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Socialist Legal Theory in the Post-Pashukanis Era

by Rett R. Ludwikowski*

I. INTRODUCTION

The western student of socialist legal theory who wants to learn something about Soviet jurisprudence of the post-Stalinist era will experience great difficulty. The student can find that Marx, Engels, and Lenin's theory of law has been studied repeatedly in the West, and the principal thesis of the "fathers of scientific communism" relating to the withering away of the state and law in the Communist society has been analyzed in a number of books and articles.1 The student will also discover good translations of works by Pashukanis and Vyshinsky, leading jurists during Lenin's and Stalin's times, and numerous comments on their theories.2 The student will face real difficulties, however, if he wishes to learn something about jurisprudence in the Soviet bloc today.3 Western students of legal theory know Bratus, Gienkin, Kechakjan, Strogovitch, Denisov, Pigolkin, Opalek, Wroblewski, and dozens of other current socialist experts on jurisprudence only as names.4 An historical approach is typical of even the most

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2 It is enough to mention only a few of them. See E. PASHUKANIS, LAW & MARXISM: A GENERAL THEORY (P. Beirne & R. Sharlet eds. 1978) [hereinafter LAW & MARXISM]; P. BEIRNE & R. SHARLET, PASHUKANIS, SELECTED WRITINGS ON MARXISM AND LAW (1980) [hereinafter BEIRNE & SHARLET]; MARXISM AND LAW 207-27 (F. Beirne & R. Quinn eds. 1985). See also A. VYSHENSKY, THE LAW OF THE SOVIET STATE (1948) [hereinafter VYSHENSKY]; and Fuller, Pashukanis and Vyshinsky: A Study in the Development of Marxist Legal Theory, 47 Mich. L. Rev. 1157-66 (1949) [hereinafter Pashukanis and Vyshinsky]. Although all of these works exist, there are still some western theorists who complain that Pashukanis' "views received far less attention and study than they deserve." See Erh-Soon Tay & Kamenka, The Life and Afterlife of a Bolshevik Jurist, 19 PROBLEMS OF COMMUNISM 77 (1970) [hereinafter PROBLEMS OF COMMUNISM].

3 A short examination of the current trends can be found in O. JOYE & P. MAGGS, SOVIET LAW IN THEORY AND PRACTICE (1983).

4 Bratus is relatively better known in the West for his attacks on Pashukanis in the 1930s. See generally PROBLEMS OF COMMUNISM, supra note 2. Bratus is the author of a few books dealing with the problems of the Soviet theory of law. S. BRATUS, OBRUSHCHAJA TEORIA SOVETSKOGO PRAVA (GENERAL THEORY OF SOVIET LAW) (1966); S. BRATUS, GRAZDANSKOE PRAVO: POSOBIE DLA SUSHESTVUJUSHCHIKH NARODNYCH UNIVERSITETOV (THE CITIZENS LAW: A HANDBOOK FOR THE STUDENTS OF THE NATIONAL UNIVERSITIES) (1957); S. BRATUS, SÜJETY GRAZDIANSKOGO PRAVA (CORPORATE BODIES IN SOVIET CIVIL LAW) (1956).

See also D. GENEK, SOVETSKOE GRAZDANSKOE PRAVO (SOVIET CITIZENS' LAW) (2d ed. 1967); D.
recent publications, where the few reflections on current problems of Soviet legal theory are usually preceded by a lengthy analysis of the Pashukanis era.\(^5\)

If, on further inquiry, the western student should try to approach the socialist lawyer, accidently abroad in the West, he is likely to face additional problems. He will realize that his interlocutor from the socialist country is not eager to discuss the problems of socialist jurisprudence. It will strike the western theorist that his expertise ends where the other's begins.

At first, it seems paradoxical; the Western student of the socialist theory of law will consider his socialist colleague not as well read in the classical books of Marx, Engels, and Lenin as one might expect from his socialist background. Everyday contact with Marxism has a very peculiar impact on the mentality of the socialist lawyer. On the one hand, he is well trained in how to decorate his speeches and works with phrases taken from the “sacred books” on classical Marxism; on the other hand, he does not take Marxist rhetoric very seriously. It is paradoxical that the socialist lawyer usually has a better understanding of the window-dressing character of Marxism than his western colleague, and a less impressive knowledge of the real texts of Marx, Engels, and Lenin. Even if he is reluctant to admit it, the socialist lawyer is usually aware that a pragmatic and flexible approach to Marxism in the Soviet bloc has deprived the “sacred books” of their real substance.

Secondly, it will amaze the western student that the socialist lawyer has only a slight recollection of Stuchka, Pashukanis, or Vyshinsky. The socialist lawyer frequently does not know too much about the tensions within the Soviet legal theory of the Stalin era, but is well read in the works of Ihering, Leband, Jellinek, Dugit, Petrazhitsky, Kelsen, Hart, and Fuller. The western student will find that his interlocutor feels more comfortable when discussing the history of natural law, positivistic jurisprudence, or U.S. functionalism than Pashukanis'...
"commodity exchange conception of law." Asked about the rationale of this seeming paradox, the socialist lawyer would reluctantly explain that for socialist theorists, it is safer to examine critically different sorts of capitalist concepts of law than to become involved in the analysis of Marxist theory. The latter undertaking can easily result in the labeling of the author's comments as revisionary and the author himself as a wrecker, a nihilist, or an anti-Marxist.

As a result of this unsuccessful inquiry, the western theorist usually comes to the conclusion that nothing significant has happened in socialist jurisprudence in the post-Pashukanis era and that the period of creative evolution of Marxist legal theory ended with the disappearance of Pashukanis in Stalin's purge.6

II. CHANGES IN SOVIET JURISPRUDENCE IN THE POST-PASHUKANIS ERA

A. General Background

The prominence of Pashukanis' theory in the United States stands in contrast to the failure of its predictions. Soviet practice has shown simply that Pashukanis' theory was wrong. No evidence exists that the Marxist concept of the withering away of state and law which Pashukanis wanted to develop creatively has any chance for implementation in any known social system in the world. Pashukanis and his followers were liquidated in the typical Stalinist way. There was no reason to sympathize with successors whose arguments were less sophisticated than those of Pashukanis and Stuchka and whose calumnious language was unacceptable to western academic culture. The fact, however, is that the Pashukanis theory was eliminated because it was utopian generally and, at that moment, completely incompatible with Stalin's policy.7 This conclusion must be borne in mind when examining the evolution of Soviet jurisprudence from revolutionary nihilism to legal realism.

Pashukanis' legal theories grew out of revolutionary naive optimism that all of Marx's predictions relating to the future of communist society would be realized quickly. During the Communist revolution and ensuing civil war many old Bolsheviks in Russia believed that the withering away of legal and political

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6 This opinion was clearly expressed by the western theorists. See Erh-Soon Tay & Kamenka, supra note 5, at 245. "[O]nly two Marxist writers on legal theory [Karl Renner and Eugene Pashukanis] have had any significant respect from the western theorists." See also PROBLEMS OF COMMUNISM, supra note 2, at 72.

Rudolf Schlesinger has stressed that "no elaborate theory has yet filled the gap caused by the dropping of the Commodity Exchange Conception of Law." R. SCHLESINGER, SOVIET LEGAL THEORY, ITS SOCIAL BACKGROUND AND DEVELOPMENT 242-43 (1951) [hereinafter SCHLESINGER]. See also BIERNE & SHARLET, supra note 2; Bierne & Sharlet, Pashukanis and Socialist Legality, in MARXISM AND LAW, supra note 2, at 305. As Lon Fuller wrote, "His work is in the best tradition of Marxism. It is the product of thorough scholarship and wide reading." See Pashukanis and Vyshinsky, supra note 2, at 1159.

7 After Lenin's death Stalin tried to strengthen his dictatorship. The theory of the withering away of the state and law was contrary to the fundamental premises of his politics.
institutions would begin immediately after the victory of the revolution. As Mihaly Samu wrote, "They believed that all types and forms of the state could be abolished at a single stroke and forgot the Marxist reference to the need of the dictatorship of the proletariat during the period of transition." The jurists of the revolutionary period maintained that the new society would form a special communist morality and a revolutionary consciousness of justice would replace formal bourgeois legality and traditional codes of law. The belief that law itself is necessary for any society was labeled a feature of "legal fetishism" which Marx criticized so strongly.

It was Lenin who claimed that law would not wither away with the extinction of the bourgeois state. In his *State and Revolution*, Lenin argued that the bourgeois state could be abolished only by revolution; the socialist state, in contrast, would wither away in a process of gradual transformation. The process of creating a collective, socialist mentality was not to be rapid, however, and this fact would necessarily slow down the process of withering away of the state. The state machinery of social control and law had to exist in the transition period. It was, however, the machinery of control over individuals, not over classes, which was to disappear gradually.

According to Lenin, the process of withering away was to start in the revolutionary period. During that period, a substantial part of private law was to be incorporated into public law. After the revolution, bourgeois law would begin to disappear proportionately to economic transformations.

The idea that bourgeois law would partially wither away and partially operate under the first phase of communist society was considered by the Soviet jurists of the 1920s and the early 1930s, with Stuchka and Pashukanis leading the way. They emphasized that it was bourgeois law that would wither away and that it was not going to be replaced by a form of socialist law. Pashukanis wrote:

The withering away of certain categories of bourgeois law (the categories as such, not this or that precept) in no way implies their replacement by new categories of proletarian law, just as the withering away of the categories of value, capital, profit and so forth in the transformation to fully-developed socialism will not mean the emergence of new proletarian categories of value, capital and so on.


9 See Collins, supra note 1, at 15.

10 See Current Problems of Socialist Jurisprudence, supra note 8. For a more detailed analysis of Lenin's approach to the theory of the withering away of the state and law, see Schlesinger, supra note 6, at 2.


12 LAW & MARXISM, supra note 2, at 61.
For Pashukanis, law was a bourgeois category that regulated relationships between isolated individuals in the process of commodity exchange. Lenin anticipated that law was to start to wither away with the introduction of communist economic relationships and the liquidation of the private sphere of exchange.

In the New Economic Policy (NEP) period, the "commodity exchange school of law" gained ascendency and its influence on the Marxist theory of law increased. The preservation of a capitalist market apparently justified the continued existence of strong state authority and extended legal relationships. Yet, either the retreat from the NEP and the introduction of more advanced communist transformations had to be accompanied by a visible reduction of the function of law, or Pashukanis' orthodox Marxist notion of law was incompatible with revolutionary practice.

The result of this dilemma could be anticipated by careful study of Stalin's policy. Both Stuchka and Pashukanis began to be criticized as reductionists for their tendency to identify all law with bourgeois law, and legal relationships solely with economic phenomena. In early 1937, Pashukanis was denounced as a "traitor and wrecker" and soon afterwards he disappeared, probably liquidated at Stalin's order.

While Pashukanis' attempt to interpret Marxism was rooted in an assumption that the realities of life in the young Soviet state would follow the predictions of the fathers of scientific communism, the Stalinist theorists faced the necessity of adopting Marxism to the changing conditions of socialist life. They learned that Lenin's generation of revolutionaries knew how to subvert, destroy, and change, but had little knowledge of how to build or create, or introduce more advanced institutions, better economic techniques, or improved agricultural methods. Lenin's generation of revolutionaries did not know how to adopt the Marxist concept of state and law to a new reality. For them, Marxism served as a sacred guide to be followed almost blindly.

Pashukanis' successors discovered that experience is usually a better teacher than theory. The tenets of genuine Marxism often proved inapplicable in post-revolutionary Russia. Soon it appeared that the new state, despite the party adherence to Marxism, did not practice its basic assumptions. "Conventional hypocrisy," using Lenin's term, had yet to affect also the sphere of law. The Stalinist legal theorist solved the dilemma of the gap between theory and practice by appearing to adhere to the basic dogmas of Marxism, while imposing strictly controlled thought. The greater their pragmatic deviations, the more they pretended to be strict orthodox followers of scientific communism. To complain that they were less Marxian and that after Pashukanis and Renner creative

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13 See Vyshinsky, supra note 2, at 50–54. The reader should compare this view with that offered by Kelsen. See Kelsen, supra note 1, at 62.

14 See Erh-Soon Tay & Kamenka, supra note 5, at 249.
interpretation of Marxism in the Soviet Union ceased would be the equivalent of complaining that the totalitarian transformation of postrevolutionary Russia did not adhere to the concept of Marx's democratic socialism. Both are "a matter of course" statements. Being a Marxist, Pashukanis did not fit to Stalin's system because this system was Marxism in name only. In the Soviet reality, Pashukanis was more Marxian but also more utopian. Stalinist and post-Stalinist theorists were more typical of totalitarian science and further away from "genuine Marxism," but their "conventional hypocrisy" and cynicism were more practical than utopian. While these theorists were less "creative" theoretically, they were instructive regarding the nature of the Soviet system.

This is not to say that the legal theory of the post-Pashukanis era is not worthy of more detailed study. To interpret socialist jurisprudence correctly, however, one must examine it against the background of political and social life in the Soviet bloc rather than against Marx's theory of law. If we want to study current socialist theory we must change the focus of our inquiry. From a sociopolitical point of view, it makes sense to study a number of successive maneuvers undertaken by the socialist theorists in order to expose the "decorative" character of their theory.

This author will examine the social and political role of socialist theory of law, and will attempt to explain why, despite its "decorative" character, the concept of the withering away of state and law was not abandoned by socialist jurisprudence in the post-Pashukanis era.

B. Legal Nornativism

The critics of Pashukanis' "commodity exchange theory," led by Andrei Vyshinsky, made several points important for the further development of Soviet jurisprudence. They stressed the existence of socialist law and opposed the idea that it is solely an institution adopted from the capitalist system. The thesis that socialism created a new, higher form of the legal superstructure was emphasized by Vyshinsky and, until recently, it was never challenged in the Soviet theory of law. In currently published textbooks of socialist jurisprudence, authors still emphasize that "it is the socialist state and law which replaced the bourgeois state and law and which is going to wither away."\footnote{See Teoria Gosudarstva i Prava (Theory of State and Law) 422 (A. Denisov ed. 1970) [hereinafter Theory of State and Law]. See also The Soviet State and Law 213 (V. Chkhikvadze ed. 1959) [hereinafter Soviet State and Law]; Picolkin & Rozhko, supra note 4, at 12.}

The Stalinist theorists also broke with the traditions of Soviet legal realism and adopted the normativist concept of law introduced into Soviet jurisprudence by Kozlowski in 1919.\footnote{18 Zvezda (1919). See also A. Plotnickis, O Pamiatnii Sovetskovo Prava—Proboleni, 8 Sovetske Gosudarstvo i Pravo 56–57 (1979).} His definition of law as "an aggregate of norms" was
discussed and partially adopted by Krylenko, and extended by Vyshinsky, who maintained:

[L]aw is the totality of the rules of conduct, expressing the will of the dominant class and established in legal order, and of customs and rules of community life sanctioned by state authority—their application being guaranteed by the compulsive force of the state in order to guard, secure, and develop social relations and social orders advantageous and agreeable to the dominant class.17

Legal normativism had strong advocates throughout the entire Stalinist era. During World War II, this trend found firm support in the popular work Theory of State and Law by Golunskii and Strogovitch.18 Even today, despite growing criticism, legal normativism has its respected advocates. In 1979 the discussion on the notion of law in Sovetskoe Gosudarstvo i Pravo (Soviet State and Law), Golunskii's and Strogovitch's definition of law was repeated by Akcenenok. The normativist trend also found strong backing from the group of theorists led by Bratus, the veteran of the Stalinist attacks on Pashukanis' "commodity exchange" school. Bratus claimed, "To understand what law means—it is enough to characterize it as a system of norms, which is protected in the case of violation by governmental state coercion."19

C. The "Dialectic" Approach to the Future of the Socialist State and Law

The most significant innovation introduced into the field of Soviet jurisprudence by the Stalinist school of law was the so-called "dialectic" understanding of the process of withering away of state and law. Stalin explained the concept in his report to the Thirteenth Congress of the Communist Party of the Soviet Union:

We are for the withering away of the state. And we are for strengthening the dictatorship of proletariat, the strongest and mightiest power of all which existed until today. The highest development of the power of the state to prepare the conditions for the withering away of the state power—it is the Marxist expression. That is contradictory. Yes, it is. But this contradiction is a real contradiction which is compatible with the Marxist dialectic.20

17 Vyshinsky, supra note 2, at 50. See also I. Samoshchenko, O Ponimanii Sovetskovo Prava, 7 Sovetskoe Gosudarstvo i Pravo 61 (1979).
19 G.A. Akcenenok, O Ponimanii Sovetskovo Prava, 7 Sovetskoe Gosudarstvo i Pravo 65 (1979). See also the more moderate opinion of A.F. Cherdancev, who stressed a "complex" character of law, putting some emphasis on its normativist component, however. Id. at 67–70.
The dialectic character of the process of the withering away was to lie in the fact that, without a strong state and law, the phase of mature communism could not be reached and, without mature Communist society, the state and law could not wither away.\(^1\)

Stalin's theory, developed by Vyshinsky's school, helped Soviet jurists escape the traps of the idea of "bourgeois law without bourgeoisie," which was hardly acceptable in the post-NEP period. While it was extremely inconvenient to maintain that the system of the dictatorship of the proletariat still used bourgeois law, it was obvious that the state and law were not going to wither away. To solve this dilemma, Soviet jurists had to adopt the category of "socialist law;" the process of the extinction of the state and law had to be put off into the remote future.

The concept of the withering away as a lengthy process gained acceptance and became a firm component of socialist jurisprudence. In the post-Stalinist era the idea was expressed in a collective work edited by Chkikvadze: "Marxism regards the withering away of the state as a long process in which the socialist state system develops and grows into communist public self-administration, a process covering a whole historical epoch when the necessary conditions for the withering away of the state are created."\(^2\) This thesis had been analyzed repeatedly in numerous publications which emphasized that "for full extinction of the state it is necessary to fulfill some internal and some external conditions."\(^3\)

The internal conditions are usually reduced to the well-known decalogue which explains that the process of the withering away of the state and law will be completed when

1. The development of the economy and culture will enable the implementation of the basic Communist principle: "From each in accordance with his capabilities and to each in accordance with his needs."

2. The property of the cooperatives and other social institutions will be incorporated into one common Communist ownership.

3. The differences between cities and villages will disappear.

4. The differences between the approach to mental and manual work will disappear.

\(^1\) See generally Theory of State and Law, supra note 15, at 411.

\(^2\) See also Theory of State and Law, supra note 15, at 410; H. Szebanow, Problemy demokracji i Praworządnosci po XXIV Zjeździe KPZR (Problems of Democracy and Legality after the XXIXth Congress of the Communist Party of the Soviet Union), 7 PANSTWO I PRAWO 12 (1971). The reader should compare this view with the address of J. Kadar, International Meeting of the Communist and Proletarian Parties 484 (1969). The postponement of the withering away of the state and law was criticized in the Yugoslavian Program of the Communist Union. See the Polish text examined in WSPÓŁCZESNY ANTYKOMUNIZM A NAUKI SPOŁECZNE (Current Anti-Communism and Social Science) 59 (1970).

5. Nationalist feeling will disappear.
6. The working day will be shorter.
7. The culture of all working people will grow.
8. Crimes and other violations of the social order will no longer exist.
9. Democracy will be fully developed and all people will instinctively participate in solving the common problems.
10. The communist morality will be strengthened.

"The full implementation of all these conditions, to say nothing of external circumstances, will signify the end of the process of the withering away."24 In addition, the total withering away of the state and law requires proper external conditions and, in particular, the consolidation of socialism on a world scale.25

D. The Paradox of the Class Law in the Classless Society

The Stalinist concept of socialist law as an institution that would wither away as the result of a lengthy process of building the internal and external prerequisites of mature Communism had to overcome one important theoretical obstacle. Marxism insisted that the state and law have a class character because they are instruments of class rule and, therefore, when classes disappear so will they. In Origins of Family, Private Property and the State, Engels wrote that "classes will inevitably disappear in the same way as they came into existence in the past. Along with the extinction of classes will inevitably disappear the state."26

The Stalinist theory of law, however, had to recognize that law retained its class character during the dictatorship of the proletariat. In his broadly quoted article on the definition of law, Stalgevitch wrote, "Law as well as [the] state is a phenomenon typical of class society, a product and manifestation of the irreconcilability of class contradictions. It has a class character and serves as one of the instruments of the implementation of the purposes of the ruling class."27 In contrast, however, Stalin proclaimed that the dictatorship of the proletariat abolished classes. The socialist theory of law found itself in a trap. Class law without classes was a self-contradictory concept. If law was nothing but an instrument of class domination, it could exist only in a society split into opposite classes. As Hugh Collins wrote, "The whole thesis of the withering away of law rests upon the dubious definitional fiat that rules which serve any other purpose than class oppression cannot be law."28

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24 Sosialisticheskoe Gosudarstvo (1972); Yuridicheskaia Literatura I used the Polish edition, Teoria Panstwa Socjalistycznego 494 (1976) [hereinafter Teoria Panstwa Socjalistycznego].
25 See VYSHINSKY, supra note 2, at 61; See also SOVIET STATE AND LAW, supra note 15, at 87, 88.
26 MARX & ENGELS, 20 SOCHINENIA (WORKS) 173.
27 Stalgevitch, K Voprosu Poniatii Prava (The Question of Definition of Law) 7 SOVETSHOE GOSUDARSTVO I PRAVO 50 (1948) [hereinafter Stalgevitch].
28 COLLINS, supra note 1, at 106.
This contradiction led the Stalinist theorists to the theoretical acrobatics that resulted in the concept of class but nonantagonistic structure of the socialist society. Theorists contended that the state and law would wither away along with the disappearance of classes, but these processes would not be concurrent. As usual, this phenomenon should be understood in the dialectic way. This time, the dialectic approach meant that the abolition of classes proclaimed by Stalin did not result in the simultaneous creation of a classless society. It meant only that the exploiter bourgeoisie was destroyed. The Stalinist Constitution declared that “antagonistic classes have ceased to exist in our society—only classes friendly to each other have remained and are in authority—the working class which makes real its guidance of society and the peasantry.”

This solution was also hardly compatible with orthodox Marxism. Marx’s original definition of class lay in the concept of a society divided into two antagonistic social groups, exploiters and the exploited, the members of which shared the same economic and social status. A conflict theory of society made sense in a society divided into classes, but became meaningless when classes were no longer antagonistic. To Stalinist jurists, “class” was synonymous with “social group.” This classic Marxist category was maintained only to hide the self-contradictory concept of class law in a classless society.

For Soviet theorists, this device made the contradiction less visible, helped to avoid inconvenient conclusions, and gave the concept of law in the phase of the dictatorship of the proletariat at least the color of reason. Students of the Marxist theory of law were persuaded that socialist law retained its class character simply because the nonantagonistic society was not yet classless, and would not become classless until it was transformed into the society of the entire people. In the era of Stalinist terror, nobody wanted to examine the coherence of these dangerous issues more profoundly.

E. The Law in the “State of All People”

In the late 1950s, the problem of the class character of law began to haunt the Soviet theorists again. Soviet jurisprudence proclaimed that the Soviet Union was entering the phase of mature socialism in which classes disappeared forever, and even the remnants of the bourgeoisie were destroyed. Society became “the union of all the toilers” and “the organization of all the people.” The classless society was strengthened as a result of the dictatorship of the proletariat, but society did not need that dictatorship any more. Finally, the Constitution of 1977 confirmed the thesis that the Soviet state passed the stage

29 See Vyshinsky, supra note 2, at 123.
30 Compare this view with Ficquel & Rozhko, supra note 4, at 7–8.
of dictatorship of the proletariat and entered a new phase of the mature, classless society.

In this period, Soviet authors continued to maintain that law in the society of all the people, despite the fact that it does not represent one class but all classes, still has a class character. Chkikvadze wrote:

This new stage [of the society of all the people] is marked, firstly, by the fact that the law is an expression of all classes and social sections of society, without exceptions, in the form of the state, and is a reflection of all their essential interests. There is no class or social section in the Soviet Union which is antagonistic in respect of the law or vice versa.

As Hans Kelsen argued convincingly, the concept of class society, class law, and class state became meaningless simply because the dominant class of toilers was identified with the entire society.

The failure to adjust the Marxist theory of law to the concept of a classless society led Soviet theorists to employ a very characteristic maneuver. In current publications, the definition of law and its class character, and the thesis of the withering away of law are always discussed separately. While this strategy cannot avoid the vicious circle of Soviet jurisprudence, it apparently protects the Soviet theorists against the exposition of embarrassing conclusions.

F. Overgrowth of the State and Law into Socialist Self-Government

In the post-Stalinist era, socialist jurists critically examined the dialectic concept of the withering away through consolidation and strengthening of society. In the satellite socialist countries and in Yugoslavia, the moderate opponents of the Stalinist dialectic argued that this concept contributed to dogmatization of Marxism-Leninism and as a result, limited the progress of social and economic relationships in the socialist countries.

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31 A. Galin & M. Farushkin, Protiv Antimarksistovskikh Postroeniy Burzuyznykh Teoretikov Gosudarstva i Prava (Against Anti-Marxist Conceptions of the Bourgeois Theorists of the State and Law) 2 SOVZRSKOE GOSUDARSTVO I PRAVO 56 (1968).
32 SOVIEt STATE AND LAW, supra note 15, at 218.
33 Kelsen, supra note 4, at 139–40.
34 A discussion on the notions of law in 7–8 SOVETSKOE GOSUDARSTVO I PRAVO (1979) provides the best example. A number of respected theorists discussed the definition of law in these volumes, but they never touched upon the problem of the withering away of law.
Some of the Soviet theorists tried to substitute for the dialectic concept the idea of "the overgrowth of the state into socialist self-government." They agreed that the withering away of the state and law will take a long time, that the process is gradual, and that it has already begun. Soviet theories asserted that it is not necessary to wait for mature communism to perceive its effects. These theorists explained that in the society of the entire people the state and law are not exclusively coercive instruments. Law also regulates social relations and educates. The state runs interests of all the people and in this sense it is only a "half-state." As Chkikvadze wrote:

Soviet theory has recognized that Andrei Vyshinsky’s interpretation of socialist law was erroneous because it emphasized solely coercive aspects of law. It tended to minimize the important ideological, educational and organisational role of Soviet law. It was a wrong view under the dictatorship of proletariat to say nothing of the law of the whole people.

The gradual process of the overgrowth of the state into socialist self-government is characterized by (1) the tendency to reduce the role of coercion in social relationships; (2) the tendency to increase the participation of all people in the running of the state; (3) the tendency to transfer many important state functions to social organizations; and (4) the tendency of the state to gradually drop its political character. In the overgrowth process the state and society will blend into an integrated whole. Socialist state development is the process of the gradual integration of the state and society, in which the former is incorporated by the latter. Communist self-government will be reached when the process ends with full union.

The careful observer of this trend may, however, discover with surprise that the extinction of the state may also be understood in the peculiar dialectic way. It does not matter whether the self-governmental organs ultimately replace the state institutions or vice versa. As Kowalski tried to argue, “In these conditions [of mature communism], contrasting state form with the self-governmental form ceases to make sense. The state forms become simply the highest form of self-

36 Smialowski maintains that there is a trend in Soviet jurisprudence that tries to combine both the dialectic theory and the concept of overgrowth of state into self-government. See Smialowski, supra note 35, at 266-87.
37 See R. Kudriacew, Przeciw Uprosczaniu i Wulgaryzacji, 10 ZESZITY TEORETYCZNO-POLITYCZNE (1959) (originally published in 14 KOMUNIST (1959)).
38 Smialowski, supra note 35, at 243.
39 Soviet State and Law, supra note 14, at 218.
41 Theory of State and Law, supra note 15, at 505.
government.”

It is quite obvious that identification of the self-government and the state institutions would justify the existence of vast legal and governmental organs even in the phase of mature communism, but it would also make the whole Marxist concept of the withering away of the law and state meaningless.

G. The “Pluralistic” Definition of Law

In the late 1970s, legal normativism, a dominant trend in the socialist theory of law since 1938, declined. In the definition of law initiated by the Sovietskoe Gosudarstvo i Pravo (Soviet State and Law), the normativist trend was challenged for its dogmatism and idealism. The respected Soviet theorist Tumanov argued that the abuses of normativism produce a tendency to deduce principles of law from norms when it should be the reverse. Aksenonok argued that the normative theory “does not throw light on the social and economic conditionality of law.” Other disputants maintained that normativism separates abstract norms from life and does not reflect real social relations.

Commentators observing the dispute admit that the theorists’ attempts to create a concept which could substitute for the normativist theory were not very successful. The return to the legal realism of Stuchka and Pashukanis and the attempt to revise Marxism were too dangerous. As usual, recourse to eclecticism seemed to be the most secure tactic. The participants of the dispute who were critical of pure normativism tried to work out a pluralistic concept of law which could combine psychological, normative, and sociological components. As Dobrjazko maintained, “Ignorance of any of these components might result in a defective perception of law.”

Traditional psychological theory assumes that law is a collection of certain normative ideas forming a psychological reality. The proponents of the pluralistic theory emphasize that law expresses the will of the dominant class which does not mean simply the sum of wills of individuals who compose this class. The will manifests itself in the legal consciousness of the class or nation. This consciousness reflects current social relations rooted in the material conditions of life. In turn, the legal consciousness expresses itself in the legal ideas of the society. The will of the dominant class manifested in the legal consciousness and in the legal ideas of society is comprehended as the psychological com-

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42 S. Kovalski, Zasady Funkcjonowania Socjalistycznego Systemu, 3 Studia Nauk Politycznych 57–58, 60 (1972) (quoted from Smialowski, supra note 35, at 276).

43 A. Mickievitch, Krugwy Stol Sovetskovo Gosudarstvo i Prava—O Pomiananiu Sovetskovo Prava, 7 Sovietskoe Gosudarstvo i Pravo 58 (1979) [hereinafter Mickievitch].

44 Id.

45 Id. at 65.

46 Id. at 66.

47 Compare this view with Stalgevitch, supra note 27, at 52.
ment of law. The state expresses class consciousness in norms sanctioned by state organs. Through norms the state regulates social relations and affects the legal consciousness of the society. Livshic concluded that “law is composed of legal consciousness, norms and social relations.”

The pluralistic definition proposed by one commentator, Ushakov, reads as follows:

Law is a form of social consciousness which manifests itself as the national measure of people's conduct in the society organized by the state; this consciousness expresses itself as the system of rules of conduct which represents a will of a class or the whole nation. This will is elevated by the state in the form of statutes and other sources of law to the rank of the binding commands which in themselves serve as a unit measurement of the conduct of the people.

A group of more cautious commentators tried to stress that the normative component is the most important element of law. Others tried to distinguish law from legal superstructure, the latter being a broader category which embraces law, legal consciousness and legal relationships. Law according to this proposal would still be understood as an aggregate of norms.

Generally, the tensions in Soviet jurisprudence during the late 1970s did not introduce any revolutionary changes into the concept of socialist law, but, rather, rejuvenated the dispute over the definition of law. During this time, younger socialist theorists became aware of the problems which rankled Soviet jurists since the Stalinist period and which were not discussed in the late 1950s and 1960s.

H. The Socialist State Will Not Wither Away

Alice Erh-Soon Tay and Eugene Komenka have written: “The classical Marxist belief that state and law will wither away once class rule has been overcome is dead.” Socialist countries still have vast legal systems which do not show signs of withering away. Yet Soviet theorists still adhere to the thesis that state and law will wither away once class rule is overcome; they only concede that it will not happen immediately. Recently, the future of the socialist state and law

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48 Compare this view with P. Livshic, O Ponimanii Sovetskovo Prava-Prodetenie, 8 SOVETSKE GOSUDARSTVO I PRAVO 59 (1979) [hereinafter Livshic].
49 Id. at 60.
50 Id. Some disputants strongly opposed the proposal of including legal relationships in the substance of law. See Pogolkin & Rozhko, supra note 48 at 62.
51 Livshic, supra note 48, at 62.
52 Micklevitch, supra note 43, at 52, 55.
53 See Erh-Soon Tay & Kamenka, supra note 5, at 217.
stimulated great interest, but the concept of withering away was not officially denied or openly criticized in the Soviet Union. One can, however, note some indications of the more critical approach to the concept in Poland where the political turbulence of the late 1970s and early 1980s favored more open academic discussion.

In 1978, the Jagiellonian University in Krakow, Poland published Jerzy Smialowski’s dissertation on *The Future of the Socialist State in the History of Socialist Thought*. The author openly and courageously attacked socialist jurisprudence for its dogmatism. Reviewing the current trends in the socialist theory of law, he wrote: “These theorists are wrong in that they take Marxism primarily as a collection of binding dogmas and disregard the historical and social context.” Smialowski distinguished a few trends in the Polish theory of law. He criticized the revisionists led by Adam Schaff, to suggest that the classics of Marxism did not take the concept of the withering away very seriously. Smialowski dismissed the arguments of Ladosz and Orzechowski, who recently tried seriously to defend the concept of the withering away of the state and law. In his opinion, the trend of Stalinist jurisprudence, which intended to postpone the process of the withering away until the indefinite victory of communism, was a relatively strong signal that the socialist jurists are aware of the theory’s decline. Indeed, Smialowski stressed that many socialist theorists admit cautiously that the concept of the future of the socialist state and law does not exist in socialist legal thought. He concluded:

> [T]he process of the withering away of the state was not taking place and is not perceptible in any of the socialist countries despite their over half-century experience. It proves that this process is by no means an objective tendency which could be derived as a social regularity from the historical development of the human civilization and cannot be considered as such. What matters is the fact that we can not treat the theory of the withering away of the state and law as an inviolable rule of the development of socialist societies.

Smialowski’s approach to the Marxist theory of the future of the state and law was not well received. Smialowski’s dissertation was to qualify him to be a

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54 See supra note 35.
55 SMIALOWSKI, supra note 35, at 168.
57 SMIALOWSKI, supra note 35, at 255.
58 Id. at 136.
60 SMIALOWSKI, supra note 35, at 281–82.
professor of the theory of state and law at the Institute of Political Science at the Jagiellonian University. Several copies of the dissertation were published for internal use by the law schools but his thesis was turned down as a basis for professorship by the Main Qualifying Committee which operates at the Polish Ministry of Science, Higher Education and Technics, and confirms all academic degrees.

It is not surprising that Smialowski's thesis did not find broad support in socialist jurisprudence. Indeed, it is puzzling that, despite the controversial nature of his work, it was still published. The fact that it was published hints at the academic centers' approach to the Marxist concept of the future of the socialist state and law. As Smialowski commented:

> It is worthy of attention that the above-mentioned thesis, referring to the socialist state, . . . did not meet with any reaction in the academic circle, either on the ground of theory or practice. It undoubtedly signifies what was the impact of dogmatism at this time. If, namely, we could assume that my opinions were wrong, then they should have been criticized. If they were right, they should have been developed. Yet, the silence of the academic circles in the matter so important for the political organization of the socialist society as the role of the socialist state and law can be explained, but in some extent only, by the negative influence of the dogmatic political and social practice. The indifferent approach of most theorists in Poland and the other socialist countries to the significant scientific truth proves that this truth was reached not through the analysis of the political and social realities of our state, based even on the simplest everyday observation, but through the adoption as true of some academic structures which were formed on the basis of the ideas proclaimed in the XIXth century and which are not adequate to the current circumstances.\(^6\)

### III. The Social and Political Role of the Marxist Theory

The decay of Communist ideology and its legal components is a theme in all debates regarding the future of the socialist system. Numerous commentators on Soviet domestic problems emphasize the decomposition of Marxism-Leninism in the Soviet bloc. They argue that in today's Soviet bloc countries, nobody takes ideological clichés seriously. Party leaders are cynical, the public is disappointed with communism, and lawyers do not see any sign that law and state are going to wither away in the Soviet system. As Vladimir Bukovsky has written: "From top to bottom, no one believes in Marxist dogma anymore, even though

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\(^6\) *Id.* at 201–02.
they continue to measure their actions by it, refer to it, and use it as a stick to beat one another with: it is a proof of loyalty and a meal ticket.\(^{62}\)

Distinguished writers such as Alexander Solzhenitsyn assert that Marxism-Leninism is a dead ideology in that even at its inception it was mistaken in its predictions, and in that it was never a science. Soviet leaders blindly follow this false and harmful ideology. The leaders\' adherence to the precepts of Marxism-Leninism results in costly economic and social failures. "The spiritual renaissance of our country," argues Solzhenitsyn, "lies in our liberation from this deadening, killing ideology."\(^{63}\) Why do the Soviet leaders not follow Solzhenitsyn\'s advice and why do they try not to abandon the obsolete theory? Are there any chances for further creative development of the Marxist jurisprudence? Does ideology still cause Soviet leaders to act? The answers to these questions are not clear.

The author of this Article has discussed numerous trends in the field of socialist jurisprudence: postrevolutionary nihilism, legal realism of the NEP period, legal normativism, the pluralistic and eclectic trend, the dialectic approach to the future of the socialist state and law, and finally, the concept of the overgrowth of the state and its legal institutions into the socialist self-government. None of these trends has had a significant impact upon the theory of law; none of these trends has solved any of the important problems of world jurisprudence. Furthermore, there are no signs that Marxist doctrine will be developed creatively in the future. This does not mean, however, that the role played by the socialist ideology and theory of law is meaningless. Long ago Marxism-Leninism stopped being a guide to action, but it did not disappear. Though pragmatic Soviet leaders do not follow Marx\'s recommendations literally, communist rulers use Marxist rhetoric in their decisions, speeches, and works. Everyday contact with Marxist clichés and slogans has an inevitable impact. Adherence to Marxism-Leninism can be a source of difficulty, but it can also be very convenient. When unable to solve a policy question, party leaders can open the sacred books and find a phrase which may justify any decision. Obviously a mechanical application of Marxism may only exacerbate the consequences of an inept policy, but the ideological facade is a useful weapon. Viewed from the perspective of Soviet leaders, Marxism-Leninism still provides a stable theoretical background for the system.

Ideology has also played an important social role. Its unifying function has often been discussed by western political thinkers.\(^{64}\) Ideology helped the ruling


\(^{63}\) A. Solzhenitsyn, Warning to the West 114 (1976).

\(^{64}\) The reader should compare the views found in J. Bochenek & D. Bell, The End of Ideology in the Soviet Union, Marxist Ideology in the Contemporary World—Its Appeals and Paradoxes, 60–120 (M. Drachkovitch ed. 1966).
elite to maximize its control over individuals' thoughts and actions. It was a priceless method to mobilize public energy, an excellent instrument of political manipulation, and an important means of shaping political culture. Indoctrination was an effective form of political socialization which involved individuals in the political system.

Ideological manipulation, once its efficacy was discovered, was continually exploited by Soviet leaders. State-controlled press, literature, and broadcasting were transformed into one big machinery. All groups in society received political education. Special political schools, universities of Marxism-Leninism, army study circles, and special committees of political enlightenment in factories created a new Communist individual subservient to the party.65

Yet despite all these precautions, the public's common sense has not been destroyed by party indoctrination. Some people began to accept ideology without question because the repetition of the same ideological lessons stripped them of critical thought.66 Others, however, ceased to react at all to ideological stimuli. The effectiveness of ideological manipulation has weakened considerably in the last forty years. Repeated Soviet "counterrevolutions" and "periods of deviations" and successive disclosures of the regime's fallacies gradually destroyed the magic of Marxism-Leninism.

This growing ideological crisis was felt most strongly in the middle ranks of society in the Soviet bloc countries. The top party layers still take advantage of ideological manipulation, and it would be naive to believe they would give it up so easily. On the other hand, the relatively small group of dissenters at the bottom of the social structure never believed in Marxism-Leninism. They always pointed to the glaring defects of communism and tried to show how it was refuted by the growing body of scientific knowledge.

The most important sign of ideological crisis came, therefore, when Marxism-Leninism began to lose its influence on the middle ranks of society. The center of any Communist society consists of three important groups. The first group contains those who have participated in internal emigration and includes those who are almost totally indifferent to political issues, neither believing in ideological clichés nor willing to fight against them. The second group of passive observers brings together skeptics and opportunists who do not refuse participation in the regime but try to minimize it. Though not believing in the Communist ideology, they pay lip service to those ideological clichés which are most profitable to them. The third group is most important to the Communist leaders and consists of the active participants who believe in the regime's ideological goals and are wholeheartedly engaged in creating a Soviet World Republic.

66 The reader should compare the examination of Zinoviev's points on this matter found in T. Kolakowski, East Central Europe: Yesterday—Today—Tomorrow 44 (1982).
group provides the party with members who are ready to make party careers and fight for the future of communism. The continuous dwindling of this group, which in some of the Communist-ruled countries has almost ceased to exist, is the most spectacular effect of the crisis of Communist ideology.

If the essence of the ideological crisis is the gradual shrinking of true believers in Marxism-Leninism, the question is whether it makes any sense to continue to protect ideology if almost nobody believes in its historical mission. The answer of the Soviet ruling elite is a definite yes. Marxism-Leninism is still highly significant for the Soviet rulers. It has ceased to be the basis for their political judgments, but it still provides an effective means of control, of imposing uniformity on society. It still allows the ruling elite to stigmatize anyone it dislikes as an enemy of the people without an official trial.

IV. Conclusion

It is clear that the Soviet leaders will not follow Solzhenitsyn's advice to abandon Marxism-Leninism. They will not give up an instrument that continues to be useful for political control. It is not ideology which binds their hands; it is the system of totalitarianism which has created the "vicious circle" of the Soviet regime.

The window dressing character of Marxism-Leninism has had important social, moral, and economic repercussions. Under pressure from the regime, the public had to observe ideological tenets and legal norms but could not be forced to respect them. The fact that ideological criteria lost credibility as the standard of social behavior inevitably led to the creation of a double standard of public morality. It left its mark on the socialist legal culture.

For a while, ideology served to slow the process of moral corruption in socialist societies. The blind belief in Marxist-Leninist dogmas prevented the Soviet people from thinking independently. As ideological values began to lose authority, there was a drastic decline in public morality and in respect for law. Ideological decay corrupted a generation of party members. They came to understand that coercion is useful not to protect ideological values but to protect their own privileges. The devaluation of ideology has had an equally demoralizing effect on the rest of society. Workers began to realize that a double standard of morality means one morality for the party elite and another for nonparty people and ordinary party members. This realization became a major detriment to the system of public property, the central characteristic of communism. The ordinary citizen argues that, if the state doctrine is only a facade, then public property, sanctified by the ideology, belongs to no one. Hence the seizure of public property (in fact, no one's property) has nothing to do with theft. It is prohibited by law but not stamped by public morality. To be more precise, there are two public moralities, one official and the other private.
The collapse of public morality contributed explicitly to significant problems in the Soviet economy: low labor discipline, neglect of equipment, absenteeism, bribery, unproductive work, lack of interest in quality output, to name only a few. The society created unofficial techniques of social compensation, methods of competition for benefits available only in backstage struggles, and means of circumventing the pretended social equality. The system created not only a black market and corruption, but also unofficial channels through which many decisions are made and the law is avoided. A "double morality," in fact, is linked with the "double life" of the whole society.

The social and political role played by ideology and its legal components still deserves attention. The fact that Marxism-Leninism is dead in the sense that it ceases to serve as a guide for either the leaders or the public does not mean that the ideology has no function. It still helps the ruling elite to maximize its control over individuals' thoughts and actions. It is still an instrument of political manipulation, less effective, but specifically applied. It is an important means of shaping the political and legal culture of society. Viewed from the perspective of the Soviet leader, ideology can serve as a means of legitimization or delegitimization of political, economic, and social decisions. Soviet leaders also consider ideology an excellent weapon in political struggles, and a justification of any international or domestic strategy. Viewed from the perspective of the western commentator, socialist ideology, including legal theory, is worthy of consideration because of the important social, moral, and economic repercussions of its window-dressing character, the phenomena scarcely perceived or purposely ignored by the socialist theorists. If we wish to have a more complete knowledge of the socialist legal system, we must also study the socialist legal theory from this point of view.