

LAW AND THE CONSTITUTION OF SOVIET SOCIETY: THE CASE OF COMRADE LENIN

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In this paper we investigate a largely unrecognized but nevertheless important chapter in the legal and political history of Soviet Marxism: the simultaneously coherent and contradictory theoretical tendencies in Lenin's pronouncements about law, legality, and delegatization ("the withering away of law") during the socialist transition. We identify and discuss these tendencies as they unfold against the historical background of the Russian Revolution. We argue that Lenin's political and theoretical objections to legal formalism greatly contributed to the tragic neglect of constitutional mechanisms needed to secure the radical democratic motives of the revolutionary process.

I. INTRODUCTION

Much has been written in the last decade about law and socialist construction and about the character and content of the approach of socialists to law.¹ The present essay is chiefly concerned with the role of law in the transitional period between capitalism and socialism and in the development from socialism to a future communist society.² We address this issue in the context of Lenin's contribution to and understanding of the Bolshevik experience with the dictatorship of the proletariat (hereinafter *DoP*) and the "withering away of law." Although Lenin never analyzed law as a distinct theoretical object, his writings nevertheless contain

For their helpful comments on an earlier version of this paper the authors wish to thank Eugene Huskey, Robert Kidder, and an anonymous reviewer of this journal. Generous assistance with referencing was provided by Martha Lippa.

¹ The main protagonists in this literature are by now well-known, and their specific contributions need no rehearsal here. The varied writings include: Thompson (1975; 1980); Cohen (1978); Hirst (1979: 96-176; 1986); Fryer *et al.* (1981); Beirne and Quinney (1982); Buchanan (1982); Collins (1982); Campbell (1983); Fine (1984); Lea and Young (1984); and Geras (1985).

² For present purposes "socialism" is a transitional stage—of a more or less protracted period—that spans the conquest of political power and the emergence of "communism" as a classless society in which capitalist social and economic relations have been wholly expunged. No existing society satisfies these conditions.

LAW & SOCIETY REVIEW, Volume 22, Number 3 (1988)

many observations and comments pertinent to a socialist theory of law. His writings on law are diverse and include numerous polemical asides, occasional theoretical remarks, and some more sustained treatments of theoretico-political issues that bear directly upon law and legal phenomena. Notwithstanding several uncritical accounts by Soviet authors, there is no sustained treatment of Lenin's conception of law and legality in the transition from capitalism to communism.³ Our first objective here, therefore, is to fill this gap. Moreover, some obvious silences in Lenin's writings can legitimately be replaced by examining his activities on such bodies as the Council of People's Commissars and his role in enacting a mass of legislation from November 1917 until his death in early 1924.

However, one of the many difficulties in an examination of early Soviet history is the temptation to confuse different levels of analysis. Analysis of the theoretical implications of Lenin's observations on the uses of law, for example, must be distinguished from an historical focus on the particular development of Soviet legal institutions. Without this distinction we are drawn to a simplistic disjunction between Soviet "theory" and "practice," culminating in a fruitless "if only" discussion based on the conflation of different analytical levels: For example, "if only the civil war had not been so protracted, then the democratic Soviets would have had a chance to develop"; or, "if only Bukharin's strictures about the growth of the bureaucracy had been heeded, then. . . ."⁴ We do not posit some artificial disjunction between Leninist theory and the particulars of Soviet history. Instead, we conduct a theoretical enquiry into those aspects of Lenin's texts pertinent to the role of law in the socialist transition and the development of communism. In this context we must briefly comment on the discursive levels provided by Lenin's concept of the *DoP*.

The concept of the *DoP*, within the Marxism-Leninism that became the official credo of Stalinism, was used as an article of faith to separate revolutionaries from revisionists. Indeed, in *State and Revolution* Lenin (1917c: 412; see also 1918h: 231–242) was emphatic that "a Marxist is solely someone who extends the recognition of the class struggle to the recognition of the *dictatorship of the proletariat*." However, in Lenin's texts as a whole the concept of the *DoP* has a more complex history than such a passage suggests. Indeed, it is central to his thought in three related but distinct forms which have not previously been noted. First, the *DoP* was to be a necessary, rigorous, and rapid conquest of political power by the revolutionary forces so as to prevent the restoration of the old order. In this sense, it was to be an exceptional, tempo-

³ See Stuchka (1925), Pashukanis (1925 [1980]), Krylenko (1934), and Bratous (1970).

⁴ Examples of these "if only" histories are provided by Cohen (1974), Makepiece (1980), and Medvedev (1981).

rary phase, quasimilitary in nature, needed to secure the complete defeat of the previous regime but not in itself constitutive of the new socialist order. Second, the *DoP* was to involve Lenin's demand that the bourgeois state machinery be smashed. His key contention here was that the variety of state institutions characteristic of capitalist societies is inappropriate for the objectives of the revolutionary classes on assuming political power.⁵ Lenin never precisely identified how the bourgeois state was inappropriate for the tasks of the proletariat, although his position derived from the broader thesis that there must be a complete rupture between the whole historical period of capitalist society and that marking the advent of socialism.⁶ Third, Lenin frequently referred to the *DoP* as a revolutionary period that actively promoted the institutions and social relations for the transition from socialism to communism. Previously, the transitions between the different forms of class society had certain institutional and political continuities because these were all dictatorships of a minority against the majority. In contrast, the socialist revolution was to be made by or on behalf of the great majority or both. The socialist revolution, therefore, was to differ from all previous revolutions in the principled importance it attached to the future. In this sense the *DoP* was less negative and coercive than active and educative in its quest for communism.

This theoretical grounding of Lenin's concept of the *DoP* provides a key for unlocking both the coherence and the contradiction of his views on the role of law in the socialist transition. The coherence of his views can be expressed in the form of five theses:

Thesis 1. Bourgeois law is inherently limited by the unequal relations on which it is founded. Yet during the bourgeois democratic revolution it provides a significant arena of struggle for securing universal political liberties—the cornerstone of bourgeois democracy—and in which democratic forces can secure concessions from the ruling classes.

Thesis 2. In the immediate context of the revolutionary seizure of power and the establishment of the proletarian dictatorship, law is a minor but nevertheless useful educative vehicle in the dissemination of the socialist program through the form of decrees and legislative enactments.

Thesis 3. The period of the *DoP* and beyond provides the con-

⁵ However, Lenin occasionally argued that the Bolsheviks should use the old bourgeois state against the bourgeoisie. In his famous lecture on the state at Sverdlov University, for example, he argued that "so far we have deprived the capitalists of this machine [the state] and have taken it over. We shall use this machine, or bludgeon, to destroy all exploitation" (Lenin, 1919d: 488).

⁶ Whilst bourgeois revolutions had varying degrees of continuity with the feudal orders they replaced, the transition from capitalism to socialism was conceived as a more fundamental rupture or break necessitating a total transformation in all arenas of economic and political life.

ditions for the realization of the emancipatory capacity of the popular classes. One dimension of this process will be the emergence of the practices and values of "socialist legality." Socialist legality will be marked by informality, flexibility, and the explicit dominance of political objectives and will therefore directly contrast with the formalism of bourgeois law.

Thesis 4. The requirements of the revolutionary transition from capitalism to communism will involve, both in the short and the long run, a complete rupture with the political and legal institutions of bourgeois society (parliament, bourgeois democracy, and law). The alternative requires the institutional form of soviets and the development of proletarian/socialist democracy.

Thesis 5. Communist society will be a nonlegal social order. Only the existence of classes and social inequality necessitates legal institutions and mechanisms. Because communism abolishes the conditions that produce law and also greatly simplifies and extends participation to all citizens, general requirements for legal regulations or processes are unnecessary.

In Parts II and III of this paper we examine Lenin's view of law under divisions derived from the coherence of these five theses. However, it will be apparent that adjacent to and overriding this coherence is a serious tension, notably expressed in his *The State and Revolution* (Lenin, 1917c), immanent in Lenin's repeated stress on the need for the disappearance of state and law under communism. We argue in Part IV that this tension led to and was part of an inadequate constitutionalism in his theory of the socialist transition, a requirement that must include the distribution of powers, checks, and supervision between state and political institutions. Although there is a certain coherence in Lenin's view of law, it fails adequately to address those problems, which, in varying forms and with different intensity, will be experienced by all attempts to construct a socialist society.

II. LAW, CONSTITUTION, AND RUSSIAN CAPITALISM

Lenin's earliest and, perhaps most substantial, writings encompassed a major debate about the causes and dynamics of the development of Russian capitalism. For present purposes the economic history that these texts debated is less salient than the narrower question of the analysis of the role of law in the economic transformation of Russia at the turn of the century. Lenin's antagonists at this time were the Narodniks, who were themselves influenced by Marxist economic theory.⁷ They argued that capitalism was an imported phenomenon whose penetration into the Russian

⁷ Narodnism was a late nineteenth-century populist doctrine based on the political advancement of the Russian peasantry. Its decline was coextensive with the rise of the Russian Socialist Democratic Labor Party (RSDLP).

economy was both limited and reversible. Politically, the Narodniks envisioned a socialist transition that built upon the communal features of the peasantry and that thereby obviated the need for capitalist development. Lenin was not concerned with abstractly debating the merits of a capitalist stage of development. Instead, he argued that capitalist relations were so deeply embedded in rural Russia that capitalism was not an import from western Europe, even though importation had played a part in the more visible fact of capitalism, namely, the small number of large industrial enterprises recently established in St. Petersburg, Moscow, and other centers. The depth of capitalist penetration was revealed by the rapid spread of wage-labor and commodity exchange in the countryside and by the resultant economic differentiation within the peasantry. Capitalism was for Lenin an indigenous, natural, and spontaneous economic development.

What role, then, did Lenin attribute to law in the development of Russian capitalism? Although he did not explicitly address this question, his answer would undoubtedly have been "very little," for he attributed little or no causal agency to law. Referring to the major legal restrictions upon the peasantry that remained long after the Emancipation Edict of 1861, he argued that "the whole process of the differentiation of the agricultural peasantry is one of real life evading these legal bounds" (Lenin, 1908a: 103). For Lenin juridical classification was irrelevant in the analysis of economic relations; indeed, the multiplicity of legal forms of land tenure concealed the actual development of capitalist relations of production. In general, he attributed little significance to law: Either it provided formal clothing for real economic and social relations, or, in its material form as police and courts, it provided the mechanism of repression.

This lack of concern with the role of law is more significant than appears at first sight. There is a marked contrast between Lenin's account of the development of capitalism in Russia and that offered by Marx in *Capital*, where England provided the major historical point of reference. Marx (1867 [1975]: Vol. 1, chaps. 27–28) stressed the creation of free labor as an essential precondition for capitalist development, and in it law and particular legislation played a central role. Whilst there is no suggestion that Russian economic development followed a pattern described by Marx, Lenin's voluminous account nevertheless omitted consideration of this theme. It can only be suggested that his general desire to stress the spontaneous nature of capitalist development in Russia resulted in this absence.

Lenin never claimed either to have advanced or to have adopted a jurisprudential position. Yet woven throughout the great mass of his references and comments about law is a strong jurisprudence, whose core is an uncompromising imperativeness. Thus he wrote, "A will, if it is the will of the state, must be ex-

pressed in the form of a *law* established by the *state*" (Lenin, 1917a: 90); "What is law? The expression of the will of the classes which have emerged victorious and hold the power of the state" (Lenin, 1908b: 327); and "Laws are political measures, politics" (Lenin, 1916a: 48). He harnessed this imperativeness to a conceptual association among law, state, and class. Law he saw as the bearer and embodiment of class interests through the coercive capacity of the state. In this his primary focus was on the way in which law is the bearer of class interests in forms that, more or less hypocritically, misrepresent social reality. Thus, his frequently repeated criticism of bourgeois legality and democracy hinged on the issue of formal equality and "the crying contradiction between the *formal* equality proclaimed by the 'democracy' of the capitalist and the thousands of *real* limitations and subterfuges which turn the proletariat into *wage slaves*" (Lenin, 1917c: 472).⁸

Lenin's critique of bourgeois legality was intimately linked with a distinctive feature of his analysis of democracy that had no obvious antecedent in Marx. He argued that, as the highest and final stage of capitalism, monopoly capitalism marks a shift from political democracy to political reaction. As a result the bourgeoisie is always prepared to abandon its own bourgeois democracy when its class interests are at stake: "The more highly developed a democracy is, the more imminent are programs or civil war in connection with any profound political divergence which is dangerous to the bourgeoisie" (Lenin, 1918h: 245). Moreover, "all of this legality *must* inevitably be cast to the four winds when the fundamental and cardinal question of the preservation of bourgeois property is affected" (Lenin, 1910: 306). In discussing the political situation before World War I, Lenin argued that this "most stable constitutional legality, is now coming to a point where this legality, *their* legality, *will have to be* shattered so that the domination of the bourgeoisie may be preserved" (*ibid.*, pp. 310–311). Thus, in the most general terms, Lenin deferred to the historical contingency of legality and constitutionality within the framework of a political sociology that insisted upon a strict correlation between the intensification of class struggle and the shift to political reaction within the bourgeois democracies.⁹

Legality and democracy were for Lenin narrowly ideological in that they involved a more or less self-conscious deception by the

⁸ Similar formulations can be found in Lenin (1919b: 353–354; 1919c: 380; 1919d: 482; 1919f: 42; 1919g: 121).

⁹ In the specific historical context of the war this thesis had some justification. Subsequently, the course of European politics in the interwar period, in particular the rise of fascism, led this thesis to play a central part in the politics of the Comintern and was a central tenet of the ultrasectarian politics of the "third period," which refused to recognize any difference between bourgeois democracy and fascism. It is much easier, from the vantage point of the defeat of fascism and the continuing vitality of bourgeois democracy, to see the underlying error in Lenin's original position.

bourgeoisie (and, even more so, by socialists who could not free themselves from the ideological influence of the bourgeoisie). However, he emphasized the practical importance of the democratic struggle as preparation for the struggle for socialism (Lenin, 1916: 144) and stressed the educative and necessary character of the struggle for democracy (Lenin, 1916a: 73). As we will see, much of the practical, agitational, and educational activity of the Bolsheviks stressed, on the one hand, the importance of demands for legal reforms and the winning of rights and, on the other, the inherent limitations of all legal and constitutional reforms.

A. *The Struggle Against Tsarism*

Issues about law, legislation, legality, constitutions, courts, and related matters often confronted Lenin during the two decades of his political activity before October 1917. While these topics were rarely his focal concerns, his writings on them were extensive. However, we will try to demonstrate that Lenin's discourse on these matters related closely to his central political and theoretical concerns.

Lenin was adamant that politics serve classes and that the state serves the dominant class. Accordingly, in discussing legal developments he focused upon what may be termed a "class" reading of law. This can be illustrated by his short article (Lenin, 1901e) "Objective Statistics," in which he analyzed the ninety-one laws enacted by the government during the previous twelve months. Of these the majority (60) served the practical needs of the capitalists, and twenty-two dealt with the administration of the tsarist state—thus attesting to the "government's solicitude for itself" (*ibid.*, p. 412). With heavy irony Lenin belittled any possible popular benefit that might accrue from the remaining minor edicts. In addition, one law extended the area of forests devoted to the development and improvement of His Imperial Majesty's hunting. He concluded, with nicely modulated irony, "Can there be any doubt whatever that such richly varied legislative and administrative activity will guarantee our country rapid and undeviating progress in the twentieth century?" (Lenin, 1908: 413).

Similarly, Lenin wrote a number of articles and pamphlets exposing the brutality of the tsarist police. His intent was usually to deal polemically with the exposure of the repressive behavior of the tsarist police on the one hand, and, on the other, to address party membership by giving illustration and instruction as to the necessary sort of public agitational work. In "Beat—But Not to Death" (Lenin, 1901), he related the fatal beating of a peasant and the subsequent trial of the police involved. Beyond the savage irony that the police would have been safe had they stopped short of their victim's death, he used this incident to advocate a wide-ranging set of legal reforms, including independent and public

courts and the extension of the jury system. His substantive political point was that exposure of such abuses should be undertaken systematically by the Social Democrats to elevate political consciousness about the lack of political and civil liberties.

A second strand within his texts advanced political demands for major democratic reforms as he explicitly attempted to raise political consciousness about the lack of liberty. This is best illustrated by his treatment of the penal servitude regulations of 1901 (Lenin, 1901b; 1901c), which regulations governed the conditions under which peasants—then experiencing a serious famine—could be drafted into labor gangs to undertake public works. Lenin underlined how these rules once again enslaved the peasants, forty years after emancipation. He exhorted the Social Democrats to distribute copies of these regulations, along with leaflets explaining their implications, to generate agitation against forced labor. This approach was part of his wider political objective to extend the struggle against tsarism into the countryside and thus fit with Lenin's insistence, in opposition to the "economistic" trend within the party,¹⁰ that the industrial working class, because of its small size, could not "emancipate itself without emancipating the whole people from despotism" (Lenin, 1901a: 418).¹¹

Several of Lenin's other articles and pamphlets of this period attempted to disseminate and popularize the democratic demands of the Social Democrats for full political liberties (such as freedom of assembly and freedom of the press), for a constituent assembly, and for full equality for the peasantry (Lenin, 1903). For example, in one pamphlet Lenin (1903a) highlighted the demands for securing the political and civil liberties of the peasantry and for discarding all remnants of feudalism; he offered a sustained contrast between Russian autocracy and the democratic advances of western Europe. He emphasized the general significance of the struggle for democracy: "The entire working class and the entire country are suffering from this absence of rights; it is on this that the Asiatic backwardness in Russian life rests" (Lenin, 1903: 351).

A major theme of his writing, particularly prior to 1905, concerned factory legislation. Here again we see the publicist's insistence on the importance of explaining to the workers the detailed implications of successive legislative devices. For example, his early pamphlet "The New Factory Law" (Lenin, 1899) provided a detailed commentary and critique of the 1897 factory legislation. This piece exemplified his repeated analysis that the securing of

¹⁰ For the culmination of his struggle against the "economist" trend in the RSDLP, see Lenin (1902a). For a brief account of this controversy, see Carr (1966: Vol. 2, pp. 105–108).

¹¹ Lenin contrasted the harsh regulations against the peasantry of 1901 with a law passed in the same year providing for the leasing of unoccupied lands in Siberia to the "poor" landowning nobility, who, in turn, he contrasted with the landless poor in the United States who were encouraged to settle on vacant land (Lenin, 1901d: 99–100).

such legislation was a tribute to the tenacity and struggle of the factory workers themselves, although it had often been facilitated by factory owners concerned with minimizing strikes and other forms of disruptions and who, accordingly, pressed the autocracy for these concessions. However, Lenin was keen to demonstrate that in practice the detailed content of the legislation, as well as the methods and procedure provided for its implementation and enforcement, often rescinded its erstwhile benefits.¹²

In an *Iskra* article of 1902, Lenin analyzed a proposal to repeal a new law that made it a criminal offense for workers to leave their employment or to strike. He argued that this provision served to embitter workers and that the commencement of proceedings against large numbers of individual employees was time-consuming and inefficient for both the employers and the authorities. The law embodied “the practical considerations of the manufacturers, which break right through the traditional juridical arguments” (Lenin, 1902: 219). The contradiction between legal requirements and practical economic considerations enabled the working class to act upon the contradiction “between the developing bourgeoisie and moribund absolutism” (*ibid.*, p. 223). In the next year Lenin (1903b) argued that the increased level of struggle had won a number of reforms. For example, he detailed the legislative provisions on injury compensation allowing employees to appoint factory stewards. After a critique of the inherent limitations of this reform, he exhorted the Social Democrats to encourage participation and thereby increase the propaganda for political liberty.

In addition to providing detailed analyses of contemporary legislation, Lenin advanced democratic demands of immediate relevance to the industrial workers. Along with such general demands as the legalization of trade unions, Lenin promoted several particular reforms. For example, over a number of years he urged the establishment of courts to resolve conflicts within the factories; his major demand was for elected workers to sit next to the employers as judges. In this case he was less concerned with promoting a particular model of industrial relations than with linking the demand for industrial democracy with that for political democracy in general, to make the political demands relevant in the trade union context and vice versa.

The 1905 Revolution achieved considerable gains for the democratic and liberal forces.¹³ However, a period of fierce repression ensued that destroyed many short-run advances. In the aftermath Lenin scrutinized the use of reactionary constitutional forms by the Social Democrats. He regarded the issue of whether they should participate in elections and take up seats as a tactical ques-

¹² This demystification closely paralleled Marx’s (1867 [1975]: Vol. 1, chap. 10, pp. 231–302) analysis of the early Factory Acts in England (although Lenin did not himself refer to Marx’s writings).

¹³ On the extent of these gains see Carr (1966: Vol. 1, pp. 57–69).

tion whose sole consideration was how best to promote the party's political objectives. The years between 1905 and 1917 were marked by the need to combine, in varying ways, legal and illegal activities. For example, there were long periods when RSDLP members sat in the Duma, whilst the party itself was illegal and some or all of its leaders were in exile abroad. Lenin thus insisted that it was obligatory to combine legal and illegal forms of struggle (1902a: 454–467).

In pursuing a flexible strategy toward participation in the largely unreformed constitutional structure of tsarism, the Social Democrats employed a propagandist approach to the use of the Duma. Their representatives had used the Duma as a tribune to attack the system and to demand democratic reforms. They also learned to employ the tactic of introducing draft legislation that they could not enact but that served to provide valuable propaganda in favor of the party's policy and program. The aim was that the whole text, or some part of it, should be published in newspapers, whether friendly or otherwise, and that it could be issued as a leaflet. Among the bills they introduced were ones to secure the eight-hour working day,¹⁴ to abolish disabilities for Jews and non-Russians, and to recognize national rights. Whilst following this flexible strategy toward participation in the Duma, Lenin adopted a flexible attitude toward participation in the courts. At different times and under different conditions, he advocated that party members both use the courts to defend the party's action and not surrender themselves to stand trial.

Russian political life after 1905 was full of debate about constitutional reform. Lenin consistently argued that constitutions themselves settled nothing because they reflect the results of class struggle: "Written and unwritten constitutions . . . are merely a record of the *results of struggle obtained through a series of hard-won victories* of the new over the old" (Lenin, 1913: 564). He frequently warned against the danger of the illusion that the adoption of an appropriate constitution was the primary objective of political struggle, a position consistent with his jaundiced view of the commitment by the bourgeoisie to parliamentary democracy.¹⁵ Simultaneously, he flexibly deployed this general position within the field of political practice and in so doing allowed the Social Democrats to use their small but growing forces to the greatest effect. With the crisis over the downfall of tsarism in February 1917, the

¹⁴ Lenin demanded that this bill expressly provide for the "gradual" introduction of the shorter working day to demonstrate the "technical, cultural and economic practicality of the Social-Democratic programme" (1909: 115).

¹⁵ Accordingly, he stressed that the revolt of major sections of the Tory Party and of the officer core of the British Army over the Irish Home Rule crisis in 1914 showed that the ruling classes would dispense with legality, the rule of law, and the constitution when their class interests were threatened (Lenin, 1914). There was even less reason to trust the Russian ruling classes than the British, he argued.

Bolsheviks were at first surprised by the rapidity of events. But in the short eternity between February and October 1917, they secured the overthrow of the provisional government and were themselves in a powerful, if not necessarily commanding, position in the soviets. Accordingly, we can now attend to Lenin's views on the role of law in securing the gains of the October revolution and in socialist construction.

III. LAW IN THE TRANSITION TO SOCIALISM

There are at least two difficulties about giving an account of Lenin's view of the role of law in socialist construction. First, there is the risk of imposing, consciously or otherwise, an artificial coherence in his utterances that is not actually present; this is precisely what happened with the canonization that occurred after Lenin's death and that became consecrated as "Marxism-Leninism." Second, when one attempts to remain faithful to the fragmented character of Lenin's views on a topic that was not among his major concerns, the diffuse nature of his observations creates some hardship for an order of presentation. Any form of discussion is easily transformed into an order of priority. Our method stems from the threefold conceptual schema that Lenin himself employed in his theoretical discussion of stages of the revolutionary process: (1) the securing of power and the *DoP*; (2) the socialist transition; and (3) the construction of communism. However, these stages are not chronologies that can be imposed mechanically on the history of the Russian revolution, because much of Lenin's discussion about the role of law in the socialist transition occurred before the Civil War. Moreover, during the extreme conditions of the War, especially from spring 1919 until November 1920, the problems associated with the securing of power regained prominence. Similarly, much of Lenin's discussion of communism occurred immediately before and just after the October revolution. We claim no superiority for this method of exposition other than that it is reasonably instructive in assimilating the material at our disposal.

A. *Securing Power and the Proletarian Dictatorship*

Lenin's varied texts about state and political power are best exemplified by *The State and Revolution* (Lenin, 1917c). Two emphases in this text must be clarified. First, all major changes in political power would incontrovertibly have to secure that power against both the old order and the factions contending for it. This required calculated coercion against identifiable political forces and institutions. Such coercion could be either reactive or anticipatory; for example, arresting the leaders of a political party demanding armed struggle against the new order would be reactive, while disbanding an army commanded by the prior regime would

be anticipatory. However, the measures would have to be calculated precisely. This calculus would be inherently controversial; for example, was it justifiable to exclude the wealthy from the franchise? Such a question was of symbolic importance in the present context in that it had no bearing on the actual course of the revolution because the wealthy classes were excluded from membership in the soviets. The Bolshevik decision to disband the Constituent Assembly—after its first meeting failed to approve the transfer of power to the soviets—made irrelevant the disenfranchisement of the wealthy.¹⁶ Second, Lenin emphasized that the *DoP* should be identified with socialism itself. He conceived the *DoP* as providing the paradigmatic form not only for its governmental structures but also for the whole organization of social, economic, and political life. The interrelationship among these elements—political and socioeconomic—can be termed the “constitution of society.”¹⁷ Only with the realization of the ultimate goal (communism) would the *DoP* lose its role. To this second attribute of the *DoP* we return below.

Lenin was most explicit about the role of the *DoP* in securing the seizure of power:

Dictatorship is rule based directly upon force and unrestricted by any laws.

The revolutionary dictatorship of the proletariat is rule won and maintained by the use of violence by the public against the bourgeoisie, rule that is unrestricted by any laws (Lenin, 1918h: 236).

¹⁶ The history of the Bolsheviks' relationship with the Constituent Assembly need not be retold here. Our focus is on its implications for Lenin's thought on the place of constitutions. It is well-known that the Bolsheviks disagreed about whether to allow the Constituent Assembly to function. As far back as April 1917 Lenin had indicated that the Bolsheviks would not be satisfied with a “bourgeois parliamentary democratic republic” but should press on to achieve a “democratic workers' and peasants' republic” (Lenin, 1917: 471). His major justification for closing the assembly involved two related arguments. First, because the news had not reached most rural areas by the time the votes were cast for the Constituent Assembly, the election results (in which the Socialist Revolutionary Party (SR) gained a handsome majority) belied the fact that the soviets had taken power in St. Petersburg and Moscow. Second, the votes were unreliable because when the assembly convened, the “victors” had already divided into the Left-SR (who supported the Bolsheviks and participated in the soviets and their executive bodies) and the Right-SR. In general these arguments practically applied Lenin's thesis that constitutions do not create but merely reflect, confirm, and legitimize political power. The rapidity of the revolutionary process had eluded the Constituent Assembly. Power was now firmly in the hands of the soviets, and to revert to the assembly would be to retreat in the face of historical reality. To argue otherwise was to fall under the spell of “constitutional illusions.”

¹⁷ The term “constitution” involves both the formal process of constitution making, or constitutionalism, and a broader set of processes by and through which societies are *constituted*. We employ this concept as Giddens (1984) does when he refers to the whole complex of relations—economic, political, and cultural—through which each society is constituted and in which great importance is attached to the relationship that exists between the state and civil society.

Variants of this formulation reoccur regularly (for example, see Lenin, 1906: 246). There was, then, no equivocation: The immediate objective of the *DoP* was to suppress the old order and the classes and institutions on which its power was based. However, Lenin provided a number of significant extensions and extrapolations from this position. For example, he directly identified the *DoP* with the soviets, the institutional embodiment of the Russian revolution: "Soviet power is nothing but an organisational form of the dictatorship of the proletariat" (Lenin, 1918f: 265). Again, Lenin offered various parallel characterizations of the soviets as the expression of the *DoP*, as the embodiment of the direct democracy of the toilers, and as the means of representation of the different sectors of "the masses" and "the working people" (such as workers, soldiers, sailors, peasants, and poor peasants—all of whom had their own soviets at different periods). These different attributes were then conflated so that the soviets were at once legislative institutions and representational expressions of classes—or sections of classes—and the new universal mechanism of socialist democracy and the state form of the revolution. One of the major absences in Lenin's theory is a consideration of the capability of the soviets to fulfill these different and potentially conflicting roles. In seeking to overinvest in this highly distinctive legacy of the revolutionary process, Lenin inadvertently prescribed its demise.¹⁸

To substantiate this thesis it must be noted that what is referred to as an "absence" in Lenin's thought was not a mere omission but the direct consequence of one of his well-known positions. He often repeated his criticism that the separation of legislative and executive functions reduced parliaments to the status of "talking shops." In contrast, he regarded the endowment of the soviets with legislative, executive, and administrative functions as a distinctive virtue of soviet over parliamentary institutions, without specifying in what this advantage consists. Moreover, Lenin failed to consider whether, in the attempt to fulfill all these functions, the soviets' roles would conflict with one another. Thus, by over-endowing the soviets he inserted a potential contradiction in the very core of the institutional apparatus of the new socialist order.

Lenin's view of the coercive function of the *DoP* was not, he insisted, an endorsement of an unbridled resort to political violence. While he supported the direct use of force in both theory and practice, he also saw law as a normal part of the operation of the *DoP*, for "as the fundamental task of the government becomes, not military suppression, but administration, the typical manifestation of suppression and compulsion will be, not shooting on the spot, but trial by court" (Lenin, 1918f: 266). Similarly, Lenin insisted that the soviets, even in their role as the agency of the *DoP*,

¹⁸ For further discussion of the role of the Soviets, see below.

were “a higher form of democracy” and the “beginning of a *socialist* form of democracy” (ibid., p. 268). From early on the Bolsheviks had resolved the tension between democracy and obedience through the principle of “democratic centralism,” which encouraged the most wide and free participation in decision making followed by mandatory adherence to majority verdict. In what was perhaps a partial recognition of the problem of overendowment, namely, the assignment of multiple, potentially incompatible roles to the soviets, Lenin observed that “we must learn to combine the ‘public meeting’ democracy of the working people—turbulent, surging, overflowing its banks like a spring flood—with *iron* discipline while at work” (ibid., p. 271). This process of consolidation involved confirming and securing that which had been made law and decreed. Lenin’s elaborations upon the *DoP*’s fundamental task of suppressing the old order led to a model of the institutionalization of the victorious revolution that required law, rules, and regulations and in which trial by court was preferred to the firing squad in confronting counterrevolutionary forces. At the same time Lenin claimed that the *DoP*, as the institutional model for socialism, would be replaced only with the advent of communism. This more expansive role of the *DoP* is less well supported by justificatory argument.

B. *The Function of Law in the Socialist Transition*

For Lenin the *DoP* had its most important ramifications beyond the initial problem of securing power. It is therefore necessary to examine his view of the role of law in the more extended period of the socialist transition. Lenin offered no neatly encapsulated account of the functions of law. Rather, we must examine *seriatim* six distinct yet intersecting themes that are both complementary and contradictory: (1) eradication, (2) education, (3) discipline, (4) transition, (5) participation, and (6) routinization, or accounting and control.

1. Eradication. Beyond the suppressive functions of the *DoP*, a number of tasks and consequences flowed from them and to which Lenin devoted some attention. While some institutions of the old order were swept away during revolutionary action, others were removed by decree.

In the nine months after October 1917 the All-Russian Central Executive Committee (CEC) and the Council of People’s Commissars (CPC) issued 950 decrees and other instructions.¹⁹ These abolished, *inter alia*, the targets Lenin set forth in “The April Theses” (Lenin, 1917h) and elsewhere: the standing army, the po-

¹⁹ *Sobranie uzakonenii* (Collection of Laws [1921]) lists 1,033 entries for 1917–1918 and 596 for 1919. On the difficulties of distinguishing the statuses of the various legislative devices, see further Feldbrugge (1964: 28–29) and Makepiece (1980: 75–78).

lice, and the bureaucracy. These legislative devices had a multiplicity of forms and included laws, decrees, proclamations, and ordinances: some, such as "On Combating the Famine" and "To the Population," had no legal status; others were issued largely for purposes of education and propaganda. Their source lay not only in the CEC and the CPC but also in bodies such as the Council of Workers' and Peasants' Defense, various commissariats, volost land committees, local revolutionary committees, Cheka, and the Revolutionary Military Council. In response to critics who charged that the Bolsheviks had issued too many decrees, Lenin explained:

If we had refrained from indicating in decrees the road that must be followed, we would have been traitors to socialism. These decrees, while in practice they could not be carried into effect fully and immediately, played an important part as propaganda. . . . *Decrees are instructions which call for practical work on a mass scale* (Lenin, 1919a: 209).

After securing political power the revolution faced "the most important and most difficult aspect of the socialist revolution, namely, the task of organization" (Lenin, 1918f: 237). It was thus necessary to establish some alternative institutions. According to Lenin, the courts themselves best illustrate this process,²⁰ for "in place of the old court [the October revolution] began to establish a new . . . Soviet Court, based on the principle of the participation of the working and exploited classes . . . in the administration of the state" (Lenin, 1918e: 217). Additionally, he recognized that the eradication of the old social order would lead, in the short run at least, to chaos and an increase in "crime, hooliganism, corruption and outrages of every kind" (Lenin, 1918f: 237), which established the need for revolutionary order and courts. A small illustration of the problems associated with this process was Lenin's comment about the abolition of the "bourgeois legal bar"; he noted the tendency of such institutions to return in new guises, for example, as

²⁰ Prior to the passage of the first decrees on the courts there was considerable discussion among the Bolsheviks about the proper relation between the revolution and the old legal system. One faction argued that the prerevolutionary courts should be retained as a necessary apparatus for the period of socialist transition; indeed, a judge of the new Moscow court reminisced that it was hoped somehow to have been possible to postpone the task of creating a new judiciary until the Moscow city government could solve some more pressing problems (Hazard, 1960: 1). Another faction insisted that all law and all legal institutions should be abolished at once because they were incompatible with socialism. Following the lead of those such as Lunacharsky (1917), Lenin himself effected a compromise between these two factions in "Decree No. 1 on the Court" (*Sobranie uzakonenii*, 1921: 1917–1918, no. 4, item 50), which he himself initiated and which was issued through the CPC. Indeed, according to Stuchka (1925), Lenin was an enthusiastic supporter of this decree, and to facilitate its passage he agreed to release it solely through the CPC rather than the Central Executive Committee where, although it probably would have been adopted, it would have met with opposition from the coalition parties.

“Soviet pleaders.” These “professional” advocates emerged in 1918 but were abolished in October 1920 (Lenin, 1920a: 115).

2. **Education.** Lenin continually stressed the educative function of both the content and implementation of law in the socialist transition: “We transformed the court from an instrument of exploitation into an instrument of education” (Lenin, 1918b: 464); “A single decree putting an end to landed proprietorship will win us the confidence of the peasantry” (Lenin, 1917f: 240); “From the very outset we gave the ordinary workers and peasants an idea of our policy in the form of decrees” (1922a: 303). Even when the content of these decrees could not be implemented, they played an important propagandistic role (Lenin, 1919a: 209). However, he emphasized that this function had limited historical significance. In 1922 he stated forcibly: “*The phase of propaganda by decrees is over. The masses will understand and appreciate only business-like practical work*” (Lenin, 1922f: 574). Lenin’s insistence on the educative role of law was tied strongly to what we may call his “revolutionary realism”: “[W]e want a socialist revolution with people as they are now. . . . [I]t is inconceivable that people will immediately learn to work *without any legal norms* after the overthrow of capitalism” (Lenin, 1917c: 467).

3. **Discipline.** The educative role of law and regulation in Lenin’s thought was closely associated with discipline. Describing the role of the Soviet courts, he identified their initial task as one of eradication: “But, in addition the courts . . . have another, still more important task. This task is to ensure the strictest discipline and self-discipline of the working people” (Lenin, 1918e: 217). His concept of discipline was far from authoritarian, however, as was signaled in his conjunction of “discipline” and “self-discipline.” This connection of law and discipline is captured in his assertion that it was “not yet sufficiently recognised . . . that the courts are an instrument for *inculcating discipline*” (Lenin, 1918f: 266). Moreover, Lenin emphasized that the Russian people had previously experienced rules, regulations, laws, and courts as external impositions that were exclusively coercive and oppressive. This experience inculcated a negative response that was part of the general backwardness of Russian civil society. Hence, for Lenin discipline and culture were also closely connected. The object must be “to establish uniformity of law and develop at least the minimum of culture” (Lenin 1922b: 365). He counterposed this combination of discipline and culture to the “semi-savage habit of mind” and the “ocean of illegality” within the parochialism of rural life, which was “the greatest obstacle to the establishment of law and culture” (*ibid.*).

4. **Transition.** Adjacent to the functions of law outlined above—all of which point to Lenin's attribution of an important role to law within the socialist transition—was the quite different thrust of law as transitory. It accordingly provided a useful, even necessary, function, but one that was subservient to politics and to the needs of the revolution:

He is a poor revolutionary who at a time of acute struggle is halted by the immutability of law. In a period of transition laws have only a temporary validity; and when law hinders the development of a revolution, it must be abolished or amended (Lenin, 1918g: 519).

The problem posed by formulations of this type is not one of logical contradiction. Rather, he regarded them as operating at different levels of generality. At the highest level he insisted on the marginality of law, but at the more concrete level of each specific stage of socialist construction he saw the role of law as useful and necessary. This does not abolish the difficulty, for it fails to address the problem of by whom and when it is to be decided that the wider exigencies of the revolution require the abolition or amendment of law. If politics are dominant, then an enormous burden is placed on the political process (that is, ultimately, the party) as the historical agency of the revolution.

5. **Participation: Anybody Can Be a Judge.** A key point of reference that allowed the Bolsheviks to distinguish between the forms of social regulation that they were creating and the bourgeois law that it replaced was the appeal to democratic participation. Thus Lenin explained about the Soviet courts that “we did not have to create a new apparatus, because anybody can act as a judge basing himself on the revolutionary sense of justice of the working class” (Lenin, 1919a: 182). At first, appeal to direct popular participation bears the hallmark of the concern to secure political power. Thus,

it is not yet sufficiently realised that the courts are an organ which enlists precisely the poor, every one of them, in the work of the state administration . . . [and] that the courts are an *organ of the power* of the proletariat and of the poor peasants (Lenin, 1918f: 266).

But this appeal was also intimately linked to one of Lenin's core conceptions of the future communist society. Both of his key programmatic texts (Lenin, 1917c; 1918f) that straddle October 1917 insist that the strategic objective of “the withering away of the state” was not an *abolitionist* idea. Instead, its objective was the construction of a radically new form of social administration in which the state would disappear. The state would be increasingly dissipated as a mechanism of social power when more and, eventually, all citizens participated in its activities.

[F]or the first time a start is made by the *entire* population in learning the art of administration. . . . [O]ur aim is to ensure that *every* toiler, having finished his eight hour "task" in productive labour shall perform state duties *without pay* (Lenin, 1918f: 272–273).

In this Lenin assumed, problematically, that the division of labor could be so transformed as to abolish the need for a special category of administrative functions, because modern capitalism

has *created* large-scale production, factories, railways, the postal service, telephone, etc., and *on this basis* the great majority of the functions of the old "state power" have become so simplified and can be reduced to such exceedingly simple operations of registration, filing and checking that they can be easily performed by every literate person (Lenin, 1917c: 420–421).²¹

Lenin's position here remained largely exhortatory. His concern with the growth of "red tape" and bureaucracy attested to events actually in conflict with the universal participation to which he was committed. But he never addressed the project of administrative democratisation in more concrete terms when discussing the fight against bureaucracy.²²

6. Routinization, or Accounting and Control. Almost immediately after October 1917, Lenin stressed the importance of accounting and control. Although he forged no concerted link between these tasks and the role of law in Soviet society, we suggest, first, that this aspect of Lenin's thought has been neglected and, second, that it has profound implications since it thereby commits him to a model of legalistic regulation as a necessary feature of socialism. As a result, despite some of the more radical and democratic functions discussed above, Lenin advanced an overall view of the necessary relationship between law and the socialist transition that was incompatible with much of his commitment to radical, participatory, nonlegal social regulation.

Frequently, Lenin defined accounting and control as the main economic task confronting the revolution and as "the *essence* of socialist transformation" (Lenin 1918a: 410). In one lengthy discussion he identified the problem as one of overcoming popular suspicion of any form of central regulation so as to "instil into the people's minds the idea of *Soviet* state accounting and control" (Lenin, 1918f: 254). But Lenin never clarified precisely in what the demand for accounting and control consists. To understand this omission its connection with some other related aspects of his thought must be seen.

Between February and October 1917 Lenin belabored the in-

²¹ For discussion and criticism of this "simplification" thesis see Hunt (1985).

²² For a more detailed discussion of Lenin's views on bureaucracy see below.

ability and the unwillingness of the provisional government to control the capitalist economic power on which its political power rested. He demanded measures of control over capital, for example over the banks, through the abolition of commercial secrecy (Lenin, 1917b: 339). He stressed that the Western capitalist powers had already taken successful measures to control the banks and major sectors of production and distribution, and that such measures could be implemented in Russia. In September 1917 he demanded the nationalization of the banks and capitalist syndicates (*ibid.*, pp. 328–329). At this stage, and then just after October 1917, the main objective of control was the surveillance and the subsequent breaking of the power of private capital.

After October 1917 the issue of control was most often raised in terms of workers' control. This concept was then employed with a dual focus: as an expression of the syndicalist aspiration to regulate the economy by the associated producers, and as a reference to the role of workers within the enterprises of control over the activities of the owners to ensure that there was no sabotage of the soviet authorities (Lenin, 1917e: 105). With the increasing socialization of private capitalist enterprises, an important shift in emphasis occurred as the definition of control changed from surveillance/supervision to the detailed accounting of all forms of economic resources. In "The Immediate Tasks of the Soviet Government," for example, Lenin (1918f) defined both "worker's control" and "soviet accounting and control" as preconditional to the passage to the next stage of socialism. This shift in emphasis emerged in the context of an economic emergency (famine) bordering on complete social collapse. The exigencies of war communism complicate the distinction between what Lenin and the Bolsheviks saw as desirable when measured against the yardstick of their conceptions of socialism and the forced requirement of necessity.

Accounting and control stemming from necessity and from principle blur into a distinctive conception of the economics of the socialist transition.²³ Lenin spoke in broad strategic terms of the need for "a prolonged, complex transition through socialist accounting and control from capitalist society" (Lenin, 1921c: 62–63). Elsewhere his concept of accounting and control was marked by more pressing considerations: "Account must be taken of every single article, every pound of grain, because what socialism implies above all is keeping account of everything" (Lenin, 1917i: 288). Lenin tried to alleviate this rather uninspiring conception of the socialist economy by calls for its democratic and popular transformation. Thus, he wrote that socialist control and accounting "can be exercised only by the people" (Lenin, 1918a: 410) and "socialists

²³ The key Bolshevik texts in the great debate about the economics of the socialist transition were Bukharin and Preobrazensky (1919 [1969]) and Bukharin (1920). For commentary on this debate see Cohen (1974: 83–106) and Nove (1976: 119–135).

demand the *strictest* control by society *and by the state* over the measure of labour . . . exercised not by a state of bureaucrats, but by a state of armed workers" (Lenin, 1917c: 470). This call for "democratic control" was predicated on the inevitable *simplification* of administration achieved under capitalism. In discussing the requirement that all citizens should work equally, Lenin argued that "the accounting and control necessary for this have been *simplified* by capitalism to the utmost and reduced to the extraordinarily simple operations—which any literate person can perform—of supervising and recording" (Lenin, 1917c: 473).²⁴ Elsewhere he offered a rather unexpected "accounting" vision of the future: "control and accounting will become universal, all-powerful, and irresistible" (Lenin, 1917d: 38).

The importance of accounting and control was not for Lenin directly linked to the role of law under socialism but they were inescapably linked: Accounting and control must be rule-bound. Even the simplest accounting measure requires a minimum set of rules about what is to be counted and how. Such activities require and generate rules, and are dependent on bureaucratic institutions that collect and analyze the data; these are collected in forms that allow, for example, comparison between localities or institutional forms. Lenin's discussion of the functions of law in the socialist transition contains major elements consistent with a theoretical and political commitment to a form of social organization and regulation that depends little upon the existence and development of law. But the other aspect of this account must dominate if we take seriously what he actually says. This aspect entails a model of law as a necessary and unavoidable mechanism for forms of routinization that are preconditions for the socialist transition. Routinization was both inevitable and necessary *prior* to the longer term objectives of socialist construction. This notwithstanding, discussion of these matters always occurred in the context of the transitional character of the Russian Revolution, dependent as it was on the success of the proletarian revolutions in the more economically developed capitalist nations.

If Lenin's argument leads to a conclusion that he himself wanted to avoid, there were, predictably, major questions about the form and content of socialist law that he either did not con-

²⁴ In turn, Lenin linked this simplification with Engels's (1880 [1969]: 147) superficially attractive claim that under communism "the government of persons is replaced by the administration of things." Lenin's (1917c: 473) formulation was that when "the more important functions of the state are reduced to such [simplified] accounting and control . . . it will cease to be a 'political state' and public functions will lose their political character and become mere administrative functions". This formulation is decidedly "un-Marxist" in that it is difficult to conceive of any way in which changes in the administration of things do not have necessary implications for some sets of social relations; its anarchic implications were carried to their logical extreme by the radical wing of the commodity exchange school of law; see especially Pashukanis (1924 [1980]: 40–131).

sider or attended to only scantily. In general, crucial absences occurred when Lenin relied on the good sense, judgment, and “revolutionary conscience” of party and soviet officials. As we shall see, these very officials, because of their power, were the most difficult to control. But although Lenin realized that legal regulation of them had to be achieved, he never relinquished a utopian commitment to the self-regulatory virtue of the party as the primary agency of revolutionary change and construction.

C. The Development of Socialist Law

Lenin was involved in the growth of law of the new socialist state as he was in so many other features of the forming society, yet his involvement was episodic and without a theoretical framework. Our concern here, however, is with neither the growth of Soviet law and legal institutions nor the intense debate among Soviet jurists about the possibility and limits of socialist law. Important and interesting though these debates were, Lenin did not participate in them, nor does the record suggest that he paid any attention to them.²⁵ His abstention from these debates reflects his abstention from the early stages of constitutional deliberation, which we will discuss in the next section. Rather, as we have seen in the discussion of his jurisprudence, Lenin had a number of rather general and unexplored positions about the nature of law and socialist law in particular. We will focus here on the issues that arise from his direct involvement in the development of Soviet law.

Lenin was an active participant in the enactment of the early decrees of Soviet power in his capacity as chairman of the CPC. Many of the drafts of these decrees he himself penned. Among those enacted in the early months of the revolution were the “Decree on Land,” “Draft Regulations on Workers’ Control,” “Decree on the Dissolution of the Constituent Assembly,” and “Declaration of Rights of the Working and Exploited People.” In addition, he actively commented on, criticized, and amended other decrees. Rather than itemize Lenin’s part in this varied legislation, we will explore the wider issues that emerge from the details of his activity.

At the level of general theory, Lenin attributed no very significant role to law. At a more immediate level, as has been indicated in regard to his conceptions of the functions of law in the socialist transition, he gave it some practical significance. Because Lenin devoted no sustained attention to questions of law and socialism, obvious contradictions existed in his position, such as, for example,

²⁵ Among Marxist jurists the leading texts of this period were Stuchka (1921 [1951]) and Pashukanis (1924 [1980]). For commentary on the respective juristic positions embodied in these works, and on the development of Soviet legal theory until the rise of Stalinism, see Pashukanis (1980: 1–36) and Sharlet *et al.* (in press).

between aspects of his centralism and his commitment to adaptation to local circumstances. In a note on the political control of procurators,²⁶ he urged that “the law must be uniform, and the root evil of our social life, and of our lack of culture is our pandering to the ancient Russian view and semi-savage habit of mind, which wishes to preserve Kaluga law as distinct from Kazan law” (Lenin, 1922b: 364). Again, without insisting upon “the uniformity of the law for the whole Federation [of Soviet Republics] it will be impossible to protect the law, or to develop any kind of culture” (ibid., p. 365). Simultaneously, he argued that Soviet law

will be applied everywhere by the Soviets in accordance with their local conditions. We are not bureaucrats and do not want to insist on the letter of the law everywhere. . . .

The local Soviets, depending on time and place, can amend, enlarge and add to the basic provisions worked out by the government. Creative activity at the grass roots is the basic factor of the new public life (Lenin, 1918: 285, 287–288).

These contradictory stances manifest a more general tension in Lenin’s thought between centralism and control from below.

Insofar as a general approach can be attributed to him, Lenin recognized the need to develop a body of socialist law as part of the wider task of contributing to socialist political and economic objectives. But this legal development had to be self-consciously distinct from the bourgeois law that it replaced. This argument emerged clearly in his discussion of the preparation of a new civil code, on which he is worth quoting at some length:

The new civil legislation is being drafted. . . . The task [of the People’s Commissariat of Justice] is to create a new civil law, and not to adopt (rather, not to allow itself to be duped by the old and stupid bourgeois lawyers who adopt) the old, bourgeois concept of civil law. . . . We do not recognise anything “private,” and regard *everything* in the economic sphere as falling under *public* and not private law. We allow only state capitalism, and as has been said, it is we who are the state. Hence, the task is to extend the application of state intervention in “private legal” relations; to extend the right of the state to annul “private” contracts; to apply to “civil legal relations” not the *corpus juris romani* but our revolutionary concept of law (Lenin, 1922d: 562–563).

Before we attribute to Lenin enthusiasm for the project of developing a total system of socialist law, it should be noted that the letter quoted above is entitled “On the Tasks of the People’s Commissariat of Justice Under the New Economic Policy [NEP].” The NEP, of course, was a conscious retreat reviving capitalist eco-

²⁶ Discussion of Lenin’s views of the political relations between central authorities and local legal officials can be found in Hazard (1960: chaps. 5–7, passim) and Solomon (1985).

conomic relations (albeit, he insisted, *state* capitalist relations) first, to consolidate the political alliance with the middle peasantry and, second, to achieve a level of economic development for long-term socialist transformation. During this period occurred most, if not all, of Lenin's "pro-law" formulations. In this context he demanded an end to excesses against the peasantry, and the trial of officials and rich peasants abusing the NEP's legal framework. He insisted that "greater revolutionary legality" (Lenin, 1921d: 176) was needed to develop relations with the peasantry and to promote trade. Similarly, he demanded that Soviet officials adhere to the legal content of the "tax in kind" which substituted, for direct requisitioning, a variable percentage tax on all agricultural production, thereby permitting the producers to exchange their surplus (Lenin, 1921a).

Lenin displayed tangible pride in the substantive content of Soviet legislation. For example, he delighted in the introduction of the eight-hour day and here and elsewhere commended the rapid advances recorded in Soviet law in contrast to the legislation of the bourgeois democracies (Lenin, 1922c: 392). Again, he often returned to the decrees affecting the position of women, stating that "no other state and no other legislation has ever done for women a half of what Soviet power did in the first months of its existence" (Lenin, 1919f: 43). Over a wide range of social questions Soviet legislation underlined a fundamental political lesson for the Bolsheviks: The struggle for reforms did not prepare the way for revolution, but the revolution itself created the conditions for the most far-reaching social reforms. Although many of the advances were later to be curtailed or rescinded, the early years of Soviet power produced much exemplary social legislation, of which that relating to women, marriage, and divorce (Berman, 1963: 330–334) and environmental conservation (Zile, 1971) was especially developed.²⁷

Lenin's conception of socialist law was deeply affected by his appeal to "socialist legal consciousness," which provided the link between the new institutional structure of courts and the commitment to popular participation. He insisted that judges should "enforce the will of the proletariat, apply its decrees, and in the absence of a suitable decree, or if the relevant decree is inadequate, take guidance from your socialist sense of justice" (Lenin, 1919: 131). This conception was explicitly incorporated into the "Decree on the Courts" of February 1918.

The concept of revolutionary legal consciousness served a dual function: It made a powerful appeal to the sovereignty of the people, which provided important legitimation to the October revolu-

²⁷ Arguably, a major exception to these advances was the continuation of capital punishment. For Lenin's own presentation of his complicated position on this issue and the regularization of "red terror," see, e.g., Lenin (1917b: 341; 1917g: 294; 1918c: 33; 1918i: 336; 1920c: 167) and Carr (1966: Vol. 1. p. 162).

tion—as it has done to all other revolutions. At the same time it marked out the separation between revolutionary and bourgeois law, and made a revolutionary virtue of its inherent variability and situational character. Yet again his strongly libertarian thrust conflicted with the demand for uniformity and centralisation; more seriously, their very coexistence created a politically legitimate mechanism for overriding formal legality just as it does for bureaucratic formalism. The very juxtaposition of revolutionary exceptionalism and bureaucratic formalism concentrates the determination of the outcome in the hands of that person or body empowered to effect the choice between antithesis and then, with equal legitimacy, to swing to the opposite moment. Insofar as Lenin created and justified this alternation between revolutionary justice and legal formalism, he bears historical responsibility for the subsequent deployment of this sublime instrument of authoritarianism by the Stalinist regime.

D. Law and Bureaucracy

A distinctive feature of Lenin's concept of law and the socialist transition was his identification of law's object as largely Soviet officialdom. His emphasis on the importance of securing adherence to socialist legality by soviet and party officials (see, e.g. Lenin, 1917f: 241; 1919e: 556; 1922d: 562) can be connected with his mounting concern about the struggle against bureaucracy. The depth and tenacity of Lenin's concern with this struggle are indisputable. However, how did it relate to the wider context of his political and theoretical positions? An important transition occurred in his analysis of bureaucracy, but it is uncertain whether Lenin himself was aware of it. Immediately after October 1917, he understood bureaucracy as a *legacy* or *survival* resulting from the need to retain and rely on tsarist officials whose habits and politics were expressed in bureaucratic practices. Such officials needed to be subject to constant surveillance: "The capitalists are still fighting us. . . . [M]any thousands are still here, waging war against us according to all the rules of the art of bureaucracy" (Lenin, 1921b: 427). In addition to his view of the tsarist state as inherently bureaucratic, Lenin also held that capitalism and bureaucracy had a structural connection that originated in the typical separation of citizens from the administration: "every bureaucracy . . . is purely and exclusively a bourgeois institution" (Lenin, 1895: 420). Later, he discarded this exclusive association and indicated that the developed capitalist states had more efficient bureaucracies. Comparing the German and Russian bureaucracies, he argued that the German "bureaucratic apparatus passed through an extensive school, which sucks people dry but compels them to work and not just wear out armchairs as happens in our offices" (Lenin, 1919a: 182); whereas the tsarist bureaucracy was constructed on feudal

patronage and as a result was characteristically corrupt and inefficient. Lenin must have approved of Rykov's reminder to soviet officials that "labour is the relation of man to nature and not to paper" (quoted in Liebman, 1975: 324).

In the second variant of his analysis of bureaucracy, he identified as its ubiquitous source the general cultural backwardness inherited by the Russian revolution. The roots of bureaucracy lay in the atomised and scattered state of the small producer with his poverty, illiteracy, lack of culture, the absence of roads and exchange between agriculture and industry . . . [and] the absence of connection and interaction between them (Lenin, 1921a: 351).

The destruction and disorganization resulting from the Civil War exacerbated the sources of bureaucracy: "Bureaucratic practices . . . [are] a legacy of the 'siege' and the superstructure built over the isolated and downtrodden state of the small producer" (ibid., p. 352). For Lenin revolutionary realism dictated that bureaucratic legacies could not be eradicated quickly: rather, their elimination would require patience, persistence, and the development of new nonbureaucratic styles. In this context he approved of flexibility and informality as alternative modes of organization. In this version of the analysis, therefore, Lenin did not view bureaucracy as a result of the soviet form itself.

In general terms Lenin applauded the nonbureaucratic character of soviet power (a "new type of state without bureaucracy"—[Lenin, 1918d: 133]) and administration. This programmatic position was revealed clearly in *State and Revolution* (Lenin, 1917c: 425): "to *smash* the old bureaucratic machine at once and to begin immediately to construct a new one will make possible the gradual abolition of all bureaucracy". The soviet state was able to transcend bureaucracy precisely because it could overcome the separation between citizens and administration. Hence Lenin's commitment to mass popular participation as a defining characteristic of Soviet power. This power was desirable in its own right and constituted a bulwark against bureaucracy: "We can fight bureaucracy to the bitter end, to a complete victory, only when the whole population participates in the work of government" (Lenin, 1919a: 183).

In Lenin's texts and speeches are reference to a novel, if unelaborated, type of bureaucracy deriving partly from deficiencies in existing party and state institutions. Sometimes Lenin treated this soviet bureaucracy as a survival. Insofar as the legacy/survival analysis became less frequent and was not replaced by any other explanation, however, we must suppose that he had no specific analysis of the new bureaucratic form. In the early days of the revolution he seemed fairly confident of a quick victory over bureaucracy, but at the Eighth Party Congress he identified "a partial revival" of bureaucracy within the soviet system, believing that

“the fight against the bureaucratic distortion of the Soviet form of organization is assured by the firmness of the connection between the Soviets and the ‘people’ ” (Lenin, 1918f: 274). His solution was the extension of public participation in administration, for

the more varied must be the forms and methods of control from below in order to counteract every shadow of a possibility of distorting the principles of Soviet government, in order repeatedly and tirelessly to weed out bureaucracy (ibid., p. 275).

Later, Lenin saw the struggle as being more protracted: “We shall be fighting the evils of bureaucracy for many years to come. . . . [It] requires hundreds of measures, wholesale literacy, culture and participation in the activity of the Workers’ and Peasants’ Inspection” (Lenin, 1921a: 351).

By 1921 Lenin (1921c: 75) was obviously concerned with failures in the fight against bureaucracy and red tape: “Why then have we achieved no success in this struggle?” But his solution remained much the same: “It can be done if the masses of the people help” (ibid.), while also proposing a major purge of the party’s membership. Significantly, Lenin’s (1923; 1923a) last two writings both concern the struggle against bureaucracy. But there is no evidence that his attitude to it changed as he began to understand its persistent and deforming effects on Soviet life. Indeed, he continued to deny the possibility of a causal connection between the soviet form and bureaucracy:

Our state apparatus is so deplorable, not to say wretched, that we must first think very carefully how to combat its defects, *bearing in mind that these defects are rooted in the past, which although it has been overthrown, has not yet been overcome* (Lenin, 1918j: 487 [emphasis added]).

Because Lenin was convinced that the cure lay in control and surveillance *from below*, he attached great importance to the Workers’ and Peasants’ Inspection (WPI). Established in 1919, the WPI was an institutional expression of his commitment to the mass participation of workers and peasants in the control and supervision of every institution.²⁸ It was to function by instituting enquiries and by “cleansing” (*chistka*, the same term used to designate the regular review/purging of party membership). These hearings enabled a janitor to complain against his director and expressed, at least in theory, the idea of workers’ control. But by 1920 Lenin admitted that the WPI “exists more as a pious wish; it has been impossible to set it in motion because the best workers have been sent to the front” (Lenin, 1920b: 423). His ultimate return to the project of making the WPI effective suggests that he

²⁸ For example, he urged that even illiterate workers were to be involved in the work of the WPI, assisting and learning from their literate comrades, and that “*women, literally every woman must be drawn into this work*” (Lenin, 1920: 301).

remained committed to the project of control from below through parallel institutional mechanisms. The substance of his proposal to the Twelfth Party Congress was greatly to reduce the WPI's size (12,000 in its central body, excluding all regional apparatuses). But a decisive shift of emphasis occurred to which insufficient attention has been paid. In its original conception the WPI was to draw upon teams of rank-and-file workers (as their cultural level was raised, the peasantry was to be included as well) to monitor and control not only the state apparatus but also all soviet institutions.²⁹ But by 1923, although he still intended to involve rank-and-file workers, Lenin's hopes for the eradication of bureaucracy depended not on "our best party forces" (Lenin, 1923: 482); instead he proposed to merge the Inspectorate with the Central Control Commission (established in 1920 as a parallel institution to the Central Committee). The latter's role was to review complaints against party officials from the membership below. These fused bodies were to have a staff of "three or four hundred persons, specially screened for conscientiousness and knowledge of our state apparatus" (*ibid.*). In other words, Lenin now relied upon a professionalized but supervirtuous party membership to check and control both the party and state apparatus; hence the slogan "Better Fewer, but Better" (Lenin, 1923a). He seems to have little appreciated that democratic control from below (that is, by the non-party masses) had disappeared. Indeed, Lenin's myopic strategy sought to remedy the deficiencies of existing institutions by creating new ones. These, in turn, become bureaucratized, and the result was a further ossification of the whole system. His strategy was therefore doomed.

Lenin's approach to bureaucracy assumed a crucial connection among class situation, political experience and education, and "virtue." Immediately after October 1917, he regarded the proletariat itself as the repository of revolutionary virtue. With the decimation of the working class, his confidence was increasingly placed in an amended conception of "the vanguard," which he equated with Bolshevik party members. This is the first and decisive stage along the road of "substitutionism"—the replacement of the masses as both the subject and the object of the revolutionary process, originally by the party, then by its leadership, and ultimately by the leader. This perspective was at best inherently utopian and at worst naive. Lenin had no proper reason to identify a specific social origin as a privileged source of virtue or rectitude. Nor are there any sound reasons for believing that people, whose virtue stems from their lack of contamination with bureaucratic apparatus, have the means or capacity to control those very bureaucracies

²⁹ As Deutscher (1961: 231) comments, "With his characteristic belief in the inherent virtues of the working classes, Lenin appealed to the workers against his own bureaucracy."

whose strength rests upon their monopolization of organizational experience and technical knowledge.

It must be conceded that Lenin identified bureaucracy as a major problem for the young Soviet state. Not only did it nullify the form of socialist accounting and control that he regarded as a precondition of socialist economic development, but it also had pervasive and debilitating effects upon political and social life. Moving testimony to Lenin's concern appears in his account of the inefficiency, incompetence and waste on the railway system that he encountered on his first journey "not as a 'dignitary'" (1922e: 432). Yet it must be concluded that the regulatory and institution-building strategy that he advanced was a failure, and that in turn it exacerbated bureaucratization and engineered the peculiar union of authoritarianism and bureaucracy that became the hallmark of Soviet society.

E. Law and the Transition to Communism

What role, if any, did Lenin conceive for law in the transition to the higher stage of communism? We can give an unqualified answer: none. He was committed to a theoretical perspective in which the withering away of the state and of formal political democracy necessarily implied the withering away of law, although it should be noted that he does not explicitly use this formulation. Lenin's notion of communism, like Marx's, was very limited. Despite well-known passages about the withering away of the state in *The State and Revolution* (Lenin, 1917c), he had little else to say on this matter. In his final reflections on the future of the revolution, Lenin was so preoccupied with the immediate problems of socialist construction that he was unable even to consider the transition to communism.³⁰

The forceful argument in *The State and Revolution* is nevertheless controversial. In Lenin's view, the people would become increasingly cultured in the course of socialist construction, all would participate in public affairs, and the division between mental and manual labor would progressively be overcome. Most important would be the abolition of all classes and thereby the prevalence of social, economic, and political conflict. In this process "people will become accustomed to observing the elementary conditions of social life *without violence* and *without subordination*" (ibid., p. 456). Democracy will by its universalization itself become superfluous:

Only [when the state ceases to exist] then will a truly complete democracy become possible and be realised, a democracy without any exceptions whatever. And only then will

³⁰ Lenin's (1923; 1923a; 1923b; 1923c; 1923d) so-called Last Testament is usually taken to include the brief papers dictated between January and March 1923. For full discussion of this period see Lewin (1969).

democracy begin to *wither away*, owing to the simple fact, that . . . people will gradually *become accustomed* to observing the elementary rules of social intercourse (ibid.).

Lenin therefore envisaged a society with rules but without law and with shared consensus about “the elementary rules of social intercourse.” Insofar as society may require detailed and technical rules, we may presume that he conceived of such rules as being without authoritative or coercive mechanisms. Lenin’s general thesis (derived directly from Marx and Engels), that social life under communism will be fundamentally simplified because of the absence of class conflict and technological advance, supports a conception that does not foresee the need for a framework of rules extending beyond the general requirements of the consensually developed rules of social intercourse: “We give the name communism to the system under which people form the habit of performing their social duties without any special apparatus of coercion” (Lenin, 1919h: 284).

This presentation of the withering away of law has serious problems. Even if we accept for expository purposes that the abolition of classes massively reduces the possibility of social conflict, Lenin’s “optimism” was dangerously crude. Even if interpersonal conflict either disappears or is handled by nonlegal mechanisms of conflict resolution, his account entirely omits institutional relations and the continuing necessity of mechanisms for allocating resources. It is possible to imagine a society in which there is an abundance of the immediate needs of life, but no abundance could ever be envisaged that would either abolish the need to make choices about resource allocation or eliminate conflicts about the priority between alternative projects and aspirations.

IV. THE CONSTITUTION OF SOVIET SOCIETY

In the introduction we indicated that the problem of constitution traversed an important paradox: The political and theoretical objections to constitutionalism, which motivated Lenin and the Bolsheviks, contributed greatly to the ultimate failure to establish Soviet society in a form by which the radical democratic motives of the revolutionary process could be realized. Indeed, this failure was a dangerous vacuum that within a decade of Lenin’s death was filled with the paradoxical coexistence of law and terror (Sharlet and Beirne, 1984). Our argument extends beyond the standard liberal critiques of the Soviet Union that point to the absence of a separation of powers between party and state as the origin of the authoritarian potentiality exemplified under Stalinism. This failure, we contend, was only a symptom. The problem of Soviet society is the failure to develop a civil society able to provide and sustain processes for handling social conflicts and choices compatible with some sustainable conception of democracy and an expanding

public participation needed in any attempt to construct a viable socialist society.

Lenin's critique of constitutionalism began with his rigorous adherence to the orthodox Marxist view of the state as an instrument of rule by a single class. Each historically dominant class has a characteristic form of state power, with parliamentary democracy being "the best possible political shell for capitalism" (Lenin, 1917c: 393). In this schema the separation of powers is a temporary, unstable phenomenon when two classes (for example, the feudal aristocracy and the bourgeoisie) vie for power; thereafter, it is nothing more than a constitutional illusion, because when a single class holds power, the different organs are expressions of the same class interest:

Bourgeois states are most varied in form, but their essence is the same: all these states, whatever their form, in the final analysis are inevitably the *dictatorship of the bourgeoisie*. The transition from capitalism to communism is certainly bound to yield a tremendous abundance and variety of political forms, but the essence will inevitably be the same: *the dictatorship of the proletariat* (ibid., p. 413).

Lenin's analysis of the state form of a successful proletarian revolution is predicated on an interweaving of two distinct strands. The first, syndicalist strand emphasizes the possibility of the direct exercise of popular power. In this the unitary conception of class power conflates political and economic power; hence in much of Lenin's discussion "all power to the soviets" and "workers' control" are synonymous. It is here that Lenin elaborated the idea of the withering away of the state. The second strand appears in the argument advancing the need for the *DoP*. Decisively, this state power is devoid of any specific form, for "*the people* can suppress the exploiters even with a very simple 'machine', almost without a 'machine', without a special apparatus, by the simple *organization of the armed people*" (ibid., p. 463). He then added in parentheses: "(such as the Soviets of Workers' and Soldiers' Deputies, we would remark, running ahead)" (ibid.).

Remarkably, and without contradiction, this formulation contains two different arguments. On the one hand, there is a syndicalist conception of popular power; on the other, there is an insistence upon an instrument, the *DoP*, with a very specific state function, namely, an essential but fundamentally transitional role in eradicating the class power of the old ruling class. In Lenin's analysis the fusion and interpenetration of these two strands most clearly appeared in his discussion of the Russian form of the dictatorship, namely, the soviets. These are simultaneously mass organizations of a class and the state form of the dictatorship.

Lenin's unique contribution to Marxist political theory before 1917 was his analysis of the party, and it was to be the primary instrument of the revolution. Yet the party was not present in *The*

State and Revolution (Lenin, 1917c), the key text linking the creation of the revolutionary instrument with its political triumph. Moreover, this work contained no theory or account of representation, which tends to explain both the specific omission of the party and also Lenin's apparent lack of concern with the political/constitutional form of the revolution.³¹ These silences were manifest in the failure to explore a question that he touched on time and time again: the way in which classes can be said to be agents, or in what sense, if any, do classes act? Much socialist discourse typically speaks of actions such as the working class "struggling" or the capitalist class "retreating." Such formulations operate as a serviceable shorthand, but they wrongly tend to be taken literally. Classes *as such* never act; rather, historical agents always "act" as some specific social force, such as trade unions or political parties. But the corollary of this truism is that the form of the agency has a distinctive effect upon the content and style of the action taken. For example, trade unions act differently than political parties. A central question for any form of political theory, therefore, is the consideration and selection of forms of political representation that are appropriate to its objectives.

At one level Lenin's whole project from the mid-1890s onward was to develop the concept of the revolutionary party as the form of working-class representation. Yet at another level he constantly conflated the interests of this class with the form of its representation. In the prerevolutionary period this imagery did not do great violence; much politics involved competition between rival parties and factions for the allegiance of the small urban proletariat. The tsarist system allowed few arenas for political competition; in comparison, bourgeois democratic systems with complex civil societies generate many different locations for and forms of political representation. However, after February 1917 major transformations increasingly occurred that posed the question of representation over a wide range of social and economic activities and in connection with a series of new institutions. In this context Lenin's analysis was problematic. It is true that the intense nature of the political struggle legitimates analysis presented in terms of assertions about a direct relationship between classes and parties. But this analysis conceals the complex forms of representation developing within the new concatenation of social, economic, and political forces created by the revolution.

Among the Bolsheviks this issue came to center stage in the controversy over the role of the trade unions. In 1920 the substan-

³¹ Representation concerns the forms in which social groups, forces, and classes manifest and advance their interests vis-à-vis other classes, groups, and the like. One of us (Hunt, 1983) has argued elsewhere that there is a similar absence in Marx when he fails to address the implications of the changed forms of representation that were the consequence of the extension of the franchise toward the end of the nineteenth century.

tive issue was the militarization of labor:³² Would the trade unions retain any capacity to represent the interests of their members and workers in particular enterprises or in a specific industry vis-à-vis management, planning bodies, or the state? Lenin at first supported Trotsky's proposals³³ for militarization but increasingly retracted his position as he recognized the need for a specific mechanism to represent the immediate interests of labor even within a proletarian state. Frequently, the role of the trade unions was debated in relation to the legitimacy of strikes. Lenin was prepared to accept that workers needed to retain some means of struggle against management, but he marginalized the problem by treating it as a *survival* of capitalism:

[T]he strike struggle in a state where the proletariat holds political power can be explained and justified only by the bureaucratic distortions of the proletarian state and by all sorts of survivals of the old capitalist system in the government offices on the one hand, and by the political immaturity and cultural backwardness of the mass of the working people on the other (Lenin, 1922: 186–187).

In recognizing the independent, representational role of the trade unions in the short term, Lenin in effect agreed to the abolition of the problem of representation because the interests of workers, managers, party, and state would be unanimous. We must now draw out the implications of Lenin's persistent tendency to insist upon the fusion of different interests and constituencies. Before focusing on this issue, however, it is important to establish how it relates to questions about law and legality.

A. *Representation and Fusion*

Lenin paid scant attention to the debates preceding the promulgation of the first Constitution of the Russian Soviet Federative Socialist Republic (RSFSR) of July 1918.³⁴ But he held what we term a "fusion model" of the constitution of a socialist society, believing that it should overcome the separation of state and people through the progressive fusion of popular and mass organizations with the decisionmaking and administrative work of the state. Although Lenin never espoused this position in its general form, we contend that it underlay all his declared views about the constitution of a socialist society in its broadest and most important sense, namely, the relations between state and civil society.

One facet of the fusion theory had a fairly high profile in Lenin's thought because of its usage in *The State and Revolution*.

³² For accounts of the debate over the trade unions see Dewar (1956) and Carr (1966: Vol. 1, pp. 372–376).

³³ For Trotsky's account of the case for the militarization of the unions as an extension of War Communism, see Trotsky (1975: 482–485).

³⁴ The best introductory discussion of the debates around the Soviet constitution is Carr (1966: Vol. 1, pt. 2, pp. 115–237).

Here he claimed that the superiority of soviet to parliamentary democracy consisted in its *overcoming* the separation of legislative and administrative functions within the state. He found little need to support this view because he derived it from the authority of Marx's commentary on the lessons of the Paris Commune: "The Commune was to be a working, not a parliamentary body, executive and legislative at the same time" (Marx, 1871 [1969]: 220).³⁵ Lenin elaborated Marx's idea into "the conversion of the representative institutions from talking shops into 'working' bodies" (Lenin, 1917c: 423). The substance of this claim for the inherent superiority of soviets is not clear. One of the advantages of soviet government was that

it makes it possible to combine the advantages of the parliamentary system with those of immediate and direct democracy, i.e., to vest in the people's elected representatives both legislative and *executive* functions. . . . [T]his is an advance in democracy's development which is of world-wide, historic significance (Lenin, 1917e: 103–104).

We may presume here that Lenin claimed that the fusion of legislative and administrative functions would render the legislature more effective, that is, it would not experience bureaucratic obstruction by the administration typically castigated by left and radical governments in parliamentary democracies. There is perhaps also a claim that fusion promotes the virtue of realism, ensuring that the legislature has its feet on the ground and in contact with the people, in that it has not only to decide policy but must also be responsible for its implementation: Fusion would "bring the state apparatus closer to the working people" (Lenin, 1919: 108). But it is unclear why Lenin thought this was true. Other claims that we may presume Lenin would have made for fusion, and thus implicitly against the separation of powers, rest on a rather naive view of the role and function of administration, which, as we have seen, he presumed would be profoundly simplified. We have indicated our serious reservation about this, but should add that Lenin's view leads to his failure to address the more difficult issues surrounding the capacity to achieve effective legislative surveillance of the implementation of law.

A second, more important version of the fusion theory in Lenin's writing has attracted almost no attention, yet it contains the grounds for the most significant criticism of his failure to address the conditions for the development and preservation of socialist democracy. Lenin was committed to the fusion of mass organizations (such as the soviets) with the state. But the fusion of legislature and administration occurs only *within the state*. To propose a merger between the primary mechanisms of popular representation and the institutions of the state is tantamount to

³⁵ Incidentally, Marx provided no supporting argument in favor of the fusion of legislative and administrative functions.

uniting state and civil society. The roots of such a project are part of the theoretical trajectory proposing the withering away of state and law (the higher stage of communism). In this the abolition of classes results in nonantagonistic social, economic, and political relations whereby the state—as an apparatus of class oppression—will be superfluous. Insofar as the withering away of the state is a process rather than an act of abolition, an important step in overcoming the separation of state and people is its removal by fusing or merging mass organizations with state organs. It is thus part of the thesis so influential in Lenin's thought, and already often encountered here, that the distinguishing feature of socialist democracy must be popular participation in governmental and administrative activity. If popular organs are fused with state organs, then one stage on the road to communism and the withering away of the state is realized. His consequential espousal of the "withering away of democracy" is an assertion that mechanisms of representation are unnecessary in a society with no class divisions and no separation between state and people.

B. Fusion and the Soviets

The soviets, as the primary instrument of popular power, provided the core legitimation of the October revolution. The slogan "All power to the soviets" was the vehicle through which political power was seized and on whose behalf the old state machine was smashed. It was to the soviets that political power was given: "Comrades, workers, soldiers, peasants and all working people! Take *all* power into the hands of *your* Soviets" (Lenin, 1917g: 297). In the early months of the revolution the local soviets operated with great autonomy and usually guarded it jealously. But the direct popular power found in the local soviets was gradually absorbed by the central state agencies. Although this story has already been recorded and we will not add to it,³⁶ the relative importance of the particular and general causes of the decline of the soviets must be mentioned here.

The exigencies of the Civil War destroyed many local soviets, and inevitable pressures tended toward centralization, militarization, and the absorption of the soviets by the state. The most salient pressure was the basic claim of soviet power that the soviets were the source of sovereignty and that they provided the central tenet of the 1918 constitution. Thus, the soviets were invested with two major roles: They were the basic representative organ for the expression and articulation of popular politics, and at the same time they were to become the new state apparatus rather than merely the basis of its sovereignty. In the absence of the separation between legislative and executive functions, the soviets were transformed into departments of state. Did this involve an

³⁶ For a general introduction see Liebman (1975) and Rigby (1979).

overinvestment of power? As the soviets increasingly became administrative state agencies, their capacity to fulfill their role as the organ of popular representation suffered. The “desovietization” of political life ensued. Political and administrative power was rapidly transferred to the state apparatus; at all levels the congresses of soviets met less and less often and began to serve the function of legitimation and *ex post facto* ratification.

The tragic paradox was that the process that served to debilitate soviet power involved those very features that Lenin praised as the great merit of the new system:

The Soviets are a new state apparatus . . . [that] provides a bond with the people . . . far more democratic than any previous apparatus . . . and so constitutes an apparatus by means of which the vanguard of the oppressed classes can elevate, train and lead the *entire vast mass* (Lenin, 1917e: 103; see also 1918k: 100; 1919: 106–107).

Lenin (1918f: 273) himself applauded the fusion of representation and administration in terms of the relations between the soviets and the commissariats. Moreover, he proposed that experimentation be followed by legislative incorporation: “[A]ll steps that are taken in this direction—the more varied they are the better—should be carefully recorded, studied, systematised, tested by wider experience and embodied in law” (Lenin, 1918h: 273). Given the party’s assigned roles as a universal political agent and as a mechanism of systematization, coherence, and leadership, the soviets’ capacity to articulate popular opinion would either disappear or be so hedged about by the party and administration that it would become superfluous. Indeed, Lenin was usually diffident about the relationship between the party and the state. Most of his utterances on this were constructed on the belief that the party’s role was *leadership*, always suggesting a separation between the leaders and the led. When he returned briefly to the question of the relations among the party, state, and soviet institutions, he asked if it was “improper” to amalgamate or fuse party and soviet institutions. His pragmatic answer clearly regarded such arrangements as atypical. He referred to “this particular amalgamation” (Lenin, 1923a: 496), but found it acceptable if it worked in a given case. In his polemic with Kautsky, Lenin pondered whether transforming the soviets from “combat organizations of a class” into state organizations would destroy their democratic character (Lenin, 1918h: 259–262). His reaction to Kautsky was so intense that he simply did not reply to the point of substance. Instead, he construed his opponent as arguing that the working class should not seek to capture state power, whereas the real problem posed by Kautsky was whether the mechanism through which the working class organized itself and then won political power could become the workers’ and peasants’ primary

mass organization and thus the institutional basis of the new state. But this issue remained dormant.

While Lenin consistently advocated the fusion of Soviet and state roles, he was, as noted above, more ambivalent about whether the trade unions should be fused with the economic administration. On occasion he decided in favor of fusion, but more often he recognized the important capacity of unions to represent the interests of workers with reference to enterprise management and in the planning institutions. His preferred role for the trade unions used an analogy with schools. The trade union, he argued, "is not a state organization. . . . It is an organization designed to draw in and train; it is, in fact, a school; a school of administration, a school of economic management, a school of communism" (Lenin, 1921: 20).

The model of fusion underlying Lenin's attitude to constitutional issues could fulfill the diverse functions that the theory assigned to it only if one major condition was met: that the end of Russian capitalism would actually vitiate serious social, political, and economic conflict. In turn, this condition depended on the contention that class struggles were the only sources of *antagonistic* conflict.³⁷ From this assumption it followed that all the mechanisms of representation, decisionmaking, and administration are capable of functioning harmoniously. Although class antagonism is a major, or even the most important, single source of conflict, if conflict has other sources (for example, the sexual division of labor) that persist under socialism, then the mechanisms of conflict resolution are important and necessary features of the constitution of a socialist society. More broadly, does recognition of the necessarily conflictual and thus pluralistic features of a viable socialism require a particular role for law as a specific mechanism? For example, an alternative case could be made (see, for example, Abel, 1982; Cain, 1985) that informalism and delegalization are the most apt mechanisms of conflict resolution under socialism.

Contrary to Lenin's fusion thesis, a strong case exists for a socialist theory of the separation of powers. Within capitalist societies the potency of this doctrine stems from the existence of strong private associations, both economic (including the organizations of labor and capital) and political. The separation of powers, and with it the role of law, are sustained by the tension between state and civil society. In a socialist society the very attempt to overcome the negative consequences of the separation of public and private spheres generates the role and location of law. The very

³⁷ "Antagonistic conflict" refers to those conflicts that are regarded as being fundamental in the sense that the conflicting interests are incapable of resolution. Other than through the victory of one side, Marxist theory traditionally regards the conflict between labor and capital as such a fundamental or antagonistic conflict, while conflicts within classes or other social groups are regarded as nonfundamental and thus nonantagonistic.

process of reducing the conflict of private interests necessitates the presence of an effective public law. We therefore agree with Lenin's contention that a peculiarity of socialist law is the transformation of private law into public law. But against him we insist that public law must guarantee the democratic conditions of decisionmaking. This requires a constitutional arrangement explicitly directed to the prevention of the overinvestment of power within any one institutional apparatus. The need for this form of public law is the major lesson of the history of the first socialist experiment and the contribution to it, with its strengths, its weaknesses, and its silences, of Lenin.

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ERRATA

The following table was incorrectly printed on page 126 of volume 22, number 1.

Table 6. Attributes of a Fair Procedure Under Varying Circumstances^a

Attribute	Authority		Dispute Present		Choice		Outcome		Outcome Importance		Process Importance	
	Courts	Police	Yes	No	Yes	No	Positive	Negative	High	Low	High	Low
Representation	.15 ^e	.18 ^g	.38 ^g	.17 ^g	* .13 ^e	.20 ^f	.15 ^f	.18 ^g	.18 ^g	.17 ^f	.15 ^g	.19 ^g
Consistency	.04	.05	.12 ^d	.03	.02	.08 ^d	-.04	.09 ^f	-.04	-.04	-.04	-.07
Impartiality												
Bias	.13 ^d	.02	* .06	.00	.14 ^f	.04	* .00	.09 ^f	* .04	.13 ^e	.05	.08
Dishonesty	.21 ^f	.26 ^g	.15 ^e	.23 ^g	.22 ^g	.23 ^g	.31 ^g	.21 ^g	.26 ^g	.15 ^f	* .23 ^g	.25 ^g
Effort	.26 ^f	.31 ^g	.07	.36 ^g	* .35 ^g	.24 ^g	.20 ^f	.32 ^g	* .29 ^g	.32 ^g	.29 ^g	.28 ^g
Quality	.26 ^f	.14 ^e	* .16	.08 ^d	.29 ^g	.03	* .12 ^d	.18 ^f	.19 ^g	.10	.18 ^g	.12 ^e
Correctability	.25 ^f	.10 ^e	* .08	.09 ^e	.23 ^g	.05	* .09	.16 ^f	.13 ^f	.14 ^e	.17 ^g	.03
Ethicality	.29 ^f	.20 ^g	.21 ^f	.23 ^g	.13 ^f	.27 ^g	.39 ^g	.15 ^f	* .19 ^g	.27 ^g	.25 ^g	.18 ^f
R ²	.67	.71	.75	.67	.67	.66	.74	.66	.71	.66	.72	.63

^a Entries are beta weights when all criteria are entered at the same time.

^b The significance of the difference in weights is assessed by using a regression equation that includes main effects and interactions terms for all eight criteria.

^c R² = adjusted square of the multiple correlation coefficient

^d $p < .10$

^e $p < .05$

^f $p < .01$

^g $p < .001$

* Interaction terms that are significant at the $p < .10$ level or greater