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THE ROLE OF LAW UNDER CAPITALISM AND SOCIALISM

INTRODUCTION

A clear understanding of the nature of the state is fundamental to Marxist theory. The existence of the state proves that society is split into irreconcilable groups with contradictory economic interests. The structure of the state is such that it is merely an instrument for the furthering of the economically dominant class's ends and the suffocating of the subjugated class's political and economic interests.

The backbone of the state machinery which carries out the above-stated tasks is the law. From the social-economic relations arise the legal relations; Marx notes this in his introduction to Critique of Political Economy:

In the social production which men carry on they enter into definite relations that are indispensable and independent of their will; these relations of production correspond to a definite stage of development of their material powers of production. The sum total of these relations of production constitutes the economic structure of society--the real foundation, on which rise legal and political superstructures and to which correspond definite forms of social consciousness. The mode of production in material life determines the general character of the social, political and spiritual processes of life. It is not the consciousness of men that determines their

existence, but, on the contrary, their social existence determines their consciousness.... (Marx, Critique, p. 11.)

Law under bourgeois rule plays the crucial twin-tasks of protecting bourgeois property relations and, by far the more important, serving as the bulwark of bourgeois democracy. Modern democracy, i.e., democracy for the businessmen, rests on the ability to fool the majority of the population, the working class, into thinking that the government and its laws and constitution are designed and operated for the benefit of that majority. This is to say that bourgeois law and democracy make up much of the vast structure of fraud necessary to keep the majority of the population in check, saving the capitalist class the unpleasant and extremely precarious task of reverting to force most of the time.

Under socialism the state and its system of laws serve a vastly different purpose than under capitalism. The state remains an instrument for the dominant class to express its will: However the dominant class is now the majority--and the oppressed the minority (i.e., the capitalists and their lackies). The state and the system of laws under socialism have the stated goal of the elimination of themselves--this stands in polar contradiction to that of the capitalist period. All states before socialism strive to maintain the social and economic structure then existing. Socialism alone strives for its elimination--by paving the way to a communist society.

This article will examine the system of laws and the purpose they serve under capitalism and in the period of transition between capitalism and communism.

I.

THE ROLE OF LAW IN CAPITALIST SOCIETY

As the above-quoted passage of Marx notes, the legal superstructure which arises within a

society is based firmly in the mode of production which exists in a given period. Thus, in order for the capitalist economic system to flourish, laws and rights conducive to capitalism had to come into existence as well. The buying and selling of labor power can only proceed on the assumption that the laborer has the right to dispose of that labor power as the worker sees fit within the limits imposed by the functioning of a capitalist system. To quote Marx again:

But in order that our owner of money may be able to find labour-power offered for sale as a commodity, various conditions must first be fulfilled. The exchange of commodities of itself implies no other relations of dependence than those which result from its own nature. On this assumption, labour-power can appear upon the market as a commodity, only if, and so far as, its possessor, the individual whose labour-power it is, offers it for sale, or sells it, as a commodity. In order that he may be able to do this, he must have it at his disposal, must be the untrammelled owner of his capacity of labour, i.e., of his person.

(Marx, Capital, Vol. I, pp. 164-5.)

Thus with the rise of capitalism as an economic system we see a portion of the laws of the previously existing feudal society coming into conflict with the burgeoning new mode of production. When the nascent capitalist class became the economically dominant class and found the necessary allies to give it the military strength to overcome the feudal lords, the feudal legal framework was gradually displaced (with a few feudal laws remaining of the books in England until the 20th century), and a structure more favorable to the economic needs of the capitalist class was constructed. (For an account of the process in England, see, Christopher Hill, The English Revolution 1640, and Maurice Dobb, Studies in the Development of Capitalism.) However, it

should be noted that while bourgeois right (and the legal structure which backed this) replaced the existing feudal legal structure, the fundamental nature of the state did not change. The basic form of the state under capitalism or feudalism is still of the minority ruling class variety. (For further discussion, see, Science, Class, and Politics, #10, "The Marxist Theory of Law.")

The early capitalist class was dominated by agricultural businessmen, but as time progressed major scientific and technological developments were to lead to the rise of the manufacturing capitalist, and with this development the legal structure arising from the capitalist economic base had to be altered and expanded in order to deal with the conflicts and crisis which industrial capitalism gave rise.

Of the problems that did arise, two were of primary importance from the industrial capitalists' point of view. First, the rise of industry and the technology associated with the increasing scale of industry led to the further concentration of its rival, the working class. Second, the working class was becoming dangerously infected with democratic ideas, given great impetus on the political end by the rhetoric of the French Revolution, and later in the economic realm by the utopian socialists such as Robert Owen, Charles Fourier, or Louis Blanc. (Later, of course, Marx and Engels were to lay down the scientific foundation necessary to given the working class its political and economic domination.)

The immediate reaction of the capitalist class to its growing economic and political rival was to resort to the method of force. Working class organizations were smashed by the police and militias. (For a fuller account of the early suppression of the working class movement see, "On the Nature and Substance of the Cold War", in Science, Class, and Politics, #31.)

Ruling classes are well aware that the method of force will not be successful on an ongoing basis; the capitalist class is no exception. So, over time in countries of the capitalist world, the parliamentary structures which had existed only for the use of the classes which held

substantial property, capitalist and otherwise, were expanded to allow "participation" in the government through suffrage for the (initially, male) population. In this process, democracy did not change: Democracy was still for the wealthy classes; only now the lower classes had the "feel" that they were participating.

Naturally, the propertied classes were petrified at the thought of the "unwashed masses" acting in government. We see evidence of this in the structure of the legislative bodies in, say, the United States and Britain where the more popularly elected bodies, the House of Representatives or the early House of Commons, had the least influence on "the process of government". (Recall that property qualifications prevented even universal white male suffrage in the U.S. until nearly 1850, and much later in England.) Naturally, if situations arose where the ballot might provide the majority of the population with a dangerous (from the ruling class point of view) amount of control of their own affairs, voting rights would be suspended; as they were for blacks in the U.S. with the rise of the Jim Crow system or, as they were for the German population with the rise of fascism.

The legal system which props up bourgeois democracy is one based on fraud. Laws may be instituted which ostensibly benefit the working class, but these laws are enforced only as the capitalists see fit. The capitalist class, using the judicial arm of their state machine, has the ability to channel efforts by the working class to better their lot into the harmless pursuit of legislation--"go away" laws that induce many movements to "go away" after they are passed. It may be expedient to pass "civil rights" or safety legislation in order to, say, break-up organizations which have the institution of such legislation as a goal--the laws are left to be enforced by other arms of the *bourgeois* state machine. Thus rule under capitalism rests on its ability to disregard law at will (fraud) and to use force (sparingly), a concise definition of dictatorship. But as capitalists rely most heavily on fraud, not force, to maintain their

rule, bourgeois law must appear to be respectable, fair and democratic, and thus has a philosophy and all the trimmings--a subject we turn to next.

MODERN BOURGEOIS LEGAL THEORY

What proximate test of excellence can be found except correspondence to the actual equilibrium of force in the community--that is, conformity to the wishes of the dominant power? Of course, such conformity may lead to destruction, and it is desirable that the dominant power should be wise. But wise or not, the proximate test of a good government is that the dominant power has its way.

(Holmes, Collected Legal Papers, p. 258.)

In order to clearly illustrate the role that bourgeois legal theory plays in the defense of that class's economic interests we will concentrate on the work of two legal scholars, Oliver Wendall Holmes and Friedrich A. Hayek, the Nobel prize winning reactionary economist.

Holmes was the outstanding legal scholar of the late 19th and early 20th century. His work laid the foundation for modern legal pragmatism, as Harry K. Wells notes in his discussion of Holmes:

Following the Civil War, and at least by 1880, the capitalist class, on two counts, required a new legal theory. The old natural law doctrine was, on the one hand, no longer an adequate weapon against the growing proletariat with its rising militancy and its developing class consciousness. The working class, organizing in trade unions and political parties and with socialist fermentation, would not be taken in, as a class, by a doctrine which preached that the laws of the employers were in fact the laws of God and nature. On the other hand, the swiftly concentrating corporations and trusts had of

necessity to undermine the doctrine of the natural rights of man. Jefferson and Lincoln in times of revolutionary upheaval had appealed to the natural rights of life, liberty and the pursuit of happiness. But to the capitalist class in full state power these rights had become revolutionary and highly explosive doctrines. That they were natural rights was an idea no longer to be tolerated.

New weapons were required in legal ideology. Regardless of what way the protagonists viewed their tasks, the upshot of their endeavors was to develop new forms of apologetics in legal theory which adequately met the requirements of the ruling class and which are still a most effective weapon against the workers.

(Wells, Pragmatism, p. 52.)

Hayek's work, the three volume Law, Legislation and Liberty represents another and more recent development in bourgeois legal theory--the wedding of bourgeois law and bourgeois economics. This "new" development is nothing more than a restatement of Holmes' legal theory of 90 years ago--a point made clearer in a later section.

"The law and economics" as popularized by the economist Ronald Coase ("The Problem of Social Cost"), and the jurist and legal theoretician, Richard A. Posner (The Economic Analysis of Law) is most clearly stated by Hayek¹. This development in legal theory represents the legal ideology of capitalism at bay--increasing frequency of crisis, economic and political, requires that much of the trimmings of the fraud of capitalist democracy be cast aside so situations can be dealt with expediently as they arise.

As the more modern (and increasingly popular) legal theory links the law and economics, brief reference is made to economic theory for clarity.

ECONOMICS AND THE LAW--A COMMON THREAD

As we have noted earlier, law and the system of laws under capitalism are designed to protect and maintain the exploitive capitalist order. As this implies that an irrational social system is under guard, we expect to find and do find that the justification for the philosophy of capitalist law is based on an irrational or "non-class" foundation. As juridical theory functions to protect economic relations, the law and economics are closely linked. The economic system, as it functions in the view of capitalist economists, is one based on the actions of *individuals* who only know one goal--narrow material gain. Cooperation or planning is viewed as an unnecessary evil; there are no classes and the only purpose in capitalist society is to allow the individual to pursue his or her own gains. Hayek describes the market order as a "game":

The best way to understand how the operation of the market system leads not only to the creation of an order, but also to a great increase of the return which men receive from their efforts, is to think of it...as a game which we may now call the game of catallaxy. It is a wealth-creating game (and not what game theory calls a zero-sum game), that is, one that leads to an increase of the stream of goods and of the prospects of all participants to satisfy their needs, but which retains the character of a game in the sense in which the term is defined by the *Oxford English Dictionary*: 'a contest played according to rules and decided by superior skill, strength or good fortune'. That the outcome of this game for each will, because of its very character, necessarily be determined by a mixture of skill and chance will be one of the main points we must now try to make clear.

The chief cause of the wealth-creating character of the game is that the returns of the efforts of each player act as the signs

which enable him to contribute to the satisfaction of needs of which he does not know, and to do so by taking advantage of conditions of which he also learns only indirectly through their being reflected in the prices of the factors of production which they use. It is thus a wealth-producing game because it supplies to each player information which enables him to provide for needs of which he has no direct knowledge and by the use of means of the existence of which without it he would have no cognizance, thus bringing about the satisfaction of a greater range of needs than would otherwise be possible. (Hayek, *Law...*, Vol. II, p. 115.)

Players in the capitalist "game," do not know that the game exists of of any purpose (beside individual gain) that the order in which they participate has. The capitalist economic conception of society is one of one known purpose--the individual pursuing gain. The selfishness and anarchy of this order precludes the possibility of planned outcomes--no economic agent can see past the end of its nose, so to speak:

The manufacturer does not produce shoes because he knows that Jones needs them. He produces because he knows that dozens of traders will buy certain numbers at various prices because they (or rather the retailer they serve) know that thousands of Joneses, whom the manufacturer does not know, want to buy them. Similarly, a manufacturer will release resources for additional production by others by substituting, say, aluminium for magnesium in the production of his output, not because he knows of all the changes in demand and supply which on balance have made aluminium less scarce and magnesium more scarce, but because he learns the one simple fact that the price at which aluminium is offered to him has fallen relatively to the price of magnesium. Indeed, probably the most

important instance of the price system bringing about the taking into account of conflicts of desires which otherwise would have been overlooked is the accounting of costs--in the interests of the community at large the most important aspect, i.e. the one most likely to benefit many other persons, and the one at which private enterprise excels but government enterprise notoriously fails.

Thus in the market order each is made by the visible gain to himself to serve needs which to him are invisible, and in order to do so to avail himself of to him unknown particular circumstances which put him in the position to satisfy these needs at as small a cost as possible in terms of other things which it is possible to produce instead... (Hayek, Law..., Vol. II, p. 115-6.)

This conception of an atomistic, selfish economic order should present a curiosity to any person who is even slightly familiar with economic conditions as they exist--we live in a world dominated economically by a few large firms. These firms know their purpose--to attain the maximum rate of profit available. As well capitalists know that the best way to attain these maximum profits is to organize, plan, and collude. The class nature of society is clear to the owners of capital; other things equal they see that their profits are higher the lower the wages of labor, or the less spent on improving labor's working conditions. Thus it seems strange that the economic theory of capitalism (as provided by the capitalists' own economists) would ignore the reality as the bourgeoisie knows it and substitute the atomistic, purposeless view of the world.

The answer to this apparent contradiction is that by ignoring the real social order (and ignoring social science), capitalist legal scholars and economists are "free" to make up false theories of society, and as we would expect, these false legal and economic theories are apologetics for the capitalist order.

Thus, for example, in the late nineteenth

century Oliver Wendall Holmes, premier legal scholar, notes in his work The Common Law that justice does not exist unless it is guaranteed by some "public force", and that legal rights are not socially determined but are the result of the existence of "natural powers":

A legal right is nothing but a permission to exercise certain natural powers, and upon certain conditions to obtain protection, restitution, or compensation by the aid of the public force. Just so far as the aid of the public force is given a man, he has a legal right, and this right is the same whether his claim is founded in righteousness or iniquity. Just so far as possession is protected, it is as much a source of legal rights as ownership is when it secures the same protection.... (Holmes, The Common Law, p. 169.)

And what are these natural powers? Holmes takes his fictional theories further by assigning instincts to mankind:

...Law, being a practical thing, must found itself on actual forces. It is quite enough, therefore, for the law, that man, by an instinct which he shares with the domestic dog, and of which the seal gives a most striking example, will not allow himself to be dispossessed, either by force or fraud, of what he holds, without trying to get it back again. Philosophy may find a hundred reasons to justify the instinct, but it would be totally immaterial if it should condemn it and bid us surrender without a murmur. As long as the instinct remains, it will be more comfortable for the law to satisfy it in an orderly manner, than to leave people to themselves.... (Holmes, The Common Law, p. 168.)

Holmes posits an entirely fictional theory of human behavior and its effect on the law. Not surprisingly the foundations which legal theory must found itself on are most beneficial to the capitalist class. Private property is for the most part concentrated into the hands of the few, and the ability to "obtain protection, restitution, or compensation by the aid of the public force..." will be primarily to the use of capitalists as the public force (the state) is an instrument of the capitalist class. This, however, has more importance to capitalist legal theory than a first reading may indicate. The existence of the first principle of the inviolability of private property allows a great deal of strength and adaptability in bourgeois legal order.

The key to the success of legal relations for the capitalist is to allow a great deal of flexibility: "The distinctions of the law are founded on experience, not logic" (Holmes, p. 244). By keeping in mind a few first principles, the law can serve as a more powerful tool for the protection of capitalist interests. Hayek further illustrates this point:

The task of developing a system of law is thus an intellectual task of great difficulty which cannot be performed without taking certain rules as given and moving within the system determined by them. It is a task which can be performed more or less successfully, but which will not normally leave those entrusted with it free to follow their own will. It is more like the search for truth than to the construction of some new edifice. In the effort to disentangle and reconcile a complex of unarticulated rules and to transform it into a system of explicit rules, conflicts among what are accepted values will often be encountered. It will occasionally be necessary to reject some accepted rules in the light of more general principles. The guiding principle will always be that justice, i.e. the generally applicable rule, must prevail

over the particular (though perhaps also generally felt) desire.
(Hayek, Law..., Vol. II, p. 41.)

And what is the "justice" that "must prevail over the particular...desire"?

'The necessities of human society' may bring about an independent emergence, at many different times and places, of the same sort of system, such as that based on private property and contract. It would indeed seem that wherever a Great Society has arisen, it has been made possible by a system of rules of just conduct which included what David Hume called 'the three fundamental laws of nature, *that of stability of possession, of its transference by consent, and of the performance of promises*', or, as a modern author sums up the essential content of all contemporary systems of private law, 'freedom of contract, the inviolability of property, and the duty to compensate another for damage due to his fault.'

(Hayek, Law..., Vol. II, p. 40.)

Thus, due to the governmental arrangement that allows the courts to interpret (in effect make and alter laws), the legal theory founded on an atomistic, selfish ideology--a system without classes or known goals--the capitalist class has an effective weapon to protect their interests from the opposite and antagonistic interests of the working class. By enforcing the "fundamental laws of nature" that are "justice" in the capitalist view, the necessary flexibility to keep the working class in check is achieved.

The courts, in their interpretation of the law, can undo any damage that the working class may inflict on the bourgeoisie's rights. Congress may pass the Sherman Anti-Trust Act, Wagner Act, or Civil Rights legislation without fear of the new laws changing the existing order. The mass

movements seeking these legislative acts can be presented with the accomplishment of their goal and the opposition is thus quieted. The courts can simply enforce the laws as they see fit. History shows that economic concentration has continued at a gallop in spite of the Sherman legislation, that labor is in reality denied the right to strike, and that the economic conditions of Blacks in the U.S. is worse now than when the "victory" of civil rights legislation fragmented the civil rights movement.

THE LEGAL SYSTEM AS A BARRIER

For law in capitalist society to be successful in keeping the majority in check, laws and the legal system must serve as a barrier between the population and the government apparatus. If this were not so, if the legal system were to provide a conduit for the majority of the population to enter the state machinery, then a real danger of a democratic process could develop in favor of that majority. We know that the dominant class, the class of substantial businessmen, would not stand for this--it would mean the end of *their* democracy. Lenin makes this point clear in a passage which should send chills down the average big businessman's spine:

The working people are barred from participation in bourgeois parliaments (they never decide important questions under bourgeois democracy, which are decided by the stock exchange and the banks) by thousands of obstacles, and the workers know and feel, see and realise perfectly well that the bourgeois parliaments are institutions alien to them, instruments for the oppression of the workers by the bourgeoisie, institutions of a hostile class, of the exploiting minority.

"We" (say) to the bourgeoisie: You, exploiters and hypocrites, talk about democracy, while at every step you erect thousands of barriers to prevent the oppressed

people from taking part in politics. We take you at your word and, in the interests of these people, demand the extension of *your* bourgeois democracy in order to prepare the people for revolution for the purpose of overthrowing you, the exploiters. And if you exploiters attempt to offer resistance to our proletarian revolution we shall ruthlessly suppress you; we shall deprive you of all rights; more than that, we shall not give any bread, for in our proletarian republic the exploiters will have no rights, they will be deprived of fire and water, for we are socialists in real earnest....
(Lenin, The Proletarian Revolution..., pp. 59, 87-8, emphasis in the original.)

A NOTE ON HAYEK'S ATTACK ON CIVIL RIGHTS

As the bourgeois conception of society dictates that man stands alone, that there is only one known purpose to strive after (individual gain), and that this order has been here universally for all time; this in effect rules out all possibility for change. Revolution and the establishment of Socialism only leads to failure. In fact even reform is a useless concept. Hayek illustrates the dissatisfaction that the class he represents holds for 20th century attempts to better the lot of the working class.

The new trend [i.e., attempts to expand civil and "human" rights, M-LL] was given its chief impetus through the proclamation by President Franklin Roosevelt of his 'Four Freedoms' which included 'freedom from want' and 'freedom from fear' together with the old 'freedom of speech' and 'freedom of worship'. But it found its definite embodiment only in the *Universal Declaration of Human Rights* adopted by the General Assembly of the United Nations in 1948. This document is admittedly

an attempt to fuse the rights of the Western liberal tradition with the altogether different conception deriving from the Marxist Russian Revolution. It adds to the list of the classical civil rights enumerated in its first twenty-one articles seven further guarantees intended to express the new 'social and economic rights'....

It should be noted that the *Universal Declaration of Human Rights* which so infuriates Hayek was written at a time when the Soviet Union had a great deal of influence in the U.N. The human rights it insisted on including in the document were of course decidedly pro-working class. Thus Hayek in his ostensible criticism of this document reveals the true nature of his motivation--legal gains for the working class should be fought at all costs. Hayek continues:

What, for instance, can be the legal meaning of the statement that every one 'is entitled to the realization...of the economic, social, and cultural rights indispensable for his dignity and free development of his personality' (Art. 22)? Against whom is 'every one' to have a claim to 'just and favourable conditions of work' (Art. 23(I)) and to 'just and favourable employment' (Art. 23 (3))? What are the consequences of the requirement that every one should have the right 'freely to participate in the cultural life of the community and to share in the scientific advances and its benefits' (Art. 27 (I))? 'Every one' is even said to be 'entitled to a social and international order in which the rights and freedoms set forth in this Declaration are fully realized' (Art. 28)--on the assumption apparently that not only is this possible but that there exists now a known method by which these claims can be satisfied for all men....

Hayek's closing clause illustrates the absurdity of his argument--the Soviet Union had proved that the items he holds up to ridicule are attainable under socialism. But Article 28, the claim that a social and international order which realizes the rights and freedoms set out in the document, is too much for Hayek (and capitalists) to bear.

...Even the slightest amount of ordinary common sense ought to have told the authors of the document that what they decreed as universal rights were for the present and for any foreseeable future utterly impossible of achievement, and that solemnly to proclaim them as rights was to play an irresponsible game with the concept of 'right' which could result only in destroying the respect for it.

The whole document is indeed couched in that jargon or organization thinking which one has learnt to expect in the pronouncement of trade union officials or the International Labour Organization and which reflects an attitude business employees share with civil servants and the organization men of the big corporations, but which is altogether inconsistent with the principles on which the order of a Great Society rests. (Hayek, *Law...*, Vol. II, p. 103-5.)

This last paragraph brings Hayek to a bone of contention he has to pick with the true threat to his "Great Society"--the danger of the "special interests." The special interests (like the working class) threaten to ruin the "Great Society" i.e., interfere with capitalist "justice." This threat can be averted:

We can prevent government from serving special interests only by depriving it of the power to use coercion in doing so, which means that we can limit the powers of organized interests only by limiting the powers of

government. A system in which the politicians believe that it is their duty, and in their power, to remove all dissatisfaction, must lead to a complete manipulation of the people's affairs by the politicians. If that power is unlimited, it will and must be used in the service of particular interests, and it will induce all the organizable interests to combine in order to bring pressure upon government. The only defence that a politician has against such pressure is to point to an established principle which prevents him from complying and which he cannot alter. No system in which those who direct the use of the resources of government are not bound by unalterable rules can escape becoming an instrument of the organized interests.

(Hayek, Law..., Vol. III, p. 16-7.)

The constitutions of the "advanced countries" of the West have fallen into the trap of serving the special interests. Thus Hayek comes to the aid of the capitalists by proposing a reform of his own--a constitution, not unlike the original constitution of the United States which rests solely on "basic principles":

The basic clause of such a constitution would have to state that in normal times, and apart from certain clearly defined emergency situations, men could be restrained from doing what they wished, or coerced to do particular things, only in accordance with the recognized rules of just conduct designed to define and protect the individual domain of each...

(Hayek, Law..., Vol. III, p. 109.)

The "rules of just conduct" are of course the "freedom of contract, the inviolability of property, and the duty to compensate another for damage due to his fault" (Hayek, Law..., Vol. II, p. 40.). A constitution founded on a basic

clause" (the rules of just conduct) has special advantages for Hayek's viewpoint:

Such a clause would by itself achieve all and more than the traditional Bills of Rights were meant to secure; and it would therefore make any separate enumeration of a list of special protected fundamental rights unnecessary. This will be clear when it is remembered that none of the traditional Rights of Man, such as the freedom of speech, of the press, of religion, of assembly and association, or of the inviolability of the home or of letters, etc., can be, or ever have been, absolute rights that may not be limited by general rules of law. Freedom of speech does of course not mean that we are free to slander, libel, deceive, incite to crime or cause a panic by false alarm, etc., etc.

(Hayek, Law..., Vol. III, p. 110.)

Thus Hayek's attack on the working class is complete: The owners of wealth (the ruling class, less than one percent of the population) do not constitute a special interest, they simply reflect the natural law. Hayek, while ostensibly putting forth a "new" theory of the law rests on the same foundation as Holmes did in 1889--protect private property first, and the rest will take care of itself. Only Hayek takes things a bit further in advocating the abolition of such trivial items as Bills of Rights, not only in the U.S., but around the world.

The necessity of this further step is brought about by the expediency needed for the capitalist class to deal with the increasing crisis which is currently wracking their world--rights granted to the majority of the population in the past now only stand in the way of the bourgeois class maintaining their hold.

II.

THE ROLE OF LAW UNDER SOCIALISM

Marxists "know" that in order to establish socialism, the bourgeois class and the government that represents their interests must be overturned by force; as the ruling class will fight tooth and nail to maintain its economic dominance, a peaceful transition to socialism is impossible. Also Marx, Engels, and Lenin advocated the smashing of the bourgeois state machinery as a necessary condition for the historical epoch of socialism to begin.

As well, Marxists know that in order to build socialism, a socialist state needs to come into being--a state which will work to further the interests of the working class. "Between capitalist and communist society lies the period of the revolutionary transformation of the one into the other. Corresponding to this is also a political transition period in which the state can be nothing but the revolutionary dictatorship of the proletariat" (Marx, quoted in Lenin, The Proletarian Revolution..., p. 46-7). Thus the state during the period of socialism takes on the form of the dictatorship of the proletariat, and "Dictatorship is rule based directly upon force and unrestricted by any laws" (Lenin, The Proletarian Revolution..., p. 49).

In what sense is the dictatorship of the proletariat unrestricted by any law? During the period of revolution itself, when the proletariat is physically seizing power from the capitalist class, the only written law is that which is interconnected with the capitalist state machinery. Thus for revolution to succeed, the revolution must ignore the law. For example, at the time of revolution it may be illegal to assemble, bear arms, or print revolutionary newspapers and directives; obviously these laws would be restricting to a revolution. This of course does not mean that the immediate period of the revolution is completely "lawless." As no socialist written laws prevail, the necessity of revolutionary discipline which Lenin constantly

stresses comes into play.

The above statement may at first examination appear to contradict the existence of law during the period of socialism--but in fact nothing could be further from the truth. Laws must exist under socialism, more laws (at least at first) than are usually found under bourgeois rule. The reason for this is simple. Under socialism it is necessary to enforce socialist law--laws which promote and protect the interests of the now-dominant working class--and certain laws of bourgeois origin: Laws that need to continue to exist and be enforced because the people in the socialist state, especially at the beginning of the period of socialism, bear all the social scars of capitalism. People--perhaps even those who consider themselves pro-socialist--will continue to behave as if they are living under capitalist rule. As well, the problems of the nascent socialist state are further compounded by the fact that the people who usually comprise the technical infrastructure under capitalism (engineers, doctors, technicians, etc.) are infected with an anti-social, petty-bourgeois mentality. These people must remain in their positions (some of which are administrative and hence offer great opportunity for wrecking) until socially conscious replacements can be educated, or those with anti-social attitudes reeducated.² These points need further elucidation.

In capitalist society it is, for example, socially acceptable for one to pilfer in the workplace. Workers, out of need or habit steal from their employers. When socialism comes into existence nothing guarantees that this sort of behavior will cease, in fact it may intensify due to the outright sabotage by those not sympathetic to the socialist regime. Thus we would find it necessary to maintain and enforce the socialist law forbidding the theft of objects from the workplace. The law against workplace theft had its origins under capitalism, which illustrates the nature of capitalist versus socialist law. Under capitalism the law against theft is not universally applicable--capitalists always steal from workers, but workers must never steal from

capitalists. The law against theft is socialist in that it forbids all theft, and is not enforced in a selective fashion as under capitalism. However, under socialism, the potential to eliminate the need for such a law exists. The means of production are now owned by and operated for the benefit of the majority of the population, the working class. Workers are no longer stealing from their antagonistic class enemy, the capitalists, but are in effect stealing from themselves.³ Thus workplace theft becomes irrational under socialism and once the working class can be educated to this fact, and the saboteurs eliminated, the necessity of maintaining or enforcing a law against theft in the workplace ceases to exist.

The experiences of the Gorky Colony as recounted by Anton Makarenko in his The Road to Life serve as an example of this. The Gorky Colony was established for juvenile delinquents, people who had no respect for law, capitalist, feudal, or socialist; their continual violation of laws were of great detriment to the emerging socialist state. Despite the fact that many of the inmates of the colony proudly proclaimed that they had served in the Red Guard and thought of themselves as pro-Soviet, the majority of them would steal or engage in other anti-social behavior at the drop of a hat. It was not until a period of reeducation took place, and the incorrigibles expelled, that the crimes committed began to diminish in frequency.

The proletariat needs a powerful state at their disposal to crush the resistance and will of the capitalist class, and as well, this state machine constructed by and wielded for the benefit of the working class provides the vehicle to reeducate the population--to nurture correct social behavior and stamp out individualistic behavior. Thus, as the process of the reeducation of mankind advances, the proletarian state (with its laws of bourgeois and socialist origin) gradually becomes redundant. In a widely used phrase "the state begins to wither away." Laws that were once to be benefit of the proletariat in the building of socialism can be overridden and

cast aside. This is another sense which "The revolutionary dictatorship of the proletariat...is unrestricted by any laws."

A clear example of this occurred in the Soviet Union. For a period after the October 1917 Revolution, the Soviet Government allowed the continued existence of the capitalist element in the agricultural sector, the class of agricultural capitalists known as kulaks. Thus the laws (laws that were entirely capitalist in nature) that facilitated the success of the kulaks were enforced by the Soviet government. While the capitalist element was not given the entirely free hand that it enjoyed under capitalism (i.e., the government was now working to build socialism) the basic legal structure was held in place. However, it was apparent that in order to build the industrial base necessary to raise the standard of living sufficiently to build a socialist state, the petty-agricultural base provided by the kulak was standing in contradiction to the interests of the working class.

On what assumption did the Fifteenth Congress proceed when it proclaimed the intensification of the policy of restricting (and *eliminating*) the capitalist elements of the countryside? On the assumption that, in spite of the restriction of the kulaks, the kulaks as a class for the time *must remain*. On this assumption the Fifteenth Congress retained in force the law regarding the leasing of land, knowing very well that the mass of those who leased land were kulaks. On this assumption the Fifteenth Congress retained in force the law regarding the hiring of labour in the rural districts and demanded that it should be strictly observed. On this assumption the impermissibility of expropriating the kulaks was once more proclaimed. Do these laws and these decisions contradict the policy of *restricting* (and squeezing out) the capitalist elements of the countryside? They certainly *do not*. Do these laws and these decisions contradict the policy of the

liquidation of the kulaks as a class? They certainly *do*! Hence it follows that these laws and these decisions must now be laid aside in the districts of mass collectivisation, the area of which is extending daily and hourly. Incidentally, they have already been set aside by the very march of the collective farm movement in the regions of mass collectivisation....

Hence, the present policy of our Party in the village is not a *continuation* of the old policy, but a *change* from the old policy of *restricting* (and squeezing out) the capitalist elements of the countryside to the new policy of *liquidating* the kulaks as a class.
(Stalin, *Leninism*, Vol. II, pp. 209-11.)

Socialism is a dynamic state, and since the stated goal of socialism is the elimination of itself and the establishment of communism, it is a period of struggle. The social scars of the bourgeois period must be eliminated, the bourgeois class must be defeated. This leads to periods of open struggle--marked by violence, interspersed with periods of construction--construction of the economic base necessary to achieve the political goals of socialism, and construction of the attitudes and behavior that will bring about the new society.

The dictatorship of the proletariat has its periods, its special forms, its diversified methods of work. During the period of civil war, the coercive aspect of the dictatorship is especially conspicuous. But it by no means follows from this that no constructive work is carried on during the period of civil war. The civil war itself cannot be waged without constructive work. On the other hand, during the period of socialist construction, the peaceful, organisational and cultural work of the dictatorship, revolutionary law, etc., are especially conspicuous. But here, again, it by no means follows that

during the period of construction, the coercive side of the dictatorship has fallen away, or could do so. The organs of suppression, the army and other organisations are as necessary now in the period of construction as they were during the civil war period. Without these institutions, constructive work by the dictatorship with any degree of security would be impossible. It should not be forgotten that for the time being the revolution has been victorious in only one country. It should not be forgotten that as long as we live in a capitalist encirclement, so long will the danger of intervention, with all the resultant consequences, continue.

(Stalin, *Leninism*, Vol. I, p. 274.)

In a nutshell, the role of law in the period between capitalism and communism might be summed up as follows: Laws under socialism, whether bourgeois or socialist in origin, should be enforced to protect the interests of the working class. However, as the socialist society progresses towards its goal of communism, laws will be discarded as the society changes and the existing laws come into conflict with the interests of the proletariat, or are no longer needed.

CONCLUSION

Knowing the methods of one's enemy is always helpful in gaining victory over that enemy. Those interested in furthering the goals of the working class movement thus should be familiar with the methods of capitalism. As noted above, the legal structure of the capitalist system allows it a great deal of flexibility in dealing with those who become dissatisfied with that system. Angry people--whether they are angry about civil rights violations, militarization, or apartheid in South Africa--can safely (from the capitalists' point of view) channel their energies into movements which

have as an end result the passing of this law or that. The capitalists can breathe sighs of relief as the number of laws favoring the working class pile up--they know that they need not enforce them, or can have their courts interpret them in a pro-capitalist fashion.

The working class must be made aware of the fraud that underlies the legislative process--the examples that history displays must be pointed out again and again. Only when the dictatorship of the bourgeoisie is stripped of all its fraudulent trimmings may the dictatorship of the proletariat assert the will of the working class.

FOOTNOTES

¹Coase, a University of Chicago economist, posits a view of the law based solely on economic efficiency. His "theorem", which gained him wide popularity, can be condensed to the following: The economic outcomes witnessed in society are unaffected by the rule of liability. This may appear harmless enough, but it results in peculiar legal outcomes.

Posner, a judge in the U.S. Court of Appeals for the Seventh Circuit in Chicago illustrates the Coase theorem in some of his decisions.

...Posner ruled that a shipowner was not negligent in the death of a longshoreman who fell through a freighter's open hatch at night. He reasoned that the dark should have made the roustabout more careful, and leaving the hatch open at night must have been "cost-justified" or the owner wouldn't have done it....

(Caplan, "The Supply-Side Judge...", The Sacramento Bee, 10-21-84.)

The Coase theorem leads to the result that both parties are always equally liable for any damages--murder victims are just as responsible as murderers, for example.

Posner is no isolated crack-pot, he is a prime contender for the Supreme Court of the U.S.

Hayek, it should be noted, is a highly influential economist and a recipient of the Nobel Prize in 1974.

²This problem is documented in the following passage from Maurice Dobb's Soviet Economic Development Since 1917, pp. 115-6.

Aggravating all this was the extreme scarcity of efficient administrative personnel, and lack of political sympathy, amounting in many cases to ill-concealed

hostility, among large numbers of those who staffed both the central and local organs. All but a small percentage of the economic experts would probably have misused discretion if this had been granted to them. The old-style *chinovnik*, or civil servant, had a tradition which generally made him worse than useless for purposes of economic administration, requiring initiative and quick decisions without interminable reference. Newly promoted proletarian elements were often rich in "drive" and had genuine organising capacity, but were lacking in experience and training and frequently both distrusted and antagonised the older specialists. Kritsman records some interesting results of a confidential enquiry made as late as 1922 among 270 engineers and technicians in responsible positions in Moscow, which probably gives a fairly representative sample of their species. These engineers were divided into two groups: those who had held responsible posts in capitalist industry before the war and those who had been in an employed capacity as technical assistants. The main items in the enquiry were three in number: were they sympathetic to the Soviet Government; did they consider their work to be of social value; and did they consider the taking of bribes to be inadmissible? Those among the first group who answered the three questions affirmatively were 9, 30 and 25 per cent. respectively, and among the second group 13, 75 and 30 per cent. Thus, if these figures are representative, nearly 90 per cent. of such officials were unsympathetic to the Government; a quarter of one group and over two thirds of the other had no faith in their work; while two thirds were unwilling to discountenance completely the taking of bribes....

³Of course, even under capitalism workers are stealing from themselves as capitalists consider such losses costs of production and raise the

price of the finished good accordingly.

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