POPULAR USE OF YUGOSLAV LABOR COURTS AND THE CONTRADICTION OF SOCIAL COURTS

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A basic tenet of communist legal theory is that the judicial function should be socialized, that is, executed by laymen rather than by professional judges. Social courts have been created in all of the Eastern European socialist countries to fulfill this mandate. However, the little empirical evidence available on the use of these courts indicates that they are rarely used voluntarily by individuals, but rather are primarily instruments of state social control over individuals.

The major exception to this pattern of use is exhibited by the Yugoslav version of social labor courts, the Courts of Associated Labor (hereafter CAL). These courts are heavily used, and over 90 percent of their cases are brought by individual workers. This paper discusses why the CAL are attractive to individual workers, drawing on ethnographic research in the trial CAL in Belgrade and on the political arguments surrounding a 1982 parliamentary effort to "reform" the CAL out of effective existence. The basic conclusion is that the CAL are successful in attracting individual workers as litigants because they are *not* really social courts. Further, it is suggested that the idea of social courts is contradictory: Such courts can offer little to most members of society, but instead are even more prone than regular courts to be used as mechanisms for social control by politically powerful elites.

I. INTRODUCTION

Marx and Engels never developed a theory of law per se, but their view of the inevitable withering of the state and law with the establishment of communism has led to the assumption, as one of the basic tenets of communist legal theory, that the judicial function should be socialized, that is, executed by laymen rather than by professional judges. Comrades' courts

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and other forms of lay tribunals were created in the Soviet Union immediately after the October Revolution (Hazard, 1960), and although these institutions themselves withered with the establishment of the Stalinist state, some were resurrected in the post-Stalin reforms, both in the Soviet Union and in the countries of the Warsaw Pact (Butler, 1972; 1977).

The importance of the withering of the state and law has been a particularly important theme to the Yugoslavs (Lapenna, 1964), who have set out to create an alternative to the Soviet model of centralized, bureaucratic communism by basing their system on the principle of self-management directly by the working class (see Rusinow, 1977). In this paper, I will be concerned with the Yugoslav self-management courts that are empowered to hear labor disputes, the Courts of Associated labor (hereafter CAL).

The paper has three parts. I will first consider figures showing who uses these courts as compared with their counterparts in some of the countries of Eastern and Western Europe. The general figures on the use of labor courts reveal a paradox: The Eastern European labor courts, which are staffed by workers, are rarely invoked by ordinary workers, but rather are primarily used by the state against individuals. In contrast, the Western European labor courts, which are quite similar to regular courts, are used primarily by individual workers. The Yugoslav CAL seem to counter this pattern, because they are supposed to be informal workers' courts and are primarily used by ordinary workers.

In the second part of the paper, I shall look more closely at the CAL to see why they are used by individual workers so much more than are their counterparts in the Warsaw Pact countries. I will show that the CAL are attractive to individual workers precisely because these courts do not meet the ideals of workers' courts but rather are similar to regular, formal courts. I will show further that this pattern of use is not unusual, but that in fact informal or alternative courts in modern, complex societies have not succeeded in attracting voluntary use, particularly as compared with regular, governmental courts.

In the third part of the paper, I will argue that, as a matter of practical politics, there is very little reason to believe that social courts, or courts embedded within a social field, will be attractive to, and hence used by, most people within that field. Instead the idea of social courts is contradictory, for if a court is embedded within a social field, it will not be of much use to most people within that field, but rather will primarily serve as

a mechanism of social control over individuals. In contrast, an independent or regular court will be attractive to more individuals because it has greater utility as a means for challenging established power within the social setting.

II. THE PARADOX OF WORKERS' COURTS

Workers' courts are social courts in work settings such as factories. The general concept of social courts is grounded in the classical Marxist formulation of the inevitable withering of the state and law and in Lenin's emphasis on the desirability of socializing the administration of justice (Ramundo, 1965: 692). Such courts, which can be generically termed "comrades' courts," were created in the Soviet Union immediately after the October Revolution and in the Eastern European socialist countries, except Yugoslavia,[1] in the 1940s and 1950s (Butler, 1972). The first Yugoslav social courts, the CAL, were only created in 1974 and 1975.

While the specifics of each court's organization and jurisdiction vary, in general comrades' courts are staffed by nonprofessional judges who serve only part-time. Procedures are meant to be informal and nonlegalistic; lawyers are often not permitted to attend. The courts sit within the relevant social context: factory, commune, or apartment block. The aim of the proceedings is not to punish offenders, but rather to educate them and the community and to correct errant behavior. In line with these goals, the sanctions available to the comrades' courts are "measures of social pressure" (ibid., p. 205) such as mandated apologies to victims; censures or reprimands, perhaps published or prominantly posted; small fines; assignments of socially useful labor; and ultimately perhaps eviction from an apartment or dismissal from employment.

Recent scholarly and professional legal interest in increasing "access to justice" (Cappelletti, 1978–79) and providing alternatives to adjudication as a means of handling certain kinds of disputes (see Abel, 1982; Tomasic and Feeley, 1982; *Journal of Legal Education*, 1984) has sparked interest in these social courts as inspirational models of new forms of dispute institution (see, e.g., Fisher, 1975; Snyder, 1980; McGillis and Mullen,

[1] American political and scholarly convention places Yugoslavia in Eastern Europe, although, as the Yugoslavs point out, such placement has interesting implications for "Western" Greece and Turkey. While Yugoslavia does share some features with the countries of the Warsaw Pact (see n. 4 below), it is important to remember that nonaligned Yugoslavia is not a member of that political body and differs from those countries in many important ways. Indeed, as will be seen, the existence and operation of the CAL are indications of the extent to which Yugoslavia differs from the Warsaw Pact countries.

1977). The theory has generally been that these lay social institutions improve access to the judicial process by lessening the costs associated with bureaucratic delay and with the need for professional assistance, and by lessening the discouragement of potential parties who are confronted in regular courts by judges and lawyers of higher social status than themselves.

These assessments of the Eastern European social courts as institutions affording increased access to justice, however, have been based either on published doctrinal material or on very short visits to the courts in question, by people who may not be familiar with the societies in which these institutions are to be found. Certainly the favorable view of these social courts is not shared by those scholars who are more closely acquainted with them. The Soviet comrades' courts, for example, are generally seen as mechanisms for extending state power rather than for settling disputes (Stephan, 1984), and the entire edifice of socialist law has been described as inherently authoritarian (Markovits, 1982). These evaluations have been based in part on the little empirical evidence available on who uses the social courts.[2]

In the East German workers' courts (conflict commissions), for example, 75 percent of the cases are brought by enterprises against individual workers, while comparable suits account for only 3.8 percent of the cases in Western German labor courts (Markovits, 1984: 4–5). Viewed another way, whereas in 1977, 143 of every 10,000 West German workers initiated cases in the labor courts, only 17 of every 10,000 East German workers did

[2] Because much of the argument in this article contrasts my observational data on the Yugoslav CAL with others' studies of Soviet and Eastern European social courts, a brief note on these other studies is in order. First, unlike my study, none of the other works has included intensive ethnographic investigation. Colleagues in Soviet and Eastern European studies have informed me that it is extremely unlikely that such observational research would be permitted in the Warsaw Pact countries, although other kinds of court studies have been undertaken in Hungary (Kulcsar, 1982) and pre-Solidarity Poland (Los, 1978; Kurczewski and Frieske, 1978) by scholars native to those countries. Thus, the studies I cite on other socialist countries cannot be considered to have the same kinds of qualitative data that I use in discussing the CAL. Instead, they are based mainly on documentary sources, the professional legal literature and the popular press of the countries in question. Because I have not drawn on works that are based primarily on interviews with expatriates of the Warsaw Pact countries, the potential for bias in such studies is not of concern here.

Second, since Western specialists have generally not viewed the comrades' courts with much favor, the question may be raised whether these authors have avoided political bias or polemics. Certainly no research is ever value-free, but the scholarly literature on Soviet and Eastern European law has generally not exhibited much obvious bias or posturing. This literature may often be skeptical of some of the positions taken in the writings it draws upon, but such skepticism of formal legal materials should not be unusual for readers of the *Law & Society Review*.

so (Markovits, 1982: 553–554). A similarly low rate of individual use is found in the Soviet Union (Berg, 1983: 145).[3] Polish researchers have found a similar pattern of lack of individual use in their country's workers' courts. These institutions hear few cases and, in those that are heard, nearly 90 percent of the "defendants" are blue-collar workers, with the majority of cases being initiated by "the company's administration, the prosecutor, or the penal administrative boards" (Los, 1978: 814). Los concludes that while the Polish workers' courts "have several attractive features, such as their educational and prophylactic character, their informal inexpensive and fast procedure, and their democratic premises . . . these courts do not work very well in practice" (ibid.).

The available evidence thus indicates that while the comrades' courts may be called *workers'* courts because they are staffed by workers who decide cases informally, they in fact are not truly *worker*'s courts because few individual workers choose to bring cases to them. I consider this pattern of use the paradox of workers' courts, for they seem to be used *against* individual workers, rather than *by* them. In view of this pattern, the Yugoslav CAL seem particularly interesting, because the available figures indicate that they are actually used by workers: In 1981, for example over 90 percent of the cases in the CAL in the Republic of Serbia[4] were initiated by individuals, at the rate of 87.1 individually initiated cases per 10,000 workers (GSURS, 1982: 120).[5] Virtually all of these cases were brought

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[3] Berg (1983: 146) does say that there were more individually initiated labor cases in the Soviet Union in the 1950s and that this evidence counters Markovits's (1982) thesis that socialist law is unattractive to individual workers. However, Berg's figures (1983: 150) indicate that the only time when such cases were brought in any great numbers was 1956. Without deciding the matter, one might suspect that the period immediately following Stalin's death, and particularly at the time of Khrushchev's "secret speech" denouncing Stalin, might have led to more optimistic assessments of the potential of socialist law by working people. Later, as it became apparent that the decline of state domination over social life was at best one of degree rather than kind, use of the new courts seems to have declined.

[4] The Socialist Federal Republic of Yugoslavia is composed of six Socialist Republics (Bosnia and Hercegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia) and two Socialist Autonomous Provinces (Kosovo and Vojvodina) within the largest republic, Serbia. Yugoslavia takes federalism seriously, to the point at which most records, studies, and figures are available only on a republican-provincial scale. In this article, almost all my figures on the CAL refer to the Republic of Serbia or Belgrade, the capital of both Serbia and the federation. Nevertheless, I do not think that these figures are unrepresentative of the situation in other parts of the country. High rates of individually initiated cases in the CAL have also been reported from Slovenia (Jambrek, 1983: 190) and Bosnia and Hercegovina (Korać, 1981: 8).

[5] This figure excludes the housing cases (see n. 6 below) as not being truly labor disputes.

against the work organizations to enforce individual rights. Thus, of the total 1981 caseload of the CAL in Serbia, 31 percent concerned salary, 25 percent the status of individual workers (e.g., challenges to a job transfer), and 23 percent the allocation of housing,[6] and another 22 percent were either worker challenges to a disciplinary action or enterprise efforts to obtain damages from workers who had caused losses to the organization. This last category accounts for almost all cases initiated by work organizations against individual workers.

In the courts' decisions, plaintiffs' requests to the CAL in Serbia in 1981 were fully or partly granted in approximately 38 percent of the cases and rejected in 33 percent, while about 11 percent were discontinued by plaintiffs and the rest were disposed of in other ways, such as dismissal for lack of jurisdiction (GSURS, 1977–82: 124). Since many of the discontinuations were likely the result of the plaintiff having received some out-of-court satisfaction of the claim, the success rate for plaintiffs is substantial.

Since the CAL seem to be the only informal socialist labor courts that are heavily used by individual workers, it is important to determine why they have been so successful in attracting such use. Do they provide evidence to counter the general Western view of socialist law as inherently authoritarian (see, e.g., Markovits, 1982)? Or are the CAL successful as workers' courts because they vary in some way from the usual model of social courts? To answer these questions, I have conducted a more detailed examination of the CAL.

III. YUGOSLAV SELF-MANAGEMENT WORKERS' COURTS: THE COURTS OF ASSOCIATED LABOR

Yugoslavia is a particularly interesting communist[7] state. Since the break with Stalin in 1948, the Yugoslavs have worked to create their own brand of communist theory and practice based on the principle of socialist self-management (see Rusi-

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[6] In Yugoslavia, the best and least expensive way to obtain housing in the larger cities is through one's work organization, which is obligated to try to provide housing for its workers. However, the housing market is very tight in these cities, which means that there are long waiting lists for factory-provided housing; this scarcity makes suits over the allocation of housing quite common.

[7] Yugoslav writers would object to the application of the term "communist" to their state, pointing out (quite correctly) that no state has yet achieved communism and that Yugoslavia is a *socialist* state. However, one is perhaps not being too parochial or bourgeois in differentiating between those socialist states with multiparty political systems (e.g., Sweden, and India) and those ruled by a single communist party. For conciseness, we will refer to the latter as communist countries, recognizing that they have not in fact achieved communism.

now, 1977). The basic idea is still the familiar Marxist concept of creating rule by the working class, but the Yugoslavs have gone much farther than any other communist state in attempting to implement this principle.

The heart of the Yugoslav self-management ideology is decentralization.[8] In the economic sphere, factories are run by directly elected workers' councils. The political system has been decentralized to the point at which the Socialist Federal Republic of Yugoslavia in some ways resembles a confederation. Similarly, in the regular legal system, the supreme court of each of the republics and autonomous provinces that are the constituent elements of the Yugoslav Federation is the final arbiter, on almost all matters, within its territorial jurisdiction. The federal court is limited to considering almost exclusively those matters involving conflicts between the constituent units of the federation, disputes over the jurisdiction of other courts, and other federal matters (Perović, 1980: 102).

The decentralization of the judicial system has been furthered by the creation of self-management courts. The present (1974) constitution of Yugoslavia provides that "judicial functions shall be performed by regular courts of law as organs of state power, and by self-management courts" (Article 92; cf. Article 217). Yugoslav writers have seen these self-management courts as embodying a completely new kind of social court (e.g., Perović 1980: 146), regulating those social relations that the state no longer needs to regulate because social classes and class antagonisms have been eliminated (Nikolić and Petrović, 1980: 46).

While the jurisdiction of the self-management courts will increase as the need for state regulation of social relations decreases, at present the most important self-management courts are the CAL, which handle nearly all disputes involving work relations both between organizations and between individual workers and organizations. The federal statute on CAL calls for these courts to decide certain kinds of legal questions (e.g., whether the conditions for forming a work organization have been met), but it also calls for them to "resolve disputes" (*rešavanje sporova*) and speaks of their duty to "restore relations" (*urediti odnose*) that have been disturbed. To accomplish these ends, the courts are obliged to make their own de-

[8] The following generalizations on the operation of Yugoslav self-management should be taken with more than a few grains of salt. The literature in sociology and management, both from Yugoslavia and abroad, contains many debates over how well Yugoslav self-management meets its goals and justifications (see, e.g., Obradović and Dunn 1978; Comisso, 1979).

termination of the factual situation, regardless of the way it is represented by the parties. At the same time, procedural rules for the CAL are less strict than in the regular courts, and most judges are not judicial professionals but rather workers, elected from their work organizations, who hear cases only two days a month. To stress that CAL proceedings are not adversarial, the usual court terminology of "accuser" (*tužilac*) and "accused" (*tuženik*) has been replaced by "initiator" (*predlagač*) and "other participant" (*drugi učesnik*), respectively. The literature on these courts at the time of their founding speaks of "untying" disputed situations and stresses that there are neither parties in dispute nor accusations. Rather, the courts deal with "proposals" by participants and "put in order an internal relationship in which more people are involved and have an interest in the restoration of that relationship" (Trifunović, 1975: 25; cf. Matović, 1974; Poznić, 1974).

The CAL thus appear to be archetypical alternative dispute institutions: informal, nonprofessional, nonbureaucratic, and therapeutic rather than condemnatory, precisely the kind of alternative to regular adjudication that both socialist legal theory and much recent American sociolegal scholarship see as desirable. They are particularly impressive because of their ability to attract large numbers of individual plaintiffs, something few if any other known social courts have been able to accomplish.

There is no reason to doubt the official figures on the use of the CAL by individuals. Yugoslav statistics are usually reliable, and the CAL administration would have no reason to inflate the individual-use figures. Indeed, as will be discussed later, in 1982 an attempt was made to "reform" the CAL out of existence precisely because they handle so *many* individual cases. Thus, there is no question that the CAL are workers' courts. On the other hand, the question of whether they are also workers' courts in the sense of workers themselves exercising the judicial function requires a closer look.

In the ideal workers' court we would see workers rather than legal professionals staffing the institution; informal procedures; disputant workers stating their own cases or taking at least some active role in the proceedings; and discussions centering more on why disputes have arisen than on the specifics of any particular incident. Such an ideal type can be derived from both the Yugoslav legal literature (Trifunović, 1975; Matović, 1974; Poznić, 1974) and American writers (e.g., Danzig, 1973; Danzig and Lowy, 1975; Sander, 1976).

Careful examination of the CAL, however, indicates a sharp divergence from this ideal type. One example may be

found at the trial-level CAL in Belgrade,[9] which I studied in 1982–83 (see Hayden, 1985: 307–320). In all, I observed over four hundred hours of activity in the court, including the discussion of over 240 cases. In these cases court proceedings were in fact almost totally dominated by lawyers. Virtually all plaintiffs had hired lawyers at their own expense, and these lawyers did almost all of the talking. In fact, most clients who wanted to speak were not permitted to do so by their lawyers. The dominance of the lawyers could be seen in the use of the few chairs available in the tiny courtrooms. In most of these rooms, only two or three chairs were available for the opposing parties, who sat next to each other, facing the judges across a table.[10] (An extra chair was found for the visiting American, next to the court secretary at the end of the table.) In *all* cases observed, the lawyers sat while the clients stood behind them, effectively out of the action.

The dominant position of lawyers on the parties' side of the table was matched on the judges' side as well. In the CAL, cases are heard by panels of three judges, as is common in continental European legal systems. While all three members of a panel are technically equal, one, the president, conducts the hearings, dictates the record,[11] and, in the cases I observed, usually summarizes the case at the start of *in camera* discussions that lead to the decisions. It is only this president who is called judge (*sudija*) by the lawyers and court personnel, including the other two judges. In the Belgrade CAL in 1981, there were

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[9] In general, there are two levels of the CAL: basic (trial) courts in larger cities, and one appellate CAL in each republic and autonomous province; there is no federal CAL. In all of Yugoslavia there are 47 basic CAL, of which nine are in Serbia (exclusive of Kosovo and Vojvodina). There are also some "special" trial-level CAL in Slovenia for hearing particular kinds of cases. The basic CAL are established on a territorial basis, encompassing one or more communes. Unlike comrades' courts, the CAL are not housed within factories or work organizations, but rather are independent entities with their own physical plants and staff. This difference from the more usual model of comrades' courts is crucial, as shall be seen below.

The basic CAL in Belgrade, the subject of the ethnographic study drawn on here, handles more cases than any other CAL in Yugoslavia. Its exceptional size might mean that its methods of handling cases are different from those of smaller courts, but my conversations with Yugoslav lawyers indicate that such is not the case. Further, the literature mentioned earlier (see n. 4 above) is quite consistent in viewing the CAL as being used primarily by individual workers.

[10] In general, Yugoslav courtrooms are fairly large, with adequate space for spectators, and the parties sit at separate, parallel tables that face the judges' bench. Although the Belgrade CAL moved into much better quarters in early 1984, the courtrooms remain as tiny as described here.

[11] In Yugoslavia, as in other continental European countries, there is no verbatim transcript of trial proceedings, but rather a record of the trial is dictated by the head judge to a typist.

eighty-four presidents of panels. Of these, seven held the job of judge in the CAL as a full-time position, eighteen were regular judges in other courts, and twenty-seven others had law degrees.[12] Thus, 62 percent of the judges had had legal training. A further eight (10%) were professionals in other disciplines (doctors, economists, and engineers), three (3.5%) were pensioners, and, finally twenty-one (25%) were "workers" with high-school educations or less (OSURBI, 1981: 5). Further, all of the panels except those of the seven full-time judges in the CAL were assisted by a secretary, a recent law-school graduate who served a role like that of an American law clerk, briefing the cases, drafting opinions, and, when the judge made a procedural error, bringing the matter to his or her attention.

The legal services of the secretaries are necessary because the decisions of the self-management courts, like those of the other courts in European civil law countries, are published, along with brief statements of the reason for the decision. The appellate CAL in the Republic of Serbia, for example, publishes its own journal, which reports the decisions of that court. Other CAL decisions are reported in the regular legal periodicals. Decisions of the trial CAL must be in accord with the relevant decisions of the appellate CAL and also with certain relevant federal and republican or provincial statutes (see Jambrek, 1983).

If a workers' court should ideally be one in which workers themselves handle the cases and make the decisions, then the CAL would not seem to qualify for this title. Instead, they appear very similar to the regular courts: Lawyers use statutory and case law to argue before legally trained judges or judges with legal assistants, producing win-or-lose decisions. At the same time, however, as noted earlier, the CAL are clearly workers' courts in that over 90 percent of their cases are brought by individual workers. This pattern is the converse of that exhibited by comrades' courts and other Eastern European social courts, and we should try to determine why this contrasting pattern of court use is found in Yugoslavia.

One possible reason for this phenomenon is that Yugoslav socialism has not developed as fully as that in the Warsaw Pact countries and consequently there is more conflict between workers and managers in Yugoslav factories than in their Eastern European counterparts. Yet Markovits (1982: 554–555) has

[12] As a general rule, most students in Yugoslav law schools do not intend to practice law as attorneys (*advokati*), but rather will use the law degree to obtain a job in a governmental or industrial bureaucracy, to enter the judiciary, or to become a prosecutor (see Hayden, 1985: 297–98).

persuasively argued against this view, noting the large number of *management*-initiated cases in, for example, the East German conflict commissions. Worker-management conflicts certainly do exist in Eastern European socialist countries other than Yugoslavia, but in those countries individual workers do not seem to find it worthwhile to initiate cases in the social courts.

The converse of this first argument could also be made, namely that the other Eastern European socialist states are so authoritarian that few workers will bother to bring cases challenging factory (and hence party or government) actions, while decentralized, comparatively liberal Yugoslavia provides a more congenial atmosphere for asserting individual claims. This argument may have greater merit, but more for a basic point that it raises concerning the kinds of resources that courts may offer to potential plaintiffs than for the specific contrast between authoritarian socialism and a form that is less so. If it is asked how the resources offered by the CAL specifically differ from those of the more typical social courts, two features stand out.

The first lies in the substance of the rules and norms applied by the CAL as opposed to more typical comrades' courts. If the Soviet comrades' courts are seen as being perhaps archetypical of the general category, it is clear that these institutions are meant to be instruments of social control over individuals. While terminology that implies guilt or punishment is avoided, the jurisdictional charge of the comrades' courts is aimed at correcting such individual misbehavior as drunkeness, truancy, misappropriation of state property, and damage to state property (Butler, 1972; 1977). This orientation toward individual misconduct is also clear from the list of sanctions that comrades' courts can apply: "social pressure" on the individual rather than any specific remedies for violation of the individual's rights or entitlements. In contrast, the basic law establishing the CAL, while granting them jurisdiction over many specific questions concerning the establishment of work organizations and other such technical questions, has a residual jurisdictional category of "the resolution of disputes . . . concerning other self-management rights and obligations of workers derived from interpersonal relations [involving work relations]" ("Law on CAL," *Službeni list SFRJ*, May 10, 1974). In practice, this residual charge has been interpreted as covering individual grievances against organizations (see GSURS 1977: 57ff.). Further, the statute does not limit the sanctions that the CAL can apply, and both my research and the case reports indicate that they in fact handle most cases by granting (or denying) specific

forms of legal relief such as rescission of a termination or a cut in pay, cancellation of a housing assignment, and cancellation of an improper employment decision. In short, despite, the use of the rhetoric of the "resolution" of disputes, the CAL do not operate like comrades' courts but rather like regular courts, offering specific legal remedies.

Legal remedies are useless, however, if a court will not award them. More particularly, in terms of court use, it might be reasonably assumed that few potential plaintiffs will bother to bring a matter before a dispute institution unless he or she can reasonably expect to derive some benefit from that action. This does not mean that a potential plaintiff must in fact expect to be able to win a contested claim, but, for reasons that will be discussed in the next section, it does mean that a potential plaintiff must be able to claim plausibly that he or she will be able to win. It might then be asked whether there are any differences in the structure of the CAL, as compared with that of the comrades' courts, that would be more inducive of such a belief regarding their use. Again the answer is yes.

One of the features that marks comrades' courts as social courts is that they are embedded in the social context from which their cases arise; labor courts, for example, are located within factories. The CAL, however, are independent agencies with their own physical plant and permanent staff of secretaries, legal assistants, and other functionaries. The "access to justice" idea would indicate that their location within factories should both make the comrades' courts more accessible than independent courts because of their proximity to potential litigants. They should also be more likely than independent courts to arrive at "just" decisions because their staff should be cognizant of local conditions and customs. Yet this assessment ignores the practical politics of labor disputes. In labor cases, the individual worker is most likely to have a grievance against the organization and its officers. In cases in which the dispute institution is inside the factory, the individual worker is in the unviable position of complaining about the factory to factory representatives within the factory. Many potential litigants may then wonder why they should bother to bring complaints to an institution that is so embedded in the relevant social field. In contrast, the CAL of Serbia has held that a worker cannot be disciplined for criticizing management and has rescinded disciplinary measures taken against such a worker.[13]

The problem of the lack of independence of social courts

[13] Decision of the CAL of Serbia, Number 5748/82, November 19, 1982.

was explicitly raised in 1982–83 during an extended political debate over a government attempt to "reform" the CAL (see Hayden, in press). The government's action was based on the results of an analysis of the operations of the CAL during the first few years of their existence, which had been undertaken by a committee of the federal parliament (Savezni Sekretarijat, 1980). The analysis had found that the overwhelming majority of cases in the CAL were initiated by individual workers and that legally trained judges were needed to deal with these cases. The analysis had mixed views of this development. On the one hand, the pattern of cases indicated that self-management had not developed properly because so many individuals had felt the need to bring actions enforcing their rights. On the other hand, the fact that individuals were bringing actions was viewed as having a positive side in showing that individual workers were cognizant of their self-management rights and felt free to exercise them.

If the original analysis had been dispassionate in its assessment of the importance of the large number of individual claims in the CAL, the political action that it sparked was more doctrinaire. The Federal Council of the federal parliament published conclusions that were based on the analysis but were highly critical of the CAL.[14] Whereas the analysis had seen the pattern of cases in the CAL as indicating that self-management had not developed satisfactorily, the Federal Council saw it as showing that the CAL themselves were unsatisfactory. The Federal Council simply ignored the positive assessments of the high incidence of individual cases that were contained in the analysis and stressed instead the conclusion that the CAL had developed rather like the regular courts and thus were not really self-management courts. The Federal Council concluded that a new law was needed to make the CAL truly social, self-management bodies.

In February 1982, the Committee on the Judiciary of the Federal Council of the federal parliament presented a proposal for such a law.[15] While this proposal had many provisions, the most important was that the CAL should be made truly social courts by ending their independent existence and instead estab-

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[14] "Zaključke o merama za dalji razvoj samoupravnog sudstva," *Službeni list SFRJ* br. 32/81 ["Conclusions Concerning Measures for Further Development of the Self-Management Judiciary," *Official Gazette of Yugoslavia],* Number 32/81 (June, 1981).

[15] "Predlog za donošenje zakona o sudovima udruženog rada," *Skupština* SFRJ ["Proposal for Passage of the Law on Courts of Associated Labor," *Parliament of Yugoslavia*], Number AS 509/1 (December 1981).

lishing them within factories. The proposal was presented as one of the utmost importance, and it was suggested that it should be adopted without delay at a meeting of the Federal Council to be held five days later through an accelerated version of the normal parliamentary procedure. However, in what newspaper accounts indicate was a very lively session, this suggestion was not accepted (*Politika* [Belgrade], Feb. 6, 1982: 4). The representatives of the trade unions objected both to the acceleration of standard parliamentary procedure, and particularly to the proposal to put the CAL into factories.

The accelerated parliamentary procedure was in fact avoided, and the political debates over various proposals for a new law on the CAL extended for more than two years. Although the new law would have completely revamped the existing legislation, almost all of the debate centered on the single issue of whether the CAL should be placed within factories or whether they should remain independent. The opponents of the reform argued that the effect of putting the CAL into factories would be to eliminate their usefulness to ordinary workers, who would then be in the untenable position of having to complain to factory representatives about factory conditions within the factory itself. To stress the implications of this sort of embeddedness, the press drew on a folk saying that had arisen from Serbia's five hundred years of subjugation to the Ottoman Empire and compared the proposed factory-based CAL to the Islamic kadi courts: "The kadi accuses you, and the kadi judges you" (*kadija te tuži, kadija ti sudi*). This parallel was made immediately after the first parliamentary presentation of the proposed new law (*Borba* [Belgrade], February 6, 1982: 2) and was repeated several times thereafter (e.g., *NIN* [Belgrade], April 4, 1982: 23; *Komunist* [Belgrade], January 7, 1983: 7).

The striking element in this entire political debate was the extent to which the proponents of the "reform" argued on definitional grounds, asserting that the CAL could not be self-management courts because they were not located within work settings. On the other side, the opponents of the proposed change (who included the federal trade union, the organized bar, and most journalists) made the more practical and realistic argument that the removal of the independence of the CAL would make them captives of the technobureaucratic oligarchies within factories. The irony in the situation is that it was precisely because the "reformers" had so clearly defined the deviation of the CAL from the ideal of social courts that their opponent's arguments were so telling. In essence, the opponents were simply stating that while conflict per se is not particularly

desirable, the assertion by individual workers of their rights should be viewed as a means of correcting the failings of self-management. The "reformers" definitional argument that the CAL were failures because they did not meet the criteria of a social court seemed extremely weak when compared with the arguments of their opponents.

Ultimately, a new law on the CAL was passed by the federal parliament in July 1984[16] that maintains the courts' independence. While it is too early to assess the impact of this legislation on the rate of court use, it seems likely that individual cases will continue to dominate, particularly as the new law makes enforcement of CAL decisions by the regular courts less problematic.

IV. THE CONTRADICTION OF SOCIAL COURTS

The "kadi justice" arguments made by the opponents of the proposed "reform" of the CAL make very clear what could be called the contradiction of social courts: If a court is embedded in a social field, it will be of little value to most people who operate within that field. A simple political logic underlies this assertion. An embedded (or social) dispute institution is unlikely to offer support to those who would challenge established power arrangements within the social field. Those who directly exercise power are also likely to control institutions, such as courts, that exercise the symbols of power, linguistic and otherwise (Bourdieu, 1977: 164–165; cf. Yngvesson, 1984). For the less powerful and the totally powerless, this situation creates insurmountable strategic difficulties to invoking a social court. Perhaps the *sine qua non* for claim credibility is that the agent to whom the complaint is made is not biased against the claimant. This is not a requirement of the agent's objectivity; the claimant would probably prefer that the intervener be biased, but in the claimant's favor. However, a claim brought before a third party who is biased *against* the claimant will have little value. Since those who hold power in the social field will generally also control its social courts, the latter are likely to be biased against those who are not powerful. Consequently, it seems that there will be little incentive for most individuals to invoke social courts, as those who already hold power can exercise that power directly and those who are not in power will find that the powerful already control the courts.

Several arguments against this contention can be made.

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16 "Zakon o sudovima udruženog rada," *Sl. list SFRJ* ["Law on Courts of Associated Labor," *Official Gazette of Yugoslavia*], (July 13, 1984).

One is that individual actions against the group are disruptive and to be discouraged; this seems to have been the view underlying the actions of those who wished to "reform" the CAL. A related argument would be that political activity can be structured in such a way that the "right" people will always be in a position to decide matters concerning the group, and that their decisions should not be challenged. This is, of course, the traditional communist argument that the working class and its agents can by definition do no wrong, and that their power should therefore be unchecked. However, the sophistry of this argument as a means for justifying the perpetuation of a new class of dominating political bureaucrats is well known (Djilas, 1957); indeed, the Yugoslav effort to establish self-management has been based on the perception that Soviet-style communism inevitably leads to such technobureaucratic domination (Rusinow, 1977: ch. 2).

The argument, however, is not that communism is inherently authoritarian, but rather that the ideology of communalism contains a contradiction that is particularly manifested in the incentives for mobilizing social courts. For example, an argument similar to the one being offered here was made by Dr. B. R. Ambedkar, the Untouchable lawyer who drafted much of the constitution of the Republic of India. He countered the Gandhian idea that the polity of independent India should be based on the village community rather than the individual by arguing that such an arrangement would serve to perpetuate the historical inequalities of the caste system, which are most evident in the villages (Bailey, 1983: 150, 164–176). While the Indian constitution is largely based on the principles of universal adult sufferage (Austin, 1972), a few concessions to the Gandhians have been made, including provisions for informal *panchayats*, or social courts, in the villages (Baxi and Galanter, 1979; Meschievitz and Galanter, 1982). However, the little empirical evidence on the use of these *panchayats* indicates that Ambedkar's fears were justified: The *Panchayats* have been largely captured by local elites and therefore offer little to less privileged villagers (Meschievitz and Galanter 1982: 68–69), which is perhaps one of the reasons why these institutions are rarely used.

One might argue that the problems of attempting to use social courts to challenge established power are most intractable in a small social field, such as a factory or an Indian village, and that social courts may be more successful in less narrowly defined settings. However, the empirical evidence counters this assertion. American alternative dispute institutions such as

neighborhood justice centers have almost universally failed to attract voluntary use (Pearson, 1982: 428; Merry and Silbey, 1984), and the analogous problems of social labor courts have already been mentioned. Other alternative dispute institutions that have failed to attract voluntary use include the West German *Schiedsman* (mediators) (Strempel, 1983: 12), the East German *Schiedskommissionen* (arbitration commissions) (Markovits, 1984), and the Polish social conciliatory commissions (Kurczewski and Frieske, 1978: 325–339). In fact, it is difficult to find any alternative dispute institution that has succeeded in developing a substantial voluntary caseload, particularly in comparison with regular courts. The examples that are often cited are from revolutionary situations (e.g., Berman, 1969; Spence, 1982; Isaacman and Isaacman, 1982), but because the revolutionary experience is inherently temporary, it seems unlikely that revolutionary courts will retain their original characteristics as political conditions stabilize (Salas, 1983).

To explain the lack of use of these alternative courts, we might again consider the practical politics of dispute institutions. In a small social field, the problem faced by a would-be plaintiff or claimant is that the social court is likely to be biased against him or her, and therefore there is little incentive to try to use the institution. In a larger setting, the problem may not be so much one of bias as of the social court not having much to offer to a potential user. If, for example, a dispute institution offers only a noncoercive mode of proceeding (e.g., mediation), it may not be able to ensure that a party against whom a complaint is made will bother to respond. This problem may help explain the lack of voluntary use of the American mediation centers; empirical data indicate that obtaining an appearance by the respondent is difficult unless there is coercion, such as a criminal charge held in abeyance (Harrington, 1984: 219). Indeed, it is becoming clear that the major use of formal courts is to structure negotiation (see, e.g., Galanter, 1984; Trubek *et al.*, 1983) and even in nonindustrial societies, effective mediation is backed by coercion (Merry, 1982). After all, if there are no sanctions for failure to appear, why should a respondent bother to do so? And if the appearance of the respondent is uncertain, why should a plaintiff bother to use the court?

On the other hand, if an alternative dispute institution does offer coercive power, it seems politically unlikely that this power will not be guided or checked by more established organs of social control. Such an institution will be "semi-autonomous" (Moore, 1973) in its ability to make decisions and thus in the nature of the decisions that it can make. Even where there

are strong social pressures to keep disputes within a social setting and concomitant pressures against the invocation of an outside agency, the very possibility of such invocation will tend to induce the social court to modify its decision-governing principles to be more similar to those of the more powerful institution, thereby lowering the incentive to use the latter (see Collier, 1976). This kind of adoption of externally derived principles by semi-autonomous indigenous tribunals has been reported from Africa (Saltman, 1979) and India (Srinivas, 1953–54). In such cases, the social nature of the tribunal seems more theoretical than actual.

The contradiction of social courts, then, may be stated as follows: If a court is embedded in a small social field, it may have the power to make and enforce decisions, but that power will be available mainly to those few who are already powerful and not to most individuals. Thus there will be little incentive for most people to invoke the court. In larger social settings, if an alternative or social court has power, that power is likely to be subject to control by larger political forces, and thus to be less attractive than the more certain power offered by regular courts. Thus we would expect to see greater use of regular than alternative courts when both are available. Whatever the size of its social field, an alternative court that does not offer power or coercion is not likely to receive much use. Since the major function of formal courts seems to be to structure negotiation, what individuals seem to value most about courts is their utility as means for threatening someone. If a court does not offer coercion, it seems unlikely to have much use as a mechanism for threatening another party (or, in perhaps less pejorative terms, inducing that party to negotiate).

Politicians clearly recognize the importance of the availability of an external source of power to people who wish to challenge established power structures within a social field. One can, without being too cynical, see both the socialist idealization of social courts and at least one strand of American advocacy of alternative courts as resting on a desire to limit the kinds of external power available to individuals in their dealings with either other individuals or corporate and government groups, thereby perpetuating the established power relationships within which those dealings take place. On the socialist side, we might remember that social courts were advocated by Lenin, whose concept of democratic centralism was hardly congruent with an institution that offered any real power to people not already within the power elite. On the other side, the support that American legal elites provide for the establishment of

alternatives to regular courts seems to be based in large part on their perceptions that the latter are "overused" or "abused" (Galanter, 1983: 68), which can be translated as used by the wrong people (Galanter, 1984). It is striking that there is a movement to establish alternatives to regular courts at the same time that efforts are being made to limit access by poor people to them through the abolition of the Legal Services Corporation.

Of course, to say that regular courts are more likely to be useful to individuals than social courts does not solve the problem of access to dispute institutions (see Cappelletti, 1978-79) nor the likelihood that those who are better off will be more able to use the courts than the disadvantaged (Galanter, 1974). Still, if we are given a choice between easy access to an institution that has little to offer and more difficult access to one that does afford some means of effecting one's wishes, the second appears to be more often likely to be chosen than the first.

This hypothesis is supported by the evidence provided by the CAL. As the opponents of the "reform" argued and as my field observations indicate, Yugoslav workers use these courts precisely because they are *not* social courts embedded within the factory. By offering the individual worker a source of coercive power external to the factory, the CAL attract use by such people. Of course, this disjunction between the social nature of a court and its utility to ordinary members of society runs counter to the ideology, or perhaps mythology, of communalism. The Yugoslavs have in fact recognized this contradiction and have pragmatically chosen to accommodate theory to reality. In the attempt to "reform" the CAL, the theoretical arguments in favor of putting these courts into factories were finally dismissed in an article in the party organ, *Komunist*, with the comment that "perhaps an idea is exceptionally good, but if we wish to implement it, failure to consider reality will most frequently lead, in actuality, to that idea giving birth to its own total contradiction, to absurdity" (January 7, 1983: 5). As a matter of practical politics, the idea of social courts seems likely to lead to such absurdity in other complex societies as well as in Yugoslavia.

V. CONCLUSION

The official Yugoslav perspective on the evolution of the judicial system under self-management is the classical Leninist position that when class contradictions are removed, the need for state law will disappear; thus, as more social relations be-

come self-managed, the need for regular courts as instruments of state power will be reduced, and society will be increasingly regulated by self-management courts (Nikolić and Petrović, 1980: 46; cf. Jovanović, 1981). The CAL should exemplify self-management courts, and their development should thus be indicative of the future evolution of the self-management judiciary.

By the analysis presented in this paper, however, this evolutionary prospect seems unlikely to be fulfilled, because the self-management courts cannot be social courts, embedded within a social setting, and still be useful and attractive to most members of society. The CAL may have successfully evolved in that workers do bring their grievances to them, but their evolution has not been as social courts. The general configurations of the CAL—their independence, professionalism, and formality—are precisely those characteristics of regular courts that social courts are supposed to avoid. Thus the general evolution of the CAL has not been to any truly new form of judicial institution. Even the specific form of the CAL—part-time lay judges hearing individual rights cases—is paralleled by such Western European labor courts as those of France (see Blanc-Jouvan, 1971).

One might try to overcome the conundrum of social courts by positing the existence of a system in which tensions (e.g., class antagonisms) are absent and hence conflict is attenuated. However, the existence of such a static, frictionless system is a curiously nonevolutionary idea that runs counter to most recent thought in social science and law. Yugoslav social scientists, for example, have explicitly recognized the inevitability and social utility of conflict (Možina, 1971; Pešić-Popović, 1971; Milanović, 1979). As noted earlier, arguments along these lines were made by the opponents of the 'reform" of the CAL. Indeed, the parliamentary success of these opponents may provide a clue to the importance of the experience of the CAL to a different kind of evolution, namely that of communist legal and political theory. The Yugoslavs have struggled since the early 1950s with the general question of whether, Lenin notwithstanding[17] (although rarely specifically contradicted), there is an inherent contradiction between participatory democracy and a system of rule by a disciplined, hierarchical party (see Carter, 1982). During this time, their political life has developed to the point at which political institutions such as the federal parlia-

[17] Indeed, a strong case has been made for the proposition that Lenin's whole aim was to end politics completely (Polan, 1984).

ment play a real role in policy-making instead of simply rubber-stamping party decisions (Seroka, 1984). The outcome of the contest over the "reform" of the CAL may be seen as a further example of this parliamentary evolution. Perhaps the need to develop new theories of socialist law and politics to accommodate the changing roles of these political institutions will lead the Yugoslavs to furthering the evolution of communist legal and political theory.

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