597, Section 35.
\item \textsuperscript{13} \textit{Id.}, text 889.
\end{itemize}
countries where statutory law prevails. It is, after all, a commonplace of jurisprudence that, in applying laws, the judge must interpret them and fill in the lacunae from his notion of what the law is, i.e., must resort to his own concept of justice. Thus, such authority of the judge was definitely recognized under the imperial regime, when the statute was the prime source of law. The imperial courts were prohibited to abstain from rendering a decision if the statutory provisions appeared incomplete, obscure, inadequate, or contradictory, and were directed to base their decisions in such cases on the ground of "the common sense of laws," i.e., a concept of law.\textsuperscript{14}

The adjective "socialist" which appears in the soviet formula, announced the platform of the new government but did not amount to an innovation in legal technique. It seems that, in substituting the socialist concept of law for the common sense of laws, as a subsidiary source, the soviet legislators merely took into account the obvious incompleteness of the soviet statutes of that time. To leave a broader scope for the discretion of the judge and to call his attention to the pursuit of new social aims was all that the soviet formula sought. But, though at first sight the soviet appeal to the concept of law (i.e., to the conviction of the judge) as an auxiliary source of law may resemble the doctrine of natural law or the Continental doctrine of free judicial legislation,\textsuperscript{15} it was far removed from these doctrines. There

\textsuperscript{14} Imperial Code of Civil Procedure of 1864, Sections 10, 11; imperial Code of Criminal Procedure of 1864, Sections 12, 13.

\textsuperscript{15} The most advanced expression of this doctrine is to be found in Article 1 of the Swiss Federal Civil Code, where it is stated that the statute must be applied to all those problems for which a solution is offered by the letter of the statute or its interpretation; if the judge cannot find such solution, he must resort to customary law and, in the absence of the latter, the judge must decide the case on the ground of such rule as he would establish if he
was no intention to stimulate the development of a law of judicial precedents, or of a customary socialist law (see infra). Nor did the courts actually establish law. The government did not wish the country to be ruled by judicial precedent or custom, but primarily by statute as a means of introducing a new social order. The courts were not designed to be an independent power. The socialist concept of law meant practically the same thing as revolutionary expediency, namely, departure from once-enacted rules for the sake of new revolutionary purposes. The more power the central government gained, the more it wished to be the exclusive guide of all governmental authorities, including the courts, in the achievement of the revolutionary goal.

Consequently, reference to the socialist concept of law as an auxiliary source of law was not retained when an era of codification of law began under the New Economic Policy of 1922. Governmental policies were substituted for the socialist concept of law so far as decisions in civil cases were involved, and the imperial formula was adopted for the rest. The soviet civil courts were instructed by a new Code of Civil Procedure, which is still in force, "to decide cases in conformity with the legislative enactments and decrees of the soviet government in effect, as well as ordinances of the local authorities enacted within their established jurisdictions." 17

In the absence of a legislative enactment or a decree bearing upon the decision in a case, the court shall decide the case, guided by the general principles of soviet legislation and the general policies of the workers' and peasants' government. 18

were a lawmaker, being guided by the established doctrine and tradition.

16 See Chapter 7, I.
17 Code of Civil Procedure, Section 3.
18 Id., Section 4.
So far as criminal cases are concerned, reference to the socialist concept of law was omitted altogether in the first soviet Criminal Code of 1922, while in the later 1926 Code, which is still in force, it was mentioned only in connection with selection of punishment. But again, no doctrine or body of rules is attached to the term "socialist concept of law" in soviet criminal justice. It is still used interchangeably with "class point of view" in instances where a nonsoviet jurist would speak of "volition," "discretion of the court," or "the following by the court of certain policies." Thus, after a lengthy discussion, the socialist concept of law was defined by Vyshinsky in 1937 as "the awareness of the necessity to proceed in a manner required by the socialist Revolution and the socialist State of workers and peasants." 19

The other term, "revolutionary legality," or, as it has been recently called, "socialist legality," is still in use. The legal periodical of the U.S.S.R. Attorney General bears this title. There was vivid discussion of the topic several times in the soviet legal press, and an important law of 1932 mentions revolutionary legality in its title. 20

4. Problem of Socialist Legality

It may be noted that the term "revolutionary legality" has given rise to well-founded objections, even among the soviet jurists. Professor A. Trainin stated with reason in 1922:

The law may be liberal or conservative, useful or harmful, but the legality, i.e., the observance of law, cannot be right or left, revolutionary or reactionary. . . . Legality means the attaching of a value to the law and is the same in revolution and in restoration; legality is the observance of law without

19 Vyshinsky, Court and Government Attorneys (in Russian 1937) 47.
which no regular power can exist, be it bourgeois or proletarian.81

To this it may be added that, from the viewpoint of traditional jurisprudence, law binds not only the citizenry but also the government; consequently, such slogans as “legality,” “observance of law,” or “enforcement of law” would mean the supremacy of law over the discretion of the authorities and of law over the government—in brief, government in accordance with law. Observance of law for the sake of law also implies respect for rights. However, this was not the purpose of revolutionary legality, which term acquired in soviet theory and practice a meaning rather difficult to define because, to use the words of a soviet writer:

In different stages of proletarian dictatorship, the content of revolutionary legality was subject to change, depending upon the circumstances and forms of the class struggle.22

In the early days of the soviet regime, as is evident from Lenin’s statement quoted above, obedience of the populace and discipline within the ranks of the government agencies were the original purposes of this slogan. It sought to check the sectionalism of local administration. “Revolutionary legality,” commented Lenin, “must be single. Legality cannot be one in Kaluga province and another in Kazan province; it must be the same for the entire federation of soviet republics.”23 But there was no unanimity among the soviet leaders and theorists on the question whether the law should bind the government and the administrative authorities

81 A. Trainin, “Revolutionary Legality” (1922) Law and Life No. 6, 6.
82 Shliapochnikov, “Revolutionary Legality” (1934) Soviet State No. 4, 46; see also Gintsburg, 1 Course 14; also Stalin, Problems of Leninism (Russian 10th ed. 1935) 113.
83 Lenin, 27 Collected Works (Russian 2d ed.) 298.
[Soviet Law]—11
in particular. On the one hand Bukharin, at one time the leading theoretician, later executed on a charge of treason, argued at the beginning of the New Economic Policy in 1923 that “Revolutionary legality means an end to any arbitrary administration, including the revolutionary.” \(^{24}\) But in the course of a bitter discussion, which lasted several years, different opinions were also brought forward. Thus, Soltz, a prominent prosecutor, in 1925 advocated:

> We must check the rule of law from the viewpoint of revolutionary expediency, which helps us in our work of reconstructing society along socialist lines. The problem of expediency should predominate over the form of the law. \(^{25}\)

Others objected that such a maxim might shake the obedience of local authorities to the central government and destroy the latter. \(^{26}\) But in a later period, in the stormy days of the revival of the drive for socialism, Vyshinsky, then Attorney General, now Deputy Minister of Foreign Affairs, sarcastically rejected the above statement of Bukharin, arguing as follows:

> When we enforce revolutionary legality, we must always consider whether our statutes are in accord with the interests and needs of the proletarian revolution, stressing this side of the matter rather than the formal element, the wording or legal formula. \(^{27}\)

The same author stated in 1935:

> The formal law is subordinate to the law of revolution. There might be collisions and discrepancies between the formal

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\(^{24}\) Bukharin, The Road to Socialism and the Union of Workers and Peasants (in Russian 1923) 79, quoted from Vyshinsky, Revolutionary Legality (in Russian 1932) 16, (2d ed. 1933) 51.

\(^{25}\) Izvestiia, November 24, 1925.


commands of laws and those of the proletarian revolution. This collision must be solved only by the subordination of the formal commands of law to those of party policy. 28

II. SOVIET THEORIES OF LAW

1. Marxian Background

The reason underlying this anticipation—that there may be collision between laws enacted by a government brought to power through a proletarian revolution and the revolution itself—apparently is that mistrust of law as an independent social force was deeply rooted in Marxian philosophy as it was originally understood by many soviet jurists. They sought not only to get rid of such traditional institutions as property and inheritance but looked at the legal concepts of any traditional jurisprudence as the expression of a capitalist ideology. 29 New concepts had to be derived from Marxian philosophy as the only ideology of the soviet world. Thus, Goikhbarg, the compiler of the Civil Code, wrote in 1923:

We refuse to see in law an idea useful for the working class. . . . Religion and law are ideologies of the exploiting classes, and the latter gradually took the place of the former. . . . At the present time, we have to combat the juridical ideology even more than the religious. 30

Reisner, another Marxian jurist, questioned in 1925:

We still do not know whether we need law, and to what extent we need it, and whether it is necessary to gild the proletarian dictatorship and the class interest, for no reason at all, with enigmatic juridical symbols and formulas. 31

The soviet textbook on civil law of 1934 similarly states:

Marxism declares a merciless war against the capitalist legal concepts and the dogmatic method in jurisprudence. However, neither did Marxian philosophy enable the soviet jurists to arrive at a unanimously accepted legal theory, nor were all the traditional legal concepts found to be useless in building up the soviet State and law.

The Marxian background of the communist jurists prompted them to depreciate the importance of law as an independent factor, to regard it primarily as a by-product of economic conditions. According to Marx and Engels, the law, as well as the whole of spiritual civilization, is a "superstructure" erected over the material "basis" that, in their opinion, is formed by the relationships of men in the process of the production of commodities. Economic factors shape and determine the form and content of law. All other elements are characterized as "the political, legal, and other ideological conceptions" through which men become conscious

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82 Gintsburg, 1 Course of Economic Law 42.
83 "Legal relations as well as forms of the state could neither be understood by themselves, nor explained by the so-called general progress of the human mind, but that they are rooted in the material conditions of life. "In the social production which men carry on they enter into definite relations that are indispensable and independent of their will; these relations of production correspond to a definite stage of development of their material powers of production. The sum total of these relations of production constitutes the economic structure of society—the real foundation, on which rise legal and political superstructures and to which correspond definite forms of social consciousness. . . . With the change of the economic foundation the entire immense superstructure is more or less rapidly transformed." Marx, Zur Kritik der Politischen Oekonomie (1877), author's preface written in 1859. English translation by N. I. Stone, A Contribution to the Critique of Political Economy (1904) 11, 12, 13.

Society is not based upon law; this is a juridical fiction. Just the reverse is the truth. Law rests upon society, it must be the expression of the general interests that spring from the material production of a given society. Marx's "Speech Before the Cologne Jury" (1849), (1923) Labour Monthly 175.
of the material forces of production and its existing or developing relations. According to Engels, "The jurist imagines that he is operating with a priori principles, whereas they are really only economic reflexes." 34

However, such symbols as "legal superstructure" or "basis," used as an explanation for the connection between economy and law, are substantially metaphorical and not explanatory. In the soviet environment, it was the soviet law which was to change the "economic foundation" of society rather than vice versa. Also, Engels had warned against an oversimplified conception of the "economic foundation" as the only cause and the "legal superstructure" as merely the effect. From his letters written not long before his death, it follows that, though dependent on the economy as the cause and, as such, an effect, law may "react in its turn upon the economy" and thus become the cause.35 Consequently, the proposition offered as an explanation presented in fact

34 Engels, Letters of July 14, 1893, September 21, 1890, October 27, 1890, and July 14, 1893, Karl Marx and Friedrich Engels Correspondence, 1846-1895, A Selection (1935) at 482, cf. 475, 511 et seq.

"In every historical epoch, the prevailing mode of economic production and exchange, and the social organization necessarily following from it, form the basis upon which is built up and from which alone can be explained the political and intellectual history of that epoch." Engels, Preface to Communist Manifesto, dated January 30, 1888, in Essentials of Marx (Lee's ed. 1926) 28.

35 "It is not that the economic situation is the cause, and the only active one, while everything else is a passive effect. There is, rather, mutual action on the basis of the economic necessity, which always asserts itself ultimately. Engels, op. cit. supra, note 34, 517.

"Though the material form of existence is the primum agens (primary agent) this does not exclude spheres of ideas from reacting upon it in their turn, though with a secondary effect." Id. 472.

The economic situation is the basis, but various elements of the superstructure are in many cases influential upon the course of historical struggle; these elements are: the political forms of the class war and its results, the constitutions established by the victorious class after its victory, etc., legal forms and then even the reflexes of these actual struggles in the minds of the participants, i.e., the political, juridical and philosophical theories, religious ideas and their further development into systems of dogma. Id. 475.
a new problem. A Marxist should, according to Reisner, "ascertain the specific relation between the law and the economic basis" or, as Pashukanis states, "offer a materialistic interpretation" of the phenomenon of law.

2. Early Theories of Law: Pashukanis and Others

Several soviet writers made an attempt to develop a constructive theory which would answer these questions. One of the first Commissars for Justice, Stuchka, offered a definition of law which was included in an early soviet penal enactment. In this definition, he actually recast the definition of law by the German legal philosopher, Rudolph von Jhering, in Marxian terms. The soviet theorists, Reisner and Pashukanis, have made a rather exhaustive critical analysis of the definition. It has been occasionally praised by some soviet...

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38 Reisner, "Theory of Law by Comrade Stuchka" (in Russian 1922) 1 Vestnik of the Communist Academy of Science 173. See also Stuchka's reply, "Defense of the Revolutionary Marxian Concept of Law" (1923) 3 id. 159-169.
38 Art. I. The law is a system (order) of social relations corresponding to the interests of the ruling class and protected by the organized force of this class (the State). "Fundamentals of the Criminal Law of the R.S.F.S.R.," R.S.F.S.R. Laws 1919, text 590, Section 1; Stuchka, 1 Course 12. See also op. cit. supra, note 29.
39 Stuchka, Thirteen Years of Struggle for the Revolutionary Marxian Theory of Law (in Russian 1931) 2.
Jhering defined "law with reference to its contents as the form of security of the conditions of social life procured by the power of the State." Jhering, Law as a Means to an End (Husek's tr. 1923) 330.
40 They contended that Stuchka's definition does not indicate any specific criteria of law as distinguished from other social relations. If it is true that law is "a system of social relations," what is the specific characteristic of this system? Without an answer to this, they argued, the whole definition sounded like a tautology: law (social relations) means social relations. Cf. Pashukanis, General Theory of Law (in Russian, 3d ed. 1927) 15-17, 39 passim. Reisner, "Theory of Law by Comrade Stuchka" (1922) Messenger of the Communist Academy, No. 1, 173; id. Law, Our Law, Foreign Law, Common Law (in Russian 1925) 21, 37 passim. Again Reisner...
writers for its "class point of view" but otherwise has fallen into oblivion. Further reference thereto is hardly needed for the study of present soviet law.

The teachings of Pashukanis, on the contrary, cannot be omitted because, until his fall in 1937, he was a recognized authority on the soviet theory of law. His writings represent the most daring attempt to create a Marxian theory of law. They gained a distinct following and, in the words of the recent soviet textbook, "The destructive 'ideas' of Pashukanis found direct repercussion in a series of studies of soviet civil law." 41

Pashukanis started with the proposition that rights are postulates of law:

The rules of law differ from those of esthetics, ethics, and rules of human conduct dictated by bare utility, in that the rules of law presuppose a person who is endowed with rights actively claimed. . . . Conflicting private interests are the basic postulate of legal regulation. . . . On the contrary, unity of purpose is the postulate of technical regulation. . . . The legal order differs from every other social order precisely for the reason that it is intended for private individuals.

Thus, law appears to adjust the conflicts of private interests. Private law, civil law, is the original sphere correctly pointed out that the protection of the interests of the ruling class does not constitute any specific criterion of law. On the one hand the protection of the interests of the dominant economic class is not necessarily secured by law, and on the other hand the interests of such a class are not the only interests protected by law. A given law does not cease to be the law even if it protects the interests of the oppressed classes, e.g., the labor legislation of the capitalist countries; or if it pertains to a neutral sphere, e.g., public health or traffic regulations. Thus, according to Professor Reisner, though any law is a class law in that it represents an ideology of a class or group, it is not necessarily the law of the ruling class. Nor does it operate to protect the governing class. Law is a compromise "made of odds and ends of the ideas of various classes, a multicolored tissue which is created on the basis of the legal demands of various social classes." The soviet law was, according to him, the co-existence of the bourgeois class law, the proletarian class law, and the peasant class law. Op. cit. 21, 37, 184, 198, 244, 274. See Gsovski, "The Soviet Concept of Law" (1938) Fordham L. Rev. 8 et seq.

41 I Civil Law Textbook (1938) 39-40.
of law; thence, it penetrates into public life. However, there is a limit to the penetration because:

As an organization of class domination or an organization for war, the State neither requires, nor really admits legal interpretation. At that point begins the sphere where the so-called *raison d’État*, that is to say, the principle of pure expediency, becomes supreme.

This is the realm of authoritarian regimentation and obedience, distinct from that of law:

The idea of absolute obedience to some external authority establishing rules (a norm-creating authority) has nothing to do with law.\(^{43}\)

This distinction is obviously derived from the prerevolutionary masters of legal thought, Korkunov and Petrazycki (Russians) and Jellinek and Laband (Germans).\(^{43}\) But from this, Pashukanis develops what he

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\(^{43}\) Pashukanis, *op. cit.*, note 37 at 37, 55, also 36, 41, 51–60, 90.

\(^{43}\) Korkunov:

Rules of law establishing rights and duties must be distinguished from technical rules, which, even when they come from the government and are compulsory, are only intended to show the best means of achievement of the objective. . . . Rules of expedience would exist even if human interests were not varied and conflicting . . . even if there were only one human being in the world. Technical rules might exist even then, but law would be out of question. . . . Law necessarily presupposes relationships of various interests of several free persons. Korkunov, *The Ukase and the Law* (in Russian 1894) 236–237.

Laband:

Law consists in delimitation of the rights and duties of particular persons as against each other; by its nature law presupposes the existence of many persons who may encounter one another. Laband, 2 *Das Staatsrecht des Deutschen Reiches* (1911) 181.

Jellinek:

Any law is a relationship between individuals endowed with rights. . . . a rule is law if it delimits the sphere of the free activities of persons. Jellinek, *Gesetz und Verordnung* (1887) 195; see also *id.* 215, 240.

calls the Marxist economico-materialistic explanation of the origin of rights.

The idea of rights, and consequently of law, appears in the popular mind when exchange of commodities and production for market develops. In order to effectuate exchange, men must appear on the market as owners of commodities, equally authorized to dispose of them freely. Moreover, the parties to a concrete act of exchange give and receive in turn equivalent values. Hence, the idea of a contract as a free agreement of wills comes from barter upon the principle of value for value and is, therefore, not a manifestation of justice, but a bare economic necessity. The old doctrines were mistaken in deducing such concepts as legal capacity or rights from the idea of the value of a human being. The postulates of law, the ideas of an abstract individual endowed with rights and of men equal in the exercise of their rights, are produced by economic experiences.\(^4^4\)

Pashukanis concluded that:

Only capitalism creates the conditions necessary to enable the juridical element to obtain its highest development in social relations. . . . When the whole economic life is based on the principle of the free agreement of wills, then every social function in some way or other obtains a legal characteristic, that is to say, becomes not a mere social function, but the right of him who exercises the function.\(^4^5\)

3. "Withering Away" Doctrine

To the question what is the value of law under a regime transitional to communism, Pashukanis replied as follows:

The withering away of the categories of bourgeois law (just

\(^{44}\) Pashukanis, \textit{op. cit.}, note 37, at 9, 42, 19, 23, 69 \textit{passim}, 113. Compare with Marx, 1 Capital (tr. by Untermann 1906) 96-97.

\(^{45}\) \textit{Id.} 19, 57, also 7, 71.
the categories, and not this or that particular rule) can under no circumstances mean their replacement by some new categories of proletarian law.

This meant to Pashukanis:

The withering away of law in general, that is, the gradual disappearance of the juridical element from human relations... Ethics, law, and State, are the forms of a bourgeois society. If the proletariat is forced to use them, it does not mean that there is a possibility of further development of these forms by way of filling them with a socialist content. They are not adapted to embrace this content and shall wither away gradually with the realization of socialism. Nevertheless, in the transition period, the proletariat must use in its own class interests these forms inherited from bourgeois society and thereby exhaust them... The proletariat must take a sober and critical attitude not only toward the bourgeois State and ethics but also toward its own proletarian State and ethics, i.e., must apprehend the historical necessity of their coming into being and their disappearance.46

The same view was expressed in the soviet decree of 1919 on criminal law before Pashukanis' writings appeared. It was there stated that, with the advent of communism, “the proletariat shall destroy the State as an organization of coercion and law as a function of the State.”47 Then there will be no classes, no State, and no law. “Communism means,” wrote Stuchka in 1927, “not the victory of socialist law, but the victory of socialism over any law, since with the abolition of classes with their antagonistic interests, law will disappear altogether.”48

46 Id. 22, 104-105.  
47 R.S.F.S.R. Laws 1919, text 590, Preamble.  
48 3 Encyclopedia of State and Law (in Russian 1925-1927) 1593. Here is a later presentation of the same view by a minor writer: “The State and the law are phenomena of a society divided into classes. Therefore, the abolition of classes, the transition from a class society to a classless society, means the final withering away of the State and the law in the higher phase of communism.” Aleshin, “Soviet Law and the Building Up of Socialism” (1932) Soviet State No. 5/6, 51.
So the doctrine of the "withering away" of law with the advent of communism was not Pashukanis' original idea. It was rather a further step in the development of the well-established Marxist thesis of the "withering away" of the State in a communist society. Thus, Engels expected that by a communist revolution:

The proletariat seizes political power and converts the means of production into the property of the State. But by this very act it will abolish itself as proletariat and all class differences and antagonisms, and with this also, the State.

Similarly, Marx thought:

The working class will put, in the course of development, such an association in place of the old bourgeois society as will exclude classes and their antagonisms; then there will be no political power in the proper sense, because political power is just the official expression of the class antagonisms within capitalistic society.

In the eyes of Engels, such disappearance of the State and government was regarded as the immediate result of the social revolution:

The first act, by which the State will act as a representative of society—the assumption of control over the means of production on behalf of society—will be at the same time its last independent act as a State [government]. The State will not be abolished; it will wither away. A new

49 Engels, "Dell 'autoritta" 32 Neue Zeit I, 32. English tr. as Socialism, Utopian and Scientific (1902) 75.
50 Marx, Misery of Philosophy (German ed. 1885) 182, English tr. in Lenin, State and Revolution (1919) 27. See also Communist Manifesto: "When . . . class distinctions have disappeared . . . the public power shall lose its political character." Essentials of Marx (Lee ed. 1926) 53.
51 It may be remarked that it is somewhat uncertain whether Marx and Engels use the word "State" (der Staat, l'état) to denote the nation as a separately existing body politic or as the governmental machinery. It seems, however, that this term is used to indicate both, because the Marxian philosophy is offered as an international plan, and hence the individually existing national states were supposed to merge in an international association of classless societies. Thus, the proposition of the "withering away of the State" apparently implied both the merger of national states and the end of government within the states.
society organized on the basis of a free and equal association of producers will banish the whole machinery of the State where it will then belong—to the Museum of Antiquities by the side of the spinning wheel and the bronze ax. 62

However, Lenin modified the meaning of “withering away of the State” by the following interpretation:

The bourgeois State does not “wither away” according to Engels but will be “abolished” by the proletariat in the course of revolution. It is the proletarian State or rather semi-State which will gradually wither away after this revolution. 63

4. “Withering Away” Doctrine Condemned

The theory of “withering away” of the State and the law was no longer of an academic nature when, in 1930 the First Five-Year Plan was in operation with the goal “to create the economic base for the abolition of classes in the U.S.S.R. and for the construction of a socialist society.” 54 Should the “withering away” of the proletarian State or semi-State begin step by step with the achievement of this plan, e.g., should not the village soviets, the lowest administrative agencies, be dissolved and replaced by purely economic management of collective farms, as some communists suggested? 55 Such logical conclusions from theoretic speculations were not admitted by the soviet leaders. The thesis of the withering away of the State received a new interpretation at this time by Stalin:

Some of our comrades understood the theses about the abol-


63 Lenin, State and Revolution (in Russian 1931 ed.) 39.


55 Rezunov, Marxism and the Psychological School of Law (in Russian 1931) 9; Aleshin, see supra, note 48.
ishment of classes, the creation of classless society, and the withering away of the State as justification of laziness and good nature, as justification of a counterrevolutionary doctrine of extinguishment of the class war and weakening of the governmental powers. Is it necessary to state that there is no place for such in the ranks of our Party? . . . The abolition of classes will be achieved not by extinguishing the class war but through its intensification; the State will wither away not through making the governmental power weak, but by strengthening it to the utmost. 56

On a previous occasion, Stalin stated:

We are in favor of the State withering away and at the same time we stand for the strengthening of the dictatorship of the proletariat, which represents the most powerful and mighty authority of all forms of the State which have existed up to the present day. The highest possible development of the government power with the object of preparing conditions for the withering away of the government power, this is the Marxian formula. Isn't it “contradictory”? Yes, it is, but this contradiction is a living thing, and completely reflects the Marxian dialectic. 67

Thus, the withering away of the State, though not stricken out of the program, was indefinitely postponed. The doctrine of the withering away of law was even more categorically condemned.

The new Constitution, proposed in 1935 and now in force, announces that “the economic foundation of the U.S.S.R. consists in socialist economy” (Section 1), creates the office of federal Attorney General for the “supervision of the strict execution of the laws,” and devotes a chapter to the “rights and duties of citizens.” 68

Pashukanis himself then disavowed his theory and wrote in March, 1936:

All talk about the withering away of law under socialism

56 Stalin, op. cit. 437, also id. (Russian 10th ed. 1935) 509.
58 1936 Constitution, Sections 112, 114, and Chapter X.
is just opportunistic nonsense, like the allegation that the government power begins to wither away the next day after the bourgeoisie is overthrown.\(^{69}\)

The belated self-criticism did not save Pashukanis' theory and his followers. In January, 1937, a campaign in Izvestiia and in the legal press was opened, demanding a "purge" on the front of legal theory. "The citizens of the Soviet Union must be sure of the firmness of the Soviet law," according to the editorial in Izvestiia.\(^{60}\) Vyshinsky, then Deputy Attorney General and prosecutor in the latest purge cases, the author and editor of several standard books on Soviet law, now Deputy Minister of Foreign Affairs, gave the following characteristics of the Pashukanis "school":

They [Pashukanis and his followers] preached anti-Party subversive "theories" of withering away of the State and law. To disarm the working class in front of its enemies, to undermine the might of socialism—that was the aim of these attempts. To the students, the growing cadres, a nihilistic attitude toward the Soviet law was suggested.\(^{61}\)

A conference of legal theorists was convoked in July, 1938, to hear a lengthy report by Vyshinsky criticizing all the work done in the legal field thus far and outlining new tasks:

Soviet theory of law and the State must afford a system

\(^{69}\) Pashukanis, "State and Law under Socialism" (1936) Soviet State No. 3, 7.


of soviet socialist principles which explain and determine the socialist content of soviet legal doctrines and legal institutions.\textsuperscript{62}

Although dogmatic jurisprudence was criticized primarily for treating legal problems separately from economic and social relations, its purely technical heritage was not to be rejected:

Marxism-Leninism requires that the proletariat virtually master the old culture, the old science.\textsuperscript{63}

Vyshinsky denied that law reaches its “highest point of development under capitalism,” as once asserted by Pashukanis. On the contrary, he says:

The process of the development of a capitalist society is connected with the process of its decay, and this is connected with the destruction, one may say, the shooting down, the demolition by the bourgeoisie of its own legality, its own law . . . . Only in a socialist society does law acquire a firm soil for its development.\textsuperscript{64}

Marxism must remain the chief guide, a “compass,” but new passages in the works of Marx, Engels, and Lenin were brought to light and interpreted to show that they admitted the necessity of a socialist law and rights in a socialist state.\textsuperscript{65}

5. Current Analytic Theory: Vyshinsky

At the same time, Vyshinsky offered a general definition of law which is worth quoting because it was repeated in 1945 in the \textit{Bulletin} of the Legal Section of the Academy of Science and, thus, seems still to be generally accepted. It reads:

\textsuperscript{62} Vyshinsky’s speech, reported in Basic Tasks of the Science of Soviet Socialist Law (in Russian 1938) 27.
\textsuperscript{63} Id. 20.
\textsuperscript{64} Id. 30.
\textsuperscript{65} E.g., Vyshinsky, “Marx’s Treatment of the Problems of Law and State” (1938) Soviet State No. 3, 13 \textit{passim}. 
Law is a general body of such rules of conduct expressing the will of the ruling class as are established by legislation, and of such customs and rules of community life as are sanctioned by the government power, the application of which body of rules is secured by the coercive force of the State for the protection, consolidation, and development of the social relations and the public order, beneficial and desirable for the ruling class.\(^6\)

This definition is at variance with those to be found in nonsoviet jurisprudence in the assumption that law expresses the will of and is for the benefit of the ruling class. Yet this assumption is by no means described as an essential element of a rule of law. The definition clearly emphasizes that a rule "expressing the will of the ruling class" or "beneficial or desirable for such class" does not become a rule of law by virtue of these characteristics alone. To be regarded as law, such rule must be "established by legislation" or "sanctioned by the government," or its application must be "secured by the coercive force of the State." In the 1944 textbook on civil law this definition appears even in a simpler form, as follows:

Law is a body of rules of human conduct established or sanctioned by the government power, the execution of which rules is secured by the coercive power of the State.\(^6\)

There is no substantial difference then from the definitions of law given by the representatives of analytical jurisprudence: e.g., Holland's idea of law as "a general rule of external human action enforced by the sovereign political authority"; \(^6\) Pollock's "the sum of rules of

\(^6\) 1 Civil Law (1944) 67; Golunsky, Theory 154.
\(^6\) Holland, Jurisprudence (13th ed. 1924) 40.
justice administered in a State and by its authority"; 69 Anson’s “rules of conduct defined by the State as those which it will enforce, for the enforcement of which it employs a uniform constraint.” 70

Thus, the soviet jurists arrived at a concept of law that had been clearly stated before by the representatives of nonsoviet analytical jurisprudence. The concept points out one essential meaning of law. But as has been so admirably shown by Roscoe Pound, the term law is used in modern jurisprudence also in other senses no less substantial, which he reduces to three: legal order, aggregate of laws, and judicial processes. 71 Other writers stress the fact that by law

69 Pollock, First Book of Jurisprudence (1896) 17.
70 Anson, 1 Law and Custom of the Constitution (1886) 8. See also:

Clark: “... the rules and principles recognized and applied by the State’s authorities, judicial and executive.” Clark, 1 Roman Private Law: Jurisprudence (1914) 75.

Austin: “Of the laws or rules set by men to men, some are established by political superiors, sovereign and subject: by persons exercising supreme and subordinate government, in independent nations, or independent political societies ... To the aggregate of the rules thus established, or to some aggregate forming a portion of that aggregate, the term law, as used simply and strictly, is exclusively applied.” Austin, The Province of Jurisprudence Determined (1832) 2.

Markby: “... a general body of rules which are addressed by the rulers of a political society to the members of that society, and which are generally obeyed.” Markby, Elements of Law (1871) Section 9.

71 “The term ‘law’ is used in three senses which it is important to distinguish: (1) one sense is the legal order ... the régime of ordering human activities and adjusting human relations through the systematic application of the force of politically organized society ... (2) The oldest and longest continued use of the term ‘law’ is to mean the aggregate of laws—the whole body of legal precepts which obtain in a given politically organized society; the body of authoritative grounds of or guides to judicial and administrative action, and so of predicting such action, established or recognized in such a society ... (3) In a third sense ‘law’ is used to mean what we may better term, with Mr. Justice Cardozo, the judicial process, the process of determining controversies, as it actually takes place in the courts, and also as we conceive it ought to take place. To this today we must add administrative process—that of administrative determination by boards and commissions and administrative officers, whether as it actually takes place or as it is conceived it ought to take place.” Roscoe Pound, The History and System of the Common Law, Vol. I, National Law Library (1939) 4, 5.

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is meant rules ultimately enforced by the courts of justice,\(^{72}\) and point out that law implies its predictability,\(^{73}\) has an inner binding force,\(^{74}\) and serves primarily the purpose of settling disputes among free and equal individuals.\(^{75}\)

Overlooking all these meanings of law, the soviet definition characterizes law by its service to the ruling

\(^{72}\) Compare Gray: "The law of the State or of any organized body of men is composed of the rules which the courts, that is, the judicial organs of that body, lay down for the determination of legal rights and duties." Gray, The Nature and Sources of Law (2d ed. 1927) 84. Salmond: "The law may be defined as the body of principles recognized and applied by the State in the administration of justice." Salmond, Jurisprudence (7th ed. 1924) Section 15, 39. "The rules recognized and acted on in courts of justice." \textit{id.} (1902) Section 5. See also Llewellyn, The Bramble Bush (1930) 3.

\(^{73}\) Holmes: "The prophecies of what courts will do in fact, and nothing more pretentious, are what I mean by the law." Holmes, "The Path of the Law" (1897) 10 Harv. L. Rev. 457, 460, at 461. Cardozo:

"A principle or rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged . . ." Cardozo, The Growth of the Law (1924) 52. See also Frank, Law and the Modern Mind (1930) 274 note.

\(^{74}\) Petrazycki, Introduction to the Study of Law (in Russian 1st ed. 1905, 2d ed. 1907, 3d ed. 1908); \textit{id.}, Theory of Law and State in Connection with a Theory of Ethics (2 vols., 1st ed. 1907, 2d ed. 1909–1910). Petrazycki sought to establish a psychological criterion of legal rules as distinct from bare force, ethical rules, and rules of social etiquette. According to Petrazycki, law arises from feelings of right and duty and the inner compulsion attached to these feelings in the human mind. For him, the bonds of rights and duties between individuals are primarily psychological phenomena, special legal emotions of the persons obligated or authorized by law. By force of these emotions, in every action which we consider to be our duty by law, we attribute to somebody the right to demand its performance. A rule of law is, according to Petrazycki, different from a rule of ethics in that the latter is merely an outright imperative, that is to say, a command, while the rule of law is not only imperative but also attributive, that is, it implies a real or imaginary person to whom the authority is attributed to ask the fulfillment of the command. Hence Petrazycki defined law as an "imperative attributive emotion." External coercion is not a criterion of law, according to him, and not the State but the people and their coincidental "imperative attributive emotions" are the source of law. Petrazycki advocated the resurrection of natural law in the form of what he called the "intuitive law." Some phases of Petrazycki's teachings are brilliantly presented in English by Babb, "Petrazhitskii" (1937) 16 Bost. U. L. Rev. 793.

\(^{75}\) See Korkunov, Laband, and Jellinek as quoted in note 43.
class. This is a tribute to the teachings of the founders of Marxism. Marx, Engels, and Lenin viewed the State and the law as a product of class antagonisms within a society. What will happen then to law if classes are abolished? What is the fate of law in the Soviet Union, which has officially entered the beginning stage of the construction of a classless society? "The whole of the [soviet] national economy has become socialist," stated Molotov in 1936. "In this sense we have accomplished the task of abolition of classes." 76 Therefore, certain soviet jurists objected that the definition of law quoted above "does not fit the law in a classless socialist society," i.e., the soviet law. To these, Vyshinsky replied as follows:

In a classless socialist society, law expresses the will of all the people, who are guided by the most advanced group of the society and who create their rules for the protection, strengthening, and development of social relations favorable to and desirable for the toilers. . . . The place of the classes is taken by the people, the toilers. . . . However, the dominating interests in a classless socialist society do coincide with the interests of the proletariat in a society divided into classes.77

Vyshinsky assumes that the socialist law expresses principles which "completely coincide with the principles of socialist dictatorship and with the interests of the proletariat as a ruling class" in a society still divided into classes. Thus, a dialectical bridge for the transition from a "class concept of law" to a "classless concept of law" is built. The Marxian saying addressed to the bourgeoisie, "Your law is the will of your class given the authority of statute," 78 and Lenin's definition of law

76 Molotov, The Plan and Our Task (in Russian 1936) 23.
78 "Euer Recht nur der zum Gesetz erhobene Wille Eurer Klasse ist . . .," Marx and Engels, Manifest der Kommunistischen Partei (1848) 6;
as "the expression of the will of the classes which have won the victory and kept the governmental power in their hands," as reconciled with the law as conceived by analytical jurisprudence. The soviet socialist law is then defined as follows:

Socialist law of the epoch of the termination of the socialist reconstruction and gradual transition from socialism to communism is a system of rules of conduct (norms) established in a legislative procedure by the power of the toilers and expressing the will of the whole of the soviet people, which is guided by the working class with the Communist Party at its head for the purpose of the protection, strengthening, and development of socialist relations and the building up of a communist society.

The italicized part of the definition is considered, and undoubtedly in it is to be found, the essential criterion of law as a specific social phenomenon. Its resemblance not only to Pashukanis' views, after he changed his original doctrines, but also to a classic of German nineteenth-century jurisprudence, Dernburg, is obvious. Thus, Pashukanis wrote in 1936: "Law is the most general and most authoritative expression of the will of the socialist nation"; Dernburg defined law in an objective sense as "that order of the relations of life which is secured by the general will."

Marx and Engels, Gesamtausgabe (1932), Abt. 2, 541. The translation of this passage is by the present writer and corresponds to the Russian translation as often quoted by the soviet writers. Published English translations are less accurate. Essentials of Marx (Lee's ed., 1926) 48, reads: "Your jurisprudence is but the will of your class made into a law"; Marx and Engels, Communist Manifesto (Riazanoff's ed., 1935) 47, reads: "Your 'right' is only the will of your class writ large as law."

79 Lenin, 11 Collected Works (2d Russian ed. 1926-1932) 418.
80 Loc. cit. supra, note 77 (italics supplied).
81 Pashukanis, "Stalin's Constitution and Socialist Legality" (1936) Soviet State No. 4, 24, 27.
82 Dernburg, 1 Das Bürgerliche Recht (3d ed. 1906) 47.
6. Class Point of View Analyzed

It may be observed that the "class point of view," traditional in Marxian writings, has displayed all its vagaries. It has proved to be no guide in the solution of the problem of law. The definition of the soviet law as quoted above still leaves open the question of whether a classless society has been achieved in the Soviet Union. Numerous contradictory statements have been made by the soviet leaders to that effect. The contradictions are a result of the fact that the notion of a social class lacks definiteness. Marx and Engels have never defined what they meant by a "class." Two attempts of Lenin at such definition are known to the writer. One reads:

What is a class, generally speaking? It is that which enables one part of society to appropriate the labor of the other. If one part of society appropriates all the land, we have the classes of landowners and peasants. If one part has factories and plants, stocks, bonds, and capital, while the other part works in these factories, we have the classes of capitalists and proletarians.83

In this sense, undoubtedly, classes are abolished in Soviet Russia. Another definition reads:

We call classes the large groups of people that are distinctive: by their place in the historically established system of national production; by their relations to the means of production (in the majority of cases fixed and shaped by laws); by their role in the national organization of labor, consequently, by their method of obtaining the share of national wealth which they dispose of and by the size of their share. Classes are such groups of people, of which one can appropriate the labor of the other owing to the difference in their position in a given system of national economy.84

If we consider the criteria given here italicized, a

84 Lenin, 24 op. cit. 337 (italics supplied).
number of classes can be found in Soviet Russia as in any other country. Communists, technical specialists, the managing staff of governmental factories, higher and lower paid workers, collectivists and independent farmers, professionals—all these differ in their place in the national economy, in their relation to the means of production, in their role in the organization of labor, and, especially, in the size of their share in the national income, if not in their method of obtaining it. However, it is not the social standing but the frame of mind, the attitude of a given person toward the current soviet policy, that determines his class characteristics in the eyes of the soviet authorities. This is well illustrated by the rulings of the R.S.F.S.R. Supreme Court instructing the lower courts regarding the application of “class justice.” During the forcible collectivization of farming, several laws were enacted authorizing the courts to impose upon kulaks (prosperous peasants) punishment for acts which were not deemed offenses if committed by members of other classes of the population. Also, higher penalties were established for kulaks who committed some ordinary crimes. The courts had difficulties in applying these laws. The R.S.F.S.R. Supreme Court explained the situation in the following terms (ruling of March 16, 1931):

. . . . There is no consistency in the application of the class point of view and a lack of clarity in the proper definition of the class standing of the defendant. . . . . The same defendant is often recognized to be a middle-class peasant at the beginning of the judgment and yet is sentenced as a kulak.

However, in cases connected with economic campaigns and in cases involving the execution of the measures of the soviet government directed toward socialist reconstruction of agriculture in general, one of the fundamental tasks of the court is to ascertain the class standing of the defendant. . . . The
court is not bound in this respect by any formal criteria; it must ascertain in each case whether the defendant is still a middle-class peasant and has according to his class interests no inimical attitude toward the measures of the soviet power, or whether he is no longer a middle-class peasant, that is, has left them and joined the well-to-do kulak class. The courts must keep in mind that, according to the resolution of the Sixth Congress of Soviets “the poor peasant or the middle-class independent peasant who helps the kulaki in the fight against collective farms and in subversion of the organization of such farms cannot be called our ally and still less the supporter of the working class, he is in fact an ally of the kulaki.” . . . In the meantime, the kulak, deprived of his possessions, deprived of his former economic basis, has not lost his attitude toward the soviet power and is no less socially dangerous than before.

For these reasons, the Supreme Court orders the courts to ascertain precisely in each case the social and economic status of the defendant, to check these data at the trial, and to indicate in the sentence by which economic criteria or activities the defendant has been classed with the kulaki, the highest class, and for what reason his hostility or resistance to the socialist measures of the soviet government in agriculture, etcetera, has been recognized [italics supplied].

It is significant that at the time when the old classes still existed and “class justice” was in full swing, the Supreme Court of the R.S.F.S.R. complained that:

Recent statistics for 1921 show that the major percentage of those convicted by the revolutionary tribunals belonged to the peasants and workers and that a very small percentage of convicts belonged to the bourgeoisie (in a broader sense). This ratio refers to all kinds of punishment including execution by shooting to death.


Statistics published by the R.S.F.S.R. Supreme Court for 1923 indicate that among those shot by the sentences of the courts, workers and peasants constituted 70.8 per cent (23.6 per cent workers, 47.2 per cent peasants), intellectuals and white collar workers 20.7 per cent, and others, who include the bourgeois element, 8.5 per cent. Thus, “class enemy” is merely a term to designate a person opposing the current policy of the soviet government. In suppressing opposition the soviet government came, in the postwar period, close to racial discrimination. Thus, the decree by which the Crimean and Checheno-Ingush autonomous republics were dissolved for disloyalty of the population during the German occupation stated that “in connection with this the Chechens and Crimean Tartars were resettled in (i.e., exiled to) other localities of the Soviet Union.” Both republics had a mixed population and the decree makes clear that the exile was applied to members of definite ethnological groups only. Although classes in the capitalistic sense of the term were abolished in the Soviet Union, the antagonism of social groups has not vanished. The political, racial, and other antagonisms, the clash of opinion and interests, are more acute in the Soviet Union than in any other place in the world, and within the Communist Party itself these conflicts are even sharper than among the populace of the soviet land. Thus, regardless of social changes in Soviet Russia, the differentiation of opinions in human society, the formation of separate groups united in pursuit of common objectives or against common opposition, will hardly cease.

87 The R.S.F.S.R. Supreme Court in 1923. Report by President Stuchka (in Russian 1924) 26 and chart at end. 
88 Izvestia, June 26 and 28, 1946.
As a justification of suppression of opposition, the "class point of view" was never abandoned although it is somewhat subdued in the theoretic definition of law (supra). This minimizes the significance of the fact that, in their quest for a Marxian theory of law, the soviet writers have come close to the precepts of analytical jurisprudence. Marxian background is still traceable in the present meaning of socialist legality.

III. Recent Development of Socialist Legality

1. Socialist Legality and Policy

The solution of the problem of socialist legality, i.e., of the actual operation of law in the soviet State, has continued to vary, depending not only on the results of theoretical speculation about the nature of law but also on the immediate objectives of government policy. Thus, during the intense struggle for consolidation of the social order, which was the goal of the Five-Year Plan designed on the basis of the domination of "public property," i.e., government property and property of the collective farms, Stalin commented on revolutionary legality as follows:

They say that revolutionary legality of the present time does not differ from that of the first New Economic Policy period. This is entirely wrong. The revolutionary legality of the New Economic Policy period directed itself mainly against the extremities of war communism, against unlawful confiscations and requisitions. It guaranteed to the private boss, the capitalist, the safeguard of his property, provided that he strictly observed the soviet laws. The revolutionary legality of our time is quite different. It is pointed against thieves and sabotage, against hooligans and the grafter of public property. The main task of revolutionary legality consists now in the protection of public property and in nothing else.89

89Stalin, "The Results of the Five-Year Plan Speech at the Plenary
The maximum elasticity of law, its identification with policy and even political action, was advocated at that time, especially by Pashukanis and his followers. Pashukanis argued:

The relationship of law and politics in our country is different from that in a capitalist society. In a capitalist society, the superstructure of law must have a maximum of immobility because it represents a firm framework for the movement of economic forces represented by capitalist entrepreneurs. Therefore, the creation of accomplished single legal systems is typical of capitalist jurists. It is different for us; we need the utmost elasticity in our legislation. We cannot tie ourselves to any system because we are every day breaking up the economic system. Policy is law; we have a system of proletarian politics, but we do not have any system of proletarian law. 90

Various authors did not cease to repeat that soviet law is in the first place a form of policy and political action. 91 But the governmental policy implied in the political action became endangered by arbitrary administration. In their zeal for communism, certain administrators went further than was authorized by statute. Others treated indifferently or as a mere formality the instructions of the central government. 92 All the dan-

90 Pashukanis, "The Situation on the Legal Front" (1930) Soviet State No. 11/12, 47-48.
92 For example, they continued to enforce agriculture communes in villages by compelling the peasants to pool in collective farms not only their fields, implements, and draft animals but also their poultry, personal property, and living quarters, while the leaders had decided on a looser type of collective farm. Cf. Stalin, article in Pravda, March 2, 1930; see also id., Problems of Leninism (Russian 10th ed. 1935) 325-327, 581 passim. Others defied government orders for delivery of foodstuffs and stored grain or distributed produce more liberally among the members of the collective farms instead of delivering it to the government. Postyshev, "Basic Task of the Soviet Administration of Justice" (1932) Soviet State No. 2, 11.
ger implied in "revolutionary expediency," anticipated in 1926 (see supra), became a reality.

2. End of Legal Nihilism

Then "the nihilistic attitude" toward soviet law was condemned. Soviet jurists have come to believe, perhaps with reason, that neglect of statutes, their own meager knowledge of soviet law, and the inferior quality of their judicial work is the result of this theory. Leading men in the legal profession no longer want the revolutionary expediency of a soviet law to be questioned by those who are called upon to enforce it. "There can be no discrepancy in soviet law between the law and expediency," wrote Vyshinsky in 1936, "because the soviet law is precisely the expression of what is expedient for the construction of socialism and the fight for socialism. Revolutionary or socialist expediency is the actual essence; the real content of soviet legality."  

In the textbook on soviet constitutional law published in 1938 under the editorship of Vyshinsky, the role of law in the soviet State is presented in the following terms:

The dictatorship of the proletariat is a power unrestrained by any laws. But the dictatorship of the proletariat which creates its own laws, uses the laws, demands observance of laws, and punishes violation of laws. . . . Marxism teaches that law must be used as a means of struggle for socialism, one of the means of the reconstruction of society on a new basis. . . . Why do we need stability of laws? Because the stability of laws fortifies the stamina of the political regime and the span of governmental discipline; it multiplies and makes ten times

93 Manikovsky, "Against Anti-Marxian Theory in Criminal Law" (in Russian 1937) Socialist Legality No. 5, 44.
For data on the judicial work of the soviet judges, see Chapter 7, I, 3.
94 Vyshinsky, "The Stalin Constitution" (1936) Socialist Legality No. 8, 12.
stronger the forces of socialism, mobilizing and directing them against forces opposed to socialism. Law not only gives rights but also imposes duties.95

Thus, law is recognized as an efficient tool in the creation of the new social order, an instrument of rulership. It is not placed above the government, but on the other hand it is recognized that the government must rule by means of law.

3. Recent Attempts to Reconcile Marxism and Law

A further elaboration of the same view, although without much clarity, is given in a recent discussion of the problem of the interrelation of the State and the law by I. A. Trainin, president of the Section of Economics and Law of the U.S.S.R. Academy of Science.96 The translation of the pertinent passages presents a peculiar difficulty because the Russian word politika covers both policy in the political sphere, i.e., political action, and politics as the sum total of political actions, policies, theories, etc. Thus, the present writer has rendered the same word politika as “political action” or “politics,” depending upon his understanding of the Russian context. Trainin begins with the traditional Marxian thesis of the “economic basis” of all “ideological superstructures” (see supra) as follows:

Marx-Lenin teaching recognizes that politics stems from the economy, develops in the struggle of conflicting forces which originate in the economy, and, being thus the result of such conflicts, is inseparable from the economy. In the economy is the key to the explanation of the facts of political life, to understanding of political currents struggling within the society, and to elucidation of the class struggle.

95 Soviet Constitutional Law (in Russian 1938) 50, 52, 54.
96 I. A. Trainin, “A Propos the Problem of the Interrelation Between the State and the Law” (1945) Izvestiia (Bulletin) of the U.S.S.R. Academy of Science No. 5, 1 passim.
On this statement, Trainin introduces a qualification:

But it would be a mistake to consider the economy the only factor determining understanding of the historical process. One must take into account Marxian teaching on the mutual relations between the [economic] basis and the [political and legal] superstructure and on the bearing which the superstructure may exercise in turn upon its economic basis so as to cause its further development or change. Politics are not a mere impression moulded from the economy, as the vulgar materialists try to represent them, but the conclusions drawn from a generalization of the economy. 97

He adds to this a rather obscure definition of politics as "the most concentrated expression of the economy, its generalization and accomplishment," 98 given in the resolution of the Ninth Congress of the Communist Party (notably shared by Lenin), and concludes:

Socialist political action is the concentrated expression of the socialist economy which determines the development of the soviet regime and the activities of the soviet State directed toward the strengthening of the union of workers and peasants under the guidance of the former with the Communist Party at their head, toward the fortifying of the friendship of nations, the development of socialist law and forms of socialist consciousness (science, art, etc.), for the purpose of planned progress on the road to communism in capitalist surroundings. . . 99 Political action, the State, and law are three sides of the same process, but political action ("the concentrated expression of the economy") conditions the development of the other two . . . 100 Law as a social phenomenon is connected with political action, but this is not a direct connection. It is effected through the State, which by its authority, force, and doctrine secures the realization of political action in the form of rules binding upon all, i.e., in the form of law. . . 101

A statute is an act by means of which the State establishes a general rule of law or organizes agencies and institutions.

97 Trainin, op. cit. 7–8.
99 Trainin, op. cit. 8–9.
100 Id. 18.
101 Id. 10.
The socialist statute is one of the most authoritative instruments by the use of which the working class crystallizes its political action.\(^{102}\)

From the viewpoint of Marxian philosophy one can see what is gained by this reasoning for the construction of a soviet theory of law, although a non-Marxist can hardly see the point of it. The soviet jurists have come to realize that law is for them an indispensable means of social control—"it fortifies the stamina of the political regime and the span of governmental discipline, et cetera" (Vyshinsky, see supra).\(^{103}\) They still believe, however, that the soviet government must remain "a power unrestrained by law" (ibid.), and that freedom of political action by the government must be preserved. On the other hand, all "politics" or "policies" are, from the Marxian point of view, merely a superstructure on the economic basis.\(^{104}\) Pashukanis, Gintsburg, and their followers anticipated a situation in which the superstructure should become superfluous. But it is indeed a necessity and in fact, under soviet conditions, dominates the presumed basis. Trainin upholds the proposition of the economic basis and superstructure but blends these concepts by means of the above characterization of politics as the "concentrated expression" or the "generalization" of the economy. Thus, political action is given the authority of a primary and independent factor such as economy appears to be in Marxian philosophy. Besides, Trainin's reasoning places political action, the State, and law in a hierarchy precisely as required by soviet practice. In contrast to Pashukanis' early theory, full authority is given to the law and consequently to the soviet statute, but law appears to be

\(^{102}\) I d. 11.
\(^{103}\) See supra at note 95.
\(^{104}\) See supra, pp. 164–165.
"conditioned" by political action through the State, i.e., the government. Thus the government is visualized as unbound by law, being its creator and master. In the same treatise, Trainin discards all doctrines of the rule of law as futile.105

4. Present Trends

The full authority of the soviet statute established, the meaning of "socialist legality" in the new setting appears to be simpler than before. As invoked at present, it denotes a call for law enforcement. As under the New Economic Policy, it is again directed against arbitrary administration by the local authorities.106 The sphere of private rights and private ownership in particular, in comparison with the New Economic Policy, is now more restricted, but a tendency to make these limited rights appear secure is also in evidence. In the early days, the soviet jurists candidly declared that, in the soviet State, "the rights of the individual are expressly subordinate to the rights of the collectivity."107 Now Stalin maintains:

Socialism does not deny but combines individual interests with the interests of the collectivity. Socialism cannot lose sight of individual interests. Only a socialist society can afford the most complete satisfaction of such personal interests. Moreover, a socialist society represents the only firm guarantee of the protection of such personal interests.108

105 Trainin, op. cit. 3 et seq.
106 Compare supra at note 89.
107 Evtikhiev, Fundamentals of the Soviet Administrative Law (in Russian 1925) 195; Kobalevsky, The Soviet Administrative Law (in Russian 1929) 34; Krylenko, The Judiciary of the R.S.F.S.R. (in Russian 1923) 176; id., The Judiciary and the Law (in Russian 1927) 19: "In all instances, the interests of the whole, the duty to safeguard the social order, are to be the decisive criteria."
And the textbook on civil law insists that "the interests of the individual and of the whole of society coincide under socialism." Thus, socialist legality is now invoked to call for the protection of limited rights secured under the new setting. But as before socialist legality does not imply candid recognition of private rights, nor does it restrict the omnipotence of the government. However, general evaluation of the change in soviet attitude toward law must be reserved until its implication for the private law in particular is analyzed.