

**THE SOVIET CRITIQUE OF NEW LEFT LEGAL THEORY:
A DESCRIPTIVE BIBLIOGRAPHY**

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[SST, p. 210]

DISCUSSION

I. COMPATIBILITY

Socialist legal culture suffers little from new left/old (Soviet) left divisions. There is respect and more or less agreement on most issues: the dialectical materialist explanation of the source, essence, content and goals of law; and the concrete sociological, historical and comparative methods of judicial science. This is in contrast to the significant differences between left legal theory and the various other schools of legal thought: natural law, sociological realism, positivism, liberalism-utilitarianism. These other schools and the differences between them and left legal theory are studied by the Soviets Chkhikvadze [30] and Tumanov [156], US old left writers Wells [167] (CPUSA1), Novack [113] (SWP), Petersen [128] (SLP), Boudin [22], De Grood [37], Franklin [46], Lamont [94], Riepe [134] (all independent old left) and Jaworskyj [79], Schlesinger [137] and Berman [19] (non-Marxists).

Those who value new left legal theory, or critical legal theory, as some of it is called, are the Soviets Batalov [14], Fedoseyev [43], Novinskaia [121], Olesevich [124], Zamoshkin [173], Zhukov [174], and their old left allies Galita [50], Green [64], Jackson [78] (all CPUSA), Steigerwald [146] [147] (West German CP), Faris [42], Ginger [52] [53], Reynolds [132], Rodriguez [135], Sedley [139] (all independents) and Mandel [107] and Novack [118] [119] (both SWP). They highly rate new left jurisprudence for its role in breaking the post-McCarthy quarantine on Marxist legal scholarship and for its part in the mass movement against imperialism in Vietnam, racism and woman's inequality. New left lawyers were part of the attack that won concessions against monopoly capitalism for its unconstitutional acts, for its violation of particular laws and norms and for acts which are difficult to dispute from the formal-judicial standpoint and yet which are in violation of the rights and freedom of citizens and organizations stemming from the level of democracy historically achieved by society.

[SST, p. 211]

The Soviets and their Western allies point out that most new left legal writers avoid overplaying the extent of bourgeois control of the masses and show how law also constitutes limits to oppression which the proletariat has forced the bourgeoisie to place on the books through arduous and costly battles. By and large, new left writers stand in unity with the old left position as outlined by Aptheker [7] (CPUSA):

Just 30 years ago, a picket line anywhere of any size and duration almost automatically meant violent assault by police or hoodlums, or others, in the employ of the bosses. The change in this matter in our time is not due to the development of tender hearts among the police or among the bosses. The change is due, basically to the alteration in the relationship of forces vis-à-vis organized labor and capital. It is due to the fact that 30 years ago there were perhaps 6 or 7 million trade-unionists and today there are 17 or 18 million. There are other reasons for this change, including the growth of class collaborationism, but this is the basic one. The bosses have the same will to smash genuine trade unions now as they did before, but they do not have the same power or capacity - given all the relationships - to do so today as they had then (p. 99).

The compatibility of new left/old left theory stems in part from the broad based, open nature of new left jurisprudence, which allows for the acceptance of old left influence and ideas. Karl A. Wittfogel (1896-) and Henryk Grossman (1881-1950) (both CP) and the labor lawyer Franz Neumann (German Socialist Party) were early members (1920s) of the new left Frankfurt School. The work of Gramsci (1891-1937) (Italian CP) and Althusser (1918-) (French CP) is often quoted by critical and structural legal theorists. Many like Angela Davis came to the old left through the new left. CPUSA youth (Dubois Clubs) worked in new left organizations and struggles. Marx, Lenin, Castro and Giap all started off toward Marxism Leninism as discontented, idealistic left legal scholars. Even new left legal theorists that ignore classical dialectical-materialist theory (Balbus [11], Cloke [31], Fraser [47], Genovese [51], Gramm [59], Kairys [83], Lefcourt [95], Miliband [113], Thompson [151], Tigar [153], Tushnet [158] and Weitzer [166]) are basically in agreement with the dialectical-materialist explanation and methods of judicial science.

New left/old left compatibility in jurisprudence stems not only from new left openness to the old: it is also due to old left openness. The old left, worker-dominated political parties play a role in, support, and learn from new left programs and offensives. Zamoshkin [173], chairman of the Soviet Institute for the Study of the International Workers Movement, writes:

[SST, p. 212]

Many of the new left are not guided by a Utopian revolutionist bravado. Their active and often courageous deeds are guided by a sense of social responsibility, manifest in a capacity for self-criticism, democratic maturity of thought, sharpness of vision and the ability to relate their actions to the country's real problems. And while the consciousness of their spokesmen is marked by limited horizons, these elements are an important factor in the front of the generally democratic, anti-monopolistic, anti-imperialistic movement. Therefore, Communist Parties pay great attention to ideological work among students and other critically minded groups of youth (p. 133).

Finally, new left/old left compatibility on legal theory also arises from the nature of law. Those who contribute to new left jurisprudence -- legal workers, lawyers and law school teachers and students -- are working within the political-juridical-legal process. Those dedicated to anarchistic tactics -- the main obstacle to solidarity with old left jurisprudence -- do not by and large become lawyers, work in courts or write jurisprudence.

II. ANARCHISM: MARCUSE

The Soviets are critical of the new left elements that tend to be anarchist, anti-working class, anti-materialist, anti-dialectical, anti-Soviet, anti-Communist Party and pro the young, Hegelian, humanist, social-democratic Marx to the exclusion of the mature Marx. These tendencies are evident in the new left groupings around Marcuse, the revival of Pashukanis, the Chinese-Maoist cultural revolution and misinterpretations of the Cuban revolution.

Batalov [15], Belkina [18], Bogomolov [21], Bykhovskii [26], Momjan [115], Shevtsov [143], Shishkin [144], Zamoshkin [172] and their Western allies, Freed [48] (Canadian CP), Steigerwald [148] (West German CP), Hoffman [74], Oakley [122], Woddis [168] (aU CPGB), Aptheker [6], Heisler [70], Laibman [92] [93] (all CPUSA), and Crosser [34] and Franklin [45] (both independents) praise Marcuse [109] for his analysis of alienation and his part in relaxing the grip of the bourgeoisie on exploited social forces. They also value Habermas [67] and Horkheimer [76] (1895-1973) for their analysis of communication and ideology, and Garaudy and Lukács [102] (1885-1971) for their insights into culture, consciousness and creativity. They reject Marcuse's anarchism, his call for the 'radical rejection' of legal forms of struggle as a parliamentary game. They are critical of Habermas, Horkheimer, Garaudy and the young Lukács to the extent they minimize legality and daily, patient, united-front struggle around immediate issues within the courtroom. To win over a majority of the workers and their allies, Soviet revolutionaries (Lenin, Stalin) participated in trade unions, bourgeois elections, united fronts with reformist parties and judicial struggle. Post World War II Eastern Europe demonstrated that under certain conditions socialist revolution could be legal. Chkhikvadze (30) writes:

[SST, p. 213]

After the Second World War, as the East European countries were being liberated from the Fascist occupation, their democratic forces, rallied by the Communist and Workers Parties, built up a clear superiority, so that the attempts here and there on the part of hostile elements to start a civil war and call in foreign imperialist troops, were pretty hopeless. This made socialist revolution in these countries possible without armed uprising or civil war, through a gradual weakening of the political and economic positions of the bourgeoisie, revolutionary change over a period of years, and steady development (via legal measures) and consolidation of the democratic people's state power (pp. 27-28).

New left legal theorists that refuse to take Marcuse's anarchist, anti political road include Balbus [11], Cain [27], Cloke [31], Fraser [47], Genovese [51], Gramm [59], Kairys [83], the more recent Miliband [113], Thompson [151], Tigar [153], Tushnet [158] [159] and Weitzer [166]. They show how courts are subject to mass movements and how struggle in the legal arena can weaken the system, increase its contradictions, constrain class rule and strengthen the capacity of the working class to resist. D'Angelo [35], Diamond [38], Dworkin [40], Gabel [49], Hakman [68], Hunt [77], Kennedy [84], Kent [85], Klee [88], Lefcourt [95], the early Miliband [114], Poulantzas [131], Weinstein [165], Wolff [169] [170], and Zinn [175] write anarchistic passages (no matter how sympathetic to the workers, the lawyer is predetermined by capitalism to betray them). Nevertheless, perhaps inconsistently, at least some (Kennedy and Lefcourt) advise not apolitical struggle, syndicalism, guerilla warfare or boycotting the judicial arena. They hold lawyers "can be a part of the struggle for liberation if they seek guidelines among the people". Even Marcuse was against or ambivalent about anarchism during much of his career. In fighting fascism in World War II, he [109] wrote:

There is no concept less compatible with Fascist ideology than that which founds the state on a universal and rational law that safeguards the interests of every individual (p.181).

Thirty years later during the height of the anti-Vietnam-civil rights protests, he [108] advised:

Working according to the rules and methods of democratic legality appears as surrender to the prevailing power structure. And yet, it would be fatal to abandon the defenses of civil rights and liberties within the established framework (p. 65).

[SST, p. 214]

III. PASHUKANIS

New left sociologists of law (Arthur [8] [9], Balbus [12], Beirne [16] [17], Blanke [20], Cain [28], Kinsey [87], Sharlet [140] [141] [142], Warrington [163]) are leaders in the revival of the early Pashukanis [126] (1891 1937) and tend to picture him as an anarchist and legal nihilist. New left legal theorists Adorno [1] and Bankowski [13] follow the closely related anarcho-syndicalist approach to law (planning and law limited to workers' councils for individual factories; party leadership seen as necessarily in opposition to workers' control; Soviet revolution miscarried because law and the judiciary, among other things, were not allowed to wither away).

The early Pashukanis, along with Bukharin [24] (1888-1938), Grigori E. Zinoviev (1883-1936), Rubinshtein [136] and Goikhbarg [54] (b. 1883), in some of their writings, felt law and the state would and should wither away more or less immediately with the establishment of the working class dictatorship. Law was held to be inevitably bourgeois, inherently exploitative, and any attempt at a socialist law was a contradiction in terms. They denied the revolutionary role and essentially fighting character of law in the period of transition. They based their position in part on law and legality in the past having been

used to cover over exploitation of workers. The new left revivers of Pashukanis, also seeing law as mainly exploitative, approach it with the view of smashing it -- legal nihilism.

The mature Pashukanis rejected the extremes of his early position. Current and many early Soviet theorists (Aleksandrov [2], Golunskiy [57] [58], Korovin [90], Lunacharskii [103], Mamut [105], Naumov [117], Rezunov [133], Trotsky [155], Vyshinsky [162] and Yudin [171]), along with their non-Soviet allies (Althusser [4] (French CP), Johnstone [82] (CPGB), Edelman [41], Fraser [47], Hirst [73], Mullin [116], Oda [123], Poulantzas [131], Sumner [149] (all independent new left)) value Pashukanis' commodity-exchange theory of law for its stress on the futility of attempts to consider law without reference to class relationships and the economic conditions of social development. But they are critical of it and its latter-day proponents to the extent they underestimate the role of law in building socialism. Trotsky [155], especially after 1923, was critical of the bureaucracy, including its judicial arm. But he did not advocate or look for its immediate withering away. As implementer of the planned economy, the bureaucracy and its judicial component were central to blocking counter-revolution and capitalist restoration. The judiciary was one of the tools used by the working people to suppress bourgeois trusts, cartels, syndicates, monopolies, the monarchic press and women's inequality. It was an aid to working people in consolidating the revolution against landlords and it played a role in encouraging the growth of unions, social security, the eight hour day, workplace safety standards and child labor prohibitions.

[SST, p. 215]

Reformist, economic-determinist politicians (Eduard Bernstein (1850-1932), Karl Kautsky (1854-1936)) engaged in non-dialectical theorizing akin to Pashukanis and his commodity-exchange theory of law. Their mechanistic approach minimized class struggle, the conscious effort of the proletariat, scientific study and revolutionary leadership.

Because working class political parties were often outlawed in capitalist countries in the 1919--1920 period, participation by the masses in legal political activity was downplayed by the early Third International. The writings of the early Gramsci [60] [61] [62] reflect the anarcho-syndicalist (factory councils, the general strike, insurrectional mobilization) and sectarian mood. The Soviet Lopukhov [101] observes that Gramsci came to reject this position, as did the Third International, and worked for united front resistance to fascism and its attack on constitutionalism and legality.

Some current old left (Cornforth [33], Lewis [99], Hindess [71], Hoffman [74], Hunt [77] (all CPGB)) and new left theorists (Thompson [152], Gold [56]) see the structural theory of law, as proposed by people like Althusser [4], the early Hirst [72] [73] and Edelman [41], to be non dialectical and economic reductionist not unlike Pashukanis. In attempting to avoid the Hegelian, moralistic, voluntaristic theories of praxist-humanists, structuralism sometimes ends up anarchistic or at least downplays political work. Althusser [5] admits that his writings suffer from failure to relate theory to class struggle as in the political-judicial arena. But he and others like the Soviet

Mamardashvili [104], Gray [63], Johnson [81], and Trierman [154] (all CPGB) and Merrit [112] (independent Marxist) dispute that structuralism is incompatible with class struggle within the judicial arena.

Among new left legal theorists rejecting the anarcho-syndicalist ideal is Cloke [31]. He shows how, in the period after socialist revolution, law can be used in socially creative ways to aid general campaigns to end racism, national chauvinism, the oppression of women and class privilege. Weitzer [166] praises the rule of law, which imposes inhibitions and constraints on arbitrary power and summary justice, and looks to its maximum use in socialist society. Likewise he believes other principles -- like legal equality and universally, due process, habeas corpus, trial by jury, confrontation of accusers and labor contracts -- can play a role in the transition era.

[SST, p. 216]

IV. CUBA

Some new left elements and the jurisprudence associated with them are more influenced by the Cuban revolution than by Marcuse or Pashukanis. They range in tactics from those who merely de-emphasize legality to those who seek "armed struggle now and forever". They include Weather People, Black Liberation Army, Condon [32], De Grood [36], the Belgian Mandel [106] [107], Schneir [138] and Sumner [149]. Condon writes that legal victories are mere placebos and no threat to capitalism. All prisoners are political prisoners. It is better to get convicted, as this raises consciousness.

The Soviet Veber [160], along with Sung [150] (North Korean CP), Azicri [10], Kinoy [86], and SomerviUe [145] (all independents) modify Condon's approach. Castro, Guevara and the revolution were not legal nihilists, but rather it was the incumbent regime which suspended the constitution. The revolution was to restore legality and defeat tyranny and anarchism. Even during the guerilla revolutionary process, Castro made positive, effective use of the judiciary. The legal process served both to teach and defend the masses. Kinoy writes:

I say to my radical colleagues at the bar, whose courage and skill I admire, that their frequently expressed formulation of their central role and objective as being that of 'delegitimizing' the institutions of the law is at once too narrow and too one-sided. In its one-sidedness it obscures, and even hinders, the fulfillment of the more complex, more critical role, which a study of the particularity of the present contradictions places before us. The struggle to preserve the elementary forms of procedural guarantees, designed originally to protect individual liberty and the right to a fair trial, is not a struggle to 'delegitimize' or 'demystify' these forms. The struggle is to defend these forms, to protect them; if you will, to legitimize them against the efforts of the rulers to delegitimize them. There is no contradiction between such an approach and the necessary exposure of prosecutors and judges who, at the government's bidding, brush aside and trample on elementary rights (p. 288).

Somerville makes the same point:

The main problem of law and order is not so much that of the people obeying the government, as that of the government obeying the constitution which set it up, and keeping to the terms and within the boundaries of the contract which it (the government) made with the people who created it, and who must remain its master. Rebellions of the people, when looked at closely, usually turn out to be counter-rebellions directed against a government which has broken its compact with the people, resorted to illegal force, and thereby placed itself in a state of war with the people (p. 18).

[SST, p. 217]

The first item in Guevara's [66] manual on guerrilla warfare repeats the Soviet (Lenin [97], Bratus [23]) and Seventh Comintern (1935) (Dimitrov [39]) position that armed struggle should be considered and can be victorious in winning mass support only when the incumbent government has ceased to observe constitutional legality. Guevara writes:

Naturally, it is not to be thought that all conditions for revolution are going to be created through the impulse given to them by guerrilla activity, it must always be kept in mind that there is a necessary minimum without which the establishment and consolidation of the first center is not practicable. People must see clearly the futility of maintaining the fight for social goals within the framework of civil debate. When the forces of oppression come to maintain themselves in power against established law, peace is considered already broken.

In these conditions popular discontent expresses itself in more active forms. An attitude of resistance finally crystallizes in an outbreak of fighting, provoked initially by the conduct of the authorities.

Where a government has come into power through some form of popular vote, fraudulent or not, and maintains at least an appearance of constitutional legality, the guerrilla outbreak cannot be promoted since the possibilities of peaceful struggle have not yet been exhausted (p. 2).

Elsewhere Guevara [65] records how the Cuban revolution, as it advanced from a small battle in eastern Cuba, adopted legal codes and set up independent judiciaries to administer them. The revolutionaries were subject to these penal and civil codes in supplying the peasant, in agrarian reform and in their dealings with each other, long before the final victory was achieved.

V. MAOISM

Maoism and the cultural revolution influenced some in the new left toward the anarchist position. Soviet (Altaiskii [3], Butenko [25], Fedoseev [43], Konstantinov [89], Leibzon [96], Ostroumov [125], Perlov [127]), current Chinese jurists (Ho Ming [75])

and their Western allies (Levine [98] (independent Marxist), Waters [164] (SWP) fault the Chinese cultural revolution and its legal philosophers like Cheng P'u [29] and in the US Tung [157] (CWP) for neglecting socialist legality. The Soviets believe the methods of administrative and military fiat, coercion and violence as used in the late 1940's in expropriating the landowners and safeguarding the revolution had a progressive significance. These methods were carryovers from the pre-war era when legal methods of recourse for the peasant and worker classes were limited. But with the revolution consolidated, legality must become the norm.

[SST, p. 218]

During the cultural revolution, the Maoist-led Chinese Communist Party violated such Leninist endorsed principles as independence of the courts and their subordination only to law, the accused's right to a defense and the presumption of innocence. Neither the Party nor Party officials make law, but rather must strictly observe the law. The Party is the driving force in the state, as constitutionally mandated. But its leadership presupposes that it, as a voluntary organization, works through legislative bodies and mass organizations like the trade unions and co-operative, consumer and volunteer societies. It guides in a complex, multidimensional manner in response to the masses and their needs.

Mao Tse-Tung (110) himself in certain periods had a high regard for law, which he saw as a force teaching socialist morality and rooting out reaction. The 1978 Chinese constitution restores the rule of law, seeks to codify the law and to guard human rights.

VI. CONCLUSION

US scholars like Mehnert [111], as well as some Soviets emphasize new left/ old left differences and equate the new left with the position of Bernstein, Kautsky and the rejection of class struggle. From the Soviet view this analysis does not apply to the bulk of new left legal theory. Of the ten or so US new left political parties studied by Vickers [161], only a few have any leaders that lean to the anarchist position. Most are in accord with the principles of Marxist-Leninist jurisprudence: even where democracy has no real power and where the space conceded is very narrow, the opposition does not stop seeking and utilizing the legal means of expression available. The proletariat and its allies proclaim their own legal demands, take action to secure their realization, to the extent the balance of class forces permits this, and uphold legality and other democratic principles against encroachment by the reactionaries. For the new left, as for the Soviets, such activity prepares the socialist revolution that is born in the transformation of old style democracy into socialist democracy: the form of the new society is determined by the maturity of the society destroyed.

[SST, p. 219]

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NOTE

¹ Below are abbreviations used for political party designations. These political party designations mean that the writer publishes in the party organ. Many identify themselves as party members, but non-party members also publish in party organs.

CPUSA	Communist Party, USA.
SWP	Socialist Workers Party.
SLP	Socialist Labor Party.
CWP	Communist Workers Party.
CPGB	Communist Party of Great Britain.

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