

**MARXISM, COMMUNISM AND LAW:
HOW MARXISM LED TO LAWLESSNESS
AND GENOCIDE IN THE FORMER SOVIET UNION**

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The writings of Marx and his collaborator Engels are in effect the New Testament of Communism. Lenin is the Pauline apostle to the gentiles who adopted the gospel to a new generation and a new people. Stalin is the Soviet Emperor Constantine, who make of the new religion a State Orthodoxy... It was on the foundation of Marxian analysis of the origin, growth, and decline of societies that the Russian Revolutionaries set out to construct a new social order. Led by Lenin, these men were thoroughly grounded in Marxism and were fanatical believers in its doctrines.

Harold J. Berman, *Justice in Russia* (1950) 8-9.

Abstract

This article discusses Marxism and how it has been interpreted and applied in communist countries that have claimed Marxism as their official state ideology, particularly the former Soviet Union. It looks into whether the undercurrent of violence and lawlessness so often exhibited by communist regimes may in actual fact represent a natural consequence of Marxist ideology itself. Marx, after all, basically viewed law in terms of guaranteeing and justifying class oppression. On this basis he defined the state and all its laws as mere instruments of class oppression that would have to disappear when the last stage of communism were at last accomplished. Meanwhile, Marx wrote, law in a truly socialist state must be no more than the mere imposition (by a socialist elite) of the ‘dictatorship of the proletariat’. The practical

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effects of such Marxist doctrines, once adopted by governments that have embraced Marxism as their official ideology, is the principal object of analysis in this article.

I INTRODUCTION

Marxism is primarily a social, political, and economic theory that interprets human history through a progressive prism. Marx claimed to have discovered a dialectical pattern controlling human development that would lead humanity to the advent of a communist society of classless individuals. On this basis Marx defined the state and all its laws as mere instruments of class oppression that would have to disappear when the final stage of societal progress was achieved. Marxism was the theory and faith of the founders of the Soviet Union. It functioned there as the ideological goal and self-justification for the entire Soviet experiment. This article discusses Marxist theory in general and how it was developed and applied during the seven decades of the Soviet Union (1917-1991), a country that claimed Marxism as its official ideology.

II MARXISM AND RELIGION

In order to more properly understand Marxism, it is necessary to explore its religious dimensions. Marxism is not only a project of social, economic and political transformation but also a form of secular theology. In many respects Marxism is no less religious or dogmatic than the traditional religions of Judaism, Christianity and Islam. Indeed, Marxism contains within itself a complete worldview that includes an explanation of the origin of the universe and an eschatological theory about the final destiny of humankind.

Theologically, Marxism declares that God does not, cannot, and must not exist. Marxism is based on the conviction (a genuine opiate of the people?) that history is progressing towards a certain end, and that the proletariat (to be guided by the ‘vanguard’ of the proletariat) is the redemptive force of humanity. Thus, Marx declared: ‘History is the judge, its executioner the proletariat’.¹ This provides the illusion that the proletariat is omnipotent, at least as method²; and that it is ‘destined to fulfil this mission in a manner as organic and ineluctable as a process of nature’.³ Marxism is therefore endowed with ‘prophetic dimensions and certainties [that are] central parts of its message and its appeal’.⁴ As Martin Krygier explains, ‘if we focus on its most obvious analogies to the world religions – its institutionalization and its emancipatory and eschatological themes, rather than its purely critical or theoretical ones – then clearly institutionalized Marxist has a lot in common with orthodox religions’. And yet, as Krygier also points out, the legacy of Marxism and the legacy of religions like Christianity and Judaism differ in at least two fundamental aspects:

The great world religions have endured for millennia and, if they have been involved in the infliction of pain, they have also been responsible for glorious achievements – achievements of the spirit; cultural, artistic, civilizational, architectural, monuments, both literal and metaphorical; and in certain case, if Weber is to be believed, significant economic achievements. Institu-

¹ Cited in Paul Johnson, *The Intellectuals* (New York/NY: Harper Perennial, 1988), 55.

² Milovan Djilas, *The New Class: An Analysis of the Communist System* (London: Thames and Hudson, 1957), 6.

³ Andrzej Flis, ‘From Marx to Real Socialism: The History of a Utopia’, in Krygier (ed.), *Marxism and Communism: Posthumous Reflections on Politics, Society, and Law* (Amsterdam: Rodopi, 1994), 25

⁴ Martin Krygier, ‘Marxism, Communism, and Narcissism’ (1990) 15(4) *Law & Social Inquiry* 707, 712.

tionalized Marxism lasted 70 years [in Russia]. In that short time it has cost millions of lives, enslaved millions of people and reduced once-civilized countries to dilapidated ruins. Its spiritual legacy is nil. Almost its only moral achievement (not small) has been the tempering of those characters that did not break or bend in hard times. The only great literature for which it was clearly responsible, and almost the only great literature produced under it, has been a literature of opposition and suffering. The less said about its monuments the better.⁵

Since Marx believed he had discovered the secret of perfecting the human condition, politics became for him a secular religion, whereby the ideal of human salvation must be accomplished by the belief in the proletariat's revolutionary actions in history.⁶ Marxist history was interpreted progressively by Marx, moving by means of ongoing social struggle. He believed that the final stage of human progress transcends class struggle, when the eschatological consummation of global communism is at last achieved.⁷ Comparing such Marxist eschatology with that contained in the Bible's *Book of Revelation*, David Koyzis comments:

Much as the scriptures teaches the ultimate victory of Jesus Christ over his enemies and the reign of the righteous over the new earth in the kingdom of God, so also does Marxism promise an eschatological consummation of human history. This does not, of course, mean that there is not a battle to be waged or work to be done. Indeed, there is much of both. But in fighting for

⁵ *Ibid*, 712.

⁶ According to Andrzej Flis, "*Marxism is more of a... socialist credo than the effect of investigations into the real dynamics of the workers' movement. Marx's conviction that the proletariat would evolve a revolutionary consciousness was not a scientific opinion but an ungrounded prophecy. Having arrived at his theory of the proletariat's historic mission on the basis of philosophical deduction, he later sought empirical evidence for it*". – Flis, above n 3, 24

⁷ David T. Koyzis, *Political Visions & Illusions* (Downers Grove/Ill: InterVarsity Press, 2003), 174.

the classless society, the proletariat does so fully confident that it is fighting not against history but with it.⁸

If the ‘god’ of Marxism is to be understood as a dialectical historical process toward communism, then its ‘devil’ constitutes the ‘reactionaries’ who either deny or hinder the eschatological consummation of communism. These ‘reactionaries’ are destined to receive their final destruction in the fires of global revolution.⁹ Hence, in the opinion of Leonardo Boff, a leading contributor to Marxist-oriented liberation theology in Latin America, one day the world will face a ‘final apocalyptic confrontation of the forces of good [communists] and evil [anti-communists], and then the blessed millennium’.¹⁰ The violent suppression of those ‘reactionaries’, he says, will represent the advent of ‘God’s Kingdom on Earth, and the advent of a new society of a socialistic type’.¹¹

In his 1987 book, *O Socialismo Como Desafio Teológico* (*Socialism as a Theological Challenge*), Boff contended that the former communist regimes in Eastern Europe, especially the former Soviet Union and Romania, ‘offer[ed] the best objective possibility of living more easily in the spirit of the Gospels and of observing the Commandments’.¹² Returning from a visit to Romania and the former Soviet Union in 1987, just a few years before the collapse of communism in Eastern Europe, this former Catholic priest stated that these notorious regimes were ‘highly ethical and... morally

⁸ *Idem*, 172.

⁹ H.M. Morris and M.E. Clark, *The Bible has the Answer* (Green Forest/AR: Master Books, 2005), 340-1.

¹⁰ Leonardo Boff, *Salvation and Liberation* (Melbourne/Vic: Dove, 1984), 106.

¹¹ *Ibid*, 116.

¹² See Leonardo Boff, *O Socialismo Como Desafio Teológico* (Petrópolis/RJ: Vozes, 1987), 682.

clean', and that he had not noticed any restrictions in those countries on freedom of expression.¹³

Marxist theologians like Boff refuse to accept any possibility of peaceful coexistence between people of different classes. For individuals like him, every religious person has the moral obligation 'to rouse the working class to an awareness of class struggle and the need to take part in it'.¹⁴ He does not regard it as a 'sin' for anyone to physically attack someone from a supposedly 'oppressive' class, since this would be committed by a person who is socially 'oppressed' and thereby involved in the struggle to remove social inequalities.¹⁵ Addressing this kind of radical thinking, Cardinal Joseph Ratzinger, now Pope Benedict XVI, states:

The desire to love everyone here and now, despite his class, and to go out to meet him with the non-violent means of dialogue and persuasion, is denounced as counterproductive and opposed to love. If one holds that a person should not be the object of hate, it is claimed nevertheless that, if he belongs to the objective class of the rich, he is primarily an enemy to be fought. Thus the universality of love of neighbour and brotherhood become an eschatological principle, which will only have meaning for the 'new man', who arises out of the victorious revolution.¹⁶

¹³ Joseph A. Page, *The Brazilians* (Reading/MA: Addison-Wesley, 1995), 349.

¹⁴ 'Liberation Theology', *The Angelus*, Vol. VIII, No. 6, June 1985 (Reprinted from 'The Economist', October 13th, 1984), at:
<http://www.sspix.ca/Angelus/1985_June/Liberation_Theology.htm>

¹⁵ Millard J. Erickson, *Christian Theology* (Grand Rapids/MI: Baker Book House, 1983), 592.

¹⁶ Joseph Ratzinger (Pope Benedict XVI), *Instruction on Certain Aspects of Theology of Liberation* (Rome: Congregation for the Doctrine of the Faith, August 6th, 1984), at
<http://www.newadvent.org/library/docs_df84lt.htm>

Radical Marxism, indeed, regards the advent of the communist utopia as an end in itself. Unlike a normal error of judgement, which can be discovered and corrected by the facts available, radical Marxism, according to François Furet, can more easily be discussed as a system of beliefs based on ‘psychological investment, somewhat like a religious faith even though its object [is] historical’.¹⁷ It is something that the believers must realise at any social cost. To realise Marxism, any means are justified, including violence and deceit.¹⁸ After all, under the communist paradise, there will be no more social injustice and everybody will be treated equally. The sum of violent actions is alleged to actually be a good thing, because this may potentially accelerate the advent of the great socialist utopia. In other words, anything that a person does to advance such a noble ideal is never to be regarded as objectively wrong or unethical. Likewise, all the failures of

¹⁷ François Furet, *The Passing of an Illusion: The Idea of Communism in the Twentieth Century* (Chicago: The University of Chicago Press, 1999), ix.

¹⁸ Believing, as Marx did, that violence was an essential element in the socialist revolution, people like Lenin, one of his most radical disciples, never quailed before the need to employ terror. He had inherited from Marx the tradition of justification for terror. Paul Johnson writes: “*Lenin always insisted that Marxism was identical to absolute truth... Believing this, and believing himself the designated interpreter ... Lenin was bound to regard heresy with even greater ferocity than he showed toward the infidel. Hence the astonishing virulence of the abuse which he constantly hurled at the heads of his opponents within the party, attributing to them the basest possible motives and seeking to destroy them as moral beings even when only minor points of doctrine were at stake. The kind of language Lenin employed, with its metaphors of the jungle and the farmyard and its brutal refusal to make the smallest effort of human understanding, reclass the odium theologicum which poisoned Christian disputes about the Trinity in the sixth and seventh centuries, or the Eucharist in the sixteenth. And of course once verbal hatred was screwed up to this pitch, blood was bound to flow eventually (55)... Just as the warring theologians felt they were dealing with issues which determine whether or not countless millions of souls burned in Hell for all eternity so Lenin knew that the great watershed of civilization was near, in which the future fate of mankind would be decided by History, with himself as its prophet. It would be worth a bit of blood: indeed a lot of blood*” – Paul Johnson, *Modern Times: The World from the Twenties to the Nineties* (New York/NY: HarperPerennial, 2001), 56.

communism are ignored by those whose faith persists amidst all the evidences provided, in the great hope that in some newly discovered land of innocence its feasibility will at last be proven. Thus Marxism becomes for them an object of faith and a spiritual ideal. As Michael Green points out,

Whatever the pogroms of Lenin, Trotsky, Stalin; whatever the revelations of the Gulag Archipelago and the terrifying brutality of the Soviet concentration camps; whatever the rapes of a Hungary, a Czechoslovakia, an Afghanistan, the faith of the committed [Marxist] persists. All personal judgement is obscured in the name of faith; faith is absolutely essential if everything is not to come tumbling round his ears ... Logically, of course, there is no reason why a modern Communist should bother to work for a utopia in which he will never share: this is one of the surds in Communism. But he is inspired by the vision, attracted by the prospect, stimulated by the struggle and warmed by the companionship. The millennial utopia held out by Communism ... is both a pale imitation of and unconsciously inspired by the Christian teaching of the Kingdom of God...¹⁹

There is, however, a remarkable difference between Christianity and Marxism. Christianity has always attracted particularly the poor and the outcast, whereas Marxism has always had a special appeal to the intellectual elite. Marxism applies a pseudo-scientific formula for the eschatological transformation of the imperfect man into an ideal communist man. The discipline most closely to this Marxist utopia is theology, since Marxism is an instrument of social engineering as well as a doctrine of redemption. As a doctrine of redemption, Marxism offers intellectuals the perfect consumma-

¹⁹ Michael Green, *I Believe in Satan's Downfall* (London: Hodder & Soutgton), 159-161.

tion of the Platonic fantasy of the philosopher king always surviving in the intellectual's subconscious mind.²⁰

As a religion properly suitable for the intellectual elite, Marxism seeks to provide intellectuals with a cause, a sense of mission, a conviction that their lives are worthwhile because history needs them to lead the working classes toward the advent of a new society and a new man. Marxism calls upon them self-sacrifice, in which freedom and historical determinism are combined in a perfect dialectical unit. Other religions have postponed happiness as a gift in another realm, as a reward for the individual in his or her afterlife. Marxism, however, promises reward still on this earth, claiming to speak for the foreseeable future of mankind. Glendon, Gordon and Osakwe thus provide this interesting explanation of Marxism's great appeal to the intellectual elite:

As a world secular religion, Marxism has its dialectic which is akin to Calvinist predestination. Like other creeds, Marxism has its sacred text, its saints, as well as its holy city. If Marx is its Messiah, Lenin is its St Paul. As is true of many other world religions, Marxism too has witnessed a luxuriant proliferation of sects and subsects – the deviationists, the revisionists, the fundamentalists, the modernizers, and so on ... But after all these analogies have been made, what remains to be emphasized is how different Marxism is from other religious. Unlike Christianity, for instance, its appeal has always been first to the intellectuals. Christianity was resisted by the ancient

²⁰ *“Marxism offers the intellectual leadership in the new world somewhere in this earth. Feudal society has been ruled by military lords, capitalist society by money-minded businessmen, but in the socialist society the intellectuals would rule in the name of the proletariat... The Platonic fantasy of the “philosopher king”, always surviving in the intellectual's subconscious mind, would be finally realized in historical actuality”.* – M.A. Glendon, M.W. Gordon and C. Osakwe, *Comparative Legal Traditions* (St Paul/MN: West Publishing, 1985), 676.

philosophers, who regarded it as an aberration of the lower classes; it spread upwards. Marxism, on the contrary, has been carried out by the intellectuals to the proletarians and peasants. To intellectuals it has appealed as no other doctrine has because it integrated for them most fully discordant psychological motives. In Marxism one finds for the first time a combination of the language of science and the language of myth – a union of logic and mysticism. Scientific criticism in the 19th century has deprived intellectuals of their God and left them uncertain as to the foundation of their ethics. Scientific agnosticism was an austere self-denial in a world inherently lifeless and undramatic, a world with neither purpose nor climax. Social movements had assumed the character of a superficial altruistic anodyne ungrounded in the nature of the universe. In Marxism, however, one's ideals could be taken as expressions of an underlying historical necessity in things.²¹

III MARXISM AND SOCIAL DARWINISM

There is a rather close relationship between Charles Darwin's biological evolution and Karl Marx's revolutionary socialism. Darwin's attempt to demonstrate how humans evolve from animals by a blind process of natural selection was deeply inspirational for Marx, who considered that the primacy of social classes paralleled the alleged inequality of the human races. As revealed in numerous of his articles and pamphlets, Marx believed that Darwinism amounted to 'a glorious corroboration and completion' of his own materialist philosophy.²² Marx thus argued in a letter to his close friend and co-writer Friedrich Engels that despite Darwin's 'crude English

²¹ *Idem*, 676.

²² Cited in Max Eastman, *Marx, Lenin and the Science of Revolution* (London; George Allen & Unwin, 1926), p.67.

style', his work 'contains the basis in natural history for our view'.²³ As Engels pointed out, 'just as Darwin discovered the law of evolution in organic nature, so Marx discovered the law of evolution in human history'.²⁴ He believed that Marxism was 'destined to do for history what Darwin's theory has done for biology'.²⁵ According to Eastman,

Darwin's achievement was to banish the ethico-deific out of biology, establish the fact of evolution upon a scientific basis, and point out a dominating principle of investigation and matter-of-fact explanation. And Marx made almost exactly the same contribution to the general science of history. He put in the place of moralistic and religious and poetic and patriotic eloquences, a matter-of-fact principle of explanation, ... and he established – or at least first adequately emphasized – the fact that there has been an evolution, not only in the political forms of society, but in its economic structure.²⁶

Marx therefore relied on Darwinian evolution to provide the revolutionary socialist movement with a more or less scientific basis. He needed such a 'scientific' element of evolution to justify the radical struggle for social change in an existing world that 'would change simply because it had to change, that it bore the seeds of its own opposition and destruction'.²⁷ Two concepts of socialism merges in Marx's writings: one castigated by him as 'Utopian Socialism', an ethical ideal to be achieved by political action; another 'Scientific Socialism', which he thought to be the 'most scientific'

²³ Paul Blackledge, 'Historical Materialism: From Social Evolution to Revolutionary Politics', in P. Blackledge and G. Kirkpatrick (eds.), *Historical Materialism and Social Evolution* (London: Palgrave Macmillan, 2002), 11.

²⁴ Frederick Engels, *Selected Works, 3 vols* (New York/NY: International Publishers, 1950), 153. See also Milovan Djilas, above n 2, 2.

²⁵ Eastman, above n 22, 67.

²⁶ *Ibid.*

²⁷ Djilas, above n 2, 6.

form of socialism and a natural result of human evolution. Marx claimed to have proven the inevitability of the latter.²⁸ As a philosopher of his time, he believed that God had been disproved by the ‘inexorable forces’ of science, reason and progress.²⁹ As a result, Darwinism became an important element of Marxist theory, receiving Darwin’s theory of evolution as a ‘support from natural science’.³⁰ In a personal letter to Engels, Marx writes that Darwin’s *Origin of Species* provided him ‘with the basis in natural science for the class struggle in history’.³¹ As a sign of gratitude, he sent Darwin the second edition of *Das Kapital*. On the title page he inscribed: ‘Mr Charles Darwin/On the part of his sincere admirer/(signed) Karl Marx/London 16 June 1873’.³²

In Darwin’s biological model, evolutionary change in the natural world is the product of the combination of variation between individuals, heredity, selection and the struggle for survival. In contrast to this model of evolutionary causation, Marxian social theory legitimises a mechanically deterministic reading of historical progress. As Blackledge points out, ‘Marxist social theory requires a sophisticated evolutionary component to underpin its revolutionary political theory. For such a politics will be strengthened if it is constructed within the parameters that are contextualised by the historical evolution of the forces of production. Moreover, through its incorpora-

²⁸ Flis, above n 3, 25,

²⁹ See H.J. Jaffa, ‘What Were the Original Intentions of the Framers of the Constitution of the United States?’, in H.V. Jaffa, B. Ledewitz, R.L. Stone, G. Anastaplo (eds.), *Original Intent and the Framers of the Constitution* (Washington/DC, Regnery Gateway, 1994), 49.

³⁰ Cited in Eastman, above n 22, 67.

³¹ Karl Marx and Friederich Engels, *Selected Correspondence* (New York/NY: International Publishers, 1942), 125.

³² S Kirschke, ‘Darwin Today’, Geissler, E. and Scheler, W. (eds.) (Berlin: Akademie-Verlag, 1983), 55.

tion of an evolutionary component Marxism is better able to ensure that history is understood to be ‘more than just a series of particular and unique events, [but] reveals a certain directionality’.³³

Marx wholeheartedly endorsed English rule in India as a tool of history in bringing about social evolution, and embraced Darwinism to also justify racism and anti-Semitism, although he was ethnically Jewish himself. For instance, he constantly resorted to phrases like ‘dirty Jew’ and ‘Jewish Nigger’ to describe his political adversaries.³⁴ About the famous German socialist Ferdinand Lassalle, Marx commented: ‘It is not perfectly clear to me that, as the shape of his head and the growth of his hair indicates, he is descended from the Negroes who joined in Moses’ flight from Egypt (unless his mother or grandmother on the father’s side was crossed with a nigger). This union of Jew and German on a Negro base was bound to produce an extraordinary hybrid’.³⁵

In *On the Jewish Question*, Marx endorsed the anti-Semitism of Bruno Bauer, the anti-Semitic leader of the Hegelian left who published an essay demanding that the Jews abandon Judaism completely. In Marx’s opinion, the ‘money-Jew’ was ‘the universal anti-social element of the present time’. To ‘make the Jew impossible’, he argued, it is necessary to abolish the ‘preconditions’, the ‘very possibility’ of the kind of money activities which produced him.³⁶ Marx thus concluded that both the Jew and the Jewish religion should disappear if the world were to be able to finally abolish ‘the Jewish attitude to money’. As he put it, ‘in emancipating itself from

³³ Blackledge, above n 23, 11.

³⁴ Johnson, above n 1, 62.

³⁵ Mark-Engels, vol. xxx, 259. Cited in Johnson, above n 1, 62.

³⁶ *Ibid*, 57-58.

hucksterism and money, and thus from real and practical Judaism, our age would emancipate itself'.³⁷

Finally, Marx sincerely believed not only in the evolution of the races and society but also that history was invariably on his side. So it was easy for him to regard his political adversaries as 'reactionaries' who deserved not legal rights and protection, but severe punishment for retarding the march of humanity.³⁸ Marxist theory denies that anything can be properly called 'right' unless it advances socialism. In such a manner a radical ideology can be applied with the same catastrophic results that occur when radical ideas are applied to racial issues. From the standpoint of *Realpolitik* it is entirely reasonable to suggest that the class genocide carried out by Marxist-oriented regimes bears striking resemblance with the race genocide in Nazi Germany. According to Stephane Courtois,

In Communism there exists a socio-political eugenics, a form of social Darwinism. ... As master of the knowledge of the evolution of social species, Lenin decided who should disappear by virtue of having been condemned to the dustbin of history. From the moment that a decision had been made on a 'scientific' basis... that the bourgeoisie represented a stage of humanity that had been surpassed, its liquidation as a class and the liquidation of the individuals who actually or supposedly belonged to it could be justified.³⁹

³⁷ T.B. Bottomore (ed.) *Karl Marx: Early Writings* (New York/NY: McGraw-Hill, 1963), 34-37.

³⁸ Dinesh D'Souza, *What's so Great about Christianity* (Washington/DC: Regnery, 2007), 220.

³⁹ Stéphane Courtois, 'Conclusion: Why?' in S. Courtois et al (eds.), *The Black Book of Communism: Crimes, Terror, Repression* (Cambridge/MA: Harvard University Press, 1999), 752.

IV MARXISM AND HEGELIANISM

No one can deny the historical influence of G.W.F. Hegel (1770-1831) upon the formation of Karl Marx's methodology. Hegel was a German philosopher who described the state as a perfect organic unity. In such a scheme the individual owes his or her physical and spiritual existence to the state. The state is therefore transformed into the new absolute, the new god of being. Indeed, Hegelianism sees in the state a perfect 'organism' so that everything the state does and turns into law must acquire the status of absolute perfectibility and intrinsic goodness.⁴⁰ Hegel's insistence upon the absolute moral authority of the state is found in passages such as this:

The universal is to be found in the State. The State is the Divine Idea as it exists on earth... We must therefore worship the State as the manifestation of the Divine on earth, and consider that, if it is difficult to comprehend Nature, it is infinitely harder to grasp the Essence of the State... The State is the march of God through the world... The State must be comprehended as an organism... To the complete State belongs, essentially, consciousness and thought. The State knows what it wills... The State... exists for its own sake... The State is the actually existing, realized moral life'⁴¹.

The above excerpt reveals the close link between Hegelianism and totalitarianism. Evolutionary social theory, as it is conceived by Hegel, makes legality intrinsically relative, changing and arbitrary. The only thing that is never relative is the state itself as a mechanism of constant social change.

⁴⁰ Karl Popper, *The Open Society and its Enemies*, Vol.II (London: Routledge, 2003), 45.

⁴¹ Georg Hegel, *Philosophy of Law*, parags. 258, 269, 270, 272. Cited in Popper, above n 40, 35.

In absolutising the state, Hegelianism leads not only to positivism but also to totalitarianism. The followers of Hegel in absolutising the state are the Fascists and the Communists, i.e., the radical Marxists.

But perhaps the most significant connection between Hegelianism and Marxism lies not in their conceptions of the state, but in the dialectical method relied by Marx to establish his own political theories of dialectical and historical materialism.⁴² Hegel saw the world as an evolving organism. He argued that scientific (and political) progress is not smooth but moves dialectically, according to a conflicting philosophical dialogue. According to this theory, person A states something, person B argues the opposite, and then the combining elements of both ideas come about as a better or more evolved idea. In applying this dialectical premise to history, Hegel contended that truth is subjective and that it is impossible to judge cultural norms by any objective standard. Furthermore, Hegel's theory also maintains that the historical progress of humanity does not depend on the search for the truth, but that it is affected by an ongoing conflict of human ideas. As a result, Gabriël Moens writes, 'in the absence of a universal norm the morality of the state was defined by the state itself... Thus the morality of the individual came to be subordinated to the morality of the state: where the individual acted under the dictates of the state, the individual was subject to the moral standards of the state'.⁴³

⁴² J.M. Kelly, *A Short History of Western Legal Theory* (Oxford: Oxford University Press, 2007), 309.

⁴³ Gabriël A. Moens, 'The German Borderguard Cases: Natural Law and the Duty to Disobey Immoral Laws', in S. Ratnapala and G.A. Moens (eds.), *Jurisprudence of Liberty* (Sydney/NSW: Butterworths, 1996), 161.

Marx agreed with Hegel about the inevitable progress of history. However, he rejected the belief that anything intellectual could be the driving force in human history. ‘Hegel’s dialectics’, Marx stated, ‘is the fundamental principle of all dialectic only after its mystical form has been sloughed off. And that is precisely what distinguishes my method.’⁴⁴ Believing that material forces are the real elements behind human progress,⁴⁵ Marx replaced Hegelianism with his own dialectical materialism, in which the forces in conflict are no longer ideas or principles, but the more tangible interests of social classes in their struggle over the ownership and control of material resources.⁴⁶ When history is understood according to this dialectical process, political and legal institutions are regarded as corresponding to the economic interests of the ruling economic class. The legal system is therefore perceived as a mere superstructure that suits the material needs of the dominating class.⁴⁷ Accordingly, the rule of law is no more than another ideological mechanism through which that class is able to eventually justify its grip on the means of production and the sources of wealth. As Marx put it,

⁴⁴ *Hegel’s Dialectic – Marx to Kugelmann*, cited in Sidney Hook, *From Hegel to Marx: Studies in the Intellectual Development of Karl Marx* (New York/NY: Columbia University Press, 1994), 16.

⁴⁵ M.D.A. Freeman writes: “*For Hegel, the law of contradiction produced, in the form of thesis and antithesis, a solution by way of synthesis on a higher level. This he applied to opposing forces in nature or society. Marx seized on this approach towards history and society, particularly with reference to the ‘class-conflict’... Marx’s dialectic was different from Hegel’s. Marx rejected Hegel’s idealist philosophy and substituted materialism. A combination of Hegel’s dialectic and a materialist theory of knowledge produced dialectical materialism, and this, applied to human relations within society, particularly to their evolution and development, Marx called historical materialism.*” – M.D.A. Freeman, *Lloyd’s Introduction to Jurisprudence* (London: Sweet & Maxwell, 2008), 1130.

⁴⁶ Kelly, above n 42, 310.

⁴⁷ *Idem.*

I was led by many studies to the conclusion that legal relations as well as forms of state could neither be understood by themselves, nor explained by the so-called general progress of the human mind, but that they are rooted in the material conditions of life, which are summed up by Hegel after the fashion of the English and French writers of the eighteenth century under the name ‘civil society’, and that the anatomy of civil society is to be sought in political economy [i.e. in economic forces]... In the social production which men carry on they enter into definite relations of production correspond to a definite stage of development of their material powers of production. The totality of these relations of production constitutes the economic structure of society – the real foundation, on which legal and political superstructure arise, and to which definite forms of social consciousness correspond.⁴⁸

V MARX’S THOUGHTS ON LAW

Born in Trier in the Rhineland in 1818, Karl Marx was the son of a Jewish lawyer, recently converted to Christianity. He received systematic university education, initially in Bonn and then in Berlin, over 1835-1841. Berlin had one of the best universities in the world at the time, particularly in law and philosophy. There Marx took his legal studies very seriously, intending to become a lawyer. As law student he attended the lectures of Karl von Savigny, the leading theorist of the German Historical School of Law. Savigny argued, from a historicist-relativist perspective, that law is only part of history and not a branch of applied ethics. It is evinced from a letter to his father that Marx had read and appreciated *Right of Possession*, a book in which Savigny argues that in place of property as a natural right of the individual, the great bulk of humanity had lived in societies whereby pos-

⁴⁸ Karl Marx, *A Contribution to the Critique of Political Economy*, tr. N.I. Stone, Chicago, 1904, preface, p. ii; cited in Kelly, above n 42, 310.

session of the land was communal and conditional. Such argument is said to have provided an indispensable basis for Marx's later work on the development of property relations.⁴⁹

Marx's ideas about law are expressed mainly in the *Communist Manifesto*, which he published in collaboration with his close revolutionary friend Friedrich Engels in 1848. There he contends that 'law, morality, religion, are so many bourgeois prejudices, behind which lurk in ambush just as many bourgeois interests'. Marx then goes to criticise the whole Western constitutional tradition of individual rights to life, liberty and property as a mere expression of bourgeois' prejudices and aspirations. 'Your very ideas', he said,

are but the outgrowth of the conditions of your bourgeois production and bourgeois property, just as your jurisprudence is but the will of your class made into a law for all; a will, whose essential character and direction are determined by the economic conditions of existence of your class... The selfish misconception that induces you to transform into eternal laws of nature and of reason, the social forms springing from your present mode of production and form of property – this misconception you share with every ruling class that has preceded you.⁵⁰

⁴⁹ Gareth Stedman Jones, 'Marx's Contribution: Prologue', in Karl Marx and Friedrich Engels, *The Communist Manifesto* (London: Penguin, 2002), 73. Jones explains: "As a law student in 1836-7, Marx had attended Savigny's lectures on the Pandects, and it is clear from a letter to his father in 1837 that he had read Savigny's *Right of Possession*. It also seems certain that he would have been familiar with the controversy, which became public in 1839, between Savigny and the Hegelian law professor Eduard Gans precisely over the relationship between possession and right". – 157-8.

⁵⁰ Karl Marx and Friedrich Engels, *Manifesto of the Communist Party*, ch.2; cited in Kelly, above n 42, 329.

Marx perceived law primarily as an instrument of class domination that was constrained by certain economic relations.⁵¹ As a result, the legal phenomenon was considered essentially superstructural, dependent for their form and content upon determining forces emanating from the economic basis of society. For if the first premise presented by him was correct, David and Brierley commented,

Law is only a superstructure; in reality it only translates the interests of those who hold the reins of command in any given society; it is an instrument in the service of those who exercise their 'dictatorship' in this society because they have the instruments of production within their control. Law is a means of expressing the exploited class; it is, of necessity, unjust – or, in other words, it is only just from the subjective point of view of the ruling class. To speak of a 'just' law is to appeal to an ideology – that is to say, a false representation of reality; justice is no more than an historical idea conditioned by circumstances of class.⁵²

Marx considered that there can be nothing intrinsically good in the existence of law. Arising from the conflict between social classes as the need to control such a conflict, positive laws would cease to exist with the final advent of communism. In *The Communist Theory of Law* (1955) Hans Kelsen argued that the 'anti-normative approach to social phenomena is an essential element of the Marxian theory in general and of the Marxian theory of

⁵¹ Naturally, Marx did not invent the idea of law as a mere expression of socio-economic oppression. It appears, for example, in Plato's *Republic*, where Thrasymachus advances the thesis that "each form of government enacts the laws with a view to its own advantage". Thus, legislation is presented as being one 'that which is for their – the rulers – advantage, and the man who deviates from this law they chastise as a law-breaker and a wrongdoer' (Plato, *Republic* 338d,e). Socrates contested the argument that justice is no more than the interest of the stronger, although he did not say this may not happen in practice.

⁵² René David and John Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (London: Stevens & Sons, 1985), 171.

law in particular'.⁵³ He curiously labelled such a Marxian promise that lawlessness would lead to 'perfect justice' a 'utopian prophecy'.⁵⁴

In the *Gotha Critique*, lawlessness is elevated by Marx to constitute the final stage of communism, which, according to him, 'must predate a period in which the state can be nothing but the revolutionary dictatorship of the proletariat'.⁵⁵ And since in this period the proletariat would impose its own arbitrary will upon all the other classes as the dominating social class, law in communist societies is largely identified with the interests of the ruling party within the communist state. It does not function as a vehicle to protect against oppressive action on behalf of the state. 'Law is in a sense merely an application of ruling party policy'.⁵⁶

In conclusion, Marx held a rather cynical idea of law that regarded it as a mere instrument of oppression that illustrated 'the course of political struggles and the evolution of social formations'.⁵⁷ According to him, the long-term trend of legality is not towards the common good, but towards the selfish interests of the economically dominant class. Of course in pluralistic societies comprised by different social classes law may sometimes favour the economically most powerful. But if one believes like Marx did that law is always an instrument of oppression, writes Mark C. Murphy, 'it is hard to see how legislative deliberation for the common good would be possible... On Marx's view, there can be no hope for law that is for the common

⁵³ Hans Kelsen, *The Communist Theory of Law* (London: Stevens & Sons, 1955), 36.

⁵⁴ *Idem*, viii.

⁵⁵ Karl Marx, *Critique of the Gotha Programme*, cited in Maureen Cain and Alan Hunt, *Marx and Engels on Law*. (London: Academic Press, 1979), 163.

⁵⁶ R.A. Hughes, G.W.G. Leane, A. Clarke, *Australian Legal Institutions – Principles, Structures, Organisation*. (Sydney/NSW: Lawbook, 2003), 33.

⁵⁷ Hugh Collins, *Marxism and Law* (Oxford: Oxford University Press, 1988), 9.

good... until revolution abolishes economic class distinctions, law will inevitably fail to be for the common good, and thus the task of the legislator is doomed to failure'.⁵⁸

VI MARXISM, HUMAN RIGHTS AND CLASS GENOCIDE

The main objective of classical Marxist jurisprudence is not to advance basic human rights or to support the rule of law, nor even equality before the law, but to criticise these very ideals and to reveal the putative structures of socio-economic domination. In *Principles of Communism* Engels describes such values as individual rights and equality before the law as 'fraudulent masks' worn by the bourgeoisie to legitimise their socio-economic exploitation. Indeed, all the most cherished values of liberal-democratic societies were denounced as merely being ideological tools for legitimising an exploitive economic system that would serve only the dominant economic group.⁵⁹

With this idea in mind Marx contended that basic human rights are variable and class-conditioned. They would not be fixed but constantly evolving according to the progressive stages of class warfare. In *On the Jewish Question* Marx states that 'the so-called *rights of man* are simply the rights of egoistic man, of man separated from other men and from the community'. Marx saw liberty as not founded upon the relations between free and responsible individual citizens but rather upon 'the separation of men from

⁵⁸ Mark C. Murphy, *Philosophy of Law: The Fundamentals* (Malden/MA: Blackwell, 2007), p,196

⁵⁹ Kelly, above n 42, 330.

men'. 'It is the right of such separation', he declared.⁶⁰ For him, its practical application was the right to property. 'If power is taken on the basis of rights', wrote Marx and Engels in *The German Ideology*,

then right, law, etc., are merely the symptoms of other relations upon which state power rests. The material life of individuals... their mode of production and form of interest which eventually determine each other... this is the real basis of the State... The individuals who rule in these conditions, besides having to constitute their power in the form of the State, have to give their will... a universal expression as the will of the State, as law.⁶¹

Can orthodox Marxists then support the universality of human rights while still remaining faithful to their ideological beliefs? After all, Marx argued that the 'narrow horizon of bourgeois right' should be entirely eliminated. He openly denied that any human right could possess any practical meaning apart from its own historical context. For Marx himself, human rights exist insofar as the existing dominant class creates them, accepts them, and then allows them to exist.⁶² According to Furet, 'what... Marx criticized about the bourgeois was the very idea of the rights of man as a... foundation of society'. Marx considered it 'a mere cover for the individualism governing capitalist economy. The problem was that capitalism and modern liberty were both subject to the same rule, that of the freedom or plurality – ... and he impugned it in the name of 'humanity's lost unity'.⁶³

⁶⁰ Bottomore, above n 37, 24-26.

⁶¹ Karl Marx and Frederick Engels, 'German Ideology', *Collected Works*, v.90, 329; cited in Kelly, above n 42, 329

⁶² E.A. Harriman, 'Enemy Property in America' (1924) 1 *The American Journal of International Law*, 202, cited in Eugeny B Pashukanis, *Law and Marxism: A General Theory* (London: Pluto Press, 1989), 130.

⁶³ Furet, above n 17, 10-11.

Rather than supporting the universality of human rights Marx advocated the abolition of all legal and moral rules.⁶⁴ He despised the idea of any objective standard of morality.⁶⁵ In *The German Ideology*, Marx mocks objective morality as ‘unscientific’ and an obstacle to the advance of socialism. Instead, the struggle for socialism, which Marx treats as the only fundamental good, would have ‘to eliminate the conditions of morality and circumstances of justice’.⁶⁶ Such a view of morality in practice ‘amounts to a self-consistent attack on non-relativist ethics’. As a matter of fact, Freeman writes, ‘Marx, and subsequent Marxists have singled out [morality] as ideological and relative to class interests and particular modes of production’.⁶⁷ To Marx and Engels, he adds,

‘... all that “basic laws” would do is furnish principles for the regulation of conflicting claims and thus serve to promote class compromise and delay revolutionary change. Upon the attainment of communism the concept of human rights would be redundant because the conditions of social life would no longer have need of such principles of constraint. It is also clear (particularly in the writings of Trotsky) that in the struggle to attain communism concepts like human rights could be easily pushed aside – and where’.⁶⁸

The force of Marx’s critique of human rights, according to Geoffrey Robertson, ‘led Marxist thinkers in the next century to characterize human rights as a device to universalize capitalist values, notably freedom of enterprise... Hence socialist governments were silent or suspicious of the

⁶⁴ Freeman, above n 45, 1151

⁶⁵ *Idem*, 1151.

⁶⁶ *Idem*, 1152.

⁶⁷ *Idem*, 1150.

⁶⁸ *Idem*, 1153.

concept until it proved useful to rally support for leftist causes in the later states of the Cold War'.⁶⁹ This being the case, the undercurrent of violence that is so often manifested by Marxist-oriented regimes seems to represent no more than a mere projection of the foundations of lawlessness laid down by Marx himself. As Krygier points out, the very notion that law can be used as a way of restraining power is entirely 'alien to Marx's thought about what law did or could do, alien to his ideals, and alien to the activities of communists in power'.⁷⁰ The notorious disdain for the rule of law so often manifested by communist regimes 'is no mere accident but is theoretically driven'. The writings of Marx, writes Krygier, 'had nothing good to say about the rule of law; it generated no confidence that law might be part of a good society; it was imbued with values which made no space for those that the rule of law is designed to protect'.⁷¹

In countries that have been governed by principles of Marxism the morally normative context for legality has resulted in the absolutisation of power. Indeed, communist regimes do not answer for their violent actions to any higher law or principle apart from that of advancing socialism. As a result, these regimes are extremely oppressive entities that might easily decide to eliminate certain people for no other reason than their 'belonging to an enemy class' or simply being declared 'socially undesirable'. These massacres are fully justified by the Marxist belief that a new world is coming into

⁶⁹ Geoffrey Robertson, *Crimes Against Humanity* (London: Penguin, 2008), 17.

⁷⁰ Martin Krygier, 'Introduction', in Martin Krygier (ed.), *Marxism and Communism: Posthumous Reflections on Politics, Society, and Law* (Amsterdam: Rodopi, 1994), 14.

⁷¹ Martin Krygier, 'Marxism, Communism, and Rule of Law', in Krygier (ed.), above n 70, 117

being, and that everything is permitted in order to assist its difficult birth.⁷²

Thus declared the editorial of a Soviet newspaper in 1918:

We reject the old system of morality and ‘humanity’ invented by the bourgeoisie... Our morality has no precedent, and our humanity is absolute because it rests on a new ideal... To us, everything is permitted, for we are the first to raise the sword not to oppress races and reduce them to slavery, but to liberate humanity from its shacklers... Blood? Let blood flow like water! Let blood stain forever the black pirate’s flag flown by the bourgeoisie, and let our flag be blood-red forever! For only through the death of the old world can we liberate ourselves from the return of those jackals!

In the former Soviet Union, Marxism was filtered through Lenin’s interpretation of Marxism and ‘formed an integral part of the body of ideas that produced it’.⁷³ Lenin was the founder and first leader of the Soviet Union. His main desire, as Miolvan Djlas pointed out, ‘was to construct a system out of Marx’s ideas’.⁷⁴ Indeed, Lenin regarded himself as ‘responsible for the continuation of all Marx’s work’.⁷⁵ As an orthodox Marxist he strongly believed that ‘in Marxism, there is not a single grain of ethics from beginning to end. Theoretically, it subordinates the ethical standpoint to the principle of causality, in the practice it reduces to the class struggle’.⁷⁶ According to Tismaneanu,

⁷² Nicholas Werth, ‘A State against its People: Violence, Repression and Terror in the Soviet Union’, in S Courtois et al, above n 39, 102.

⁷³ Furet, above n 17, 99.

⁷⁴ Djlas, above n 2, 4.

⁷⁵ *Idem.*

⁷⁶ *Collected Works*, vol. I, 421; cited in Freeman, above n 45, 1150.

Communism in its Leninist version (and, one must recognize, this has been the only successful application of the original dogma) was from the very outset inimical to the values of individual rights and human freedom. In spite of its overblown rhetoric about emancipation from oppression and necessity, the leap into the kingdom of freedom announced by the founding fathers turned out to be actually an experiment in ideologically driven unbound social engineering. The very idea of an independent judiciary was rejected as “rotten liberalism”. The party defined what was legal and what was not: as in Hitler’s Germany, where the heinous 1936 Nuremberg trials were a legal fiction dictated by Nazi racial obsessions, Bolshevism from the very outset subordinated justice to party interests. For Lenin, dictatorship of the proletariat was rule by force and unrestricted by any law. The class enemy had to be weeded out, destroyed, smashed without any sign of mercy.⁷⁷

In a lecture delivered at Moscow University in 1919, Lenin advocated that ‘the revolutionary dictatorship of the proletariat shall be ruled, won, and maintained by the use of violence by the proletariat against the bourgeoisie, rule that is unrestricted by any laws’.⁷⁸ Such a brutal approach to politics was fully endorsed by Soviet leaders such as Grigory Zinoviev, who once declared: ‘To dispose of our enemies, we will have to create our own socialist terror. For this we will have to train 90 million of the 100 million Russians and have them all on one side. We have nothing to say to the other 10 million; we’ll have to get rid of them’.⁷⁹ Thus the Soviet decree of January 1918 called on the agencies of the

⁷⁷ Vladimir Tismaneanu, ‘Communism and the Human Condition: Reflections on the Black Book of Communism’, *Human Rights Review*, Jan-Mar 2001, 126.

⁷⁸ ‘The Proletarian Revolution and the Renegade Kautsky, Selected Works,’ Volume II, Part 2 (Progress Publishers, Moscow, 1951), 41, cited in Martin Krygier, ‘The Rule of Law’, in N.J. Smelser and P.B. Baltes (eds.), *International Encyclopedia of the Social & Behavioral Sciences* (2001), 13404.

⁷⁹ *Severnaya Kommuna*, n.109 (19 September 1918), 2, cited in Werth, above n 72, 76.

state to ‘purge the Russian land of all kinds of harmful insects’. This was not a mere piece of legislation but an invitation to mass murder. Entire groups thus found themselves condemned to extermination as ‘insects’, including homeowners, high-school teachers, parish choirs, priests, Tolstoyan pacifists, officials of trade unions – soon all to be classified as ‘former people’.⁸⁰

In 1891, a young lawyer called Vladimir Ilych Ulianov refused to participate in the aid efforts to assist the hungry during that great famine in Russia. As recalled by a friend, ‘he had the courage to come out and say openly that famine would have numerous positive results, particularly in the appearance of a new industrial proletariat, which would take over from the bourgeoisie... Famine, he explained, in destroying the outdated peasant economy, would bring about the next state more rapidly, and usher in socialism, the state that necessarily followed capitalism. Famine would also destroy faith not only in the tsar, but in God too’.⁸¹ Thirty years later, that very law student, now a revolutionary leader called Lenin, the head and founder of the newly established Soviet Union, deeply rejoiced in the fact that the great famine of 1922 that cost the lives of 5 million people would ‘strike a mortal blow against the enemy’. The enemy in question was the Russian Orthodox Church. In a 19 March 1922 letter to the Politburo, Lenin stated:

With the help of all those starving people who are starting to eat each other, who are dying by the millions, and whose bodies litter the roadside all over the country, it is now and only now that we can – and therefore must – con-

⁸⁰ Johnson, above n 18, 70.

⁸¹ A. Beliakov, *Yunost vozhdya* (The adolescence of the leader) (Moscow: Molodaya gvardiya, 1958), 80-82, cited in Werth, above n 72, 123-24.

fiscate all church property with all the ruthless energy that we can still muster ... We must therefore amass a treasure of hundreds of millions of gold rubles (think how rich some of these monasteries are! ... No matter what the cost, we must have those hundreds of millions of rubles. This can be carried out only at the present moment, because our only hope is the despair engendered in the masses by the famine, which will cause them to look at us in a favourable light or, at the very least, with indifference. I thus can affirm categorically that this is the moment to crush the ... clergy in the most decisive manner possible, and to act without any mercy at all, with the sort of brutality that they will remember for decades ... The more representatives from the reactionary clergy and the recalcitrant bourgeoisie we shoot, the better it will be for us. We must teach these people a lesson as quickly as possible, so that the thought of protesting again doesn't occur to them for decades to come.⁸²

According to the irrefutable evidence that is now readily available, the great famine of 1932-34 was not another in a series of famines that has inflicted Russia throughout the centuries. Unlike the famine of 1921-1922, the famine of 1932-33 was the sole result of a genocidal assault inflicted by the Soviet authorities upon the people of the countryside. As a result, nearly 40 million people were affected and more than 6 million died as the direct result of an utterly artificial, systematically perpetuated famine. 'While millions of people were starving to death, the Soviet government 'continued to export grain, shipping 18 million hundredweight of grain abroad'.⁸³ As Nicolas Werth points out,

⁸² RTsKhIDNI, 2/1/22947/1-4, *cited in* Werth, above n 72, 125.

⁸³ Werth, *idem*, 164.

This famine alone, with its 6 million deaths, exacted by far the heaviest toll of Stalinist repression and constitutes an extreme and previously unknown form of violence. After having been collectivized, the kolkhoz peasants of a number of the richest agricultural regions of the country (Ukraine, North Caucasus, and Black Lands) were robbed of their entire harvests, then “punished” for having tried to resist – passively – this plundering. This punishment managed to transform the situation from one of scarcity to one of famine.⁸⁴

Forced to hand over everything they had, and lacking the means for buying food, these millions of peasants had no option but escape to the cities for their lives. On October 27th, 1932, however, Soviet authorities instructed the local authorities to ban ‘by all means necessary the large-scale departure of peasants from Ukraine and the Northern Caucasus for the towns’.⁸⁵ Desperately struggling to survive, those peasants were criminalised with a vast range of laws, such as the law from August 7th, 1932, that condemned anyone who took any potato of a collective plantation (*kolkhoz*) to either outright execution or concentration camp for ‘theft or damage of socialist property’. These laws help explain why the peasants formed the vast majority of prisoners in the Soviet camps in the 1930s.⁸⁶

The law of August 7th, 1932, opened the way to criminalisation of a significant number of minor offences, a tendency that would develop throughout the 1930s and 1940s, feeding the Soviet concentration camps called Gulags

⁸⁴ Nicholas Werth, ‘Strategies of Violence in Stalinist URSS’, in Henry Rousso (ed.), *Stalinism and Nazism: History and Memory Compared* (Lincoln/NE: University of Nebraska Press, 1999), 74.

⁸⁵ Werth, above n 72, 164.

⁸⁶ Anne Applebaum, *Gulag: A History* (London: Anchor, 2004), 47.

with millions of prisoners. Gulag is an acronym for Main Camp Administration and it has been described as the ‘quintessential expression of the Soviet system’.⁸⁷ Over time the term came to mean not only the Soviet administration of concentration camps, but also the Soviet repressive system in all its varieties of labour camps, punishment camps, women’s camps, and children’s camps.

In his seminal *Democracy and Totalitarianism*, Raymond Aron discussed ideas that have inspired both Marxist-oriented regimes and Hitler’s National Socialism. In one case, Aron said, the final result is the labour camp, in another it is the gas chamber. As Aron pointed out, the destruction of the kulaks during the collectivisation campaigns in the former Soviet Union was unquestionably analogous to the Nazi genocidal politics against ethnic groups deemed to be racially inferior.⁸⁸ Similar to Hitler’s Nazi Germany, Lenin’s Soviet Union also legitimated itself by establishing categories of ‘enemies’ or ‘sub-humans’ against whom they conveniently dehumanised and then mercilessly destroyed on a massive scale. In Nazi Germany the first targets were the crippled and the retarded, and then the Jews. In the Soviet Union, the victims were at first ‘the enemies of the people’, a category of people that could include not only alleged opponents of the regime but also national groups and ethnicities ‘if they seemed (for equally ill-defined reasons) to threaten the Soviet state’.⁸⁹ These people were arrested and brutally assassinated not for what they had done but for who they

⁸⁷ *Idem*, xxix.

⁸⁸ Raymond Aron, *Democracy and Totalitarianism* (London: Weidenfeld and Nicolson, 1968), 168.

⁸⁹ Applebaum, above n 86. ‘At different times Stalin conducted mass arrests of Poles, Chechens, Tartars, and – on the eve of his death – Jews’, xxxvi.

were.⁹⁰ The Soviet propaganda described these poor people as ‘half-animals’ and ‘as something even lower than two-legged cattle’. They referred to them in Social Darwinian terms as ‘vermin’, as ‘pollution’, as ‘poisonous weeds needing to be uprooted’⁹¹, just as Nazi propaganda had associated Jews with images of vermin, of parasites, of infectious disease.⁹² Therefore, as Tismaneanu explains,

The most important point that needs to be made is that both regimes [Nazism and Communism] are genocidal. Analytical distinctions between them are certainly important,... but the commonality in terms of complete contempt for the ‘bourgeois’ rule of law, human rights, and the universality of humankind regardless of spurious race and class distinctions is in my view beyond doubt...

The persecution and extermination of the Jews was as much a consequence of ideological tenets, held sacred by the Nazi zealots, as the destruction of the ‘kulaks’ during the Stalinist collectivization campaigns. Millions of human lives were destroyed as a result of the conviction that the sorry state of mankind could be corrected if only the ideologically designated “vermin” were eliminated. This ideological drive to purify humanity was rooted in the scientific cult of technology and the firm belief that History (always capitalized) had endowed the revolutionary elites... with the mission to get rid of the “superfluous” populations...⁹³

As early as October 1923, there were 315 concentration camps spread all over the Soviet Union. From 1929 to 1951 alone, one adult male in five had passed through them. Over that period no less than 15 million people were

⁹⁰ *Idem.*

⁹¹ *Idem.*, 102.

⁹² *Idem.*, xxxvi.

⁹³ Tismaneanu, above n 77, 130.

condemned to forced labour, with more than 1.5 million dying in prison. Six million more were collectively deported by family and indeed by ethnic group.⁹⁴ So it was precisely in the Soviet Union, and not Nazi Germany, that the first concentration camps in Europe were created.⁹⁵ Hitler knew very well of those Soviet camps and learned a lot from them in order to create his own concentration camps for Nazi Germany. As Kaminski pointed out,

The leaders of Soviet communism were the inventors and creators of ... the establishments called "concentration camps"... [They] also created a specific method of legal reasoning, a network of concepts that implicitly incorporated a gigantic system of concentration camps, which Stalin merely organized technically and developed. Compared with the concentration camps of Trotsky and Lenin, the Stalinist ones represented merely a gigantic form of implementation... And, of course, the Nazis found in the former as well as the latter ready-made models, which they merely had to develop. The German counterparts promptly seized upon these models'.⁹⁶

To complete this brief inventory of communist brutality in the former Soviet Union, it is important to remind that from 1929 to 1936, around 3.6 million people were condemned by a special court dependent on the Soviet political police. Of these, 770,000 received the death penalty, most of them (88%) during the Great Terror of 1937-39, according to 'execution quotas' that were planned and approved by the Political Bureau.⁹⁷ There is no doubt whatsoever that all this terror was caused and motivated by Marxist ideology. Marx himself had never rejected violence and terrorism when it

⁹⁴ Werth, above n 84, 73.

⁹⁵ *Idem.*

⁹⁶ Andrzej Jozef Kaminski, *Konzentrationslager*, 82-83, cited in Richard Pipes, *The Russian Revolution* (New York/NY: Vintage Books, 1997), 836.

⁹⁷ Werth, above n 84, 74.

suiting his ideological objectives: 'We are ruthless and ask no quarter from you. When our turn comes we shall not disguise our terrorism', he wrote in a letter addressed to the Prussian government, in 1849.⁹⁸ Moreover, when Marx heard about a failed terrorist attempt to murder the German Emperor Wilhelm I in 1878, a fellow communist recorded his great anger and indignation, 'heaping curses on this terrorist who had failed to carry out his act of terror'.⁹⁹ According to Paul Johnson,

That Marx, once established in power, would have been capable of great violence and cruelty seems certain. But of course he was never in a position to carry large-scale revolution, violent or otherwise, and his pent-up rage therefore passed into his books, which always have a tone of intransigence and extremism. Many passages give the impression that they have actually been written in a state of fury. In due course Lenin, Stalin, and Mao Tse-tung practiced, on an enormous scale, the violence which Marx felt in his heart and which his works exude.¹⁰⁰

History shows beyond any doubt that class genocide in Marxist regimes have been aided and abetted by a political philosophy that encourages, inadvertently if not explicitly, governmental policies that turned out to be profoundly genocidal. The problem is not so much that such a philosophy does not pay enough attention to policies that turn genocidal, but rather that this philosophy (and those who support it) may actually bear some responsibility for what happened. Such philosophy prepared the mindset and provided the whole rationale for the implementation of state-directed mass murder and violence. Arguably, the most disturbing characteristic of every

⁹⁸ Marx-Engels, *Gesamt-Ausgabe*, vol.vi, pp.503-5. *Cited in* Paul Johnson, above n 1, 71.

⁹⁹ Johnson, above n 1, 71.

¹⁰⁰ *Idem*, 72 .

communist terror is not only the quantity of the victims but also the very principle on which genocide can be justified. Once in power Marxist regimes tend to abandon the notion of personal responsibility, to use the state's repressive apparatus to hunt down people, and destroy them, not on the basis of what they have done but on the basis of their social condition or 'category'. In the Soviet Union, decree-laws extended to whole classes the notion of killing people collectively rather than individually. As Paul Johnson points out,

Once Lenin had abolished the idea of personal guilty, and had started to 'exterminate' (a word he frequently employed) whole classes, merely on account of occupation or parentage, there was no limit to which this deadly principle might be carried. Might not entire categories of people be classified as 'enemies' and condemned to imprisonment or slaughter merely on account of the colour of their skin, or their racial origins or, indeed, their nationality? There is no essential moral difference between class-warfare and race-warfare, between destroying a class and destroying a race. Thus the modern practice of genocide was born.¹⁰¹

VII MARXIST JURISPRUDENCE IN THE FORMER SOVIET UNION

In a normative sense, all the most prominent jurists in the former Soviet Union considered the existence of law 'a theoretically inconvenient fact'.¹⁰² They maintained that the rule of law was an objectionable bourgeois notion that served to mask economic inequalities and to cripple the power of the

¹⁰¹ Johnson, above n 18, 71.

¹⁰² Igor Grazin, 'The Role of Ideas in Political Change', in S. Ratnapala and G.A. Moens (eds), *Jurisprudence of Liberty* (Sydney/NSW: Butterworths, 1996), 249.

socialist state.¹⁰³ Hence the leading Soviet jurist Evgeny Pashukanis (1891-1937), in his seminal *The General Theory of Law and Marxism* (1924), contended that the ‘excessive’ neutrality and formality of the rule of law served only as a mask to the ‘hegemonic’ underpinnings of the ‘bourgeois legality’.¹⁰⁴ For Pashukanis, the rule of law is no more than ‘a mirage, but one which suits the bourgeois very well, for it replaces withered religious ideology and conceals the fact of the bourgeoisie’s hegemony from the eyes of the masses’.¹⁰⁵

¹⁰³ R.C. van Caenegem, *An Historical Introduction to Western Constitutional Law* (Cambridge: Cambridge University Press, 1995), 260.

¹⁰⁴ Pashukanis is described by Harold Berman as “a profound legal philosopher, who dominated Soviet jurisprudence (and in some respects Soviet legal development) for some 20 years”. – Harold J. Berman, ‘Book Review: Soviet Legal Philosophy, by H.W. Babb and J.N. Hazard’, *The Annals of the American Academy of Political and Social Science* n.281 (1952), 249.

¹⁰⁵ The entire passage reads as follows: “*The constitutional state (Rechtsstaat) is a mirage, but one which suits the bourgeois very well, for it replaces withered religious ideology and conceals the fact of the bourgeoisie’s hegemony from the eyes of the masses... The free and equal owners of commodities who meet in the market are free and equal only in the abstract relations of appropriation and alienation. In real life, they are bound by various ties of mutual dependence. Examples of this are the retailer and the wholesaler, the peasant and the landowner, the ruined debtor and his creditor, the proletarian and the capitalist. All these innumerable relationships of actual dependence form the real basis of state structure, whereas for the juridical [i.e. the conventional Rechtsstaat-related] theory of the state it is as if they did not exist... One must, therefore, bear in mind that morality, law, and the state are forms of bourgeois society. The proletariat may well have to utilise these forms, but that in no way implies that they could be developed further or be permeated by a socialist content. These forms are incapable of absorbing this content and must wither away in an inverse ratio with the extent to which this content becomes reality. Nevertheless, in the present transition period the proletariat will of necessity exploit this form inherited from bourgeois society in its own interest. To do this, however, the proletariat must above all have an absolutely clear idea – freed of all ideological haziness – of the historical origin of these forms. The proletariat must take a soberly critical attitude, not only towards the bourgeois state and bourgeois morality, but also towards their own state and their own morality. Phrased differently they must be aware that both the existence and the disappearance of these forms are historically necessary*”. Evgeny Pashukanis, *Law and Marxism* (1978), 143-60, cited in Kelly, above n 42, 358.

Through his political writings, Marx often commented on the importance of law for the formation, organisation and maintenance of the capitalist modes of production and social relations. Pashukanis built his entire jurisprudence on the basis of such ideological assumptions. His ‘Commodity Exchange Theory of Law’ asserts that in the organization of human societies, the economic factor is paramount and that as a result, legal and moral rules are nothing more than a mere reflection of the economic forces operating at each social context. When communism achieved its final stage of development, Pashukanis concluded, not only the state and its laws would disappear, but all moral principles should also cease to perform any practical function.

Curiously, Vladimir Lenin (1870-1924), the main leader of the 1917 October Revolution and first Head of State of the Soviet Union, once was a lawyer who practiced law in the Volga River port of Samara. This happened before Lenin moved to St Petersburg to pursue his career as a political agitator in 1893. Although being trained as a lawyer, he despised the rule of law and believed, as Lenin himself put it, that ‘the revolutionary dictatorship of the proletariat must be ruled, won, and maintained by the use of violence by the proletariat against the bourgeoisie, rule that is unrestrained by any laws’.¹⁰⁶ The final victory of communism, Lenin believed, required the creation of the ‘dictatorship of the proletariat’.¹⁰⁷

Lenin nonetheless agreed with Pashukanis that once the revolutionary period of ‘proletarian dictatorship’ was accomplished, the state with all its laws and institutions would simply wither away. After all, there would be no fur-

¹⁰⁶ V.I. Lenin, *Collected Works*, Vol.28 (Moscow: Progress Publishers, 1981), 236.

¹⁰⁷ *Ibid*, 16: 33.

ther conflict among the social classes to activate the engine of dialectical historicism.¹⁰⁸ Meanwhile, in order to continue on the road to the communist utopia, the Soviet state would have to become increasingly more arbitrary and violent. Caenegem provides an insightful explanation of how these seemingly self-contradictory ideas could co-exist and be justified by the Soviet leadership:

In order to continue on the road to communism a strong state was indispensable. At the end of the road, after socialism had given way to the ultimate achievement of communism, the state would be meaningless and doomed to disappear. In the meantime, however, its power was needed to keep the forces of reaction in check. When exactly this disappearance would take place was a moot point that used to pop up in theoretical journals. The date was, like that of the coming of the Lord for the early Christians, constantly pushed into a more distant future. It was precisely because a strong state was necessary... that the constitutional freedoms had to be limited, as they could not be invoked against the workers and their state... Freedom in the Soviet Union was a guided, teleological freedom, not to do what one liked, but to co-operate in the construction of socialism. It was comparable to the Christian doctrine that true liberty consists in doing God's will. Consequently Article 50 [of the 1977 Soviet Constitution], which guaranteed freedom of the press and the expression of opinion, stated that Soviet citizens enjoyed those liberties 'in accordance with the interests of the people and in order to strengthen and develop the socialist regime'.¹⁰⁹

The death of Lenin in 1924 unleashed a deadly struggle for power within the Soviet elite. The struggle was ultimately won by the Party's General Secretary, Joseph Stalin (1878-1953), who after eliminating his principal

¹⁰⁸ Kelly, above n 42, 310-311.

¹⁰⁹ Caenegem, above n 103, 266.

political adversary, L.D. Trotsky (1879-1940), launched a deadly ‘reign of terror’ in which millions were killed with or without mock trials by outright execution or by mass deportation to Siberia. It was during this time that Pashukanis was executed. Stalin’s new ‘socialist legality’ was incompatible with Pashukanis’ legal nihilism. Ironically, it has been argued that Pashukanis’s own legal approach may have contributed to the rise of Stalinism. According to Berman, ‘[h]is theories were ... disastrous for ... the Soviet law, since he believed that law was based essentially on the market and on the principle of reciprocity or exchange, and that hence in a socialist planned economy law represented a bourgeois survival which should be used, if all, simply for political purposes’.¹¹⁰ This so being, Krygier explains,

There was no place... for legal rights [in Pashukanis’ legal theory]. In the 1920s Pashukanis, whose commodity-exchange school dominated Soviet law and set the agenda for Soviet law schools, argued for “direct action” rather than “action by means of a general statute” in criminal law. This “legal nihilism” was an important ingredient in early Stalinist lawlessness. Pashukanis attacked, and his school sought to root out, “the bourgeois juridical worldview”. In doing so, they contributed directly to what has been called “jurisprudence of terror”. In the “campaign against the kulaks”, for example, which Robert Conquest estimates to have cost some 6.5 million lives, terror operated directly without legal restraint, as well as through legal provisions empowering local authorities “to take all necessary measures... to fight Kulaks.”¹¹¹

¹¹⁰ Berman, above n 105.

¹¹¹ Martin Krygier, ‘Marxism, Communism and the Rule of Law’, *in* Krygier (ed.), above n 71, 163.

VIII CONSTITUTIONALISM IN THE SOVIET UNION

The Soviet legal system created institutional safeguards for the individual citizen that were only nominal, whereas others were merely a façade. Indeed, the Soviet regime had no interest whatsoever in complying with the rule of law. Established by violence, such regimes never became a government under the law. On the contrary, the Soviet legal system played an insignificant role in the actions of the communist government, since the real power lay in the small leadership of the Bolshevik Party. Aron commented: ‘The proletariat is expressed in the Party and the latter being possessed of absolute power, is the realization of dictatorship of the proletariat. Ideologically the solution is satisfactory and justifies the monopoly of the party. The party possesses and should possess supreme power, because it is the expression of the proletariat and the dictatorship of the proletariat’.¹¹²

The public authorities who promulgated the Soviet Constitutions never intended to respect their legal provisions. The first Soviet Constitution is dated from 1918, the second is from 1924, the third was enacted in 1936, and the fourth and final Soviet Constitution was promulgated in 1977, remaining in operation until the regime’s final collapse in 1991. The first constitution explicitly stated that the Soviet Union was a ‘dictatorship of the proletariat’ and that human rights were guaranteed only to the ‘workers’. In all subsequent constitutions, the people were declared to enjoy fundamental rights to free speech, free press, free assembly, etc. And yet nobody really expected to enjoy any of these rights. There were limitations derived from

¹¹² Aron, above n 88, 168.

the constitution itself, which determined that these rights could only be enjoyed if they were exercised in absolute conformity with the general interests of the socialist state. A further check lay in the fact that the special police was immune from respecting the law. So it is argued that all these constitutional rights were merely a façade to deceive naïve foreigners and to advance the cause of communism worldwide. As explained by Aron in relation to the Soviet Constitution enacted by Stalin in 1936:

Because Westerners consider constitutional regulations important, [the Soviet rulers] must be shown that they have no reason to feel superior even in this respect... One of the reasons for the 1936 constitution was possibly to convince world public opinion that the Soviet regime was close in spirit to western constitutional practice and opposed to fascist tyranny or Nazism. The regime wanted foreigners to see the distinction between the party and the state. Without this juridical distinction, relations between the Soviet Union and other states would be compromised.¹¹³

IX THE JUDICIAL FUNCTION IN THE FORMER SOVIET UNION

During the former Soviet Union the power of the state was indivisible. The principles of judicial independence and neutrality were discarded as no more than mere ‘bourgeois myths’. Instead, the Soviet courts had two basic functions: to advance socialism and to destroy all the real or imagined enemies of the state. I.M. Reisner (d.1958), an influential member of the People’s Commissariat of Justice from 1917 to 1919, commented:

The Separation of powers in legislative, executive and judicial branches corresponds to the structure of the state of the bourgeoisie.... The Russian So-

¹¹³ Ibid, 166.

viet Republic... has only one aim, the establishment of a socialist regime, and this heroic struggle needs unity and concentration of power rather than separation.¹¹⁴

Lenin believed that the Soviet judiciary needed to be ‘an organ of state power’, and nothing else.¹¹⁵ ‘The court is an organ of power of the proletariat. The court is an instrument for inculcating discipline’, he wrote.¹¹⁶ According to Lenin, ‘the only task of the judiciary is to provide a principled and politically correct (and not merely narrowly juridical)... essence and justification of terror... The court is not to eliminate terror... but to substitute it and legitimize it in principle’.¹¹⁷ True to this conviction, Lenin established in 1918 the notorious ‘People’s Courts’ whereby judges were under no obligation to rely on any rules of evidence. Their final verdicts were basically guided by executive decrees, and their own sense of ‘socialist justice’.¹¹⁸ Figes reports on their functioning:

The Bolsheviks gave institutional form to the mob trials through the new People’s Courts, where ‘revolutionary justice’ was summarily administered in all criminal cases. The old criminal justice system, with its formal rules of law, was abolished as a relic of the ‘bourgeois order’... The sessions of the People’s Courts were little more than formalised mob trials. There were no set of legal procedures or rules of evidence, which in any case hardly featured. Convictions were usually secured on the basis of denunciations, often arising from private vendettas, and sentences tailored to fit the mood of the crowd, which freely voiced its opinions from the public gallery...

¹¹⁴ Cited in Caenegem, above n 104, 261.

¹¹⁵ Lenin, above n 107, 25:155.

¹¹⁶ Ibid, 2:478-9.

¹¹⁷ V.I. Lenin, *PSS*, XLV, 190, cited in Richard Pipes, *Russia under the Bolshevik Regime 1919-1924* (London: Harvill Press, 1997) 401.

¹¹⁸ Pipes, above n 96, 798.

The People's Courts judgements were reached according to the social status of the accused and their victims. In one People's Court the jurors made it a practice to inspect the hands of the defendant and, if they were clean and soft, to find him guilty. Speculative traders were heavily punished and sometimes even sentenced to death, whereas robbers – and sometimes even murderers – of the rich were often given only a very light sentence, or even acquitted altogether, if they pleaded poverty as the cause of their crime. The looting of the 'looters' had been legalized and, in the process, law as such abolished: there was only lawlessness.¹¹⁹

To further intensify repression Lenin introduced a second court called the 'Revolutionary Tribunals', in February 1919. Modelled on a similar institution of the French Revolution, the first Soviet Commissar of Justice, Dmitry Kursky, defined such tribunals as not really intended to be 'real courts' in the 'normal,' bourgeois sense of the term, but instead 'courts of the dictatorship of the proletariat, and weapons in the struggle against the counterrevolution, whose main concern was eradication rather than judgments'.¹²⁰ So Nicolai Krylenko, who succeeded Kursky as the Soviet Commissar of Justice, commented that 'in the jurisdiction of revolutionary tribunals complete freedom of repression was advocated while sentencing to death by shooting was a matter of everyday practice'.¹²¹

Although Lenin deemed 'mass terror' an indispensable instrument of oppression for every socialist government, to his great disappointment the

¹¹⁹ Orlando Figes, *A People's Tragedy* (London: Pimlico, 1996), 534.

¹²⁰ D.I. Kurskii, *Izbrannye stat'i rechi (Selected articles and speeches)* (Moscow: Gos. izd-vo iurid. lit-ry, 1958), 67, cited in Werth, above n 72, 55.

¹²¹ N. Krylenko, *Sudoustroistvo RSFSR (The Judiciary of the RSFSR)* (Moscow, 1923), 205, cited in Vladimir Gsovski, 'Preventive and Administrative Detention in the U.S.S.R.' (1961) 3(1) *Journal of the International Commission of Jurists* 135, 138.

revolutionary tribunals turned out not to be as entirely efficient. Too many of these ‘revolutionary’ magistrates could easily be bribed, and they also appeared reluctant to impose sentences of death on the ‘enemies’ of the ‘proletariat’. This was not what Lenin had in mind, so a new instrument of terror had to be conceived. The power conferred on those revolutionary tribunals was gradually transferred to a new and far more deadly entity: the Cheka. Since the decree establishing Cheka has never been published, the exact date of its creation cannot be ascertained. Although its date of creation is uncertain, it is absolutely clear that Cheka became a ‘state within the state’, assigned as it was with unlimited power to eradicate anyone perceived ‘to undermine the foundations of the socialist order’.¹²² Krylenko characterised its activities as follows:

The Cheka established a de facto of deciding cases without judicial procedure... In a number of places the Cheka assumed not only the right of rendering final decisions but also the right of control over the courts. Its activities had the character of tremendously merciless repression and complete secrecy as to what occurred within its walls... Final decisions over life and death with no appeal from them... were passed... with no rules establishing the procedure or jurisdiction.¹²³

Cheka is a name derived from the first letters of the Russian word *Chrezvysainaiia Kommissiia*, meaning ‘Extraordinary Commission’. Cheka agents had full licence to kill without having to follow the most perfunctory procedures. Martin Latsis, the head of the Ukranian Cheka, explicitly instructed his agents: ‘Do not to look for evidence as proof that the accused has

¹²² NZh, No.112/327 (June 9, 1918), p. 4, *cited in* Gsovski, above n 121, 137.

¹²³ Krylenko, *Sudoustroistvo RSFSR (The Judiciary of the RSFSR)* (Moskva, 1923) 97, 322-323, *cited in* Govski, above n 20, 137.

acted or spoken against the Soviets. First you must ask him to what class he belongs, what his social origin is, his education and profession. These are the questions that must determine the fate of the accused. That is the meaning of the Red Terror'.¹²⁴ Such 'enemies of the regime', often their entire families, were systematically arrested and thrown into concentration camps, which Latsis himself once reported as being no more than death camps: 'Gathered together in a camp near Maikop, the hostages, women, children, and old men survive in the most appalling conditions... They are dying like flies. The women will do anything to escape from death. The soldiers guarding the camp take advantage of this and treat them as prostitutes'.¹²⁵

Latsis also produced two revealing books that provide a general account of Cheka activities: *Two Years Fighting* (1920) and *The Extraordinary Commission for Combating Counterrevolution* (1921). These books reveal Cheka not simply as a mere tribunal or commission, but as 'a fighting organ on the internal front of the civil war... It does not judge, it strikes. It does not pardon, it destroys all who are caught on the other side of the barricade'.¹²⁶ In fact, Latsis presented its activities in a way that leaves absolutely no doubt about their extra-legal nature as well as incredible brutality:

Not being a judicial body the Cheka's acts are of an administrative character... It does not judge the enemy it strikes... The most extreme measure is shooting... The second is isolation in concentration camps. The third measure is confiscation of property... The counterrevolutionaries are active in all spheres of life... Consequently, there is no sphere of life in which the Cheka

¹²⁴ *Izvestiia*, 23 Aug 1918, cited in Figes, above n 119, 535.

¹²⁵ RTsKhIDNI, 17/84/75/28, cited in Werth, above n 72, 100.

¹²⁶ Nazhivin, *Zapiski*, 14, cited in Figes, above n 119, 632.

does not work. It looks after military matters, food supplies... etc. In its activities the Cheka has endeavoured to make such an impression on the people that the mere mention of the name Cheka will destroy the desire to sabotage, to extort, to plot.¹²⁷

On February 6th, 1922, Cheka was abolished by executive decree but Cheka's successors (GPU, OGPU, NKVD, MVD, MGB, and KGB) continued operating outside the legal boundaries, remaining technically free to condemn anyone by means of summary procedure, including the death penalty.¹²⁸ These were nominal changes laid down by such organisations that, if anything, only amounted to the institutionalisation of terror in Soviet Russia. So it happens that between 1937 and 1938 alone, no less than 1,575,000 people were arbitrarily arrested by the NKVD. Out of that number, 1,345,000 received some form of punishment, with 681,692, or 51 per cent, being executed.¹²⁹ As Werth points out,

Although the name had changed, the staff and administrative structure remained the same, ensuring a high degree of continuity within the institution. The change in title emphasized that whereas the Cheka had been an extraordinary agency, which in principle was only transitory, the GPU was permanent. The state thus gained a ubiquitous mechanism for political repression and control. Lying behind the name change were the legalization and the institutionalization of terror as a means of resolving all conflict between the people and the state.¹³⁰

¹²⁷ Latsis, *Chrzvychainaia Komissiiia*, 8, 15, 23, 24, cited I, Gsovski, above n 121, 137.

¹²⁸ The Cheka was abolished on February 1922, and immediately replaced by an organization named 'State Political Administration', or GPU. In 1924, following the creation of the Soviet Union, it was renamed 'United State Political Administration', or OGPU.

¹²⁹ Werth, above n 71, 128, 190.

¹³⁰ *Idem*, 128.

Curiously, during the first five years of the communist experiment, from 1917 and 1923, there was no proper judicial system in the Soviet Union. One of the earliest decrees of Soviet regime was to abolish all the courts, dismiss all the public prosecutors, and even the Bar Association was dissolved.¹³¹ The newly established activities of the revolutionary tribunals and the Cheka overshadowed any possible legal action. Pipes provides a rather dramatic description of the daily life of the Russian people in April 1918:

Those living under Bolshevik rule found themselves in a situation for which there was no historic precedent. There were courts for ordinary crimes and for crimes against the state, but no laws to guide them; citizens were sentenced by judges lacking in professional qualifications for crimes which were nowhere defined. The principles *nullum crimen sine lege* and *nulla poena sine lege*... were thrown overboard as so much useless ballast... One observer noted in April 1918 that in the preceding five months no one had been sentenced for looting, robbery, or murder, except by execution squads and lynching mobs. He wondered where all the criminals had disappeared to... The answer, of course, was that Russia had been turned into a lawless society.¹³²

Ultimately a Judiciary Act was enacted by the Soviet authorities in 1923, which created a uniform judicial system that, in the main, survived until the final collapse of the communist regime. The new courts conceived by this legislation were constituted as ‘obedient instruments of the policy of the government and the Communist Party.’¹³³ Soviet judges were not expected to be neutral adjudicators of the law. In fact, they had no independence

¹³¹ Gsovski, above n 120, 135.

¹³² Pipes, above n 96, 799.

¹³³ Gsovski, above n 121, 139.

from the government. Instead, they were instructed to carry out the general line of the Party as well as the general policies of the Soviet Executive, and the same was true until the Soviet experiment ended in 1991. As mentioned by Krylenko in a lecture delivered at the University of Moscow in 1923:

No court has even been above class interest and if there were such a court we would not care for it... We look upon the court as a class institution, as an agency of government power, and we erect it as agency completely under the control of the vanguard of the working class... Our court is not an agency independent of governmental power... therefore it cannot be organized in any other way than dependent upon and removable by the Soviet power.¹³⁴

It is somehow ironic, therefore, that such a staunch supporter of the ‘Red Terror’ ended up being arrested and executed in the 1930s during Stalin’s ‘Great Purge’. In 1938, Krylenko was forced by Stalin to step down as Prosecutor General only to be sentenced to death in a trial that lasted no more than twenty minutes. He was then replaced by Andrei Vyshinsky (1883-1954), a legal academic who acquired a reputation for his lectures on legal philosophy at the University of Moscow.¹³⁵ Vyshinsky’s approach to legal matters was remarkably similar to Krylenko’s. Inspired by the teachings of Marx, Vyshinsky argued:

Law is the aggregate of the rules of conduct expressing the will of the dominant class and established by legislation, as well as of customs and rules of community life confirmed by state authority, the application whereof is guaranteed by the coercive force of state to the end of safeguarding, making

¹³⁴ Krylenko, above n 121, 177.

¹³⁵ Vyshinsky served also as Soviet Foreign Minister from 1949 to 1953.

secure and developing social relationships and arrangements advantageous and agreeable to the dominant class.¹³⁶

According to Vishinsky, ‘the main function of the Soviet courts is to destroy without pity all the foes of the people in whatsoever form they manifest their criminal encroachments upon socialism’.¹³⁷ He argued that the ‘formal law’ should be entirely subordinated to ‘the law of the revolution’: ‘If there might be conflict and discrepancies between the formal commands of law and those of the proletarian revolution this conflict must be solved... by the subordination of the formal commands of law to those of Party policy’, Vishinsky wrote.¹³⁸ In *Judiciary in the URSS* (1936) he stated:

The court of the Soviet State is an inseparable part of the whole of the government machinery... This determines the place of the court in the system of administration. The general Party line forms the basis of the entire government machinery of proletarian dictatorship, and also forms the basis of the work of the court... The court has no specific duties, making it different from other agencies of government power, or constituting its ‘particular nature’.¹³⁹

¹³⁶ Cited in Francis Nigel Lee, *Communist Eschatology* (Nutley/NJ: Craig Press, 1974), 383.

¹³⁷ A. Vyshinsky, *Judiciary of the USSR* (Moscow: Progress Publishers, 1935), 32.

¹³⁸ A. Vyshinsky, *Sudoustroistvo v SSR* (2nd ed. Moscow, 1935), 32, cited in Krygier, above n 70, 141.

¹³⁹ A. Vyshinsky, *The Judiciary*, Vol.1 (Criminal Procedure) (1936), cited in Gsovski, above n 121, 139.

X SOVIET CRIMINAL LAW

Among the peculiarities of the Soviet legal system there was the existence of parallel jurisdictions for prosecuting criminal matters, one judicial and the other administrative. When questions about the abolition of the Cheka were raised, the Soviet authorities promised that the ‘the fight against violations of the laws’ would be entrusted exclusively to judicial bodies. Hence, a decree from 6 February 1922 that abolished Cheka promised that all crimes henceforth would be subject to trial in ordinary courts. This promise was never truly accomplished. Alongside these ordinary courts there remained a variety of Cheka successors that kept its broad, largely undefined arbitrary powers: GPU; OGPU; NKVD; MVD; and from 1954, the KGB.¹⁴⁰ These agencies were endowed with extraordinary powers to arrest, investigate, try, sentence and execute any person whom they suspected of political opposition. They worked in secret and without any need to consult a court or legal rule.¹⁴¹

The first Soviet Criminal Code came into force only on June 1st, 1922. And even after this code was enacted the widespread practice of arbitrary imprisonment continued to be one of the most notorious characteristics of Soviet public life. According to Stuchka, the then Soviet Commissar of Justice, the criminal code was only a ‘codification of revolutionary practices consolidated on a theoretical basis’.¹⁴² Indeed, ‘one of the code’s functions was to permit the use of all necessary violence against political enemies

¹⁴⁰ KGB is the abbreviation for *Komitet gosudarstvennoy bezopasnosti* or ‘State Security Committee’ Committee for State Security. KGB operated from 1954 to 2002.

¹⁴¹ *Prisoners of Conscience in the USSR: Their Treatment and Conditions* (Amnesty International, London, 1975), 18-9.

¹⁴² Stuchka, *Kurs sovetskogo grazhdanskogo prava tom 1. Vvedenie* (‘Course on Soviet Civil Law, vol.1, Introduction’), 1931. Cited in Gsovski, above n 120, 140.

even though the civil war was over and expeditious elimination could no longer be justified'.¹⁴³ In other words, the code was enacted not to prevent violence on political grounds, but to reveal the 'motivation' and the 'essence' of the Soviet terror. This, after all, was exactly what Lenin intended when he demanded the following from the drafter of the Criminal Code:

Comrade Kursky, I want you to add this draft a complementary paragraph to the penal code... It is quite clear for most part. We must openly – and not simply in narrow juridical terms – espouse a politically just principle that is the essence and motivation for terror, showing its necessity and its limits. The courts must not end terror or suppress it but give it a solid basis.¹⁴⁴

In Lenin's view, the main cause of crime was 'the exploitation of the masses'. The removal of such a cause (i.e., capitalism), Lenin argued, would lead to the withering way of ordinary crime.¹⁴⁵ In time, the socialist revolution would do away with such crimes. The code therefore stated that there is 'no such thing as individual guilt', and that criminal punishment 'should not be seen as retribution'.¹⁴⁶ On the other hand, unlike ordinary criminals all those 'political criminals' classified under the category of 'class enemies' were forced to endure 'harsher punishment than would an ordinary murdered or thief'.¹⁴⁷ This being the case, N.V. Krylenko, the People's Commissar of Justice and Prosecutor-General of Soviet Russia in the 1920s and the early 1930s, wrote entire books and articles advocating that matters

¹⁴³ Werth, above n 72, 127.

¹⁴⁴ I.V. Lenin, *Sochineniia* (Works), 3rd ed, vol.27, p.296, cited in Gsovski, above n 120, 140.

¹⁴⁵ See Kelsen, above n 53, 45 & 102.

¹⁴⁶ Some aspects of the language in the Soviet criminal code would have 'warmed the hearts of the most radical, progressive criminal reformers in the West'. Applebaum, above n 85, 160.

¹⁴⁷ *Ibid*, 161.

of ‘political consideration’, not criminal ones, should play far more decisive a role on issues of guilt, innocence and punishment. Krylenko even went to the point of stating: ‘We must execute not only the guilty. Execution of the innocent will impress the masses even more’.¹⁴⁸ Serving as Commissar of Justice in 1918, he declared:

It is one of the most widespread sophistries of bourgeois science to maintain that the court... is an institution whose task it is to realize some sort of special “justice” that stand above classes, that is independent in its essence of society’s class structure, the class interests of the struggling groups, and the class ideology of the ruling classes... “let justice prevail in courts” – one can hardly conceive more bitter mockery of reality than this... Alongside, one can quote many such sophistries: that the court is a guardian of “law”, which, like “governmental authority”, pursues the higher task of assuring the harmonious development of “personality”... Bourgeois “law”, bourgeois “justice”, the interesting of the “harmonious development” of bourgeois “personality”... Translated into the simple language of living reality this meant, above all, the preservation of private property.¹⁴⁹

The criminal codes legislated during the Soviet Union provided for the arrest, conviction and imprisonment on ideological grounds. Article 58 of the first Criminal Code was especially obnoxious in that it classified as ‘counterrevolutionary’ any form of participation in the so-called ‘international bourgeoisie’. This was treated as a serious crime punishable by either three years of incarceration or lifelong banishment. Such punishment was applied with considerable liberality, in such a manner that facilitated the arrest of countless innocent people, often on no logical basis other than polit-

¹⁴⁸ N.V. Krylenko ‘Revoliutisonnye Tribunaly’ VZh, No.1, (1918), *cited in* Pipes, above n 96, 796.

¹⁴⁹ *Ibid.*

ical expediency.¹⁵⁰ The lifelong-banishment provision in practice meant that anyone who dared return to the country would be greeted with immediate execution. Among those exiled were the compassionate people who “had committed the ‘political crime’ of establishing a committee for the fight against the severe famine of 1921-1922, which was dissolved on 27 July 1921 by Lenin.”¹⁵¹

Article 58 indeed provided blanket charges against anyone who was even remotely suspected of representing a threat to the socialist regime. Thus, anyone who fell within the elastic categories of ‘socially dangerous’ and/or ‘counter-revolutionary’ could be rapidly sentenced to prison even if there was a complete absence of guilt.¹⁵² Arguably the dramatic situation sprang from the primacy assigned to the interests of the socialist state, together with the Marxist understanding of law as a mere instrument of class oppression. Writing in 1947, the Soviet jurist A.A. Piontkowsky made it crystal clear that for political reasons any individual could be sentenced even if no crime had actually been committed:

Of course, sometimes for these or those considerations of a political nature... it is necessary to apply compulsory measures to persons who have

¹⁵⁰ Werth, above n 72, 128.

¹⁵¹ According to Werth, “*In place of the committee the government set up a Central Commission for Help for the Hungry, a slow-moving and bureaucratic organization made up of civil servants from various People’s Commissariats, which was characterized by inefficiency and corruption. When the famine was at its worst in the summer of 1922 and nearly 30 million people were starving, the Central Commission was assuring an irregular supply to about 3 million people... Despite the massive international relief effort, at least 5 million people of the 29 million Russians affected died of hunger in 1921 and 1922*”. – Werth, above n 72, 123.

¹⁵² *Ibid*, 136.

not committed any crime but who on some basis or another are socially dangerous.¹⁵³

Alongside the criminal code there was also the Soviet Code of Criminal Procedure (1926), which broadened the definitions of ‘counter-revolutionary crime’ and ‘socially dangerous person’. Among the crimes deemed to be ‘counter-revolutionary’ was any criticism or negative comment about ‘the political and economic achievements of the revolutionary proletariat’.¹⁵⁴ Another striking feature of this procedural code was the instruction of provincial courts to refuse ‘to admit as a counsel for defense any formally authorized person if the court consider such person not appropriate for appearance in the court in a given case depending upon the substance or the special character of the case’.¹⁵⁵ Furthermore, Article 281 allowed these courts to hear a case in the absence of both the prosecution and the defence.¹⁵⁶ As a result, millions of prisoners who received criminal sentences were not really criminals in any normal sense of the word.¹⁵⁷

From the mid 1920s until the death of Stalin the crimes for which people were arrested, tried and sentenced were often ‘nonsensical’ and the procedures in which they were investigated and convicted were arbitrary and violent if not absurd and surreal. For instance, the vast majority of inmates in the notorious Soviet concentration camps (‘Gulags’) had been interrogated only cursorily, tried farcically, and found guilty in a trial that often

¹⁵³ A.A. Piontkowsky, *Stalinskaya Konstitutsia i Proyeckt Ugolovnogo Kodeksa SSSR* (1947,) 15-16, cited in Amnesty International, above n 140, 15.

¹⁵⁴ Werth, above n 72, 135-6.

¹⁵⁵ RSFSR Code of Criminal Procedure, Section 382, cited in Gsovski, above n 121, 140.

¹⁵⁶ *Ibid*, 140.

¹⁵⁷ Applebaum, above n 86, 582.

would take less than a minute.¹⁵⁸ The investigations conducted by the Soviet secret police routinely included gruesome methods of torture, including hitting their victims in the stomach with sandbags, breaking their hands or feet, or tying their arms and legs behind their backs and hoisting them in the air.¹⁵⁹

Undoubtedly one of the most appalling aspects of the Soviet penal system was the treatment of children.¹⁶⁰ Small children were frequently ‘arrested’ alongside their parents. Both pregnant and nursing women were arrested. In 1940, an executive order allowed female inmates to stay with their babies for no longer than a year and a half. But once breast-feeding ended, the mother was immediately separated from her child and denied any further contact. The consequences of separating children from their mothers were so horrifying that, in these Soviet prisons, infant death rates were extremely high.¹⁶¹ Usually children at the age of two and sometimes even less were transferred into regular orphanages that ‘were vastly overcrowded, understaffed, and often lethal’.¹⁶² Upon arrival at the state orphanages these infants, even little babies, had their fingerprints taken like criminals, and ‘caretakers were all afraid to show them too much affection, not wanting to be accused of having sympathy with “enemies”’.¹⁶³ These children were brainwashed in such establishments to despise and hate their own parents as ‘enemies of the people’. Applebaum provides the following account:

¹⁵⁸ *Ibid*, 122.

¹⁵⁹ *Ibid*, 141.

¹⁶⁰ *Ibid*, 318.

¹⁶¹ *Ibid*, 323.

¹⁶² *Ibid*, 325.

¹⁶³ *Ibid*, 326.

Some children... were permanently damaged by their orphanage experiences. One mother returned from exile, and was reunited with her young daughter. The child, at the age of eight, could still barely talk, grabbed at food, and behaved like the wild animal that the orphanage had taught her to be. Another mother released after an eight-year sentence went to get her children from the orphanage, only to find that they refused to go with her. They had been taught that their parents were “enemies of the people” who deserved no love and no affection. They had been specifically instructed to refuse to leave, “if your mother ever comes to get you”, and they never wanted to live with their parents again.¹⁶⁴

The adoption of a new Penal Code on December 25th, 1958, seemed to represent some change of direction. After all, this code did away with key terms such as ‘enemy of the people’ and ‘counterrevolutionary crimes’. The use of violence and torture was also outlawed, and from now on the accused should be entitled to always have a lawyer. Regrettably, all these changes were more apparent than real, because the new code retained some provisions of the previous legislation, including the one authorising for the punishment of ‘political deviancy’. Under Article 70, any person caught spreading ‘anti-Soviet propaganda’ was susceptible of being sentenced to a maximum seven-year imprisonment in a concentration camp followed by exile for two to five years. In addition, Article 190 determined a sentence of no less than three-year jail for any failure to denounce ‘anti-Soviet behaviour’. During the 1960s and 1970s these two articles combined were widely used to punish any act of ‘political deviancy’.¹⁶⁵

¹⁶⁴ *Ibid*, 327.

¹⁶⁵ Werth, above n 72, 258.

A further problem for the many victims of ‘political crime’ was that the vast majority of defence lawyers in the former Soviet Union were members or candidate members of the Communist Party (CPSU). These lawyers were utterly subordinated to the party, which required its members an ‘uncompromising obedience to its rules and policies’. Under Article 2 of the Statute of the CPSU, ‘a member of the Party is obliged to observe Party and State discipline and one law for all Communists, irrespective of their work and of the positions held by them’.¹⁶⁶ So it was not surprising that a 1975 report released by Amnesty International commented:

There has never in Amnesty International’s experience been an acquittal of a political defendant in the USSR. No Soviet court trying a person charged from his political activity has rejected the prosecution’s case on grounds of procedural violations committed during the investigation period or on grounds of insufficient evidence.¹⁶⁷

That such cases invariably ended in criminal conviction indicates that some criteria other than criminal culpability played a more decisive role. Lawyers who were too up-front in defending their clients accused of dissent activity risked losing the right to defend in political cases, and perhaps even the license to exercise the legal profession. The best known such case was that of B.A. Zolotukhin, a Moscow lawyer who defended Alexander Ginzburg in 1968. As a ‘reward’ for his professional legal defence, Zolotukhin lost his licence to practice law and was thus deprived of the right to work as a defence lawyer. He was expelled from the Communist Party, from the presidium of the Collegium of Lawyers, and from a post as the head of a

¹⁶⁶ *Ustav Kommunisticheskogo Partii Sovetskogo Soyuz*, Article 2, cited in Amnesty International, above n 140, 30.

¹⁶⁷ *Ibid*, 32.

prestigious legal consultative office. The reason for all these expulsions was Zolotukhin's 'adopting a non-party, non-Soviet line in his defence of Ginzburg'.¹⁶⁸

XI CONCLUSION

Marx believed that laws are the product of class oppression, and that laws would have to disappear with the advent of communism. Marxist ideas are closely associated with communist regimes, since these regimes have claimed Marxism as their official ideology. Unfortunately, the Marxist dream of a classless (and lawless) society has led only to gross inequality and class-oriented genocidal policies. In fact, Marxist regimes have been far more efficient in the art of killing people than in art of producing any concrete or perceived form of social justice. In the twentieth century alone, Marxist-inspired governments killed at least 100 million people. In the former Soviet Union, a country founded on basic Marxist goals and principles, the victims of assassination by the socialist state approached at least 20 million people.¹⁶⁹

As demonstrated in this article, there was absolutely no respect for human rights and the rule of law in the former Soviet Union. Marxism operated in that country as a rigid dogma 'used for the purpose of cementing power, justifying tyranny, and violating human conscience'.¹⁷⁰ It was clear to everyone who lived in the Soviet Union that laws could be easily ignored or manipulated by the Marxist ruling elite. There was no judicial guarantee

¹⁶⁸ *Ibid*, 31.

¹⁶⁹ See Courtois et al, above n 39.

¹⁷⁰ Djilas, above n 2, 9.

against the encroachment on basic human rights and, as a result, a nihilistic attitude towards legality was developed that affected the entire social perception about law, not only among the bureaucratic elite but also among the ordinary people. Instead of trust in the fairness and neutrality of the law, citizens were forced to subject their most basic rights to life, liberty, and property to the arbitrary will of the state. Under such a social context, any possible right derived from state law was perceived as possessing little or no practical importance at all.

