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“SOCIALIST LEGALITY” AND COMMUNIST ETHICS

George L. Kline

I

THE “NIHILISM” which dominated Soviet legal theory and practice during the 1920’s has deeper and more tangled intellectual roots in the Russian past than has generally been recognized. With respect to ethics and social philosophy, early Russian Marxists around the turn of the century were divided into three factions: an “orthodox” group, led by Plekhanov; a “Kantian” revisionist group, led by Berdyaev; and a “Nietzschean” revisionist group, led by Bogdanov. On the question of law and “legality” the influence of Kant, Nietzsche, and Marx — and, for that matter, of the anarchists Bakunin, Tolstoy, and Kropotkin — came to a single focus.

All the early Russian Marxists, though for rather different reasons, took a negative view of legal institutions and norms. For them the “juridical state” and the “rule of law” were empty and alien concepts. It is significant that a leading Russian theorist of law, writing in 1909,¹ felt called upon to defend the rule of law against Russian intellectuals of every political hue, from Leontyev and the Slavophiles to Herzen and the radicals — both Marxist and non-Marxist — who had scorned and neglected it.

Marxism, of course, reinforced Russian antilegalism with its doctrine that positive law is merely a codification of the selfish interests of the ruling class, and that law as such, doomed by history, will wither away completely in the classless society. But Kantianism also reinforced this antilegalism with its sharp distinction between moral and legal norms, the latter being viewed as external, compulsory, and nonmoral, while the former alone are internal, “autonomous,” and moral. (Of course, Kant himself had much more respect for positive law than either Marx or Nietzsche.) Finally, Nietzsche reinforced Russian antilegalism with his ferocious attack upon norms as such, and his violent rejection of obligation, whether moral or legal, as a constraint upon individual freedom and creativity. It seems clear that Soviet “juridical nihilism” was fed, sometimes in subterranean fashion, by all of these intel-

1. V. Kistyakovski, *V zashchitu prava* [In Defense of the Law], ВЕКНИ (1909).

lectual currents, as well as by the still powerful Russian anarchist tradition of Bakunin, Tolstoy, and Kropotkin.

By the 1920's nothing remained of the active revisionist movements of the early 1900's; both "Kantian" and "Nietzschean" Marxism had been washed under in the tidal wave of Leninist neoorthodoxy. It was the classical Marxist influence, derived most unambiguously from Engels, that motivated the juridical nihilists. They were firmly convinced that the "juridical world view" was the "classical world view of the bourgeoisie generally," just as the religious world view was typical of feudal society. Law, as Engels had held, was inextricably bound up with the capitalist state as a system of legalized coercion, and would logically disappear with the gradual "withering away" of the latter.

This metaphorical notion of "withering away" or "dying out" (German *Absterben*, Russian *otmiraniye*) presupposes the conceptual model of society as a plantlike growth having leaves as well as roots.² The root of the social plant is the economic "base"; the foliage is the sociopolitical and ideological "superstructure." According to classical Marxist doctrine, the social revolution cuts (or extracts) the roots of capitalist society, whereupon its "bourgeois" leaves, deprived of nourishment, begin to wither and eventually die.

II

HIGH ON THE post-1917 priority list of candidates for "withering away" stood religion, the family, and positive law. During the 1920's not only academic theorists but also such active policy-makers as Trotsky, Bukharin, Zinoviev, and Lunacharski — to say nothing of Lenin — were convinced that these three institutions, and several others, would all gradually disappear with the "building of socialism."

Religion is still expected to wither away completely with the approach to full communism, although the Program adopted at the Twenty-second Party Congress in 1961 cautiously avoided assigning any date to its final disappearance.

In contrast, the institution of the family and monogamous marriage — which early Marxist theorists considered just as much an "opiate" as religion, and as surely destined to "wither away" — has been wholly reclaimed for socialism. There is now no slightest suggestion that the Soviet family will ever "wither away." On the contrary, the 1961 Party Program, like all Soviet

2. For a fuller discussion, see my *The Withering Away of the State: Philosophy and Practice*, in W. LAQUEUR & L. LABEDZ (eds.), *THE FUTURE OF COMMUNIST SOCIETY* 63-71 (1962).

statements since 1936, stresses the proposition that a new kind of family, the firm, stable socialist family, has made its appearance on the stage of history, and is here to stay.³

Positive law, as a candidate for “withering away,” appears to occupy a position intermediate between religion and the family. From the beginning the Soviet attitude toward law has been vaguer and more ambiguous, and the doctrinal shifts with regard to it have been somewhat less clear and pronounced.

Lenin seemed to agree with Engels that legal compulsion generally would disappear with the vanishing state apparatus. With the construction of communism, Lenin wrote, men

will gradually become habituated to observing the elementary rules of community living [*obshchezhitiiye*] which have been known for centuries and have been repeated in all the copybook maxims for thousands of years — observing them without force, without compulsion, without subjugation, without that special coercive apparatus known as the state.⁴

Lincoln Steffens reported that Lenin and other Bolshevik leaders continued, through 1918, to *talk* in terms of eventual anarchism, or at least semianarchism, setting as their goal a stateless as well as classless society. Steffens quoted “the Bolsheviks” as saying in Moscow in 1918: “. . . we plan to evolve from the socialist state on to anarchism.”⁵

This is not the place for a recital of the measures taken during the 1920’s to implement Soviet “juridical nihilism” in practice.⁶ Our concern is rather with the legal theorists, who, pushing Engels one step further, argued that law and the “juridical world view” were inextricably bound up with the socioeconomic relations of bourgeois society, and that “socialist law” — or “socialist legality” (*sotsialisticheskaya zakonnost*) — was as self-contradictory a notion as “socialist religion” or “socialist private property.” The Soviet theorist Goikhbarg, writing in 1924, asserted that law was an even more poisonous “opium” for the people than religion, and added: “The temple

3. PROGRAMMA KPSS, pt. II, preamble (Moscow, 1961). There are various English translations. A convenient edition, with informed and intelligent editorial comment, is THE NEW SOVIET SOCIETY, ed. and intro. by HERBERT RITVO (1962), in which the reference to the family appears on p. 113.

4. V. I. Lenin, *Gosudarstvo i revolyutsiya*, 21 SOCHINENIYA 431 (2nd ed., 1928). [In English: *State and Revolution*, in 8 SELECTED WORKS 81 (New York: International Publishers, n. d.).]

5. THE AUTOBIOGRAPHY OF LINCOLN STEFFENS 795 (1931).

6. For details see RUDOLF SCHLESINGER, SOVIET LEGAL THEORY: ITS SOCIAL BACKGROUND AND DEVELOPMENT ch. V (1945); VLADIMIR GSOVSKI, 1 SOVIET CIVIL LAW: PRIVATE RIGHTS AND THEIR BACKGROUND UNDER THE SOVIET REGIME 163-175 (1948); HAROLD J. BERMAN, JUSTICE IN RUSSIA: AN INTERPRETATION OF SOVIET LAW 17-37 (1950).

of bourgeois domination is the legislature, and its fetish is the law. . . .”⁷ As one authoritative publication made the point in 1925: “. . . the juridical world view, together with bourgeois ethics, represents the last refuge of the remnants and traditions of the old world.”⁸ Leading theorists like Stuchka and Pashukanis argued in detail that legal concepts and norms were products of the marketplace, and that “legality” was characteristic of a “bourgeois-capitalistic” trading society.

“Juridical nihilism,” at the level of both theory and practice, remained dominant throughout the 1920’s. But by 1930 the “nihilist” tendency had been reversed. This reversal took a final and dramatic turn in the promulgation of the Stalinist Constitution of 1936, with accompanying “theoretical” justifications. Soon after Stalin’s consolidation of power in 1930-31, both Stuchka and Pashukanis were repudiated. In 1936 Stalin himself declared unequivocally, “We need the stability of laws now more than ever.”⁹ A new era of “socialist legality” had begun.

III

IN 1937, shortly after the adoption of the Stalinist Constitution, Andrei Vyshinski, newly prominent as prosecuting attorney during the purge trials, gave a series of public lectures at the Juridical Institute in Moscow. Vyshinski had been assistant attorney general during the period when Pashukanis, Stuchka, and their followers dominated Soviet legal theory and practice; there is no evidence that he dissented from the reigning “juridical nihilism” of the 1920’s. But he now launched a blistering attack upon all of the “juridical nihilists.” The title of his militant lecture series was built around a military metaphor: “The Situation on the Front of Legal Theory.”

Vyshinski reported indignantly that the “legal sector” of the “theoretical front” was cluttered with “pseudo-Marxist, antiscientific rot and rubbish.”¹⁰ The widely accepted but dangerous “anti-Party theories of the withering away of law and the state,” he insisted, led directly to counterrevolution. Stuchka and Pashukanis, he continued, were “enemies of the people,” at-

7. Quoted in ANDREI VYSHINSKI, *K POLOZHENIYU NA FRONTE PRAVOVOI TEORII* [The Situation on the Front of Legal Theory] 6 (1937).

8. *REVOLYUTSIYA PRAVA* [The Legal Revolution] 3 (1925).

9. I. V. Stalin, *O proyekte konstitutsii SSSR*, *VOPROSY LENINIZMA* 530 (11th ed., 1947). [In English: *On the Draft Constitution of the USSR*, *PROBLEMS OF LENINISM* 586 (Moscow: Foreign Languages Publishing House, 1940)]

10. VYSHINSKI, *op. cit. supra* note 7, at 3.

tempting to “disarm the working class in the face of its foes, and to undermine the socialist state.”¹¹

Vyshinski vehemently rejected the claim implicit in all — and explicit in some — statements of the “juridical nihilists,” namely, that whatever residuum of law actually remains in effect in the Soviet Union must be “alien,” i.e., “bourgeois” law, since “socialist law” is a contradiction in terms. Such views, Vyshinski exclaimed, undermine respect for Soviet law, which is, in fact, genuinely socialist law, a political expression of the dictatorship of the proletariat. “The proletarian dictatorship and the Soviet power,” he explained, “are the source of our [socialist] law, and the aim of our law is to secure the interests of the workers, to safeguard and defend the interests of the development of our socialist society.”¹²

Vyshinski discerned another consequence of “juridical nihilism” which may be less obvious, namely, its relationship to Trotsky’s denial of the possibility of “building socialism in one country.” Trotsky, like Lenin, assumed in the 1920’s that socialism would emerge in *many* countries at about the same time, and that the new “confraternity of socialist states,” joining their collective strength against a dwindling “capitalist encirclement,” could afford to give up legal coercion in managing their separate internal affairs. In contrast, Stalin, having opted for the doctrine and program of “building socialism in one country” in the teeth of continuing “capitalist encirclement,” held that positive law backed by coercive sanctions could not be permitted to wither away, but must be preserved at full strength, even after the achievement of full communism, so long as there were nonsocialist, hence potentially aggressive, systems anywhere in the world. One of the few explicit references to “withering away” in the 1961 Party Program repeats Stalin’s position (without mentioning his name): the coercive apparatus of the state — we are told — will finally and fully “wither away” when there is (a) full communism in the Soviet Union and (b) full communism throughout the world.¹³

In 1937 Vyshinski himself merely reformulated the position taken by Trotsky in 1920 and Stalin in 1930 with respect to the eventual withering away of law and the state. “The path to this withering away,” he wrote, “lies through the strengthening of our law, as socialist law; not until we have raised this socialist law to the full height of its historic growth will the conditions for its withering away be present.”¹⁴ “It would be incorrect

11. *Id.* at 5.

12. *Id.* at 52.

13. PROGRAMMA KPSS, pt. II, sec. iii, subsec. 2 (THE NEW SOVIET SOCIETY 183).

14. VYSHINSKI, *op. cit.* *supra* note 7, at 54-55.

to assume," Vyshinski solemnly continued, "that the withering away of law and the state will occur in some mechanical or automatic way, that it will not be preceded by a vast period of time, and probably, not by a single period, but by a whole series of periods, of epochs."¹⁵ The implied time scale is almost geological.

Vyshinski went on to stress the stability of the Soviet legal system, a system which is "truly stable, that is to say, inviolable, inflexible," yet one which does not preclude whatever new legislation may be required by changing circumstances. In fact, the drastic shifts in Soviet legislation during the past generation would seem to cast doubt on such claims to "inflexibility": there have been abrupt legislative reversals with respect to capital punishment, labor discipline, "social parasitism," divorce, and education. Apparently Vyshinski's "firm and stable legal principles" boil down to the supreme positivist principle: obey the laws of the moment and don't ask questions.¹⁶

Soviet spokesmen since Vyshinski have wanted to have their juridical cake and eat it too, ascribing to Soviet law an inconsistent combination of (inflexible) stability and (unstable) flexibility. They seem to have been moved by the ideological need to confer upon detailed statutes the kind of prestige and moral authority usually associated with "natural law," while admitting drastic, politically-motivated changes in the content of such statutes. At the theoretical level, needless to say, this attempt has been something less than a success.

Vyshinski's (and Stalin's) un-Marxian stress on the stability of "socialist law" has been accompanied by a growing emphasis on another un-Marxian claim, namely, that law can develop morality, either directly or by modification of the economic base. Marx, of course, had asserted that you cannot legislate men into being good, since the foundations of morality, like the foundations of law, are economic. The clear counterassumption made by Soviet writers — especially after the publication of Stalin's *Marxism and Problems of Linguistics* (1950) — is that a part of the ideological superstructure (in this case, legal norms) can directly modify human conduct, without the intervention of economic forces or institutions.

The theorist Kareva, for example, ascribes a "qualitatively new" and uniquely "creative" role to socialist law in "forming and developing a socialist [economic] base." There is, we are told, an "active, creative influence of the superstructure of Soviet society upon its base. The Communist Party

15. *Id.* at 54.

16. Harold J. Berman of Harvard Law School reports that during the academic year 1961-1962 Soviet law school lecturers were quite outspoken in their criticism of the "positivism" implicit in Vyshinski's definition of law.

. . . makes skillful use of all parts of the socialist superstructure, including law and morality, for the construction of a socialist base. . . .”¹⁷

This revision of classical Marxism is carried even further by another writer who asserts that “the Soviet State, as distinguished from bourgeois states, can [through legislation] deliberately plan and modify not only the character of social relationships and the level of development of the forces of production, but also . . . human thought and feeling. . . .”¹⁸

IV

WHAT, IN THE SOVIET VIEW, is the relation of legal to moral norms, of “socialist legality” to “Communist ethics”?

During the 1920’s Soviet writers often formulated this distinction in Kantian or quasi-Kantian terms: the motive force which causes men to obey legal norms (laws) is external and coercive; that which causes them to obey moral norms (imperatives) is internal and noncoercive (“autonomous” or “free”).¹⁹ You can compel a man to be “legal,” but you cannot compel him to be moral, since external compulsion destroys morality.²⁰ Moreover, as Gurvich put it, following the Russian-Polish sociologist of law, Petrazhitski, “. . . moral obligation is one-sided; the counteragent may *desire* its fulfillment, but he cannot *require* it. . . .”²¹

I have already noted the strong Kantian influence on the ethical theory of one group of Russian revisionist Marxists around the turn of the century. The early Soviet appeal to a Kantian or quasi-Kantian distinction between legal and moral norms may have been a belated echo of that influence. The Kantian distinction seems not to have been openly attacked by Soviet critics, but merely to have faded quietly from the literature. This may be because Marx, though he generally disliked Kant’s philosophy and shared

17. M. P. KAREVA, PRAVO I NRAVSTVENNOST V SOTSIALISTICHESKOM OBSHCHESTVE [Law and Morality in Socialist Society] 22 (1951).

18. VOPROSY NAUCHNOI RABOTY I PREPODAVANIYA OBSHCHESTVENNYKH NAUK V VYSSHEI SHKOLE [Questions of Scientific and Scholarly Work and the Teaching of Social Sciences at the University Level] (1947).

19. The difference between a Kantian and a “quasi-Kantian” formulation of this distinction parallels that between “free” or “autonomous” and merely “noncoercive” motives. In Kant’s own technical terminology, legal norms are *heteronomous*, and their imperatives are *hypothetical*; moral norms are *autonomous*, and their imperatives are *categorical*. A thorough analysis of Kant’s distinction between law and morality would have to consider his peculiar doctrine of noumenal freedom, a doctrine which sets the Kantian approach off sharply from that of the Marxist-Leninists.

20. A similar distinction, in slightly different terminology, was defended in detail during the 1880’s by the liberal Russian historian and “semipositivist” sociologist, K. D. Kavelin.

21. G. S. GURVICH, NRAVSTVENNOST I PRAVO [Morality and Law] 9 (1924). (Italics added)

Hegel's critical view of Kantian ethics as "empty" and "purely formal," never discussed the question of the relationship between legal and moral norms in any detail. Nor did Lenin. Thus Soviet theorists of the 1920's who did discuss this question were to a considerable degree on their own.

However, the threat of what Soviet writers call "petit-bourgeois individualism" lurks in any Kantian (or quasi-Kantian) discussion of law and morality, even when such discussions are not explicitly linked to Kant's dictum that the individual must always be treated as an end, never as a means only. Perhaps for this reason, the distinction which has become dominant in the Soviet literature since the early 1930's is deliberately anti-Kantian, seeing the sanction for both legal and moral norms as external, the one being coercive while the other is (at least relatively) noncoercive. As before, the first kind of sanction is identified with state power; but the second kind is now identified with public opinion.

The 1961 Party Program, while declaring that *law* will eventually wither away in a future almost as geologically remote as that envisaged by Vyshinski in 1937, insists that *morality* will remain, even under full communism.²² It adds that with the approach to communism the external sanction of public opinion will increasingly give way to the internal sanction of individual "conscience" or "consciousness of social duty." Soviet writers sometimes describe this process as the emergence of an increasingly habitual or automatic obedience to the internalized voice of social obligation; at other times they see it as the response to a developing "vital need" (a felt need to serve the collective interest). In Kantian terms one might say that the voice of duty or conscience will come infallibly to prevail — in Communist society — over the selfish tug of individual interest or impulse (what Kant called *Sinnlichkeit*).

The "withering away" of legal norms, as the Party Program makes clear, is to be accompanied by an increasing control of conduct through "social organizations"²³ — the present model of which is the *druzhina*

22. PROGRAMMA KPSS, pt. II, sec. iii, subsec. 2, and sec. v, subsec. 1.c. (THE NEW SOVIET SOCIETY 183, 206)

23. The importance of continuous public, as well as governmental and Party, inspection and control was stressed in general terms in the 1961 Party Program (pt. II, sec. iii, subsec. 1 [THE NEW SOVIET SOCIETY 173-174]). The November 1962 Plenum of the Party's Central Committee called in explicit terms for the creation of "a single system of continuously functioning inspection and control in which broad masses of the workers would participate." (Cf. *Izvestia*, Nov. 24, 1962, p. 2) A massive mobilization of volunteer spies and busybodies, "checking and controlling" what their neighbors and fellow workers are doing or failing to do, is now under way. This is in addition to the comrades' courts, people's militia (*druzhiny*), and so-called "Home-and-Family-Life Detachments" (*Bytovyie Otryady*) of Komsomol volunteers who visit Soviet citizens in their homes to check on

("people's militia" or, perhaps more accurately, in American terms, "vigilante gang").²⁴ The *druzhinniki* tend to be much tougher than ordinary Soviet policemen; they are empowered to call citizens to order not only for "disturbing the peace," but also for such a trivial offense as eating while driving. Since February, 1962, violent resistance to arrest by the *druzhinniki* as well as by regular police officers, has been a capital offense under Soviet law.²⁵ Such extreme sanctions blur, if they do not wholly erase, the distinction between "legal" and merely "social" controls.

V

WHATEVER THE FUTURE may hold, there is a clear effort by Soviet authorities here and now to undermine the distinction between moral and legal obligation in a more direct and practical way — by *converting* specific moral norms into legal norms, and thus bringing them within the orbit of positive sanctions. The recent "antiparasite" laws are the most striking example of this process:²⁶ they convert the moral obligation to "work for the good of society" into an enforceable legal obligation, evasion of which can lead to exile (up to nine years) and confiscation of property; they aim at idlers, gray-marketeters, and purveyors-at-a-profit of goods and services which the authorities consider frivolous or socially harmful (though not actually illegal). Examples include the commercial use of privately owned automobiles and the sale of produce from the garden, orchard, or fish pond of a privately owned *dacha*.

At least one prominent legal theorist argued in 1959 that the "anti-

family matters and inculcate the principles of Communist collectivism. Since refusal to welcome members of these Detachments results in visits from the *druzhinniki* or regular police officers, it seems clear that family privacy is actively "withering away" — or being "liquidated" — in the Soviet Union. (Cf. *Komsomolskaya pravda*, Dec. 26, 1961, p. 2)

24. The full official title is *Dobrovolnaya Narodnaya Druzhina* (Voluntary People's Militia). The *druzhiny* were established in 1958 and have grown rapidly. By 1960 they included 2.5 million volunteers, organized into 80,000 *druzhiny*, averaging just over 30 members each. Though the institution (as a "mass social organization") is new, the term itself can be traced back to the sixteenth century.

25. Cf. *VEDOMOSTI VERKHOVNOVO SOVETA SSSR* no. 8 (1095), Feb. 21, 1962, art. 83: "*Ob usilenii otvetsvennosti za posyagatelstvo na zhizn, zdorovye i dostoinstvo rabotnikov militsii i narodnykh druzhinnikov.*" This may be translated as "On Increased [Criminal] Responsibility for Attempts upon the Life, Health, and Dignity of Members of the Militia [i.e., regular police officers] and *druzhinniki*."

26. Such laws were first proposed in May, 1957, publicly discussed during the following months, and adopted in December of that year by several of the Union Republics. They became law in the Russian Soviet Federated Socialist Republic (RSFSR), much the largest and most important of the Republics, in May, 1961.

parasite" laws violate fundamental principles of "socialist legality."²⁷ But these laws remain very much in effect. According to Professor Harold Berman, two thousand "social parasites" were exiled from Moscow alone — and fifteen of them suffered confiscation of their property — during the first year (May 1961 to May 1962) that the "antiparasite" laws were in effect in the RSFSR. Eight thousand other "social parasites" were arrested in Moscow during the same period, but were released with warnings.^{27a}

Other recent measures undertake to tighten social control by declaring "morally obligatory" — a part of every Soviet citizen's "civic duty" — actions which are neither explicitly prohibited nor explicitly enjoined by Soviet law. The editors of *Izvestia* have castigated the widespread practice of "looking the other way" and failing to denounce persons guilty of embezzling, giving or taking bribes, etc. Soviet citizens are reminded that they are fully responsible under Communist morality, even if not technically responsible under Soviet law, for any criminal action which they know of but fail to report or prevent. A Soviet conscience, we are told, cannot tolerate "either the criminal himself or the man who passes by the scene of a crime."²⁸ The general point had been made in the 1961 Party Program: "It is the [moral] duty of Soviet men and women to see to it that legality and public order are rigidly enforced, to be intolerant of, and ready to combat, every abuse."²⁹

VI

IS OBEDIENCE TO LAW a moral duty? The current Marxist-Leninist answer is: "Yes and no." On the one hand, members of the exploited classes in *capitalist* society have a moral duty to *disobey* certain laws — since "bourgeois" legality is only a codification of the interests of the ruling classes, and by its nature contrary to the interests of the ruled. But, on the other hand, in *socialist* society obedience to law is a moral duty binding upon every citizen. "Socialist law and Communist morality," according to one Soviet writer, "are homogeneous in their social nature [i.e., both are codifications, or at least expressions, of proletarian class interests] and pursue the

27. That is, *after* the laws had been adopted by the Ukraine, etc., but *before* they were adopted by the RSFSR. The "prominent theorist" also expressed his own confidence that the antiparasite laws would *not* be adopted by the RSFSR, and would be repealed by the Union Republics that had adopted them. See Harold J. Berman. *The Dilemma of Soviet Law Reform*, forthcoming (1963) in HARVARD LAW REVIEW.

27a. See the forthcoming article cited *supra*, note 27.

28. *Izvestia*, Dec. 9, 1962, p. 1.

29. PROGRAMMA KPSS, pt. II, sec. iii, subsec. 1 (THE NEW SOVIET SOCIETY 174-175).

same ends. Communist morality includes within itself the observance of the norms of socialist law, regarding them as a most important social duty."³⁰

The Stalinist Constitution is regularly referred to both as "the fundamental law of the Soviet Union" and as "the *moral code* of Soviet society." As an authoritative Soviet spokesman put it in 1946: "The Stalinist Constitution is a remarkable code of Communist morality. . . . In the U.S.S.R. law and morality reinforce one another. A man who is condemned by a Soviet law is also morally condemned. If someone has violated a Soviet law, we can no longer respect such a person."³¹

To be a moral man, Soviet readers are repeatedly told, is to obey the laws of the Soviet State, and to despise and, on occasion, denounce violators of these laws.

All this is part of the systematic Soviet attempt to assimilate moral norms to legal norms, a process which tends to make morality as a whole increasingly "legalistic." "Legalism," of course, is not the same thing as "legality"; and the "rule of law" — a conception which Soviet writers repudiate as "bourgeois" — is distinct from both. "Socialist legality" means not the rule of law, but rather the rule of a Party by means of a (manipulable) legal system. Like its ancestor, "revolutionary legality," "socialist legality" is another name for "*politicalized* rule of law" — or "rule of politicalized law." Khrushchev criticizes Stalin for "violating socialist legality" not primarily as a dictator whose personal will ran counter to the dictates of an impersonal legal system, but as a *Party leader* whose political will ran counter to the Party interests vested in a politicalized legal system.

VII

THERE IS A CERTAIN historical irony in the fact that the Russian public, with its long tradition of indifference to, and even contempt for, the law, has finally acquiesced in the construction and imposition of a complex, detailed, and relatively stable system of legal norms, by a state and a Party which are ideologically committed to the Marxist-Leninist program-and-prediction of the "withering away" of all positive law. That the stabilization of Soviet "socialist legality" has been less than totally successful is due, I suspect, to two related factors: (1) the persistence of a definite, if generally subdued,

30. A. Ya. Zis, *Moral burzhuaznaya i moral kommunisticheskaya* [Bourgeois Morality and Communist Morality], *POD ZNAMENEM MARKSIZMA* no. 6 (1939), p. 72.

31. M. P. BASKIN, *MORAL KAK FORMA OBSHCHESTVENNOVO SOZNANIYA* [Morality as a Form of Social Consciousness] 13 (1946).

antilegalistic and even anarchist attitude, and (2) the increasingly obvious fact that more than a few Soviet laws have been and remain opposed to the vital interests of many Soviet citizens. The most striking example of the latter is, without question, the imposition of capital punishment for certain "economic crimes."³²

We should recall that capital punishment for nonpolitical crimes was abolished in Russia long before 1917; during most of the nineteenth and the early twentieth century Siberian exile was the standard punishment for first-degree murder. Early Russian Marxists, as well as anarchists like Tolstoy and Kropotkin, were unanimous in rejecting capital punishment both as a moral monstrosity and as an ineffective deterrent to crime. Lenin formally abolished the death penalty on January 17, 1920, but restored it in May of the same year. Stalin, in turn, abolished capital punishment (May 26, 1947), but restored it in less than three years (January 12, 1950). Khrushchev has not only made no move to abolish capital punishment; he has steadily enlarged the class of capital crimes and, for the first time in modern Russian history, made crimes against property punishable by the firing squad.

The general theoretical "justification"³³ of the increased harshness of Soviet legal sanctions echoes Trotsky's "justification" (in 1920) — repeated by Stalin in 1930 — of the increased harshness of Lenin's dictatorship of the proletariat. Trotsky argued that the coercive apparatus of the state must be raised to its highest pitch of development before the state could begin to wither away. Like the flame of a kerosene lamp, which flares up brightly

32. Cf. *Izvestia*, May 7, 1961, and *VEDOMOSTI VERKHOVNOVO SOVETA SSSR* no. 19 (1054), May 11, 1961, art. 207: *Ob usilenii borby s osobo opasnymi prestupleniyami* [On Intensified Struggle Against Especially Dangerous Crimes]; supplemented in: *VED. VERKH. SOV.* no. 21 (1056), May 25, 1961, art. 222, and no. 27 (1062), July 6, 1961, art. 291. "Economic crimes" include "large-scale" plundering or embezzling of state and public — but not private — property, black-market operations, counterfeiting, and speculation in foreign currencies. All of these activities, when carried out on a scale less than "large," are punishable only by imprisonment, exile, confiscation of property, or some combination of the three. Present Soviet criminal law may thus be said to convert "quantitative" into "qualitative" differences, in good "dialectical" fashion: A relative difference between crimes — say, embezzlement of n rubles and embezzlement of $n + m$ rubles — is reflected in an absolute difference between the respective punishments — imprisonment or exile in the one case, execution in the other.

33. Natural law theories would form a convenient platform from which to attack the abuses of Soviet positive law; this is probably why all such theories are cavalierly dismissed by Soviet theorists. Nearly two centuries ago, in the aftermath of the French Revolution, Elizabeth II condemned Russian versions of natural law theory as "alien and subversive." Today "bourgeois theorists" are charged with using natural law theories to rationalize social inequality, sanctify private property, and justify meddling in the internal affairs of Soviet bloc countries in defense of "human rights" which "allegedly exist independently of given political systems." (15 *BOLSHAYA SOVETSKAYA ENTSIKLOPEDIYA* 543 [2nd ed., 1952])

just before going out forever, so proletarian "statism" flares up hugely as a preliminary to its final withering away.³⁴

The 1961 Party Program asserts that both crime and punishment will disappear under full communism — antisocial behavior being prevented by "education" and timely "social influence"; but for the present, criminals must be punished with utmost severity.³⁵ The lives of several hundred Soviet citizens, convicted only of crimes against property, have already been consumed in the "final" flame of a punitive apparatus which allegedly serves socialist legality. The urgent question raised by Khrushchev's penal policy — as by Lenin's, Trotsky's, and Stalin's before him — is when, and indeed whether, the flame will ever subside. The "withering away" of capital punishment seems quite as remote in 1963 as the withering away of the state had seemed to Vyshinski in 1937.

The extension of capital punishment to "economic crimes" raises both sociological and ethical questions of the utmost seriousness.

1) *Deterrence*. Will the well-publicized threat of the firing squad deter Soviet citizens from "large-scale" embezzling, counterfeiting, or speculating in foreign currencies? The authorities apparently believe that it will; otherwise they would scarcely have adopted a measure at once so Draconian, so much at variance with the Russian Marxist tradition, and so calculated to stir misgivings, if not revulsion, among the Party faithful and fellow travellers in all parts of the world. Perhaps they assume that "economic crimes" are crimes of calculation rather than of passion, and that considerations of probable punishment will enter into the calculation of any potential "economic criminal." There is strong evidence that the death penalty does not effectively deter potential murderers moved by avarice. Would the death penalty have greater deterrent force in the case of similarly motivated embezzlers or counterfeiters?

2) *Justification*. The categories which the indignant young Marx applied (in 1844) in criticizing "bourgeois morality" seem peculiarly applicable to the case of "economic crimes." To punish a man for what he *has* rather than what he *is*; to take a man's life because he has taken the "state's" property — seems very close to what Marx called *Verdinglichung* (reification) and *Entfremdung* (alienation). Capital punishment for crimes against property seems involved in a "fallacy of misplaced value," demanding not an eye for an eye, or a life for a life, but a *life* for a *thing*. Such "reifica-

34. L. D. TROTSKY, *TERRORISM I KOMMUNIZM* 158-159 (1920). In English: *TERRORISM AND COMMUNISM* 170 (Ann Arbor, 1961).

35. *PROGRAMMA KPSS*, pt. II, sec. iii, subsec. 1 (*THE NEW SOVIET SOCIETY* 177).

tion” completely inverts the humanistic values which the young Marx, and many early Russian Marxists, held and fought for.

In the face of the continuing Soviet executions for “economic crimes,” it would appear beyond dispute, not only that “Communist ethics” has become increasingly legalistic in recent years, but — what is more alarming — that “socialist legality” has become increasingly immoral. This immorality is evident when the principles of current “socialist legality” are measured against any humanistic ethical criterion — whether the Kantian categorical imperative, a natural law theory, or any other ethical position which recognizes the essential worth and dignity of the individual human person. Contemporary defenders of “socialist legality” and Communist ethics are committed to no such principle; as we have seen, they repudiate in cynical deed what Trotsky had repudiated in sardonic words — the “Kantian-clerical, vegetarian-Quaker chatter about the ‘sanctity of human life.’”³⁶

36. TROTSKY, *op. cit. supra* note 34, at 61 (TERRORISM AND COMMUNISM 63).